

FILED
SUPREME COURT
STATE OF WASHINGTON
5/3/2019 4:25 PM
BY SUSAN L. CARLSON
CLERK

NO. 96578-1

SUPREME COURT OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,
a labor organization,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF EARLY LEARNING,
a state agency, and EVERGREEN FREEDOM FOUNDATION, a non-
profit corporation,

Respondents.

**SUPPLEMENTAL BRIEF OF RESPONDENT STATE OF
WASHINGTON, DEPARTMENT OF EARLY LEARNING**

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ISSUES PRESENTED FOR REVIEW2

 1. Did the Court of Appeals correctly determine that the statutes established by I-1501 did not apply retroactively?

 2. Did the Court of Appeals correctly conclude that the Department properly applied the law in existence at the time the public record request was made?

III. STATEMENT OF FACTS3

IV. ARGUMENT.....6

 A. Standard of Review.....6

 B. The Public Disclosure Act Favors Broad Disclosure7

 C. The Court of Appeals Correctly Held That I-1501 Did Not Prevent the Release of Records Because It Was Not the Law at the Time of the Request and the Amendments Were Not Retroactive.....8

 1. I-1501 was not law at the time of the PRA request8

 2. The Court of Appeals correctly held that RCW 42.56.640 and RCW 43.17.410 apply prospectively from the effective date of the initiative9

 a. I-1501 does not express retroactive intent10

 b. I-1501 is neither curative nor remedial12

 c. There is no vested right in a public records request13

 d. The Unpublished Decision in *Puget Sound Advocates for Retirement Action v. Dept. of Soc. & Health Serv.* and the current case can be harmonized16

V. CONCLUSION.....17

TABLE OF AUTHORITIES

CASES

Accord Washington State Farm Bureau Fed'n v. Gregoire,
162 Wn.2d 284, 305, 174 P.3d 1142 (2007)..... 15

Am. Legion Post No. 149 v. Dep't of Health,
164 Wn.2d 570, 585, 192 P.3d 306 (2008)..... 11

Ameriquist Mortg. Co. v Office of Att'y Gen.,
177 Wn.2d 467, 486-87, 300 P.3d 799 (2013)..... 7

Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.,
123 Wn.2d 391, 414, 869 P.2d 28 (1994)..... 15

City of Ferndale v. Friberg,
107 Wn. 2d 602, 605, 732 P.2d 143 (1987)..... 10

Densley v. Dep't of Ret. Sys.,
162 Wn.2d 210, 223, 173 P.3d 885 (2007)..... 10, 12

Dragonslayer v. Gambling Comm'n,
139 Wn. App. 433, 448, 161 P.3d 428 (2007)..... passim

Godfrey v. State,
84 Wn.2d 959, 963, 530 P.2d 630 (1975)..... 15

Hale v. Wellpinit Sch. Dist. No.49,
165 Wn.2d 494, 507, 198 P.3d 1021 (2009)..... 10

Hearst Corp. v. Hoppe,
90 Wn.2d 123, 127, 580 P.2d 246 (1978)..... 7

Hi-Starr, Inc. v. Liquor Control Bd.,
106 Wn.2d 455, 460, 722 P.2d 808 (1986)..... 10

In re Estate of Haviland,
177 Wn.2d 68, 75, 301 P.3d 31 (2013)..... 7

<i>In re F.D. Processing, Inc.</i> , 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).....	11, 13
<i>In re Flint</i> , 174 Wn.2d 539, 546, 277 P.3d 657 (2012).....	12, 13
<i>In re Marriage of MacDonald</i> , 104 Wn.2d 745, 750, 709 P.2d 1196 (1985).....	15
<i>John Doe A v. Wash. State Patrol</i> , 185 Wn.2d 363, 371, 374 P.3d 63, 66 (2016).....	6, 7, 9
<i>Johnson v. Continental West, Inc.</i> , 99 Wn.2d 555, 563, 663 P.2d 482 (1983).....	15
<i>Puget Sound Advocates for Retirement Action v. Dept. of Soc. & Health Serv.</i> , No. 50430-8-II, 2018 WL 5617942 (Wn. Ct. App. Oct. 30, 2018)	16, 17
<i>SEIU 925 v. State of Wash., Dept. of Early Learning</i> , No. 49726-3-II (September 18, 2018).....	passim
<i>Spokane Police Guild v. Liquor Control Bd.</i> , 112 Wn.2d 30, 35, 769 P.3d 283 (1989).....	6
<i>State v. Rose</i> , 191 Wn. App. 858, 861, 365 P.3d 756 (2015).....	10, 11, 12
<i>Wade’s Eastside Gun Shop, Inc., v. Dep’t of Labor & Indus.</i> , 185 Wn.2d 270, 283-98, 372 P.3d 97 (2016).....	7, 9

