NO. 48881-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SERVICE EMPLOYEES INTERNATIONAL UNION 775,
Appellant/Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and THE EVERGREEN FREEDOM FOUNDATION d/b/a FREEDOM FOUNDATION,
Appellees/Defendants.

PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT

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I. IDENTITY OF THE PETITIONER

Petitioner Service Employees International Union 775 (formerly SEIU Healthcare 775NW) ("SEIU 775") is the Plaintiff and Appellant below. SEIU 775 is a labor organization representing a statewide bargaining unit of individual providers of personal care services to functionally disabled individuals pursuant to Washington State's Medicaid program (hereinafter, "IPs").

SEIU 775 sought an injunction to prevent the Washington State Department of Social and Health Services ("DSHS") from providing to PRA requester and Respondent Freedom Foundation ("the Foundation") the "times and locations" of certain contracting appointments and safety and orientation trainings that public employees working as IPs must attend as part of their employment as IPs. Thurston County Superior Court Judge Mary Sue Wilson advanced and consolidated the hearing on SEIU 775's petition for a preliminary injunction with the hearing on SEIU 775's request for permanent injunctive relief and denied the request for an injunction. The Court of Appeals, Division II, affirmed.

II. DECISIONS BELOW

SEIU 775 seeks review of the Court of Appeals' published decision rendered in *SEIU Healthcare 775NW v. State of WA, Dept. of Soc. and Health Services*, No. 48881-7-II (April 25, 2017), which affirmed

the Thurston County Superior Court's March 25, 2016, order denying SEIU 775's request for a preliminary and permanent injunction. A copy of the decision is in the Appendix at pages 0001-0012.

III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals decision conflict with decisions of the Supreme Court which have found the "other statute" provision contained in RCW 42.56.070(1) to be met where disclosure would violate another statute, notwithstanding the fact that those other statutes did not expressly prohibit disclosure?

2. Does the Court of Appeals decision conflict with other Court of Appeals decisions which have found the "other statute" provision to be met where disclosure would violate another statute, notwithstanding the fact that those other statutes did not expressly prohibit disclosure?

3. Does the Court of Appeals decision involve an issue of substantial public interest where the decision found no PRA exemption applicable even in situations where disclosure would necessarily require an employer to commit an unfair labor practice and violate the Public Employees Collective Bargaining Act ("PECBA")?

IV. STATEMENT OF THE CASE

SEIU 775 is a labor organization which represents more than 43,000 long-term care workers who either contract with the State of

Washington, or who are employed by private home-care agencies and nursing homes in Washington and Montana. CP 44. Approximately 34,000 of these long-term care workers are IPs as that term is defined in RCW 74.39A.240. *Id.* IPs provide "personal care services," as defined in WAC 388-106-0010, to functionally disabled individuals throughout the state under the Medicaid personal care, community options program entry system, chore services program, or respite care program. RCW 74.39A.240(3). Pursuant to the provisions of RCW 74.39A.270 and RCW 41.56.026, SEIU 775 is the exclusive bargaining representative of all IPs.

IPs must attend contracting appointments and safety and orientation trainings as part of their employment. CP 45. The collective bargaining agreement ("CBA") between SEIU 775 and the State of Washington provides SEIU 775 with access to bargaining unit members at these two types of appointments. *Id.* These appointments generally take place at various DSHS facilities around the state, though DSHS representatives do not attend the portion of the appointments at which SEIU 775 speaks to the IPs. *Id.* The contracting appointments and safety and orientation trainings are not events open to the public, but are internal matters for the State and the IPs that are part of the operation of the home-care program. *Id.* There is no evidence that the State releases or has ever

released to the public the times, dates, and locations of other such internal meetings between the State and its employees. *Id.*

The Foundation is a Washington State organization aligned with anti-union interests that are ideologically opposed to the goals of SEIU 775, including SEIU 775's mission to improve the wages, benefits and working conditions of employees throughout Washington State. The Foundation regularly publicizes its goal to "defund" and "bankrupt" public sector unions, including SEIU 775, and efforts it is taking to attempt to accomplish that goal. CP 103-140. The Foundation advertises its mission to economically cripple unions like SEIU, and announces the details of steps it has taken or will take to "defund" and "bankrupt" public sector unions generally and SEIU specifically in order to raise funds from supporters and from the public. *Id.*; *see, e.g.*, CP 112-140 (calling public-sector unions a "rampant disease" and SEIU 775 "deceptive," "well-paid thugs," along with other disparaging phrases).

Since the U.S. Supreme Court issued its decision in *Harris v. Quinn*, __ U.S. __, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014), the Foundation has sought to contact IPs working in Washington to encourage, assist, and incite them to drop their membership in and financial support of SEIU. CP 112-148, 159-162, 167-184, 187-189 (including fundraising letter from the Foundation's CEO Tom McCabe

boasting about the physical mailings, email blasts and robo-calls made to SEIU 925-represented child-care providers whose information it did obtain, to encourage the providers to withdraw membership in and economic support of the union, and document referencing door-to-door "Opt-Out" project launched after *Harris v. Quinn*).

In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the U.S. Supreme Court held that Illinois personal care assistants who chose not to join a public-sector union could not be compelled to pay an agency fee to support work that is related to the collective-bargaining process on the grounds that the personal care assistants were not "full-fledged public employees." No court has ever held that home-care workers in Washington State are similar to the workers in *Harris* or are properly characterized as "partial" or "quasi" public employees like the workers were in *Harris*, despite the invitation to do so. *See* Appendix at 0013-22 (*Hoffman et al. v. Inslee et al.*, No. C14-200-MJP at 6 (WD Wash. August 16, 2016) (Order on Motions for Summary Judgment)) (holding that opt-out system for the deduction of dues and agency fees did not impermissibly infringe on the IPs' First Amendment rights). In fact, this Court recently made clear that this remains an open question. *Thorpe v. Inslee*, No. 92912-2, 2017 WL 1821182, at *1 (Wash. May 4, 2017) (noting that question of whether *Harris* applies to the Washington IP

question was not raised and consequently not addressed). The Foundation's oft-repeated claim that it seeks to inform IPs of their "constitutional right" to opt out of their union is therefore misleading.

The Foundation has attempted, through several PRA requests, to obtain the names and contact information of IPs represented by SEIU 775 in order to locate and contact them for these same purposes. CP 149-158 (Foundation fundraising letter informing recipients that in the previous year the Foundation requested from DSHS the names of IPs so it could encourage them to opt out of paying union dues); CP 167-171 (information piece announcing the number of care providers who have opted out of dues payments as a result of the Foundation's "door to door" efforts and plans to reach home healthcare providers); CP 194-207 (discovery responses discussing intended use of list of IP names).

