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No. 93306-5

(Court of Appeals Case No. 46797-6-II)

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU HEALTHCARE 775NW,
Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and FREEDOM FOUNDATION,
Respondents,

RESPONDENT FREEDOM FOUNDATION'S RESPONSE OPPOSING PETITIONER'S MOTION FOR INJUNCTIVE RELIEF PRESERVING THE STATUS QUO PENDING APPEAL

James G. Abernathy, WSBA #48801
Stephanie D. Olson, WSBA #50100
David M. S. Dewhirst, WSBA #48229
P.O. Box 552, Olympia, WA 98507
Phone (360) 956-3482, Fax (360) 352-1874
SOlson@myfreedomfoundation.com
Ddewhirst@myfreedomfoundation.com
JAbernathy@myfreedomfoundation.com
Attorneys for Respondent Freedom Foundation

I. IDENTITY OF MOVING PARTY

Respondent Freedom Foundation ("the Foundation" or "Respondent") hereby responds in opposition to Petitioner's Motion for Injunctive Relief Preserving the Status Quo Pending Appeal.

II. STATEMENT OF RELIEF SOUGHT

Respondent Freedom Foundation respectfully requests that this Court deny Petitioner's Motion for Injunctive Relief Preserving the Status Quo Pending Appeal.

III. STATEMENT OF RELEVANT FACTS

This is a public records case where a third party has delayed the release of nonexempt public records for ***over two years***. The Freedom Foundation ("Foundation" or "Respondent") submitted a public records request to Department of Social and Health Services ("DSHS") on July 2, 2014. The Foundation requested the names of individual providers ("IPs") who care for disabled or elderly patients and who are grouped into a single statewide bargaining unit represented by SEIU 775 ("SEIU," "Petitioner," or "Appellant"). The Foundation's sole purpose in seeking and obtaining the list of IP names is to inform IPs of their constitutional rights recently articulated in the U.S. Supreme Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). That ruling held that the First Amendment prohibited

the imposition of mandatory union fees upon home care workers in Illinois (substantially identical to Washington's IPs).

On October 1, 2014, SEIU sued DSHS and the Foundation in Thurston County Superior Court to enjoin the release of the records.[1] SEIU proffered a variety of legal arguments, all of which have been resoundingly rejected by the Superior Court and the Court of Appeals (unanimously). *SEIU Healthcare 775NW v. State, Dep't of Soc. & Health Servs.* ("*SEIU 775*"), 193 Wn. App. 377, 2016 WL 1447304, at *1, ___ P.3d ___ (2016).[2] After Division II declined to reconsider its April 12, 2016 decision, SEIU sought discretionary review in this Court.

SEIU filed the instant motion on June 29, 2016. For the reasons below, the motion should be denied.

IV. GROUNDS FOR RELIEF SOUGHT

A. The scope of injunctive relief must be considered within the context of the PRA.

The scope of SEIU's request for an injunction must be considered within the PRA's statutory scheme, which presumptively and heavily commands disclosure unless a specific, narrowly-tailored exemption applies. *Washington State Dept. of Trans. v. Mendoza de Sugiyama*, 182 Wn. App. 588, 596, 330 P.3d 209 (2014). This is because the PRA serves

[1] This occurred after SEIU erroneously filed the case in King County Superior Court on September 25, 2014. SEIU later voluntarily dismissed the King County case.
[2] Respondent cites to the *SEIU 775* decision using the Westlaw page numbers (e.g. *1).

as one of Washington citizens' most powerful tools in ensuring government accountability and transparency. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 343, 217 P.3d 1172 (2009) ("Washington's Public Records Act (PRA), chapter 42.56 RCW, gives the public access to the public records of state and local agencies, with the laudable goals of governmental transparency and accountability.").[3] This Court has repeatedly affirmed the overriding importance of the PRA's open government policy objectives:

> The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." The Public Records Act "is a strongly worded mandate for broad disclosure of public records". The Act's disclosure provisions must be liberally construed, and its exemptions narrowly construed. Courts are to take into account the Act's policy "that free and open examination of public records is in the public interest, even though such

[3]*See also DeLong v. Parmelee*, 157 Wn. App. 119, 145, 236 P.3d 936 (2010) ("The PRA allows individuals to make informed decisions in their government...[a]nd the PRA's declaration of policy states that full access to information concerning the conduct of government...must be assured as a fundamental and necessary precondition to the sound governance of a free society."); *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 144, 466 (2010) ("The PRA is a forceful reminder that agencies remain accountable to the people of the State of Washington.").