STATUTES

Laws of 2017, 3d Spec. Sess., ch. 6.....	1
Laws of 2017, ch. 4.....	5
RCW 41.56.028	4
RCW 41.56.030(7).....	4

RCW 42.56.070(1).....	9
RCW 42.56.080(2).....	8
RCW 42.56.270	14
RCW 42.56.270(10).....	14
RCW 42.56.520	9
RCW 42.56.520(1).....	8
RCW 42.56.540	7
RCW 42.56.550	8
RCW 42.56.550(3).....	6
RCW 42.56.640	passim
RCW 42.56.640(2)(b)	8
RCW 43.17.410	passim
RCW 43.215.020	3
RCW 43.215.135	3
RCW 43.215.495	3
RCW 43.216.020	3
RCW 43.216.135	3
RCW 43.216.495	3

OTHER AUTHORITIES

Governor’s Proclamation (Dec. 7, 2016), http://lawfilesext.leg.wa.gov/biennium/2017-18/ Pdf/Initiatives/Initiatives/INITIATIVE%201501.sl.pdf	5
--	---

I-502, Part 1, Sec. 1 11

REGULATIONS

WAC 110-15-0001-0240 3

WAC 110-300B-0010 4

WAC 170-290-0001-0240 3

WAC 170-296A-0010 3

I. INTRODUCTION

On November 2, 2016, six days before the general election, the Freedom Foundation (the Foundation) filed a public record request with the Department of Early Learning (the Department)¹ asking for the names, mailing addresses, and email addresses for all licensed and licensed-exempt family child care providers. Applying existing law, the Department determined that no statutory exemption prevented release of the requested information, and it notified the child care providers' bargaining representative, Service Employees International Union Local 925 (SEIU 925), that the requested information would be released unless prevented by a timely court order. SEIU 925 filed this action to prevent release of the information.

At the general election, subsequent to the Department's determination that the requested information must be released, voters approved Initiative 1501 (I-1501). The initiative included two sections that, if applicable, would prevent release of the information the Foundation requested. SEIU 925 argued that the two sections of I-1501 were retroactive

¹ The Department of Early Learning became part of the Department of Children, Youth, and Families (DCYF) on July 1, 2018. Laws of 2017, 3d Spec. Sess., ch. 6. For consistency with prior briefing in this case, this brief will refer to the Department of Early Learning unless otherwise specified.

or, alternatively, that they should apply because the requested information had not yet been released on the date I-1501 took effect. The superior court rejected both arguments, and the Court of Appeals affirmed. The central issue before this Court is whether the exemptions in those two sections of I-1501, codified in RCW 42.56.640 and RCW 43.17.410, apply to information the Foundation requested on November 2, 2016.

More generally, agencies need clarity as to how to apply changes to Washington laws controlling access to public records, because noncompliance with the Public Records Act (PRA)—even inadvertent noncompliance—can subject an agency to significant penalties and fines. This Court should issue a clear rule that an agency is to apply the law in effect at the time of a public record request when it produces records in response to the request, unless a subsequent change in the law clearly states that it applies to agency responses that are in still in process when the change in law takes effect.

The Department is prepared to release the requested information as directed or permitted to do so by the Court.

II. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly determine that the statutes established by I-1501 did not apply retroactively?

2. Did the Court of Appeals correctly conclude that the Department properly applied the law in existence at the time the public record request was made?

III. STATEMENT OF FACTS

Washington State subsidizes child care expenses of qualified low-wage working families. RCW 43.215.020, .135, .495 (recodified as RCW 43.216.020, .135, .495).² The State offers subsidies to qualified families for child care through several programs, the largest of which is the Working Connections Child Care Program. RCW 43.215.135 (recodified as RCW 43.216.135); WAC 170-290-0001-0240 (recodified as WAC 110-15-0001-0240). The Department (now DCYF) administers the Working Connections Child Care Program.