The Foundation's efforts to diminish the membership of public-sector unions are not restricted to mailings or websites. The Foundation has implemented a door-to-door canvass and has gone directly to public-sector employees' workplaces to induce them to opt out of union membership and dues payments and to provide them a means for doing so. CP 141-145, 159-166, 187-189. For example, in December of 2015, the Foundation sent a "Santa Clause" to "greet government employees as they enter and exit their offices in Washington and Oregon" and to distribute

packets of materials encouraging workers to opt out of union membership and to cease paying union dues and providing them a letter to use by which to do so. CP 163-166. The "Freedom Foundation Santa" also made an appearance to "deliver that message in the cafeteria of the Washington State Department of Natural Resources." *Id.*

The Foundation attempts to accomplish its goal to "defund" and "bankrupt" SEIU 775 in part by discrediting, disparaging and undermining the Union to encourage and assist IPs to forego their membership in and economic support for SEIU. *See, e.g.*, CP 103-140 (goal to "defund" and "bankrupt;" calling public-sector unions a "rampant disease"; graphic of "SEIU member" holding a billy club over a kneeling stick person, about to strike them); CP 159-162 (Foundation Web posting saying, "Within 24 hours of obtaining the list of exploited workers who fall under Harris V. Quinn, we sent out a mailing and began automated calls…From TV ads to attending childcare provider early achiever trainings to handing out literature and speaking with providers…the Freedom Foundation will be ongoing and relentless in the year to come."; referring to SEIU's contacts and relationship with its represented workers as a "scheme," "bullying," "intimidation," and "bribing"); CP 163-166 (Freedom Foundation Santa "has been visiting state workers this week to tell them how they can sever

ties from the *naughty* public employees' unions"; Santa's message included "why they should opt out" of the union) (emphasis added).

The Foundation's efforts to contact IPs are part and parcel of its attempts to diminish workers' support of their union by discrediting, disparaging and undermining the Union. CP 163-166; *see also* CP 324-326 (Foundation telling provider not to let SEIU "continue to trick and mislead you into their money making scheme" and stating that SEIU will "use scare tactics and deception" with providers who say they want to discontinue membership); CP 327-329 (misinformation about SEIU given during at-home visits by Freedom Foundation representatives).

In short, the Foundation's mission to "bankrupt" and "defund" SEIU 775 explicitly relies on contacting members or potential members of the Union directly wherever they may be—even at their places of employment—to discredit, disparage and undermine the Union and to encourage and assist IPs to forego their support for SEIU. CP 103-184.

In furtherance of the Foundation's efforts to find IPs wherever they are, Maxford Nelsen, the Foundation's Director of Labor Policy, submitted a PRA request dated January 12, 2016, to DSHS on behalf of the Foundation seeking in part "[t]he times and locations of all contracting appointments for individual providers held or to be held between November 1, 2015 and December 31, 2016," as well as "[t]he times and

locations of any state-sponsored or facilitated opportunities for individual providers to view the initial safety and orientation training videos … held or to be held between November 1, 2015 and December 31, 2016." CP 93-95. Based on the Foundation's prior conduct and publicity surrounding its efforts to contact IPs to encourage and assist them to forego union membership and to not financially support SEIU 775, it cannot be disputed that if DSHS provides the Foundation with the times and locations of the contracting appointments and/or trainings, the Foundation will attempt to attend those appointments or to contact IPs as they come or go from those appointments to disparage and discredit SEIU 775 and to encourage IPs to cease or withhold union membership and/or dues.

DSHS has identified the documents it intends to disclose to the Foundation in response to the relevant portions of its PRA request as "201601-PRR-360 MSD HQ 0001-0062." CP 45. These documents consist of plans by various State agencies to implement Article 2.3 of the 2015-2017 CBA, along with correspondence and other documents that happen to contain, among nonresponsive information, the times and locations of contracting and/or orientation appointments for IPs. *Id.* SEIU 775 objected to the production of these records, and DSHS indicated it would provide the documents unless SEIU 775 obtained an injunction by March 18, 2016. CP 45.

On March 10, 2016, SEIU 775 filed suit in Thurston County Superior Court for declaratory and injunctive relief. CP 8-18. On March 11, 2016, SEIU 775 filed a motion for preliminary injunction, with a hearing date of March 18, 2016. CP 26-41. The hearing was later moved to March 25, 2016. *See* CP 367.

At the hearing, the Honorable Mary Sue Wilson advanced and consolidated the hearing on Plaintiff's motion for a preliminary injunction with a hearing on Plaintiff's request for permanent injunctive relief, under Civil Rule 65(a)(2). CP 386-388. The court then issued an order denying SEIU 775's request for a preliminary and permanent injunction. *Id.* Also on March 25, in order that the fruits of Plaintiff's appeal would not be completely destroyed, Judge Wilson entered an order staying the court's order on preliminary and permanent injunctive relief and temporarily enjoining DSHS from disclosing the requested records for a period of 14 days to allow SEIU 775 to seek emergency injunctive relief from this Court pending appeal. CP 389.

The Court of Appeals issued its decision affirming the denial of injunctive relief on April 25, 2017. App. 1-12.

V. ARGUMENT

A. Summary of Argument

The Court should accept discretionary review of the Court of Appeals decision pursuant to RAP 13.4(b). Review is warranted pursuant to 13.4(b)(2) because the decision is in conflict with the Court of Appeals decision in *White v. Clark Cty.*, 188 Wn. App. 622, 354 P.3d 38 (2015), *rev. denied*, 185 Wn.2d 1009, 366 P.3d 1245 (2016), which makes clear that the "other statute" provision can be satisfied where another statute operates to effectively prohibit disclosure of the records, even if no particular provision does so expressly.

Review is also warranted pursuant to RAP 13.4(b)(1) because the decision is in conflict with the Supreme Court's decision in *Progressive Animal Welfare Soc'y v. Univ. of Wn.*, 125 Wn.2d 243, 884 P.2d 592 (1994) ("*PAWS II*") and *John Doe v. Wash. State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016) ("*Wash. State Patrol*").

Finally, review is warranted because the decision involves an issue of substantial public interest that should be determined by the Supreme Court pursuant to RAP 13.4(b)(4) because whether or not the PRA can compel to disclose documents even where disclosure would be prohibited by the PECBA is an issue with wide-ranging applicability, potentially requiring all public employers to commit unfair labor practices.

B. The Decision Conflicts with Published Court of Appeals Decisions.

Review is warranted under RAP 13.4(b)(2) because the decision is in conflict with a published decision of the Court of Appeals. The decision below found that because no PECBA provision prohibits a public employer from releasing records or addresses privacy or confidentiality, the "other statute" provision could not apply, regardless of whether disclosure would violate the PECBA.

This is in direct conflict with *White v. Clark Cty.*, where the Court of Appeals found the "other statute" provision was met by combining Article VI, Section 6, of the Washington Constitution, multiple sections of 29A RCW, and secretary of state regulations, which collectively operated to ensure ballot security and secrecy. 188 Wn. App. at 636. Therefore, the Court concluded that the PRA prohibited disclosure of digital copies of election ballots. *Id.* at 634, 635-36.

