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NO. 95262-1

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, et al.,

Appellants,

v.

WASHINGTON STATE CENTER FOR CHILDHOOD DEAFNESS
AND HEARING LOSS et al.; and FREEDOM FOUNDATION,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Invoking the Public Records Act, RCW 42.56, Freedom Foundation sent public record requests to multiple state agencies requesting certain identifying information for state employees who were members of specific bargaining units. Those agencies, which are named as State Respondents in this appeal, found no statutory exemption that applied to the requested information. Each agency thus determined that the responsive records should be released and would have done so had the agencies not been restrained by successive orders of the superior court and Court of Appeals. The agencies have released the portions of the responsive records not restrained by the courts and are prepared to produce the remainder if the restraining order is lifted or if otherwise directed to do so by this Court.

None of the agencies sought to withhold or redact any responsive records on the basis of employees' constitutional privacy rights, because they believed that any such rights could be asserted only by the employees and because, at the time of the public record requests, no Washington appellate court had found a constitutional privacy exemption that would prevent release. Instead, the agencies notified affected employees of the request as allowed under RCW 42.56.540, and of the need to obtain an injunction to prevent release. The employees, represented by their respective Unions (Appellants here), argued that the responsive records are protected by various statutes and by article I, sections 5 and 7, of the Washington Constitution.

The Court of Appeals decided the appeal under article I, section 7, of the Washington Constitution without addressing the statutory arguments. Thus, the primary issue before this Court is whether a privacy right under article I, section 7 of the Washington Constitution prevents release of a list of public employees' full names and birthdates in response to a request under the Public Records Act. The state agencies have not taken a substantive position on the application of article I, section 7 of the Washington Constitution, in the superior court or the Court of Appeals because they believe those rights belong to the employees, not the agencies, and they do not take a position now as to whether this Court should grant the petition for review of that issue.

II. ISSUES PRESENTED FOR REVIEW

If the Court granted review, two issues would be presented:

1. Did the Court of Appeals correctly determine that a constitutional privacy interest under article 1, section 7 of the Washington Constitution protects public employees' full names and corresponding birthdates from release in response to a public record request?
2. Did the Court of Appeals proceed properly in resolving this matter on privacy grounds under article 1, section 7 of the Washington Constitution without first addressing statutory exemptions asserted by the Appellants?

III. RESTATEMENT OF FACTS

On April 7, 2016, Freedom Foundation employee Jami Lund made public record requests to multiple state agencies for the first name, middle initial, last name, birthdate, and work email address of employees

represented by various bargaining units. Clerk's Papers (CP) 123-24.¹ All of the bargaining units identified in the requests were formed under the authority of the Personnel System Reform Act, RCW 41.80.

Each agency that received the request identified a responsive record comprised of a list generated from electronic records, which was reviewed for applicable statutory exemptions that would prevent release under the Public Records Act. Then, as authorized in RCW 42.56.540, each agency notified affected employees through the unions representing the bargaining units that the agency had received the request and determined that no statutory exemption applied to the responsive record, and therefore the agency would release the record unless timely enjoined by a court order. CP 128-29, 1327.

On or about April 20, 2016, the Appellants² filed complaints to enjoin the agencies from releasing the records. CP 22-29, 1469-76, 2020-26, 2787-93, 3616-25; Thurston Cty. Superior Ct. Nos. 16-2-01547-34, 16-2-01573-34, 16-2-01826-34, 16-2-01875-34, and 16-2-01749-34.

The trial court granted preliminary injunctions in these matters. CP 186-87. Though not consolidated by the trial court, all five matters were aligned on the trial court's docket, with a unified briefing schedule and a

¹ Lund submitted separate requests to each agency identifying a specific bargaining unit. The request at CP 123-24 is representative—the only differences among the requests are the receiving agency and identified bargaining unit(s).

² Teamsters Local Union No. 117, Washington Federation of State Employees, International Brotherhood of Electrical Workers Local 76, United Association Local 32, Washington Public Employees Association Local 365, Professional & Technical Employees Local 17, and SEIU 1199NW.

single hearing date for permanent injunction. CP 398-400. At the close of the hearing on July 29, 2016, the trial court denied each Appellant's Motion for Permanent Injunction, but stayed release of the record to provide an opportunity for appeal. CP 1443-47. The cases were timely appealed and subsequently consolidated into the present action by the Court of Appeals.

The Appellants sought temporary relief from the Court of Appeals to stay release of all the information in the records. By a ruling dated August 16, 2016, as clarified on August 17, 2016, Commissioner Schmidt found there was no debatable issue as to names and work email addresses and did not stay their release. He did find, however, a debatable issue of whether employees' dates of birth are exempt, and he stayed their release pending appeal. The names and work email addresses were released, but the dates of birth were withheld while the matter was reviewed by the Court of Appeals.

On October 31, 2017, the Court of Appeals issued its decision. The Court held that public employees have a privacy interest under article 1, section 7 of the Washington Constitution preventing release of dates of birth when associated with the employee's name. It did so without addressing whether any asserted statutory exemption prevented release.³

³ In the trial court and in the Court of Appeals, the Appellants argued six statutory grounds for not disclosing employee names in association with their birthdates. *See* Appellants' Opening Br. at 13-16 (citing RCW 42.56.230(3)), 20-23 (citing RCW 42.56.070(9)), 23-27 (citing RCW 42.56.230(7)(a)), 27-33 (citing RCW 42.56.250(9)), 34-38 (citing RCW 42.56.070(1) and RCW 42.52.180), and 38-43 (citing RCW 41.80.110(1)(a)).

In compliance with the Court of Appeals decision, the agencies continue to withhold employee dates of birth from release, but they are prepared to release the remainder of the responsive records if directed to do so by this Court.

IV. ARGUMENT

The Court of Appeals decision in this case is the first appellate decision holding that a privacy interest under article 1, section 7 of the Washington Constitution prevents release of information in response to a public disclosure request.⁴ Constitutional rights generally are personal, and the agencies would have been unable to assert a represented employee's constitutional right in the employee's stead. *See In re Marriage of Akon*, 160 Wn. App 48, 59, 248 P.3d 94 (2011). *See also Rakas v. Illinois*, 439 U.S. 128, 138, 99 S. Ct. 421, 428, 58 L. Ed. 2d 387 (1978) (same, under Fourth Amendment). Consequently, the agencies have taken no position on the existence, scope, or applicability of article I, section 7 of the Washington Constitution in this case. For that reason, the agencies do not take a position now as to whether this Court should accept review of the Court of Appeals decision.

V. CONCLUSION

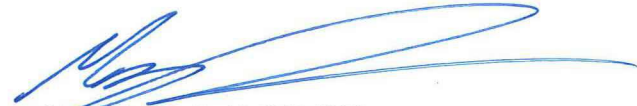
The State Respondents do not take a position as to whether this ¶

⁴ The Court of Appeals considered the argument in *SEIU Local 925 v. Freedom Foundation*, 197 Wn. App. at 223 (2016), but found in that case that the union had failed to meet its burden of proof.

Court should accept review of the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 4 day of January, 2018.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4 day of January, 2018, at Olympia, WA.


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