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SUPREME COURT
STATE OF WASHINGTON
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NO. 98768-8

**SUPREME COURT OF THE
STATE OF WASHINGTON**

BRIAN GREEN, RESPONDENT

v.

PIERCE COUNTY, APPELLANT

PIERCE COUNTY'S ANSWERING BRIEF TO THE AMICUS CURIAE MEMORANDUM OF WASHINGTON STATE ASSOCIATION OF BROADCASTERS, RADIO TELEVISION DIGITAL NEWS ASSOCIATION AND WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION

MARY E. ROBNETT
Prosecuting Attorney

By
DANIEL R. HAMILTON
Deputy Prosecuting Attorney
Attorneys for PIERCE COUNTY

955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
PH: (253) 798-7746

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I. INTRODUCTION

Amici Curiae Washington State Association of Broadcasters, Radio Television Digital News, and Washington Newspaper Publishers (hereinafter "WSAB amici") agree with Defendant Pierce County that "this Court should reverse the trial court" because the latter court's "interpretation [of RCW 5.68.010(5)] defies common sense and the statute's plain language." *See* WSAB Br. 5, 14. Their brief shows that as a matter of law Plaintiff Brian Green does not meet the "news media" exception to RCW 42.56.250(8)'s protection from Public Records Act disclosure (hereinafter "PRA") because "a YouTube channel is not a media entity" and "cannot be an employer or principle" under that statute. *See* WSAB Br. 5-12, 14; *see, also*, AB 19-44; RB 13-21. Since WSAB amici are correct in those legal conclusions, the County's Answer need not discuss them further.

However, though it does not change these grounds for reversal, amici are incorrect as to who bears the burden of proof on those issues and in separately attempting to read out of the statutory definition of "news media" its additional requirement that one claiming the privilege/exception for protected law enforcement photographs and birthdates must be "engaged in *bona fide news* gathering." RCW 5.68.010(5)(b); WSAB Br. 12-14. Because these are important issues, the County addresses them below.

II. ARGUMENT

A. To Access Protected Data, Requester Must Prove an Exception Applies

Regardless of who bears the burden of proof under RCW 42.56.250(8), WSAB amici agree Green as a matter of law does not meet the "news media" privilege/exception thereunder. WSAB Br. 5-12, 14. However, as noted later, these amici separately attempt to make meaningless RCW 42.56.250(8)'s incorporation of RCW 5.68.010(5)(b)'s requirement that a person claiming the privilege/exception must – among other things – be "engaged in bona fide news gathering." *Id.* at 13. In so doing, WSAB amici erroneously state in passing "the county has the burden of proof" to show protected documents *do not* fall within the privilege/exception to its protection. *Id.* This misstates the law.

WSAB amici's assertion ignores that where records are otherwise statutorily protected – as is the undisputed case here – the "burden *shifts* to the party seeking disclosure to establish" that an exception to the rule applies. *See Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013) (citing *Oliver v. Harborview Med. Ctr.*, 94 Wn. 2d 559, 567–68, 618 P.2d 76 (1980)) (emphasis added); *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 433, 327 P.3d 600 (2013), *as amended on denial of reh'g* (2014) (same). Indeed, the

media privilege exception to the PRA's statutory protection expressly provides it is available only to "news media, *as defined in RCW 5.68.010(5)*." *See* RCW 42.56.250(8) (emphasis added). Precedent specifically interpreting RCW 5.68.010(5) holds the "burden of showing that privilege applies *in any given situation rests entirely upon the entity asserting the privilege.*" *See Republic of Kazakhstan v. Does 1-100*, 192 Wn.App. 773, 781, 368 P.3d 524 (2016) (*citing Guillen v. Pierce Cnty*, 144 Wn.2d 696, 716, 31 P.3d 628 (2001), *rev'd in part on other grounds*, 537 U.S. 129 (2003)) (emphasis added). Further, the Legislature is presumed to have known this burden of proof for evidentiary privileges when it incorporated it into the PRA as an exception to the protection from disclosure under RCW 42.56.250(8). *See, e.g., Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 811, 123 P.3d 88 (2005) ("We presume that the legislature knows the existing state of the case law in the areas in which it legislates") (*citing Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994)). None of these issues are addressed, much less refuted, by amici.

Though these amici are therefore mistaken as to who bears the burden of proof, they are correct that regardless of who has the burden, the record and law are clear that the trial court erred in requiring disclosure, and its order should be reversed.

B. Exception Requires Requester Be Engaged in *Bona Fide News Gathering*

WSAB amici correctly identify many of the ways Green fails to qualify for the "news media" privilege/exception under RCW 42.56.250(8) and RCW 5.68.010(5). WSAB Br. 5-12. However, they separately "object to [a] line of inquiry" that gives any real meaning to the statutes' additional requirement that a person asserting that privilege/exception must be "engaged in bona fide news gathering." WSAB Br. 12-13. The objection, however, is unsupported by any analysis applying basic principles of statutory construction and analysis. *Compare id.* at 12-14 *with* AB 43-44; RB 21-23.