Just as in this case, no single statute or regulation contained an express prohibition or exemption of a specific record. *Id.* at 631 ("no single provision provides a comprehensive PRA exemption for ballot images," but finding "other statute" exemption from combination of other sources). Instead, the Court concluded that statutes dictating that ballots be kept secure together with regulations ensuring the secrecy of ballots

operated to necessarily prohibit digital copies of ballots from being disclosed. "Because these provisions are inconsistent with producing copies of ballots and ballot images to a third person under the PRA they constitute an express 'other statute' exemption for ballots and ballot images..." *Id.* at 637.

The result in *White* cannot be reconciled with the Court's opinion below. If the Court of Appeals had applied the same analysis in *White* as it did here, the absence of an express statutory prohibition on disclosing ballots would have been fatal to the effort to protect the secrecy of ballots and public disclosure of the ballots would have been compelled. The court below wrongfully ignored the decision in *White* by concluding that the PECBA could not qualify as an "other statute" exemption, despite the fact that various portions of the Act prohibit employers from committing unfair labor practices and disclosure of the records in question would constitute an unfair labor practice. Review should be granted.

C. The Decision Below Conflicts with Prior Decisions of This Court Finding that the "Other Statute" Provision Applies Where Nondisclosure of Records is Necessary to Prevent Violation of Another Statute.

Review is also appropriate here pursuant to RAP 13.4(b)(1) because the decision below conflicts with previous holdings of this Court. In *PAWS II*, 125 Wn.2d 243, this Court found that the "other statute"

provision applied notwithstanding the fact that no other statute contained an express prohibition on disclosure where the policies underlying two other statutes made clear that disclosure would run afoul of those statutes. First, the Court found that the Uniform Trade Secrets Act ("UTSA") operated as an independent limit on disclosure where disclosure would interfere with the UTSA's purpose of protecting trade secrets, even though no provision of that Act expressly dealt with confidentiality or records disclosure. *Id.* at 262. Second, the Court held that RCW 4.24.580 met the "other statute" provision where disclosure would undermine the legislative intent to protect animal researchers from harassment:

> Quite clearly, the Legislature intended to forestall the kinds of threats, harassment, and intimidation that have become all too familiar to those attempting to carry out legitimate biomedical research. We hold that researchers may seek to enjoin the release of certain portions of public records if the nondisclosure of those portions is necessary to prevent harassment as defined under the antiharassment statute.

Id. at 263.

The second holding in *PAWS II* should have been dispositive here. Just as in the instant case, the antiharassment statute did not expressly prohibit the University from disclosing records, but disclosure would have done violence to the legislative policies underlying "other statute" and would have violated those laws. The Court of Appeals decision below cannot be reconciled with *PAWS II*, as the anti-harassment statute in

PAWS II lacked an explicit reference to disclosure or confidentiality. The decision below acknowledged but did not resolve that conflict when it observed: "To the extent that *PAWS II* is inconsistent with the holding in *Washington State Patrol* that a statute must expressly prohibit or exempt the release of records to qualify as an 'other statute,' *Washington State Patrol's* holding controls." *SEIU 775 v. State Dep't of Soc. & Health Servs.*, No. 48881-7-II, 2017 WL 1469319 at *11 (2017).

But this Court's recent decision in *Washington State Patrol* did not overrule *PAWS II*. In fact, *Washington State Patrol* favorably discussed *PAWS II* by observing that if the Legislature had wanted to protect level I sex offenders in that case from harassment, "as it protected animal researchers from harassment in *PAWS II*," it could have done so expressly. *Wash. State Patrol*, 185 Wn.2d at 378-79. This observation makes clear that this Court continues to interpret the PRA in a manner applied in *PAWS II*, such that the animal researcher anti-harassment statutes operated as an "other statute" that exempted records from disclosure when disclosure would result in a violation of those laws, even though the anti-harassment statutes did not explicitly reference disclosure or

confidentiality of records.[1] This Court should accept review to make clear that *PAWS II* is still the law of the land which courts of appeals may not disregard.

The Court of Appeals decision below also conflicts with this Court's decision in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004), where the Court found that the attorney-client privilege created by RCW 5.60.060(2)(a) was an "other statute" that prohibited disclosure, even though nothing in that statute expressly dealt with disclosure or confidentiality of records. Nonetheless, the Court found that the statute "is unquestionably a statute...that prohibits the disclosure of certain records..." *Id.* at 453. The Court of Appeals acknowledged that the statute in *Hangartner* "does not expressly address the disclosure of records," but reasoned that "its entire focus is on the *confidentiality* of communications." *SEIU 775 v. State Dep't of Soc. & Health Servs.*, No. 48881-7-II, 2017 WL 1469319 at *10 (2017) (emphasis in original). Despite this attempt to distinguish *Hangartner* from the instant case, this Court's decision in *Hangartner* is inconsistent with the Court of Appeals

[1] The Court of Appeals decision is also in conflict with the recent *Washington State Patrol* decision to the extent that it disregards *Washington State Patrol's* directive to consider whether there is a "legislative intent to protect a particular interest or value" in determining whether the "other statute" provision applies. *Wash. State Patrol*, 185 Wn.2d at 378-79. As explained in detail in § V.D, *infra*, such interests or values—protecting the bargaining relationship and preventing the commission of unfair labor practices—exist in RCW 41.56.040 and RCW 41.56.140 and favor nondisclosure here.

decision that the "other statute" provision cannot apply unless the statute expressly exempts or prohibits from production a specific record.

D. Interpreting the PRA to Ensure That State Agencies Are Not Forced to Commit Unfair Labor Practices Is an Issue of Substantial Public Interest Warranting Review.

The Court of Appeals decision broadly held that RCW 41.56.040 and RCW 41.56.140 (App. 0023-24) do not operate as an "other statute" pursuant to RCW 42.56.070(1) (App. 0026-28), without addressing whether disclosure of the requested records in this case would amount to an unfair labor practice. The decision effectively holds that those provisions of the PECBA can *never* operate as an "other statute" that prohibits public disclosure, *even where* disclosure would undisputedly constitute an unfair labor practice. The decision consequently yields the absurd result whereby a public agency can be both compelled to disclose records by the PRA and also prohibited from disclosing records by the PECBA. This untenable conflict is an issue of substantial public importance that should be resolved by this Court.

The purpose of the PECBA is "to promote the continued improvement of the relationship between public employers and their employees..." RCW 41.56.010 (App. 0025). One way in which the PECBA achieves this goal is by prohibiting employers from taking actions that interfere with the free exercise of public employees' collective

bargaining rights. RCW 41.56.040; RCW 41.56.140. RCW 41.56.040 prohibits interference by an employer "or other person" with the right of employees to organize and bargain collectively through representatives of their own choosing. It is also an unfair labor practice for a public employer to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed under the PECBA. RCW 41.56.140(1). "An interference violation will be found when ***employees could reasonably perceive*** the employer's actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees." *Pasco Housing Authority,* Decision 5927-A 1997, 1997 WL 810882 (PECB, 1997), *aff'd*, 98 Wn. App. 809, 991 P.2d 1177 (2000) (emphasis in original).