Child care in Washington State is provided in two different care settings, child care centers and in-home child care. CP 904. Child care centers are commercial operations (for profit or not-for-profit) that hire staff and are usually located in a building, school, or faith-based space, rather than a private residence. *Id.* Child care center provider information is not at issue in this case.

In-home child care is provided by family child care providers,

² When the Legislature reorganized the Department of Early Learning as part of the new Department of Children, Youth, and Families, both its governing statutes and implementing rules were amended and recodified into new chapters.

usually in the provider's residence or in the child's own home. WAC 170-296A-0010 (recodified as WAC 110-300B-0010); CP 904. Family child care providers can be either licensed or licensed-exempt. CP 904-05. SEIU 925 represents all family child care providers—both licensed and licensed-exempt providers—for purposes of collective bargaining with the State of Washington. RCW 41.56.028.

On November 2, 2016, Foundation employee Maxford Nelson made a public record request under the PRA to the Department for two lists. The first was for a list containing the first name, last name, work mailing address, and work email address of all licensed family child care providers, as defined by RCW 41.56.030(7). CP 909. The second was for a similar list for licensed-exempt family child care providers. CP 909-10. The Department determined that no statute exempted the requested information from release in response to the PRA request. On November 4, 2016, the Department notified SEIU 925 that it intended to release the provider lists on November 22, 2016, unless SEIU 925 produced a court order enjoining disclosure. CP 912-13. On November 16, 2016, SEIU 925 filed a Complaint for Declaratory and Injunctive Relief under the PRA to enjoin release of the

lists, as well as a motion for a Temporary Restraining Order to prohibit release. CP 5-14, 257-72.³

Meanwhile, six days after the Foundation filed its public record request, the voters approved I-1501 in the 2016 general election. *See* Governor's Proclamation (Dec. 7, 2016), <http://lawfilesextra.leg.wa.gov/biennium/2017-18/Pdf/Initiatives/Initiatives/INITIATIVE%201501.sl.pdf>. I-1501 took effect on December 8, 2016, the day before the hearing on SEIU 925's motion. *See* Laws of 2017, ch. 4. I-1501 included two new sections of law relevant herein: Section 8, codified as RCW 42.56.640; and Section 10, codified as RCW 43.17.410. RCW 42.56.640 exempts from public disclosure "sensitive personal information of in-home caregivers for vulnerable populations," and "sensitive personal information" is defined to specifically include the names, addresses, and email addresses of family child care providers. RCW 43.17.410 prohibits the state and its agencies from releasing "sensitive personal information of in-home caregivers for vulnerable populations, as those terms are defined in RCW 42.56.640." The

³ On November 22, 2016, a superior court commissioner heard arguments on SEIU 925's motion for a Temporary Restraining Order, but did not rule on the motion. Instead, the commissioner asked the Foundation and the Department to refrain from releasing the records on that date and to schedule a hearing on SEIU 925's request for a preliminary injunction as soon as possible. The parties agreed, and the matter was scheduled for December 9, 2016. *See SEIU 925 v. Dep't of Early Learning*, No. 49726-3-II, slip op. at 5 (Sep. 18, 2018).

stated intent of I-1501, in part, was to protect seniors and vulnerable individuals by “prohibiting the release of certain public records that could facilitate theft and other financial crimes against seniors and vulnerable individuals.” CP 299.

The motion for preliminary injunction was heard on December 9, 2016. At the close of the hearing, the superior court denied SEIU 925’s request for an injunction, but entered a stay preventing the release of the requested lists pending appeal. *SEIU 925 v. Dep’t of Early Learning*, No. 49726-3-II, slip op. at 7 (Sep. 18, 2018). These rulings were memorialized in a written order entered that day. CP 967-68. SEIU 925 timely appealed to the Court of Appeals, which issued its unpublished decision affirming the trial court’s ruling that the relevant portions of I-1501 did not apply retroactively and, therefore, the law at the time of the record request applied. This Court granted SEIU 925’s Motion for Discretionary Review.

IV. ARGUMENT

A. Standard of Review

This Court reviews actions under the PRA and the injunction statute de novo. *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63, 66 (2016) (citations omitted); *see also*, RCW 42.56.550(3); *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35, 769 P.3d 283 (1989).