Instead, they first object by asserting the legislation's "focusing on the requester's subjective intentions is unlikely to" have any real effect because "it is easy to establish a *genuine intention* to gather *news* for the purpose of positing it on a social media platform." WSAB Br. 12-13 (emphasis added). However, Courts "should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principal that the drafting of a statute is a legislative, not a judicial, function." *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quotation marks omitted) (*quoting State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229(1999)); *State v. Cromwell*, 157 Wn.2d 529, 598, 140 P.3d 593

(2006) (same). Further, WSAB amici fail to show where in the record Green *ever* tried to "establish" any "*genuine intention to gather news.*"

Instead, the record shows: 1) Green uses the PRA, court motions and his YouTube account to *retaliate against law enforcement personnel for his personal grievances* both before and after his PRA request at issue;¹ 2) at the time of his instant request he made *no showing* he was "news media" engaged in "*bona fide news gathering,*" AB 34-38; 3) Green concedes he "made his Public Records Act seeking [sic] documents regarding his [own supposed] unlawful imprisonment," RB 37 (emphasis added); 4) his request targeted *his* correctional officer's protected photographs and birthdates, RB 3, 8-9, 37; CP 6; 5) he *admits his intent* is to circulate these protected personnel records and data "to a broad segment of the public," CP 107; 6) doing so will endanger those law enforcement workers and their families,² AB 3-5; and 7) RCW 42.56.250(8) was enacted to prevent

¹ See AB 1 n.1, 13 n.13, 44 n.24; 6/10/19, 7/3/19, 10/15/19, 11/14/19, 11/15/19, 12/11/19, 12/26/19, 1/7/20 Green COA Motions/Replies; 1/6/20 McDaniel Dec., Ex. A; Nicholson Dec., Ex. A; CP 443-45; <https://www.youtube.com/watch?v=VmGo37e1kAU>.

² During the pendency of this suit, on March 25, 2020, the Legislature amended RCW 42.56.250(8) to extend its protections to "employees or volunteers of a public agency." See 2020 c 106, § 1, effective June 11, 2020. It did so because testimony showed disclosure of birthdates and photographs put state employees "in danger of being retaliated against" and "at risk of identity theft and harassment ... due to modern cybersecurity concerns." See House Bill Report, HB 1888, 6th Legislature, 2020 Reg. Sess.; Senate Bill Report, 2SHB 1888, 6th Legislature, 2020 Reg. Sess. One effect of this was to extend protection to "retired law enforcement officers who worked dangerous undercover assignments – *the lives of them and their families could be jeopardized through disclosures.*" See Senate Bill Report, *supra*. (emphasis added). More broadly, however, the Legislature recognized "no other employer would send out all this information" and extension of the protection was necessary for "the safety and privacy of one in ten Washingtonians." *Id.*

precisely such disclosures by just such requestors as Green. *See* AB 8, 42-45; CP 290, 302. WSAB amici offer no rationale how a video blogger targeting protected photographs and birthdates of correctional officers working at the time of *his incarceration* so he can broadly disseminate them on the internet to their harm is "engaged in *bona fide news* gathering."

Next, again without the benefit of any cited authority, WSAB amici object that "probing a reporter's motives for obtaining information is intrusive, and contradicts the purpose of the shield law to prevent government interference with news gathering." *See* WSAB Br. 13. They cite nothing in the shield statute, or its adoption as the test for the PRA's "news media" exception, indicating its purpose is to entitle all who *claim* to be "news media" the right to distribute protected records when they make such a request based on personal grievances and thus endanger others. To the contrary, on its face the plain language of the Legislature's *separate* requirement that someone claiming the privilege/exception prove he or she is "engaged in *bona fide news gathering*" confirms that its purpose is *not to privilege or create an exception for* those engaged in *anything other than "bona fide news gathering."*

Further, "probing ... motives" of a PRA requestor *is not* impermissibly "intrusive" but is often a statutory requirement. *See, e.g., Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness &*

Hearing Loss, 194 Wn.2d 484, 502, 450 P.3d 601 (2019) ("In the specific case of records requested for a commercial purpose [under RCW 42.56.070(8)], agencies may inquire as to future uses of the requested documents."); *Pierce Cty., Wash. v. Guillen*, 537 U.S. 129, 136, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003) (federal statute protects certain documents from PRA disclosure when they are sought "in any action for damages") (*quoting* 28 U.S.C. § 409). Indeed, even the intent of those who actually otherwise are "news media" often is the subject of judicial inquiry. *See, e.g., Herron v. KING Broad. Co.*, 109 Wn.2d 514, 524, 746 P.2d 295, 302 (1987), *decision clarified on reh'g*, 112 Wn.2d 762, 776 P.2d 98 (1989) (trial court was reversed in official's defamation suit against news media because, among other things, "actual malice can be inferred from circumstantial evidence, including defendant's hostility or spite") (emphasis added); *Duc Tan v. Le*, 177 Wn.2d 649, 669, 300 P.3d 356, 366 (2013) ("Evidence of *intent* ... may also be sufficient to show actual malice.") (emphasis added).