In this case, disclosure of the requested information by DSHS to the Foundation would constitute unlawful interference in violation of the PECBA because a typical IP attending contracting appointments or orientation meetings with her employer (and set up by her employer) could reasonably see DSHS's decision to enable—indeed, to effectively invite—the Foundation to attend these meetings to disparage and discredit SEIU 775 and to encourage and assist IPs to cease or refrain from union membership and dues payments as DSHS *itself* discouraging union activity. The PECBA prohibits DSHS from taking such actions which

would cause employees to reasonably perceive their employer as discouraging union activity.

The PRA cannot be read so as to require public employers to commit unfair labor practices. Disclosure of public records, while favored by the PRA, is *not* so favored as to allow or mandate State agencies to violate their obligations under other statutes. RCW 42.56.070(1) avoids such conflicts by "incorporate[ing] into the Act other statutes which exempt or prohibit disclosure of specific information or records." *PAWS II*, 125 Wn.2d at 261.

The "other statute" exemption avoids inconsistency and allows state statutes and federal regulations to supplement the PRA's exemptions. *Ameriquest Mortg. Co. v. Office of Att'y Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010); *see also Fisher Broadcasting-Seattle LLC v. City of Seattle*, 180 Wn.2d 515, 525–28, 326 P.3d 688 (2014); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004); *PAWS II*, 125 Wn.2d at 262; *Freedom Foundation v. Dep't of Transp.*, 168 Wn. App. 278, 289, 276 P.3d 341 (2012). Courts look to the other statutes to determine whether the statute *operates* as a prohibition against such disclosure. *See PAWS II*, 125 Wn.2d at 262 (Uniform Trade Secrets Act and anti-harassment statute); *Hangartner*, 151 Wn.2d at 453 (attorney-client

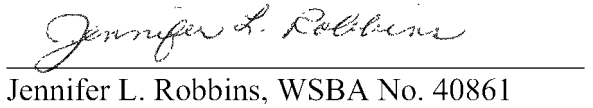
privilege statute); *Ameriquest Mortg. Co.*, 170 Wn.2d at 440 (federal privacy laws).

It simply cannot be the case that the PRA requires public agencies to disclose records when doing so would violate the PECBA, require the employer to commit an unfair labor practice, and undermine the strong legislative interest in promoting collective bargaining. This Court should accept review so as to reconcile the false conflict between the PRA and PECBA created by the decision below.

VI. CONCLUSION

The Court should accept review for the reasons indicated in Part V in order to address whether the prohibitions against committing unfair labor practices in the PECBA act as an "other statute" that prohibits public disclosure of records under the PRA.

RESPECTFULLY SUBMITTED this 24th day of May, 2017.



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DECLARATION OF SERVICE

I, Jude Bryan, hereby declare under penalty of perjury under the laws of the State of Washington that on May 24, 2017, I caused the foregoing Petition for Discretionary Review to be filed with the Court of Appeals, Division II, and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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SIGNED this 24th day of May, 2017 at Seattle, Washington.

Jude Bryan
Paralegal

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

April 25, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SEIU 775, a labor organization, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and EVERGREEN FREEDOM FOUNDATION d/b/a FREEDOM FOUNDATION, Respondents.	No. 48881-7-II PUBLISHED OPINION

MAXA, A.C.J. – The Freedom Foundation (Foundation) made a public records request to the Department of Social and Health Services (DSHS) seeking the times and locations of contracting appointments and training presentations for individual providers (IPs), who provide personal care services to functionally disabled persons. SEIU 775, the union that represents the IPs, sought preliminary and permanent injunctions preventing DSHS from disclosing the requested information.

SEIU appeals the trial court's denial of its request for an injunction. SEIU argues that provisions of the Public Employees Collective Bargaining Act (PECBA), chapter 41.56 RCW, provide an "other statute" exemption to the Public Records Act (PRA) under RCW 42.56.070(1)

because DSHS's disclosure of the records to the Foundation would constitute an unfair labor practice in violation of the PECBA.

We hold that the PECBA does not provide an "other statute" exemption under the PRA because it does not expressly prohibit or exempt the release of specific records or information. Accordingly, we affirm the trial court's denial of SEIU's request for an injunction to prevent DSHS from disclosing the records the Foundation requested.

FACTS

SEIU is the collective bargaining representative in Washington for all IPs. The Foundation is a Washington-based organization with a stated purpose of educating public employees, including IPs, about their constitutional right not to join or pay dues to public sector unions.

DSHS requires IPs to attend contracting appointments and safety and orientation training presentations. These meetings generally take place at DSHS facilities and are not open to the public. Under the collective bargaining agreement between SEIU and the State, the State provides time during these meetings for an SEIU representative to meet with the IPs.

On January 12, 2016, the Foundation submitted a public records request to DSHS for certain information about meetings involving IPs. The request specifically sought "[t]he times and locations of all contracting appointments for individual providers" and "[t]he times and locations of any state-sponsored or facilitated opportunities for individual providers to view the initial safety and orientation training videos . . . held or to be held between November 1, 2015 and December 31, 2016." Clerk's Papers at 95.

DSHS determined that it had responsive records and that the records were not subject to any exemptions preventing disclosure. DSHS notified SEIU of its intent to release the requested records to the Foundation.

SEIU filed suit for declaratory and injunctive relief, and then filed a motion for a preliminary injunction to enjoin DSHS from releasing the records. SEIU argued that the records were subject to an "other statute" exemption under the PRA, asserting that the PECBA is a statute that prohibits the disclosure of the requested records. SEIU believed, based on the Foundation's previous actions, that the Foundation sought the information about the IPs' meetings in order to show up at the meeting times and discourage the IPs from participating in the union.

Pursuant to CR 65(a)(2), the trial court consolidated the hearing on SEIU's preliminary injunction motion with a hearing on a permanent injunction. The court denied injunctive relief, ruling that SEIU failed to satisfy its burden of showing that an exemption to the PRA applied. The trial court exercised its equitable powers to restrain DSHS from releasing the records for 14 days, in order to allow SEIU to file an appeal.

SEIU appealed the trial court's denial of a preliminary and permanent injunction. We subsequently enjoined DSHS from releasing the requested information until resolution of SEIU's appeal.

ANALYSIS

A. PRA DISCLOSURE

The PRA mandates the broad disclosure of public records. *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). Therefore, a state agency has an affirmative

obligation to disclose records requested under the PRA unless a specific exemption applies. *Id.* at 371-72. And we must liberally construe the PRA in favor of disclosure and narrowly construe its exemptions. RCW 42.56.030; *Wash. State Patrol*, 185 Wn.2d at 371.

Although the PRA encourages openness and transparency, the legislature has made certain records exempt from disclosure. *Wash. State Patrol*, 185 Wn.2d at 371. There are three sources of PRA exemptions: (1) enumerated exemptions contained in the PRA itself, (2) any "other statute" that exempts or prohibits disclosure as provided in RCW 42.56.070(1), and (3) the Washington Constitution. *White v. Clark County*, 188 Wn. App. 622, 630-31, 354 P.3d 38 (2015), *review denied*, 185 Wn.2d 1009 (2016). The party seeking to prevent disclosure of requested records has the burden of establishing that an exemption applies. *SEIU Healthcare 775NW v. Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 391, 377 P.3d 214, *review denied*, 186 Wn.2d 1016 (2016).