The party seeking to prevent disclosure under RCW 42.56.540 has the burden of proof to demonstrate that a prohibition or exemption applies. *John Doe A*, 185 Wn.2d at 370 (citing *Ameriquest Mortg. Co. v Office of Att’y Gen.*, 177 Wn.2d 467, 486-87, 300 P.3d 799 (2013) (*Ameriquest II*)). Additionally, review of statutory interpretation and retroactivity are reviewed de novo. *In re Estate of Haviland*, 177 Wn.2d 68, 75, 301 P.3d 31 (2013).

B. The Public Disclosure Act Favors Broad Disclosure

The PRA is a strongly worded mandate for broad disclosure of public records. *John Doe A.*, 185 Wn.2d at 371 (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). A public agency may suffer harsh penalties when failing to timely disclose public records. *Wade’s Eastside Gun Shop, Inc., v. Dep’t of Labor & Indus.*, 185 Wn.2d 270, 283-98, 372 P.3d 97 (2016). Agencies, such as the Department, need clear direction on the law that must be followed when responding to public record requests, when there is a change in the law after a request is received but before all responsive records are produced to the requester.

An agency’s obligation to act on a public record request attaches at the time of the request. Once a public record request is received, an agency must respond within five business days, and the agency must respond in one of the following ways: (1) provide the record; (2) provide an Internet link

for the record; (3) acknowledge the request and give a reasonable estimate of time it will need to provide the record; or (4) deny the request. RCW 42.56.520(1). Depending on the size of the request and other factors, an agency may provide responsive records in a single release or in installments. RCW 42.56.080(2). The burden of proof is on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records. RCW 42.56.550.

C. The Court of Appeals Correctly Held That I-1501 Did Not Prevent the Release of Records Because It Was Not the Law at the Time of the Request and the Amendments Were Not Retroactive

1. I-1501 was not law at the time of the PRA request

I-1501 created two new public records exemptions, codified as RCW 42.56.640 and RCW 43.17.410. RCW 42.56.640 provides a specific PRA exemption for sensitive personal information of family child care providers. RCW 43.17.410 prohibits state agencies from otherwise releasing sensitive personal information of family child care providers. “Sensitive information” includes a child care provider’s name, address, telephone number, and email address. RCW 42.56.640(2)(b). The new statutes became effective on December 8, 2016, and therefore were not in effect when the Foundation submitted its request on November 2, 2016. The exemptions were not applicable when the Department received the public

record request. VRP at 43-45.

Indeed, at the time the Foundation made its PRA request, and when the Department was required to respond, the 2016 General Election had not occurred. The fate of proposed I-1501 was unknown. While RCW 42.56.520 allows an agency to take additional time to respond to a request in order to clarify the request, locate and assemble the records, notify third persons affected by the request, or determine whether any information is exempt, nothing in the PRA allows an agency to take additional time to wait for the results of an election and base its initial response on potential changes in the law. An agency delaying release of records without authority faces potential penalties for the delay. *Wade's*, 185 Wn.2d at 283-98.

2. The Court of Appeals correctly held that RCW 42.56.640 and RCW 43.17.410 apply prospectively from the effective date of the initiative

The Department has a duty to make public records available to requestors unless they are exempt from disclosure. RCW 42.56.070(1). As the Court of Appeals recognized, the default rule is that an agency should apply the public records law as it exists at the time a request is received. *John Doe A*, 185 Wn.2d at 375 n. 2. See *SEIU 925*, slip op. at 13. *SEIU 925* argues that the specific PRA exemptions, RCW 42.56.640 and RCW 43.17.410 (as an “other statute” under RCW 42.56.070(1)), apply

retroactively and prohibit release of the records in this case

Rules of statutory construction apply to voter passed initiatives in the same manner they apply to legislatively passed statutes. *Hale v. Wellpinit Sch. Dist. No.49*, 165 Wn.2d 494, 507, 198 P.3d 1021 (2009); *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 460, 722 P.2d 808 (1986). Statutes and initiatives are presumed to apply prospectively. *State v. Rose*, 191 Wn. App. 858, 861, 365 P.3d 756 (2015), *Dragonslayer v. Gambling Comm'n*, 139 Wn. App. 433, 448, 161 P.3d 428 (2007); *City of Ferndale v. Friberg*, 107 Wn. 2d 602, 605, 732 P.2d 143 (1987). That presumption can only be overcome when 1) the legislature or the voters explicitly provide for retroactivity, or 2) the statute or initiative is an amendment that is clearly curative or remedial. *Rose*, 191 Wn. App. at 868, 870; *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 223, 173 P.3d 885 (2007); *Dragonslayer*, 139 Wn. App. at 449; *City of Ferndale*, 107 Wn.2d at 605.