Finally, WSAB amici object that the statute "does not mention good faith" and that the "term 'bona fide' is not defined." *See* WSAB Br. 13. However, the statute does not "mention good faith" because the common ordinary meaning of the word it *does use*; i.e., "bona fide," is: "Made in *good faith*" Black's Law Dictionary, 168 (7th Ed. 1999). *See, also, Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 519–20, 91 P.3d 864 (2004), as

amended (July 30, 2004) ("we look to a dictionary in use at the time the statute was adopted to give them their plain and ordinary meanings," and thus cited how "Black's Law Dictionary defines" the term). Ignoring the common and ordinary meaning of the word chosen by the Legislature, as well as any textual analysis, AB 43-44; Reply 22-23, WSAB amici instead rely on a *different kind of statute* from a *different jurisdiction* that concerns a *different term*; i.e., "bona fide newspaper." WSAB Br. 14 (citing 15 U.S.C.A. § 80b-2(a)(11)). Of course, a "bona fide" *thing* (i.e., "newspaper") concerns something different than a "bona fide" *activity* (i.e., "engaging in ... news gathering"). Regardless, the cited definition of even this different term in another jurisdiction's different kind of statute, *supports* the meaning of "bona fide" advocated by the County and amicus Guild.

Specifically, as WSAB amici note, a "bona fide *newspaper*" under that foreign statute was judicially defined as something that does "*not deviate from customary newspaper activities* to such an extent that there is a *likelihood that the wrongdoing which the Act was designed to prevent* has occurred." *Id.* (quoting *Securities and Exchange Commission v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1377 (2nd Cir. 1970)). Applying that definition here shows that being "engaged in *bona fide news gathering*" at the very least requires the person "*not deviate from customary*" *news gathering* "to such an extent that there is a *likelihood that the wrongdoing which*

the Act was designed to prevent has occurred." Misusing our state's "news media" privilege/exception to retaliate against law enforcement workers with whom a requestor has a personal grievance by posting their protected photographs and birthdates "to a broad segment of the public" as intended here, "drastically deviates from customary" *news* gathering and is precisely the type of "wrongdoing which" RCW 42.56.250(8) "was designed to prevent." See AB 3-8, 42-45; CP 107, 290, 302.

This is confirmed by the fact the House Bill report for the RCW 42.56.250(8) applicable here noted that in enacting the statute, the Legislature recognized newspapers investigating police misconduct customarily go "through databases and match[] up the employees of criminal justice agencies with the database of criminal convictions, cases, and arrests" – and that it is "specifically *the name and date-of-birth that really are the two necessary identifiers for these databases.*" CP 290-91 (emphasis added).³ Thus the "news media" exception to RCW 42.56.250(8)'s protection of law enforcement photographs and birthdates allows for such "*bona fide news gathering*" that uses birthdates and photographs to *gather news*, while at the same time protecting as intended against the misuse of those records by

³ So, too, during the recent Legislative hearings that led to extending the protections of RCW 42.56.250(8) to all state employees, Legislators again heard testimony that actual "investigative reporting" used "dates of birth ... *to distinguish between state employees with similar names.*" See House Bill Report, HB 1888, 6th Legislature, 2020 Reg. Sess. (emphasis added).

requesters who instead would disperse birthdates and photographs themselves directly to a broad segment of the public and thereby endanger law enforcement and their families. In short, here, Green is not "engaged in *bona fide news gathering*" because – among other reasons, *see, e.g.*, AB 5-21; Guild Br. 4-11, 13-15; WSAB Br. 5-12 – his intended use *deviates from customary newspaper activities* to such an extent *there is a likelihood that the wrongdoing which RCW 42.56.250(8) was designed to prevent will occur*; i.e., broadly disclosing protected records that can be used to endanger, threaten, or intimidate law enforcement and their families.

WSAB amici's misreading of "bona fide news gathering" to mean simply "staying within the scope of employment or principal-agent relationship with a media entity," WSAB Br. 14, gives the express statutory language at issue no meaning. RCWA 5.68.010(5)(b) *already* elsewhere requires the "employee, agent, or independent contractor of any entity listed in (a) of this subsection" be "serving in that capacity" in order to qualify for the privilege/exception. Thus WSAB reads "bona fide news gathering" out of the statute. This violates the principle that a "legislative body is presumed not to use nonessential words," and that Courts "are bound to give meaning, if possible, to every word contained in it." *See State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (*citing State v. Lundquist*, 60 Wn.2d 397, 403, 374 P.2d 246 (1962)).