RCW 42.56.540 allows an interested third party to seek to enjoin an agency's disclosure of records to a requester under the PRA. *Wash. State Patrol*, 185 Wn.2d at 370. Under this statute, the party seeking an injunction must show that (1) the record specifically pertains to that party, (2) an exemption applies, and (3) disclosure would not be in the public interest and would substantially and irreparably harm the party or a vital governmental function. *SEIU Healthcare*, 193 Wn. App. at 392. The party seeking the injunction has the burden of proof. *Wash. State Patrol*, 185 Wn.2d at 370.

We review de novo a trial court's actions under the PRA and the injunction statute. *Id.* at 370-71.

B. "OTHER STATUTE" EXEMPTION

SEIU argues that two provisions of the PECBA, RCW 41.56.040 and RCW 41.56.140, together provide an "other statute" exemption under the PRA. We disagree.[1]

1. Legal Principles

The "other statute" exemption is found in RCW 42.56.070(1): "Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, *unless the record falls within the specific exemptions of . . .* this chapter, *or other statute which exempts or prohibits disclosure of specific information or records*." (Emphasis added.) Whether a statute is an "other statute" under RCW 42.56.070(1) is a question of law that we review de novo. *Wash. State Patrol*, 185 Wn.2d at 371.

The Supreme Court in *Washington State Patrol* emphasized that an "other statute" exemption applies only if that statute explicitly identifies an exemption and that a court cannot imply such an exemption. *Id.* at 372. The court stated: "[W]e will find an 'other statute' exemption only when the legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response to a public records request." *Id.* at 373. The statute "does not need to expressly address the PRA, but *it must expressly prohibit or exempt the release of records*." *Id.* at 372 (emphasis added).

In *Washington State Patrol*, the Supreme Court concluded that "courts consistently find a statute to be an 'other statute' when the plain language of the statute makes it clear that a record,

[1] Even if we held that the PECBA provides an "other statute" exemption to the PRA, SEIU would have to show that DSHS's release of the requested records here would constitute an unfair labor practice. It is difficult to conceive of a situation where complying with a PRA request would constitute an unfair labor practice. But we need not address this issue here.

or portions thereof, is exempt from production." *Id.* at 375. The court reviewed several cases applying an "other statute" exemption that support this proposition. *Id.* at 375-77.

In *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, the Supreme Court held that RCW 9.73.090(1)(c) provided an "other statute" exemption for dashboard camera videos. 180 Wn.2d 515, 527-28, 326 P.3d 688 (2014). That statute provided that "[n]o sound or video recording [made by a dashboard camera] may be duplicated and made available to the public . . . until final disposition of any criminal or civil litigation which arises from the event or events which were recorded." RCW 9.73.090(1)(c).

In *Ameriquest Mortgage Company v. Office of the Attorney General*, the Supreme Court held that the federal Gramm–Leach–Bliley Act (GLBA)[2] and certain Federal Trade Commission rules enacted pursuant to the GLBA provided an "other statute" exemption. 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010). That statute and related rules concerned privacy of bank customers' personal information and provided that "the receiving nonaffiliated third party may not reuse or redisclose the nonpublic personal information to another nonaffiliated third party unless an exception applies or the reuse or redisclosure would be lawful if done by the financial institution." *Ameriquest*, 170 Wn.2d at 426 (citing 15 U.S.C. § 6802(c) and 16 C.F.R. § 313.11(c)-(d)).

In *Hangartner v. City of Seattle*, the Supreme Court held that RCW 5.60.060(2)(a), the attorney-client privilege statute, provided an "other statute" exemption. 151 Wn.2d 439, 453, 90 P.3d 26 (2004). That statute stated that "[a]n attorney or counselor shall not, without the consent

[2] 15 U.S.C. §§ 6801-6809.

of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RCW 5.60.060(2)(a)[3].

In *Planned Parenthood of the Great Northwest v. Bloedow*, Division One of this court held that RCW 43.70.050(2) provided an "other statute" exemption for records of induced abortions. 187 Wn. App. 606, 623, 350 P.3d 660 (2015). That statute stated that health care data "shall not be disclosed" when the patient or health care provider could be identified. RCW 43.70.050(2).

In *Wright v. Department of Social and Health Services*, this court held that chapter 13.50 RCW provided an "other statute" exemption for juvenile justice records. 176 Wn. App. 585, 597, 309 P.3d 662 (2013). RCW 13.50.100(2) stated that "[r]ecords covered by this section shall be confidential and shall be released only pursuant to this section and RCW 13.50.010."

The Supreme Court in *Washington State Patrol* essentially endorsed the holdings in these cases. Conversely, the court noted that courts will not find an "other statute" exemption when a statute is not explicit. 185 Wn.2d at 377. The court referenced this court's decision in *Belo Management Services, Inc. v. Click! Network*, 184 Wn. App. 649, 343 P.3d 370 (2014). In *Belo*, the court addressed whether federal regulations allowing parties who submit materials to the Federal Communications Commission to request that the information "not be made routinely available for public inspection," 47 C.F.R. § 0.459(a)(1), precluded disclosure of retransmission consent agreements (RCAs). *Id.* at 660. The court held that these regulations did not provide an "other statute" exemption because they did not "specifically state that RCAs are confidential and

[3] RCW 5.60.060 has been amended since the events of this case transpired. However, these amendments do not impact the statutory language relied on by this court. Accordingly, we do not include the word "former" before RCW 5.60.060.

protected from disclosure" and did not "preclude disclosure of any *specific* information or records." *Id.* at 660-61.

In *Washington State Patrol* itself, the Supreme Court held that RCW 4.24.550 did not provide an "other statute" exemption for information regarding sex offenders. 185 Wn.2d at 384-85. That statute stated that public agencies are authorized to release information regarding sex offenders in certain situations and provided guidelines for local law enforcement to consider when deciding whether to disclose such information. RCW 4.24.550(1)-(3). The court noted that "[t]here is no language in the statute that prohibits an agency from producing records" and that "[t]he plain language of RCW 4.24.550 does not explicitly exempt any records from production." *Wash. State Patrol*, 185 Wn.2d at 377.

2. PECBA Provisions

SEIU relies on the PECBA in an effort to prevent disclosure of the requested records. The purpose of the PECBA is "to promote the continued improvement of the relationship between public employers and their employees," by regulating the "right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers." RCW 41.56.010.

RCW 41.56.040 prohibits interference with public employees' right to organize:

> No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

RCW 41.56.140 states that it is an unfair labor practice for a public employer to engage in certain conduct, including "(1) To interfere with, restrain, or coerce public employees in the

exercise of their rights guaranteed by this chapter" and "(2) To control, dominate, or interfere with a bargaining representative."