a. I-1501 does not express retroactive intent

When determining whether there is voter or legislative intent to provide for retroactivity, courts look to statements made in the initiative or legislation itself, but may also consider other evidence from which retroactive intent can be inferred. *Rose*, 191 Wn. App. at 868; *Dragonslayer*, 139 Wn. App. at 448. The legislative history, the voters' intent, and the use

of past tense language in the amendment to a statute are all factors that courts have considered in determining whether intent should be inferred. *Rose*, 191 Wn. App. at 868-69; *Dragonslayer*, 139 Wn. App. at 449.

In *Rose*, the Court addressed a newly passed initiative decriminalizing the production, processing, and retail sale of marijuana. *Rose*, 191 Wn. App. at 862. The initiative decriminalized possession of less than an ounce of marijuana for those 21 years and older and contained specific language that, “the people intend to stop treating adult marijuana use as a crime” and “[a]llow [] law enforcement resources to be focused on violent and property crimes.” *Id.* at 869 (quoting I-502, Part 1, Sec. 1).⁴

In *Rose*, the Court looked first to the intent expressed by the voters in the initiative language itself. It held that the voters’ intent to stop pending misdemeanor prosecutions of marijuana possession was clear based solely on the language that the initiative intended to stop treating such possession as a crime. *Rose*, 191 Wn. App. at 869. Additionally, the Court determined that the average lay voter would understand the language of the initiative to mean that prosecutions for that crime would be stopped on the effective

⁴ While *Rose* dealt with an amendment to a criminal statute, the legal standards are essentially the same for criminal and civil statutory amendments. In fact, parties in this case rely on two cases *Rose* cites that do not concern amendments to criminal statutes, *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008), and *In re F.D. Processing*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).

date. *Id.* The Court then noted that if the language had not been clearly expressed, it would then address other evidence from which intent might be inferred, such as the Voters' Pamphlet or other legislative history. *Id.* at 869-70.

Here, there is no explicit retroactivity language in I-1501, and nothing in the initiative explicitly demonstrates the voters' intent to apply the amendments retroactively. CP 299-306. The voters' intent is expressed in relevant part as, "prohibiting the release of certain public records that could facilitate identity theft and other financial crimes against seniors and vulnerable individuals." CP 299. Based on this language, there is insufficient evidence of either express or inferred voter intent to overcome the presumption of prospective application of the amended statutes, and the Court of Appeals properly held that no voter intent of retroactivity was expressed.

b. I-1501 is neither curative nor remedial

After determining that there is no explicit voter intent expressed on the issue of retroactivity, the analysis turns to whether the initiative is remedial or curative in nature. If it is remedial or curative, then the initiative is applied retroactively. *Densley*, 162 Wn.2d at 223; *Dragonslayer*, 139 Wn. App. at 449. A curative amendment clarifies or makes a technical correction to an ambiguous statute. *In re Flint*, 174 Wn.2d 539, 546,

277 P.3d 657 (2012); *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). No party asserts that I-1501 is curative in nature.

A remedial amendment is one that relates to practice, procedure, or remedies, and does not affect a substantive or vested right. *Flint*, 174 Wn.2d at 546; *F.D. Processing*, 119 Wn.2d at 462-63. Here, the amendments did not purport to change the procedure by which a requester can obtain public records. Nor did they simply clarify an existing exemption to remedy some confusion as to its scope or application. Rather, the new statutes, RCW 42.56.640 and RCW 43.17.410, substantively changed what records a state agency may produce in response to a public record request. The amendments are not remedial.

c. There is no vested right in a public records request

In this case, the Court of Appeals correctly concluded that the amendments to the PRA approved in I-1501 were not retroactive because I-1501 lacked an express statement regarding retroactive application, because the language of the initiative does not otherwise fairly convey the voters' intent to apply the new exemptions retroactively, and because the amendments are neither curative nor remedial. *SEIU 925*, slip op. at 9-13.