Further, these amici's dismissal of this language also would have the absurd result of *enabling* the very real intimidation, threats, and endangerment of law enforcement and their families that the Legislature intended to prevent by instead barring broad public access directly to these highly personal materials. This would be the result because giving access *under that same statute* to those who otherwise qualify as "news media," but who are not "engaged in *bona fide* news gathering" and intend instead to broadly disperse them directly to the public for personal retaliatory reasons, would have the same effect as not having the PRA protection at all. In short, the intended *exception to the statutory protection* of these materials would become instead a *rule of access* that empowers their *broad public dissemination* to the public in general. Only by requiring even a *real* news media entities' agent to be "engaged in *bona fide* news gathering" can the statute have *any*, much less its *intended*, function.

Courts "will not interpret a statute in a manner that leads to an absurd result." *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26, 30 (2004). *See, also, Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007) (statutory "[c]onstrutions that would yield 'unlikely' or 'absurd' results should be avoided"); *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001) (same). A statutory "reading is absurd and renders the entire statute practically meaningless" and thus should be avoided when –

as here – it requires a court "to construe the statute's limited proviso exception so broadly that it swallows the general rule entirely." *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 264, 413 P.3d 549 (2018). Because "Courts will presume that the legislature did not engage in vain and useless acts and that some significant purpose or object is implicit in every legislative enactment," *see, Oak Harbor Sch. Dist. v. Oak Harbor Educ. Ass'n*, 86 Wn.2d 497, 500, 545 P.2d 1197, 1199 (1976) (*citing Kelleher v. Ephrata School Dist. No. 165*, 56 Wn.2d 866, 355 P.2d 989 (1960)), the requirement that a person claiming the exception to RCW 42.56.250(8) be "engaged in bona fide news gathering" must be given its intended significant purpose and object. It must actually protect law enforcement personnel's birthdates and photographs from broad public dissemination rather than enable it.

III. CONCLUSION

Though WSAB amici are mistaken as to Green's burden of proof regarding requirements of the "news media" privilege/exception, and whether there is any meaning to its requirement that he be "engaged in *bona fide news* gathering," they are correct as a matter of law that "a YouTube channel is not a media entity" and Green's social media account "cannot be an employer or principle" under RCW 5.68.010(5). For these latter reasons, amici and the County both agree "this Court should reverse the trial court."

DATED this 9th day of October, 2020.

MARY E. ROBNETT
Prosecuting Attorney

s/ DANIEL R. HAMILTON
DANIEL R. HAMILTON, WSBA #14658
Pierce County Prosecutor / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
Ph: 253-798-7746 / Fax: 253-798-6713
Email: dan.hamilton@piercecountywa.gov
Attorneys for Pierce County

CERTIFICATE OF SERVICE

On October 9th, 2020, I hereby certify that I electronically filed the foregoing **PIERCE COUNTY'S ANSWERING BRIEF TO THE AMICUS CURIAE MEMORANDUM OF WASHINGTON STATE ASSOCIATION OF BROADCASTERS, RADIO TELEVISION DIGITAL NEWS ASSOCIATION AND WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION** with the Clerk of the Court, which will transmit electronically to the following:

- **Joseph Thomas:** joe@joethomas.org
- **Joseph Evans:** joe@jwevanslaw.com; joesephwevans@hotmail.com
- **Katherine George:** kathy@johnstongeorge.com
- **Clive A. Pontusson:** cpontusson@clinelawfirm.com
- **James M. Cline:** jcline@clinelawfirm.com

s/ CHRISTINA WOODCOCK
CHRISTINA WOODCOCK
Legal Assistant
Pierce County Prosecutor's Office
Civil Division, Suite 301
955 Tacoma Avenue South
Tacoma, WA 98402-2160
Ph: 253-798-7732 / Fax: 253-798-6713

2019 Legis. Bill Hist. WA H.B. 1888

Bill Analysis, January 1, 2019

Reporter

2019 Legis. Bill Hist. WA H.B. 1888

Committee: Senate Ways and Means Committee

Text

SENATE BILL REPORT

2SHB 1888

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

As of February 27, 2020

Title: An act relating to protecting employee information from public disclosure.

Brief Description: Protecting employee information from public disclosure.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Hudgins and Valdez).

Brief History: Passed House: 2/14/20, 91-7.

Committee Activity: State Government, Tribal Relations & Elections: 2/21/ 20, 2/26/20 DPA-WM].

Ways & Means: 2/28/20.

Brief Summary of Amended Bill

* Exempts month and year of birth, photographs, and payroll deduction information of public employees and volunteers held in personnel files from public disclosure requirements, but permits the news media to have access to full dates of birth and photographs.