> examination may cause inconvenience or embarrassment to public officials or others.

Progressive Animal Welfare Soc. v. University of Washington, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (internal citations omitted).

In accordance with the legislature's strong preference for disclosure, the legislature also strongly intended for PRA cases to be resolved quickly. *See Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 555-56, 199 P.3d 939 (2009) ("The legislature's continuous reduction in the time for filing an action under the PRA establishes with clarity its desire that PRA claims be resolved quickly."). Thus, in PRA cases, speedy resolution is always within the public interest. *See id.*; *DeLong v. Parmelee*, 157 Wn. App. 119, 145, 236 P.3d 936 (2010) ("The policy behind the PRA is that free and open examination of public records is in the public interest. As a result, the PRA preserves the most central tenets of representative government, namely the sovereignty of the people and the accountability to the people of public officials and institutions.").

Accordingly, any equitable interests at play heavily tip the scale in favor of disclosure. *See id.* Any competing equitable interests must be considered under and within the PRA's overarching interpretive mandate that requires disclosure wherever possible, as quickly as possible. *See*

Ameriquest Mort. Co. v. Office of Attorney General of Washington, 177 Wn.2d 467, 487, 300 P.3d 799 (2013) ("Courts should construe exemptions narrowly to allow the PRA's purpose of open government to prevail where possible. If there is information in a public record that is exempt and redaction and disclosure is possible, then it is required."); *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 555-56, 199 P.3d 393 (2009); *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) ("in the event of a conflict between the [PRA] and other statutes, the provisions of the [PRA] must govern") (citing RCW 42.17.920, recodified as RCW 42.17A.904). Here, SEIU's request for a stay pursuant to RAP 8.3 requires the diminution of the PRA's strong and clear principles favoring open government in Washington.

RAP 8.3 "authorizes an appellate court to stay a trial court order if the moving party can demonstrate that debatable issues are presented on appeal and that the stay is necessary to preserve the fruits of the appeal for the movant, after considering the equities of the situation." *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260, 271–72 (1998). While, ostensibly, RAP 8.3. sets a lower-than-normal standard for injunctive relief, SEIU essentially argues that even the barest of showings can satisfy it. Before both the Thurston County Superior

Court and the Court of Appeals, SEIU has had two full opportunities to present its arguments. Both courts rejected these arguments as a matter of law. But SEIU suggests that it can merely affirm its intention to continue arguing these failed arguments, and it therefore satisfies the "debatable issues" prong of the RAP 8.3 test. But RAP 8.3 is not denied to delay justice so that one party can persist in delaying the ultimate disclosure of public records, as SEIU seeks to do here. SEIU is treating the "debatable issues" prong as a loophole and is eagerly attempting to exploit it.

This Court should put an end to SEIU's exploitation of RAP 8.3 and its improper reliance on courts' equitable powers to delay the disclosure of non-exempt public records for several reasons. **First**, when such a conflict exists between the PRA and other conflicting statutes, the PRA is clear: "in the event of a conflict between the [PRA] and other statutes, the provisions of the [PRA] must govern." *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 262 (1994). The PRA's strong mandate favoring disclosure presumptively, and statutorily, overrides conflicting equitable interests in RAP 8.3, especially when such (non-mandatory) equitable interests have been stretched beyond the breaking point.

Second, the legislature certainly did not intend parties to use RAP 8.3 to contravene the intent, purpose, and effect of one of Washington

citizens' strongest tools for ensuring open government for years on end. *See* RCW 42.17A.904.

Third, this is especially true for the Foundation's requests, where the records will be used to further the Foundation's mission of informing IPs of their constitutional rights. Every day that passes is another day where thousands of home healthcare providers remain in the dark about their constitutional rights, and where the United States Supreme Court's ruling in *Harris v. Quinn* remains unrealized in Washington State due to SEIU's strenuous and costly efforts (ironically paid for by the dues of members SEIU is working so hard to keep uninformed).

> Any loss of First Amendment freedoms ... unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion); accord, e.g., *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir.2014); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir.2013); S*anders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir.2012); *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir.2012); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011).