In reaching that conclusion, however, the Court of Appeals erroneously, and without analysis, characterized a request for a public record as creating a "vested right," thereby propagating an error made by

Division Two in *Dragonslayer*, 139 Wn. App. at 449. *SEIU 925*, slip op. at 12.⁵

In *Dragonslayer*, the Gambling Commission received a public record request for certain financial records *Dragonslayer* had filed with the Commission. *Dragonslayer*, 139 Wn. App. at 439. The Commission determined that the records should be released, and the superior court denied *Dragonslayer*'s motion to enjoin the Commission from releasing the records. *Id.* at 439-40. The Court of Appeals reversed and remanded because it had not been shown that the requested records were "public records" as defined in the PRA. *Id.* at 444-46. Having reversed on that ground, it was unnecessary for the court to go further, but it did. First, it held that if the records were public records, they were not exempt under former RCW 42.56.270(10). *Id.* at 446-47. Then, it held that an amendment to RCW 42.56.270, adopted after the trial court's decision, was not retroactive and did not apply to the case at hand. *Id.* at 448-49. In doing so, the Court of Appeals stated, without any citation to authority or any substantive analysis, that the requester had a "vested right" in the requested

⁵ The Court of Appeals decision in this case appears to be the first appellate decision to have cited and relied on *Dragonslayer*'s statement that a request for a public record creates a vested right.

records, impliedly protected by due process. *Id.* at 449. The statement is legally incorrect.

This Court has held consistently that a vested right entitled to protection under the due process clause, “must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*” *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975) (emphasis in original). *Accord Washington State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 305, 174 P.3d 1142 (2007); *Caritas Servs., Inc. v. Dep’t of Soc. & Health Servs.*, 123 Wn.2d 391, 414, 869 P.2d 28 (1994); *In re Marriage of MacDonald*, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985). As this Court explained in *Godfrey*, “[t]here is neither a vested right in an existing law which precludes its amendment or repeal nor a vested right in the omission to legislate on a particular subject.” *Id.* See also *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 563, 663 P.2d 482 (1983) (“No one has a vested right in any general rule of law or policy of legislation which gives an entitlement to insist that it remain unchanged for one’s own benefit.”).

It was error for the Court of Appeals here to rely on unsupported dictum in *Dragonslayer* to conclude that a request for a public record

creates a vested right to the requested record. *SEIU 925*, slip op. at 12. That dictum conflicts with this Court's cases by allowing a public record requester, rather than the Legislature, to control which public records should be released upon request.

No vested rights analysis is needed to conclude that the Department complied with the PRA. The Department followed the law at the time of the public record request. The Department had no duty or authority to apply a new statutory exemption that might be added to the PRA. Since there was no applicable exemption or prohibition in effect the day that the Foundation made its public record request or on the day the Department applied the PRA to the request, there was no basis for the Department to deny the Foundation's request.

d. The Unpublished Decision in *Puget Sound Advocates for Retirement Action v. Dept. of Soc. & Health Serv.* and the current case can be harmonized

SEIU 925 argues that the unpublished decision in *Puget Sound Advocates for Retirement Action v. Dept. of Soc. & Health Serv. (PSARA v. DSHS)*, No. 50430-8-II, 2018 WL 5617942 (Wn. Ct. App. Oct. 30, 2018), conflicts with the Court of Appeals decision in the instant case. This is not accurate. In *PSARA*, the court specifically addressed RCW 43.17.410, the statute prohibiting the agency from releasing information. It determined that the prohibition became effective on December 8, 2016, the effective date of

the initiative. It did not specially address RCW 42.56.640, as the court determined the records at issue in *PSARA* were not subject to release on other grounds. Furthermore, in *PSARA* the court did not address whether there is a vested right in a public record request. *SEIU 925*, slip op. at 12. For these reasons, *PSARA* and the instant case can be harmonized.

V. CONCLUSION

The Department fully complied with the PRA by applying the law as it existed at the time the Foundation filed the public record request at issue here and determined that the requested information was not exempt and must be released. The Department has been and continues to be ready to release the requested records as directed or permitted to do so by the Court.

RESPECTFULLY SUBMITTED this 3rd day of May, 2019.

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DATED this 3rd day of May, 2019, at Olympia, WA.



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May 03, 2019 - 4:25 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96578-1
Appellate Court Case Title: Service Employees International Union Local 925 v. Department of Early Learning, et al.
Superior Court Case Number: 16-2-04580-1

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