* Exempts race or ethnicity, sexual orientation, national origin, or disability status information voluntarily submitted to state agencies which is not in deidentified or aggregated format from public disclosure requirements.

* Requires an agency to notify an employee, the employee's union, and the requestor when a public records request has been made for information located exclusively in the employee's personnel, payroll, supervisor, or training file.

SENATE COMMITTEE ON STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.

Signed by Senators Hunt, Chair; Kuderer, Vice Chair; Zeiger, Ranking Member; Muzzall, Assistant Ranking Member; Hasegawa, Hawkins and Takko.

Staff: Samuel Brown (786-7470)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Sarian Scott (786-7729)

Background: Public Records Act. The Public Records Act (PRA), enacted in 1972 as part of Initiative 276, requires that all state and local government agencies make all public records available for public inspection and copying unless certain statutory exemptions apply. Over 500 specific references in the PRA or other statutes remove certain information from application of the PRA, provide exceptions to the public disclosure and copying of certain information, or designate certain information as confidential. The provisions requiring public records disclosure must be interpreted liberally while the exemptions are interpreted narrowly to effectuate the general policy favoring disclosure.

Personal Information. Several exemptions apply to records containing personal information and records that raise privacy concerns, including medical information, contact information, financial information, and other personally identifying information. Photographs and month and year of birth of employees and workers of criminal justice agencies in personnel files are exempt from public disclosure. However, the news media may access photographs and full dates of birth. In October 2019, the Washington Supreme Court held that birth dates of state employees are not exempt from disclosure under PRA, and their release does not violate the state Constitution's guarantee of privacy.

Third-Party Notification. Agencies generally may notify persons named in a record or to whom a record pertains that the release of a record has been requested if the agency is not already required to do so by law. Persons named in a record or to whom a record specifically pertains may seek to enjoin the release of a record. A court may enjoin the release of a record if disclosure is not in the public interest and would substantially and would irreparably damage a person or vital government functions.

Summary of Amended Bill: Exemptions. The month and year of birth, photographs, and payroll deductions of public agency employees and volunteers are exempt from public disclosure requirements. This exemption does not restrict disclosure of full dates of birth and photographs to the news media.

Information voluntarily submitted to a state agency or higher education institution that identifies an individual's race or ethnicity, sexual orientation, national origin, or disability status is exempt from the PRA's disclosure requirements. The exemption does not apply to deidentified or aggregated information.

Notification. An agency receiving a request for information located exclusively in the employee's personnel, payroll, supervisor, or training file must provide notice to the employee, any union representing the employee, and the requestor with:

- * the date of the request;
- * the nature of the requested record;
- * that agency will release any nonexempt information in the record at least ten days after the notice is made; and
- * that the employee may seek a court order enjoining disclosure.

EFFECT OF STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS COMMITTEE AMENDMENT(S): Notification. Agencies must only provide notice upon a request for information located exclusively in an employee's personnel, payroll, supervisor, or training file. The date the agency intends to release the record must be at least ten days after the notice is made, rather than mailed. The notice must state that the agency will only release information not exempt from public disclosure requirements if no injunction is obtained.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Second Substitute House Bill (State Government, Tribal Relations & Elections): The committee recommended a different version of the bill than what was passed. PRO: This bill lines up with a lot of other work around privacy and cybersecurity. Public agencies are stewards of their employees, and no other employer would send out all this information. Public employees have to say "no" all the time, to awarding benefits or parental rights, and that puts them in danger of being retaliated against. Members of law enforcement and firefighters protect our community, and they should be protected too. One of our members adopted a foster child, and releasing his birthdate puts him and his family at risk to threats from the child's biological family. Public employees involved in closed adoptions and in domestic abuse situations have very real reasons for not wanting their employers to release their personal information.

We want to protect retired law enforcement officers who worked dangerous undercover assignments- "the lives of them and their families could be jeopardized through disclosures. Some retirees have passed away, but their beneficiaries are still there, some whom are disabled and need some safety. Disclosure of this information is very intrusive to our plan's retirees, the majority of whom are disabled. Retirees are scared when they see a public disclosure request aimed at a broad number of employees and retirees. This is about the safety and privacy of one in ten Washingtonians. I have been harassed in my home based on information my employer gave out. My identity has been stolen. A woman is getting ready to quit her public service job because her employer informed her the address confidentiality program will not protect her information, after she has had to move out of two other states to avoid a domestic abuse situation.

This is a reasonable accommodation between privacy and accountability interests that would let our journalists do their job.

CON: If notice is given under the bill, it could be potentially anything about a person because "personal information" is not defined in the PRA. It is cumbersome and expensive to give notice to 800,000 public employees, and that requirement should be in the personnel exemptions section, not the personal information exemptions section. This bill will not protect the safety or privacy of public employees. We have no documented instances of this information being used to target public employees. If there is a problem, it should be addressed by correcting laws around protection of criminal justice employees, domestic violence victims, or the address confidentiality program.

