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NO. 97621-0

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Respondent.

**ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY
THE WASHINGTON STATE SUPREME COURT**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PRESENTED FOR REVIEW.....1

 1. Whether the Department provided a reasonable estimate of time in its five-day response to the Foundation.1

 2. Whether the Foundation, as the requester of records, and the SEIU Training Partnership (Partnership), as a potentially affected third person, are similarly situated with respect to receiving records.1

 3. Whether the Department appropriately provided the Partnership two business days to obtain an injunction after providing copies of the responsive records.2

III. STATEMENT OF FACTS.....2

 A. January 12, 2016, Foundation Public Records Request.....2

 B. April 25, 2017, Foundation Public Records Request.....3

 C. After the Court of Appeals Lifted Its Injunction, the Supreme Court Promptly Enjoined Release6

IV. ARGUMENT7

 A. The Department Provided a Reasonable Estimate of Time in Response To the Foundation’s Public Record Request7

 B. The Foundation Was Not Similarly Situated To the Partnership10

 C. The Department Appropriately Provided the Partnership with Two Business Days To Obtain an Injunction12

V. CONCLUSION16

TABLE OF AUTHORITIES

Cases

Hobbs v. Wash. State Auditor’s Office,
183 Wn. App. 925, 335 P.3d 1004 (2014)..... 13

Ockerman v. King Cty. Dep’t of Envtl. Serv.,
102 Wn. App. 212, 6 P.3d 1214 (2000)..... 8

Ralph v. State Dep’t of Nat. Res.,
182 Wn.2d 242, 343 P.3d 342 (2014)..... 14

SEIU 775 v. State Dep’t of Soc. and Health Serv.,
198 Wn. App. 745, 396 P.3d 369 (2017)..... 2, 3

Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor and Indus.,
185 Wn.2d 270, 372 P.3d 97 (2016)..... 14, 15

Statutes

RCW 42.56.520(1)..... 8

RCW 42.56.520(2)..... 8, 13

RCW 42.56.540 12, 13

RCW 74.09.520(5)..... 4

RCW 74.39A.074(1)(d)(i)(A)–(B)..... 11

RCW 74.39A360(1)(a) 11

Rules

RAP 8.3..... 3

I. INTRODUCTION

The Department of Social and Health Services (Department) worked diligently to comply with the Public Records Act (PRA) in this matter in the midst of ongoing and active litigation against it by both Service Employees International Union 775 (SEIU 775) and the Freedom Foundation (Foundation). Within five days of the Foundation's public record request, Department staff reviewed and discussed the request and provided a reasonable estimate of the time it would need to gather, compile, and produce the requested records. The Department produced the records to the Foundation immediately upon the expiration of a Supreme-Court order prohibiting release.

Further, the Department acted within the scope of the PRA in providing timely notice to third persons of its intent to produce information to the Foundation, and provided the fullest assistance to the Foundation in fulfilling its request. The Court of Appeals agreed, affirmed the superior court's decision, and upheld the Department's actions. This Court should decline the Foundation's Petition for Discretionary Review (Petition).

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Department provided a reasonable estimate of time in its five-day response to the Foundation.
2. Whether the Foundation, as the requester of records, and the SEIU Training Partnership (Partnership), as a potentially

affected third person, are similarly situated with respect to receiving records.

3. Whether the Department appropriately provided the Partnership two business days to obtain an injunction after providing copies of the responsive records.

III. STATEMENT OF FACTS

This case involves the interplay of two separate Foundation record requests to the Department and several stays issued by the Court of Appeals and this Court. While the Foundation's Petition alleges violations only with respect to the 2017 PRA request, the litigation surrounding the 2016 PRA request provides critical context.

A. January 12, 2016, Foundation Public Records Request

On January 12, 2016, the Foundation submitted a public record request to the Department seeking “[t]he times and locations of all contracting appointments” and “state-sponsored or facilitated opportunities for individual providers to view the initial safety and orientation training videos” between November 1, 2015, and December 31, 2016 (2016 records request). Clerk's Papers (CP) at 40; *SEIU 775 v. State Dep't of Soc. and Health Serv.*, 198 Wn. App. 745, 748, 396 P.3d 369 (2017). The Department provided third person notification of the 2016 records request to SEIU 775, the bargaining representative for individual providers (providers), which then sought a preliminary and permanent restraining order in Thurston

County Superior Court. When the restraining orders were denied, SEIU 775 appealed to the Court of Appeals. *See id.* at 747–48

On April 7, 2016, the Court of Appeals enjoined the Department from disclosing the requested information about contracting appointments and opportunities for providers to view safety and orientation trainings, “pending further order of this court.” CP at 398. The Court of Appeals later clarified that this order would remain in effect until it issued a mandate. CP at 418; *accord* RAP 8.3.

On April 25, 2017, the Court of Appeals issued a published opinion holding that the 2016 records were subject to disclosure to the Foundation. *SEIU 775*, 198 Wn. App. at 745. Within minutes of the Court of Appeals having sent its decision to the parties, the Foundation sent an email demanding release of the 2016 records that same day. CP at 406–07.

B. April 25, 2017, Foundation Public Records Request

Shortly after the Court of Appeals issued its April 25, 2017, opinion, the Foundation sent a new public record request to the Department for the same information as in the 2016 records request, but for the period of January 1, 2017 to December 31, 2017 (2017 records request). CP at 42–43.