Significantly, no PECBA provision prohibits a public employer from releasing records or even addresses the release of records. And no PECBA provision addresses the privacy or confidentiality of information.

3. "Other Statute" Analysis

SEIU argues that the PECBA and specifically RCW 41.56.040 and RCW 41.56.140 provide an "other statute" exemption to the PRA when a public employer's release of records would constitute an unfair labor practice in violation of those provisions. SEIU asserts that the PECBA expressly prohibits a public employer from committing an unfair labor practice and that DSHS's release of the requested records here would constitute an unfair labor practice. As a result, SEIU claims that the PECBA prohibits the release of the requested records and therefore provides an "other statute" exemption.

However, the Supreme Court in *Washington State Patrol* stated that to qualify as an "other statute" under RCW 42.56.070(1), a statute must explicitly exempt or prohibit from production a "specific record." 185 Wn.2d at 373. The court emphasized that although the statute need not reference the PRA, it "must expressly prohibit or exempt the release of records." *Id.* at 372. The PECBA does not explicitly exempt or prohibit the release of records or information that would constitute an unfair labor practice. In fact, the PECBA does not even mention any records or information. Holding that the PECBA provides an "other statute" exemption would require us to imply such an exemption, which *Washington State Patrol* expressly prohibits. *Id.* If the legislature had wanted to prevent the disclosure of information

related to public employees and their unions, it could have done so expressly through explicit language.

SEIU argues that *Washington State Patrol* is consistent with its position because in applying the rule stated in that case, the court favorably discussed cases that analyzed statutes which did not expressly deal with records disclosure. SEIU refers to *Hangartner*, 151 Wn.2d at 453, and *Progressive Animal Welfare Society v. University of Washington* (*PAWS* II), 125 Wn.2d 243, 262, 884 P.2d 592 (1994).

Hangartner does not support SEIU's position. The court in that case considered RCW 5.60.060(2)(a), the attorney-client privilege statute. That statute does not expressly address the disclosure of records, but its entire focus is on the *confidentiality* of communications. Under RCW 5.60.060(2)(a), there is no question that attorney-client communications found in public records are exempt from any type of production. The PECBA does not involve the confidentiality of communications.

PAWS II is more similar to this case. There, the court considered RCW 4.24.580, an anti-harassment statute which allows animal researchers to obtain injunctive relief to protect against being harassed.[4] 125 Wn.2d at 263. The court held that this statute qualified as an "other statute" under the PRA. *Id.* at 262-63. The court stated that "researchers may seek to enjoin the release of certain portions of public records if the nondisclosure of those portions is necessary to prevent harassment as defined under the anti-harassment statute." *Id.* at 263. Specifically, the

[4] *PAWS* II also involved the Uniform Trade Secrets Act (UTSA), chapter 19.108 RCW, which contained provisions designed to protect the secrecy of trade secrets. 125 Wn.2d at 262. The court held that this statute also qualified as an "other statute" under the PRA. *Id.* at 262-63. Like the attorney-client privilege statute and unlike the PECBA, the UTSA clearly focuses on the confidentiality of certain records.

court held that the names of researchers and certain other information was exempt from PRA disclosure. *Id.* at 263-64.

The court in *Washington State Patrol* cited *PAWS* II for general "other statute" principles. 185 Wn.2d at 372. However, the court did not endorse the holding in *PAWS* II regarding the anti-harassment statute like it did for the cases discussed above. *See id.* at 375-77. To the extent that *PAWS* II is inconsistent with the holding in *Washington State Patrol* that a statute must expressly prohibit or exempt the release of records to qualify as an "other statute," *Washington State Patrol*'s holding controls.

SEIU also relies on the statement in *Washington State Patrol* that "when courts have found an 'other statute' exemption, they have also identified a legislative intent to protect a particular interest or value." 185 Wn.2d at 377-78. SEIU points out that the PECBA reflects the legislature's intent to protect a particular value – public employees' free exercise of their right to organize. But the court in *Washington State Patrol* did not identify a legislative interest as an independent basis for finding an "other statute" exemption. Instead, the court was noting that the statutes that *explicitly prevented the disclosure of certain information* – the court's test for finding an "other statute" exemption – were designed to protect a particular interest or value.

The PECBA is not concerned with the privacy or confidentiality of specific records or information, and it does not explicitly prohibit the release of records or information that would constitute an unfair labor practice. Accordingly, we hold that the PECBA does not provide an "other statute" exemption to the PRA under RCW 42.56.070(1).

CONCLUSION

We affirm the trial court's denial of SEIU's request for an injunction to prevent DSHS from disclosing the records the Foundation requested.

MAXA, A.C.J.

We concur:

WORSWICK, J.

SUTTON, J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY HOFFMAN, et al., Plaintiff, v. JAY INSLEE, et al., Defendant.	CASE NO. C14-200-MJP ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The above-entitled Court, having received and read:

1. Defendant Department of Social and Health Services, et al. Amended Motion for Summary Judgment (Dkt. No. 171), Plaintiffs' Response (Dkt. No. 182), and Defendants' Reply (Dkt. No. 184);
2. Defendant SEIU Healthcare 775NW's Motion for Summary Judgment (Dkt. No. 172), Plaintiffs' Response (Dkt. No. 182), Defendant's Reply (Dkt. No. 183), and Defendant's Notice of Supplemental Authority (Dkt. No. 189); and

3. Plaintiffs' Motion for Summary Judgment (Dkt. No. 175), Defendants DSHS et al. Response (Dkt. No. 177), Defendant SEIU Response (Dkt. No. 179), and Plaintiffs' Reply (Dkt. No. 185),

and all attached declarations and exhibits, rules as follows:

IT IS ORDERED that the summary judgment motions of Defendants are GRANTED and Plaintiffs' claims are dismissed.

IT IS FURTHER ORDERED that Plaintiffs' motion for summary judgment is PARTIALLY STRICKEN (as moot) and PARTIALLY DENIED.

Background

Plaintiffs are in-home health care providers who contract with the State of Washington (through the Defendant Department of Social and Health Services; "DSHS") to provide personal health care to disabled persons under a variety of Medicaid programs. Prior to July 2014, the system for payment of these individual providers (IPs) called for the automatic deduction of union membership dues and "agency fees" from their wages; only by affirmatively contacting the union and "opting out" could the IPs exempt themselves from union dues, but the "agency fee" (which represents that portion of the payment which the union calculated was being spent on collective bargaining in the IPs' behalf) was still deducted. This system was based on RCW 41.56.113(1)(b)(i).

In 2014, Harris v. Quinn, 134 S.Ct. 2618 (2014) struck down a system of payment and payroll deduction involving union dues for Illinois "personal care assistants" on the grounds that the plaintiffs were not "full-fledged public employees" for whom this First Amendment infringement was otherwise justified. In response, the State of Washington and Defendant SEIU Healthcare 775 NW ("the Union") renegotiated the dues deduction provision of the collective bargaining agreement ("CBA") which governed the IPs' employment. The result was a revised

system whereby, as of July 1, 2014, (1) the State ceased making deductions for either dues or agency fees for any IP who expressed their wish not to pay them (i.e., retaining an opt-out system) and (2) any dues deducted from July 1, 2014 forward from any objecting IP were refunded.