Persons Testifying (State Government, Tribal Relations & Elections): PRO: Representative Zack Hudgins, Prime Sponsor; Sandra Toussaint, AFSCME Council 28/WFSE; Lucinda Young, WEA; Erin Haick, SEIU 925; AJ Johnson, Washington State Council of Firefighters; Brent Beden, Washington State Retired Deputy Sheriff & Police Officers Association; William Dickinson, Joyce Willms, LEOFF 1 Coalition; Mark Allen, Washington State Association of Broadcasters; Kati Thompson, Bob Evans, citizens.

CON: Rowland Thompson, Allied Daily Newspapers of Washington; Maxford Nelsen, Freedom Foundation.

Persons Signed In To Testify But Not Testifying (State Government, Tribal Relations & Elections): No one.

Classification

Subject: ANALYSIS; LEGISLATION (91%); EMPLOYMENT (91%); LEGISLATIVE BODIES (90%); GOVERNMENT & PUBLIC ADMINISTRATION (90%); INFORMATION SECURITY & PRIVACY (89%); CIVIL

SERVICES (89%); FREEDOM OF INFORMATION (89%); REGIONAL & LOCAL GOVERNMENTS (89%); PUBLIC RECORDS (89%); APPROPRIATIONS (79%); CRIMINAL LAW (77%); ETHNICITY (75%); RACE & ETHNICITY (75%); LABOR UNIONS (71%); PRIVACY RIGHTS (71%); SUPREME COURTS (60%); LAW COURTS & TRIBUNALS (60%); CRIME LAW ENFORCEMENT & CORRECTIONS (60%)

Load-Date: March 3, 2020

WASHINGTON LEGISLATIVE BILL HISTORY
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2019 Legis. Bill Hist. WA H.B. 1888

Bill Report, January 1, 2019

Reporter

2019 Legis. Bill Hist. WA H.B. 1888

Committee: House Appropriations Committee

Text

HOUSE BILL REPORT HB 1888

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

As Reported by House Committee On:

State Government & Tribal Relations

Appropriations

Title: An act relating to protecting employee information from public disclosure.

Brief Description: Protecting employee information from public disclosure.

Sponsors: Representatives Hudgins and Valdez.

Brief History:

Committee Activity:

State Government & Tribal Relations: 1/14/20, 2/7/20 DPS];

Appropriations: 2/10/20, 2/11/20 DP2S(w/o sub SGOV)].

Brief Summary of Second Substitute Bill

* Exempts month and year of birth and photographs of government employees and volunteers, and payroll deductions of dependents of government employees and volunteers from public disclosure.

* Requires a governmental entity to notify its employees when a public records request has been made for records containing personal information about the employee.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL RELATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Gregerson, Chair; Pellicciotti, Vice Chair; Goehner, Assistant Ranking Minority Member; Appleton, Dolan, Hudgins and Smith.

Minority Report: Without recommendation. Signed by 2 members: Representatives Walsh, Ranking Minority Member; Mosbrucker.

Staff: Carrington Skinner (786-7192).

Background:

The Public Records Act (Act) requires all state and local governmental entities to make available to the public all public records, which are records prepared or retained by a governmental entity that relate to the conduct of government or the performance of governmental or proprietary functions. This general rule applies to records regardless of the form they take unless a specific exemption applies. The Act specifies that it is to be liberally construed; any exemptions to the disclosure requirement must be interpreted narrowly.

There are a number of statutory exemptions for records or information contained in records, including certain records containing personal information and records that raise privacy concerns. Several of these exemptions apply to medical information, contact information, financial information, and other personally identifying information. Other records included in personnel and volunteer records, such as residential addresses, telephone numbers, electronic mail addresses, and social security numbers are also exempted.

Photographs and month and year of birth of employees and workers of criminal justice agencies in personnel files are exempt from public disclosure. However, the news media have access to photographs and full dates of birth.

A court may enjoin the release of a record if it determines that examination of the record would clearly not be in the public interest and would substantially and irreparably damage a person or vital government functions. A governmental agency is generally given the option to notify persons named in the record or to whom the record pertains that the release of a record has been requested, unless the agency is required to do so by law.

In October 2019 the Washington Supreme Court held that public records containing birth dates of state employees are not exempt from disclosure under the Act, and their release does not violate the state Constitution's guarantee of privacy.

Summary of Substitute Bill:

Month and year of birth and photographs of public agency employees in personnel files are exempt from public disclosure. The news media is permitted to have access to full dates of birth and photographs. Payroll deduction information of dependents of public agency employees or volunteers that are in certain records held by agencies are exempted from disclosure.