Americans for Prosperity Found. v. Harris, No. CV 14-9448-R, 2016 WL 1610591, at *6 (C.D. Cal. Apr. 21, 2016). SEIU's protracted litigation strategy is designed to deprive IPs of their First Amendment freedoms. Time is, therefore, of the essence in light of the important constitutional considerations in this case. SEIU's continued interest in delay does not justify the continued diminution of those constitutional interests. **Fourth**,

the issues SEIU presents on appeal are not debatable, as discussed below. **Fifth**, a stay is unnecessary to preserve the fruits of appeal.

B. It is undebatable that RCW 42.56.070(9) does not bar disclosure of the requested public records.

RCW 42.56.070(9) of the PRA provides, "This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes . . ." Petitioner's broad definition of "commercial purposes" in RCW 42.56.070(9) is clearly untenable and antithetical to the PRA. Contrary to its claim otherwise, Petitioner does not "present[] compelling legal theories" for why the "commercial purpose" provision of the PRA should be defined broadly. Emergency Motion, 9. Petitioner's primary arguments are the exact same it presented before the Court of Appeals Division II, which the Court unanimously rejected.[4] In most contexts, this is the quintessential example of why an argument is "devoid of merit."

The April 16, 2016 published opinion by the Court of Appeals was the first time a Washington appellate court has interpreted the commercial purpose provision in RCW 42.56.070(9). *SEIU* 775, at *8-14. In the process of statutory construction, the Court concluded that the commercial

[4] *SEIU 775*, at *8-14.

purpose prohibition must be interpreted like every other PRA exemption: in favor of disclosure. *Id.* at *10. To reach its adopted definition, the Court consulted dictionary definitions of "commercial" as well as several Attorney General Opinions construing RCW 42.56.070(9). The Court further determined that a requestor must intend to profit (or generate revenue/financial gain) *from the direct use of the list it is requesting. Id.* at *11-12 ("If indirect benefits are considered, a wide range of requests might fall within the commercial purposes provision and the policy of full disclosure of public records would be thwarted. In addition, a comment in the 1975 AGO opinion supports the Foundation's position. The AGO stated: "Where the requester's potential commercial benefit is remote and ephemeral and there is a clear purpose other than commercial benefit, the statute does not prohibit supplying the information in list form."[12] 1975 Op. Att'y Gen. No. 15, at 13."). Ultimately, the Court defined "commercial purpose" as ***the intention "to generate revenue or financial benefit from the direct use of the lists."*** *Id.* at *13 (emphasis added). Only that type of commercial purpose triggers the prohibition on disclosure of public records under RCW 42.56.070(9).

SEIU now attempts to introduce additional evidence to support the claims considered and rejected by the Court of Appeals. First, the Court addressed the allegation that the Foundation's use of the list is commercial

because it will economically injure SEIU. *Id.* at *13.

> First, SEIU [775] argues that the Foundation's actions will economically injure SEIU, including by decreasing SEIU's membership and funds. SEIU suggests that this use constitutes a commercial purpose because the Foundation perceives SEIU as an "economic competitor." Economically injuring SEIU would not directly generate revenue or financial benefit for the Foundation. Even if SEIU ceases to exist there will be no direct financial benefit to the Foundation. Therefore, economically injuring SEIU does not fall within the definition of "commercial purposes" that we adopt above. We decline to hold under the facts of this case that a nonprofit entity decreasing the revenue of another nonprofit entity is a type of commercial purpose under RCW 42.56.070(9).

Id. at *13. The Court also applied the test to the appellant's allegation that the Foundation will increase its own membership and funds from its use of the records. *Id.* at *14.

> Second, SEIU argues that the Foundation's actions will increase the Foundation's membership and funds. However, SEIU does not explain how contacting the individual providers would directly increase membership or donations. The Foundation emphasizes that it will not solicit donations from the individual providers. There also is no indication that the Foundation will ask individual providers to become Foundation members. SEIU argues that the Foundation fundraises by broadly publicizing its goal to defund SEIU and therefore attacking SEIU may generate donations. However, SEIU does not explain how merely obtaining the lists and contacting the individual providers will cause others to join the Foundation or donate money to the Foundation. Any such a benefit is too attenuated to constitute a commercial purpose.

Id. SEIU's new "facts" do not work to revive the issues rejected below as a matter of law. Such new evidence certainly does not create debatable

issues. Even if the Court of Appeals had considered the new "evidence," the decision would have been the same.