Discussion/Analysis

The summary judgment motions raise two main issues for resolution:

1. Is the current, post-Harris opt-out system unconstitutional?
2. Are Plaintiffs entitled to monetary damages for unjust enrichment for any dues or agency fees deducted prior to Harris?

The current "opt-out" system is constitutional

At the heart of Plaintiffs' claims is their argument that the system currently in place regarding the deduction of dues and agency fees is unconstitutional because it requires the IPs to affirmatively declare that they do not wish to have the money deducted from their wages. Plaintiffs base their argument on two cases: Knox v. SEIU, Local 1000, 132 S.Ct. 2277 (2012) and Harris v. Quinn. But, despite some very creative advocacy by Plaintiffs' counsel, these two cases simply do not stand for the proposition that an opt-out system such as the one in place in Washington creates an impermissible infringement on the First Amendment rights of the affected parties.

Knox concerned a public-sector union in California which operated under an opt-out system ("…if a nonunion employee objected within 30 days to payment of the full amount of union dues, the objecting employee was required to pay only 56.35% of total dues;" 132 S.Ct at 2285.) At issue was a "special assessment" which the union unilaterally imposed (after the regular objection period for that year had passed) to create a "Political Fight-Back Fund" to

contest two ballot initiatives which it judged to be adverse to its interests. The Supreme Court invalidated the assessment as an impermissible infringement on First Amendment rights.

Plaintiffs attempt to argue that Knox stands for the principle that the Constitution requires an opt-in process for union fee deductions to pass First Amendment muster. Although the Court did state hypothetically that "[t]o respect the limits of the First Amendment, the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out" (Id. at 2293), nowhere in the opinion does it state that an opt-out procedure is unconstitutional.

What is apparent from the opinion is that the Knox court considers the opt-out process to have barely passed constitutional muster, that its presence in the landscape of union labor relations is the result of non-rigorous legal thinking and analysis ("…acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles;" "[b]y… permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate;" Id. at 2290, 2291), and that its days may be numbered. But nowhere does the Supreme Court say, as Plaintiffs claim, that "as [a] 'general rule' the First Amendment requires opt-[in] procedures…" (Response at 7.) In fact, at one point in the Knox opinion, the Court refers to the opt-out process as "tolerable if employees are able at the time in question to make an informed choice." (132 S.Ct. at 2292; emphasis supplied.)

So, according to the Court's reading of Knox, the opt-out process is not constitutionally impermissible. The other case Plaintiffs rely on is Harris v Quinn, *supra*. The problem with relying on Harris is that it has nothing to say about the constitutionality of opt-out processes.

The case concerns the unconstitutionality of compelling persons who are not "full-fledged public employees" to support political speech by a third party if they do not wish to do so. The personal care assistants in Harris could not even "opt out" of paying the agency fee assessed against them, and it was the compulsory nature of that payment which was invalidated by the Harris court. The Court agrees with Defendants that Plaintiffs are trying to weave together the Harris and Knox opinions to create a constitutional principle that neither stands for. As a matter of law, Plaintiffs cannot prevail on a claim that the opt-out process utilized by the State and the Union is unconstitutional.

The Court's understanding of the constitutionality of the opt-out process is confirmed by the Friedrichs cases. The plaintiffs in Friedrichs argued that "[b]y requiring Plaintiffs to undergo 'opt out' procedures to avoid making financial contributions in support on 'non-chargeable' union expenditures, California's agency-shop arrangement violates their rights to free speech and association under the First and Fourteenth Amendments to the United States Constitution." Friedrichs v. Cal. Teachers Ass'n, 2013 U.S. Dist. LEXIS 188995, *4 (C.D.Cal., Dec. 5, 2013)(citations omitted).

In an interesting procedural move, the Friedrichs plaintiffs conceded to judgment on the pleadings at the trial court level, acknowledging that their claims were at that time foreclosed by Ninth Circuit and Supreme Court precedent holding that "the First Amendment did not require an 'opt in' procedure for nonunion members to pay fees… The parties do not dispute that Abood and Mitchell foreclose Plaintiffs' claims, and the Court agrees that these decisions are controlling." Id. at *5-6.

Upon receiving the appeal of the judgment on the pleadings, the Ninth Circuit summarily affirmed the result: "…the questions presented in this appeal are so insubstantial as to not require

further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent." Friedrichs v. Cal. Teachers Ass'n, 2014 U.S. App. LEXIS 24935 (2014). The Supreme Court granted certiorari (135 S.Ct. 2933 (2015)), but split evenly, thereby affirming the lower court result. 136 S.Ct 1083 (2016). Friedrichs is thus still good law and controlling precedent, and the opt-out process as utilized in the instant case is constitutionally permissible.

There is a "sub-issue" raised by Plaintiffs' summary judgment motion. While the State of Washington does not weigh in on this question, Plaintiffs and the Union expend quite a bit of argument attempting to establish whether, as a matter of law and based on the standards enunciated in Harris, the IPs are or are not "full-fledged public employees" ("FFPEs") for purposes of collective bargaining (a distinction which the Harris court found important in determining that the plaintiffs there could not be compelled – as the true FFPEs were – to subsidize political speech with which they did not agree).

Based on the Court's ruling concerning the constitutionality of the opt-out process, and the finding that Harris does not touch upon whether the opt-out process is permissible, Plaintiffs' "what makes a true FFPE?" question is not relevant to this case. To find that the IPs are not FFPEs only would only mean they cannot be compelled without recourse to give money to a union they do not wish to join or support. It does not mean, for the reasons cited above, that the Union may not employ an opt-out process to determine whether they wish to contribute money. This portion of Plaintiffs' summary judgment will be stricken as moot.

Resolution of the present constitutionality of the opt-out process leads to dismissal of the claims for declaratory and injunctive relief: the Court finds that Plaintiffs are not entitled to a declaratory judgment that Defendants' process violates the Constitution and, since there is no likelihood of prevailing on the merits, Plaintiffs are not entitled to injunctive relief. Plaintiffs

argue that the *possibility* that the State and the Union could resume making mandatory deductions in the future entitles them to a declaration that the Washington system is unconstitutional. But the case law requires a "live controversy" – "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" -- before a federal court may grant a declaratory judgment. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007). The speculative possibility that the State or the Union might attempt to re-introduce a system which the Supreme Court has already declared unconstitutional does not satisfy the "live controversy" requirement.

Defendants not liable for damages under an "unjust enrichment" theory or for § 1983 violation

The remaining issue concerns the money damages Plaintiffs have requested; they seek an order

> restoring to non-member Individual Providers all fees that they have paid to SEIU beginning from three years prior to the filing of this lawsuit [*February 2014*], or alternatively, an award of damages in the amount of such fees. Plaintiffs further seek an award of nominal damages for violation of their rights under the First Amendment.