A state or local government agency that receives a request for personal information or for records that contain personal information of an employee must provide notice regarding the request to the employee, any union representing the employee, and the requestor. This notice must include:

- * the date of the request;
- * the nature of the record that has been requested;
- * the date on which the agency plans to release the record, which must be at least 10 days from the date the notice is mailed; and
- * a statement that the record will be released unless a court order is issued before the intended release date enjoining the release of the record under procedures provided by state law.

Substitute Bill Compared to Original Bill:

The substitute bill exempts photographs and month and year of birth in personnel files of public agency employees and volunteers from public disclosure. It also permits the news media to have access to photographs and the full date of birth.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill originated with state employees who had concerns about the way their information was being handled. Providing notice will allow employees to know that their privacy and security may be in danger. Survivors of domestic violence have concerns about personal information that can be made public. State employees are at risk of identity theft and harassment, and need to keep their information from being disclosed. The Secretary of State address-protection program does not always prevent disclosure. The law is outdated and needs to be updated to protect public employees due to modern cybersecurity concerns.

(Opposed) A free press needs access to information to hold institutions accountable. There is room for reasonable exemptions to support privacy, but they cannot interfere with the ability of the media to inform the public about government. This bill will diminish investigative reporting because dates of birth are used to distinguish between state employees with similar names. Dates of birth are already publicly available. Genuinely sensitive information cannot be disclosed. Current law provides protections for employees who have fears of being exposed, like the confidentiality program operated by the Secretary of State. As the State Supreme Court found, there is no compelling reason to keep employee dates of birth private.

(Other) The Department of Retirement Systems would have a difficult time providing notice to all people in its systems in an effective way. If curtailments to First Amendment activity are allowed, liberty is harmed.

Persons Testifying: (In support) Representative Hudgins, prime sponsor; Lucinda Young, Washington Education Association; Erin Haick, Service Employees International Union 925; Andrea Vaughn and Mike Yestranski, Washington Federation of State Employees; Kati Thompson, Employment Security Department; Serena Davis, Teamsters 117; and Stephen Baker.

(Opposed) Andy Hobbs, Sound Publishing; Jonathan Martin and Ray Rivera, Seattle Times; Dale Phelps, The News Tribune; Rowland Thompson, Allied Daily Newspapers of Washington; Mark Allen, Washington State Association of Broadcasters; Maxford Nelsen, Freedom Foundation; and Juli Buning, Washington Coalition for Open Government.

(Other) Arthur West; and Shawn Merchant, Department of Retirement Systems.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on State Government & Tribal Relations. Signed by 24 members: Representatives Ormsby, Chair; Robinson, 1st Vice Chair; Bergquist, 2nd Vice Chair; Rude, Assistant Ranking Minority Member; Caldier, Chopp, Cody, Dolan, Fitzgibbon, Hansen, Hoff, Hudgins, Kilduff, Macri, Pettigrew, Pollet, Ryu, Senn, Springer, Steele, Sullivan, Tarleton, Tharinger and Ybarra.

Minority Report: Do not pass. Signed by 7 members: Representatives Stokesbary, Ranking Minority Member; Chandler, Corry, Kraft, Mosbrucker, Schmick and Sutherland.

Minority Report: Without recommendation. Signed by 1 member: Representative Dye.

Staff: David Pringle (786-7310).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On State Government & Tribal Relations:

The second substitute bill makes the following changes:

* adds an exemption to public records disclosure for personal demographic details of individual state employees that are voluntarily submitted to and maintained by a state agency or higher education institution;

* clarifies that payroll deduction information of public agency employees and volunteers is exempt from disclosure rather than payroll deduction information of dependents of employees and volunteers; and

* changes are made to underlying provisions to reflect changes made by legislation that passed in the 2019 Legislative Session.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This is a contentious issue, but after meeting with stakeholders, two major concerns were identified: that the media wanted to be able to seek out malfeasance; and that public employees are concerned about personal safety. The draft finds a way to address both of these concerns. The state shouldn't be sending out thousands of birthdates, but the media sometimes needs to be able to identify individuals. The cost is driven by the notification requirement, and vulnerable people need notice in order to protect themselves. The Service Employees International Union 925 members include involuntary treatment workers, those working in residential facilities, and with people that deal with stalkers and dangerous individuals. One worker, T.J., was held hostage by her ex-spouse at gunpoint- "real and specific safety concerns. The large media outlets have portrayed this as a spat between unions and the Freedom Foundation, and that is false. Anyone can request this information at any time. Giving out this kind of information is unsafe, and it is ridiculous. Employees have been contacted by unfriendly entities using information from their employer. This is based on a law drafted in 1972-that predates the Internet, and modern information aggregation.

(Opposed) The Freedom Foundation is not convinced a change needs to be made. This issue has been debated in the courts for years, and although there are certainly some terrible stories, no connection between the information being available and those acts has been convincingly drawn. This has been the law for many years-and we are not just now entering the digital age. There are already protections and exceptions, like the confidentiality program. The exceptions could be strengthened. Much of this information is available through the voter registration database anyway.