C. It is undebatable RCW 42.56.230(1) does not prohibit disclosure of the requested records.

SEIU's entire argument based on RCW 42.56.230(1) can succeed only if this Court overturns its own recent decisions. Despite Petitioner's best efforts at obscuring this fact, SEIU's argument is a classic iteration of the prohibited "linkage" argument. *Koenig v. Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006). Such reasoning allows courts to infer exemptions, which is prohibited. *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 800, 791 P.2d 526, 533 (1990) ("The language of the statute does not authorize us to imply exemptions but only allows specific exemptions to stand."). Because SEIU's argument requires this Court to reverse itself and upheave the PRA's policy, it is devoid of merit and is not a debatable issue.

D. Denying the Stay would not destroy the fruits of SEIU's appeal.

First, SEIU already enjoyed an appeal, but it received a result it did not like. If the Court denies review, then obviously this request for injunction is moot and should be denied. Second, the Foundation's worker education project will continue in the future. And as the IP bargaining unit regularly experiences turnover, the Foundation will request identical lists in the future to ensure it has an optimally-updated list. IF SEIU were to

obtain a favorable ruling, it would prevent the need to re-litigate the same issues in the future.

V. CONCLUSION

Based on the foregoing, the Foundation respectfully requests the Court deny Appellant's Emergency Motion for Injunctive Relief Preserving the Status Quo Pending Appeal.

Respectfully submitted on August 1, 2016.

FREEDOM FOUNDATION

By: _____

James G. Abernathy, WSBA #48801
STEPHANIE D. OLSON, WSBA #50100
PO Box 552, Olympia, WA 98507
p. 360.956.3482
SOlson@freedomfoundation.com

Counsel for Respondent
Freedom Foundation

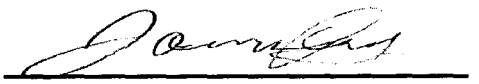
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on August 1, 2016, I delivered a copy of the foregoing Response to Petitioner's Motion by email pursuant to agreement to:

Dmitri Iglitzin
Jennifer Robbins
Jennifer Woodward
Jennifer Schnarr
Law Offices of Schwerin Campbell
18 West Mercer Street, Suite 400
Seattle, WA 98119
Iglitzin@workerlaw.com;
Robbins@workerlaw.com;
Woodward@workerlaw.com;
Schnarr@workerlaw.com

Morgan Damerow
Janetta Sheehan
Albert Wang
Michelle Earl-Hubbard
Office of the Attorney General
7141 Cleanwater Drive SW
P.O. Box 40145
Olympia, WA 98504-0145
morgand@atg.wa.gov;
JaneC@atg.wa.gov;
LPDarbitration@atg.wa.gov

Dated August 1, 2016, at Olympia, Washington.



James Abernathy

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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Damerow, Morgan (ATG) <MorganD@ATG.WA.GOV>; Wang, Albert (ATG) <AlbertW@ATG.WA.GOV>; Sheehan, Janetta (ATG) <JanettaS@ATG.WA.GOV>; Diane Newman <dianen@atg.wa.gov>; Labor & Personnel Division <LPDarbitration@atg.wa.gov>; 'Dmitri Iglitzin' <iglitzin@workerlaw.com>; Jennifer Robbins <robbins@workerlaw.com>; Jennifer Woodward <woodward@workerlaw.com>; Genipher Owens <owens@workerlaw.com>; David Dewhirst <DDewhirst@myfreedomfoundation.com>; Kirsten Nelsen <KNelsen@myfreedomfoundation.com>
Subject: SEIU 775NW v. DSHS & Freedom Foundation, Supreme Ct. No. 93306-5 (Ct. of Appeals, Div. II No. 46797-6-II)

Please see attached for filing in *SEIU 775NW v. DSHS & Freedom Foundation*, Supreme Ct. No. 93306-5 (Ct. of Appeals, Div. II No. 46797-6-II) the following:

1) Respondent Freedom Foundation's Answer to Appellant SEIU's Petition for Discretionary Review by the Supreme Court (and Appendix);
2) Respondent Freedom Foundation's Response to Appellant SEIU's Motion to Allow Additional Evidence on Review; and
3) Respondent Freedom Foundation's Response to Appellant SEIU's Motion for Injunctive Relief Preserving the Status Quo Pending Appeal.

Please contact me immediately if you have trouble with any of the documents.

Thank you!

—
James Abernathy
Litigation Counsel | Freedom Foundation

JAbernathy@myfreedomfoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

"The curious task of economics is to demonstrate to men how little they really know about what they imagine they can design." – F.A. Hayek

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