Dkt. No. 68, Third Amended Complaint, ¶ 7.4. Their theories of recovery are under § 1983 (id. at ¶ 6.2) and "unjust enrichment." (Id. at ¶ 6.3.)

The State Defendants can be dealt with summarily. Plaintiffs have sued them in their official capacities (*see* case caption, id. at 1[1]) and the Eleventh Amendment bars claims for money damages against state agency officials in their official capacities. Edelman v. Jordan, 415 U.S. 651, 662-63, 677 (1974). Although both sides go on to argue about whether these individuals are also entitled to qualified immunity, Plaintiffs never dispute that (1) they sued the State Defendants in their official capacity and (2) those Defendants are thereby immunized from

[1] Jay Inslee is named "in his capacity as Governor of the State of Washington," and Kevin Quigley is sued "in his capacity as Secretary of the Department of Social and Health Services."

money damages by the Eleventh Amendment. The Court declines to address the issue of "qualified immunity" as unnecessary.

In terms of money damages sought against the Union, Plaintiffs seek the moneys collected under the pre-Harris system (requiring an "opt-out" to avoid paying union dues, with a mandatory "agency fee" deduction). No one who has opted out since July 1, 2014 has been charged either union dues or agency fees.

The Union asserts a "good faith" defense to the alleged violations of § 1983, citing Ninth Circuit case law holding that a private party sued under § 1983 is not liable for money damages if that party was acting in good faith reliance on a facially valid state law. Clement v. City of Glendale, 518 F.3d 1090, 1097 (9th Cir. 2008). The Union maintains that, prior to Harris, it operated under the good faith belief that the statutory scheme under which it collected its dues and fees was constitutionally sound.

The Court is unpersuaded by Plaintiffs' arguments to the contrary. They assert that the Union bears the burden of establishing that they had the "subjective state of mind" indicating a good faith belief in their conduct. Their case support for this comes from two California District Court cases (Ambrose v. Coffey, 696 F.Supp.2d 1119, 1139 (E.D.Cal. 2010), *citing* Robinson v. City of San Bernandino Police Dept., 992 F.Supp. 1998, 1207 (C.D.Cal. 1998)). Even to the extent that this is valid precedent, it is a low threshold. The Union states several times in its briefing that it considered the RCW on which its system relied to be a facially valid statute and (pre-Harris) had no reason to think to the contrary. The burden then falls on the other party to demonstrate why the Court should not give credence to that assertion.

The strongest argument that Plaintiffs can muster to suggest that the Union's allegations of "good faith" lack credence is the observation that the Union sponsored the ballot initiative

which (upon passage) later became RCW 41.56.113(1)(b), the state law that permits the deduction of union dues and/or agency fees from the salaries of the IPs. It is not a persuasive position. In the first place, the ballot initiative (regardless of who sponsored it) still had to be approved by a majority of voters in the state and then (a year later) enacted into law by the Washington State Legislature which the Court will assume was doing its best to create constitutional legislation. Further, the Court fails to see how the proposition asserted by Plaintiffs (that the Union somehow did not have a good faith belief in the validity of the statute) follows from the Union's involvement in the ballot process; one has no bearing on the other. Nothing presented by Plaintiffs in any way invalidates the Union's claim that in good faith they relied on (and had a right to rely on) the constitutionality of the RCW . Defendants are entitled to rely on the defense and entitled to summary judgment on the § 1983 claim.

Regarding unjust enrichment, Plaintiffs cannot satisfy all the elements of that common law tort. Those elements are:

1. A benefit conferred upon a party
2. The receiving party being aware of the benefit
3. An inequity which would result from the receiving party being permitted to retain the benefit.

Young v. Young, 139 Wn.App. 560, 576 (2007).

Challenged to establish what inequity arises from the Union retaining the pre-Harris funds, Plaintiffs' response is, basically: "A violation of the First Amendment is *per se* inequitable." But, as demonstrated above, Plaintiffs have failed to establish that the opt-out system employed by the State and the Union is unconstitutional, therefore their proof fails and the Union is entitled to summary judgment of dismissal on the unjust enrichment claim.

Conclusion

Neither Harris nor Knox declares the opt-out system at issue here unconstitutional and binding Ninth Circuit and Supreme Court precedent uphold its constitutionality. The State Defendants are immune from suit for money damages. The Defendant Union relied in good faith on a statute which, to the extent it mandates an opt-out system of union dues and agency fees, remains constitutionally sound; therefore it is immune from suit for unjust enrichment.

The Court grants the summary judgment motions of both Defendants and dismisses the claims of Plaintiffs against them. Plaintiffs' summary judgment is partially stricken as moot and the remainder of the motion is denied.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 16th day of August, 2016.

Marsha J. Pechman
United States District Judge

RCW 41.56.040

Right of employees to organize and designate representatives without interference.

No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

[**1967 ex.s. c 108 § 4.**]

RCW 41.56.140

Unfair labor practices for public employer enumerated.

It shall be an unfair labor practice for a public employer:

(1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;

(2) To control, dominate, or interfere with a bargaining representative;

(3) To discriminate against a public employee who has filed an unfair labor practice charge;

(4) To refuse to engage in collective bargaining with the certified exclusive bargaining representative.

[**2011 c 222 § 2; 1969 ex.s. c 215 § 1.**]

RCW 42.56.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

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

(2) "Person in interest" means the person who is the subject of a record or any representative designated by that person, except that if that person is under a legal disability, "person in interest" means and includes the parent or duly appointed legal representative.

(3) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW **40.14.100** and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

(4) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

[**2010 c 204 § 1005; 2007 c 197 § 1; 2005 c 274 § 101.**]

RCW 42.56.070

Documents and indexes to be made public.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW **34.05.010** and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW **34.05.240** and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW **34.05.010** that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW **34.05.010** that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

(9) 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, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition may be refused

only for a good cause pursuant to a hearing under the provisions of chapter **34.05** RCW, the Administrative Procedure Act.

[**2005 c 274 § 284; 1997 c 409 § 601.** Prior: **1995 c 397 § 11; 1995 c 341 § 1; 1992 c 139 § 3; 1989 c 175 § 36; 1987 c 403 § 3; 1975 1st ex.s. c 294 § 14;** 1973 c 1 § 26 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.260**.]

NOTES:

***Reviser's note:** Subsection (6) of this section was renumbered as subsection (7) by **1992 c 139 § 3**; and subsection (7) was subsequently renumbered as subsection (9) by **1995 c 341 § 1.**

Part headings—Severability—1997 c 409: See notes following RCW **43.22.051**.

Effective date—1989 c 175: See note following RCW **34.05.010**.

Intent—Severability—1987 c 403: See notes following RCW **42.56.050**.

*Exemption for registered trade names: RCW **19.80.065**.*

SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT

May 24, 2017 - 12:11 PM

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Appellate Court Case Title:	SEIU 775, Appellant v State DSHS, et al, Respondents
Superior Court Case Number:	16-2-01007-2

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