Persons Testifying: (In support) Representative Hudgins, prime sponsor; Erin Haick, Service Employees International Union 925; and Kati Thompson.

(Opposed) Maxford Nelsen, Freedom Foundation.

Persons Signed In To Testify But Not Testifying: None.

Classification

Subject: ANALYSIS; LEGISLATION (91%); REGIONAL & LOCAL GOVERNMENTS (90%); GOVERNMENT & PUBLIC ADMINISTRATION (90%); EMPLOYMENT (90%); APPROPRIATIONS (90%); INFORMATION SECURITY & PRIVACY (89%); CIVIL SERVICES (89%); PUBLIC RECORDS (89%); CRIMINAL LAW (77%); FREEDOM OF INFORMATION (76%); PRIVACY RIGHTS (71%); CRIME LAW ENFORCEMENT & CORRECTIONS (60%)

Load-Date: February 15, 2020

WASHINGTON LEGISLATIVE BILL HISTORY
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2019 Wa. HB 1888

Enacted, March 25, 2020

Reporter

2020 Wa. ALS 106; 2020 Wa. Ch. 106; 2019 Wa. HB 1888

WASHINGTON ADVANCE LEGISLATIVE SERVICE > STATE OF WASHINGTON — 66TH LEGISLATURE —
2020 REGULAR SESSION > CHAPTER 106, LAWS OF 2020 > SUBSTITUTE HOUSE BILL 1888

Notice

Added: Text highlighted in green

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Synopsis

AN ACT Relating to protecting employee information from public disclosure; and reenacting and amending RCW 42.56.250.

Text

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW Rev. Code Wash. (ARCW) § 42.56.250 and 2019 c 349 s 2 and 2019 c 229 s 1 are each reenacted and amended to read as follows:

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

- (1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;
- (2) All applications for public employment other than for vacancies in elective office, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;
- (3) Professional growth plans (PGPs) in educator license renewals submitted through the eCert system in the office of the superintendent of public instruction;
- (4) The following information held by any public agency in personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers of any public agency: Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, driver's license numbers, identocard numbers, payroll deductions including the amount and identification of the deduction, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential

addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency. For purposes of this subsection, "employees" includes independent provider home care workers as defined in RCW 74.39A.240;

- (5) Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed;
- (6) Investigative records compiled by an employing agency in connection with an investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws or an employing agency's internal policies prohibiting discrimination or harassment in employment. Records are exempt in their entirety while the investigation is active and ongoing. After the agency has notified the complaining employee of the outcome of the investigation, the records may be disclosed only if the names of complainants, other accusers, and witnesses are redacted, unless a complainant, other accuser, or witness has consented to the disclosure of his or her name. The employing agency must inform a complainant, other accuser, or witness that his or her name will be redacted from the investigation records unless he or she consents to disclosure;
- (7) Criminal history records checks for board staff finalist candidates conducted pursuant to RCW 43.33A.025;
- (8) Photographs and month and year of birth in the personnel files of employees or volunteers of a public agency, including employees and workers of criminal justice agencies as defined in RCW 10.97.030. The news media, as defined in RCW 5.68.010(5), shall have access to the photographs and full date of birth. For the purposes of this subsection, news media does not include any person or organization of persons in the custody of a criminal justice agency as defined in RCW 10.97.030;
- (9) The global positioning system data that would indicate the location of the residence of a public employee or volunteer using the global positioning system recording device; ~~and~~
- (10) Until the person reaches eighteen years of age, information, otherwise disclosable under chapter 29A.08 RCW, that relates to a future voter, except for the purpose of processing and delivering ballots; ~~and~~
- (11) Voluntarily submitted information collected and maintained by a state agency or higher education institution that identifies an individual state employee's personal demographic details. "Personal demographic details" means race or ethnicity, sexual orientation as defined by RCW 49.60.040(26), immigration status, national origin, or status as a person with a disability. This exemption does not prevent the release of state employee demographic information in a deidentified or aggregate format.
- (12) Upon receipt of a request for information located exclusively in an employee's personnel, payroll, supervisor, or training file, the agency must provide notice to the employee, to any union representing the employee, and to the requestor. The notice must state:
 - (a) The date of the request;
 - (b) The nature of the requested record relating to the employee;
 - (c) That the agency will release any information in the record which is not exempt from the disclosure requirements of this chapter at least ten days from the date the notice is made; and
 - (d) That the employee may seek to enjoin release of the records under RCW 42.56.540.

History

Approved by the Governor March 25, 2020

Effective date: June 11, 2020

Sponsor

By House Appropriations (originally sponsored by Representatives Hudgins and Valdez)

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PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION

October 09, 2020 - 11:27 AM

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