The following day, SEIU 775 filed an emergency motion with the Court of Appeals seeking clarification, among other things, of whether the

Court's April 7, 2016, injunction prohibited the Department from releasing records in response to the Foundation's 2017 records request. CP at 422-37. Following a later motion for clarification filed by the Department, the Court of Appeals ultimately, on May 15, 2017, issued a stay prohibiting release of the 2017 records until it received briefing from the parties and made a decision on the Department's motion related to the 2017 records request. CP at 60-61.

In the meantime, on May 1, 2017, the Department's Public Record Office held an internal meeting to discuss an estimate of the time needed to gather, review, and produce responsive records. CP at 160; *see also* CP at 137. The records were not located in a central location, so the Department realized it would need to contact and hear back from its three Department regional offices, as well as 14 different Area Agency on Aging offices, to gather the requested information. CP at 137, 159, 171. Area Agencies on Aging are separate entities that contract with the Department to provide case management to clients needing in-home care. RCW 74.09.520(5). The Department provided notice to the Foundation that it would take up to 30 business days, or until June 13, 2017, to produce the records "[d]ue to workload, the number of other pending requests and the scope of [the Foundation's] request." CP at 21.

The estimate of time took into account the status of other public record requests the Department was processing. On April 25, 2017, the Department received 79 other public record requests. CP at 230. Between April 25, 2017, and June 13, 2017, the Department received 2,767 public record requests. CP at 135–36, 475. Of the 2,767 requests, the Foundation made three of those requests. CP at 475. During this same time, the Department closed 2,698 public record requests. *Id.* The Foundation also made numerous requests prior to April 25, 2017, that the Department was processing. CP at 476.

On May 2, 2017, the Department provided notice of the Foundation's 2017 records request to the possibly affected third persons, the Partnership and SEIU 775. CP 137, 294–95. The notice stated that any protective orders would need to be obtained by May 16, 2017. CP 294–95. On May 8, 2017, and May 11, 2017, the Partnership followed up with the Department, repeatedly noting that it had not yet received the information the Department believed was responsive, and stating that it could not know whether to seek injunctive relief without being able to see what the agency planned to produce. The Partnership asked the Department to provide the documents to it as soon as possible, in order to determine if it would seek a protective order. CP at 296, 303–04. On May 12, 2017, the Department responded to the Partnership providing the limited records that

it had collected at the time and stating that any protective order would need to be provided to the Department by May 26, 2017. CP 161, 297.

As noted above, on May 15, 2017, the Court of Appeals issued a stay prohibiting the Department from releasing records in response to the 2017 records request. CP at 60–61. As a result of the stay, the Department did not send the Partnership, as a potentially-affected third person, additional records responsive to the Foundation’s 2017 records request for review. CP at 163.

C. After the Court of Appeals Lifted Its Injunction, the Supreme Court Promptly Enjoined Release

On Friday, June 9, 2017, the Court of Appeals clarified that the Department was not enjoined from releasing the 2017 records sought by the Foundation. CP at 119. The parties received the ruling from the Court of Appeals, and the Foundation emailed counsel for the Department the same day demanding that the Department produce the requested 2017 records within two hours. The email stated, “[i]f we do not have the schedules by that time, we will seek fees. There is no order preventing their release, and [the Department] has had more than enough time to run the queries for the schedules.” CP at 307–09.

The same day that it received clarification from the Court of Appeals, the Department provided the remaining records to the Partnership

for its review as a potentially affected third person. CP at 161. The Department informed the Partnership that any protective order must be provided to the Department by close of business on Monday, June 12, 2017, *Id.*, allowing only one business day to seek a protective order.

On the following business day after the stay was lifted, June 12, 2017, SEIU 775 notified the parties of its intent to seek emergency relief in the Supreme Court, where its petition for review of the Court of Appeals opinion was pending. SEIU 775 filed a motion for emergency relief the same day. CP at 447–48. On June 13, 2017, the day the records were scheduled to be released to the Foundation, the Supreme Court issued a ruling enjoining the Department from releasing the 2017 records to the Foundation until the deadline for SEIU 775 to file a motion for discretionary review of the Court of Appeals decision on the stay related to the 2017 records request. CP at 121–23.

The Supreme Court’s stay of release of the 2017 records expired on July 10, 2017. *Id.* The Department produced the records to the Foundation on July 11, 2017. CP at 163.

IV. ARGUMENT

A. **The Department Provided a Reasonable Estimate of Time in Response To the Foundation’s Public Record Request**

The Department acted reasonably in estimating the time it needed to respond to the Foundation's request. An agency must respond to public record requests promptly, within five business days of receiving the request, and the agency must respond in one of the following ways: (1) provide the records; (2) provide an internet link for the records; (3) acknowledge the request and give a reasonable estimate of time it will need to provide the records; or (4) deny the request. RCW 42.56.520(1).

RCW 42.56.520(2) specifically provides that an agency may need additional time to process a public record request when it is required to locate and assemble records or to notify third persons affected by the request. *See also Ockerman v. King Cty. Dep't of Envtl. Serv.*, 102 Wn. App. 212, 219, 6 P.3d 1214 (2000). In *Ockerman*, there was no single file where the requested records were located, and the records were held in different locations, requiring that they be gathered and assembled. In that case, the court held that King County had reasonably estimated its response time to allow for that, despite the fact that a similar request had been made one month prior, and it had only taken two days to respond to the prior request. *Id.* at 218-19.

Here, the Department considered numerous factors in determining that thirty days was a reasonable estimate of time. On May 1, 2017, the Department held an internal meeting to discuss how to estimate the time

needed to produce responsive records. This meeting included the Department's Public Records Officer, as well as representatives from both the Aging and Long-Term Care Administration and the Developmental Disabilities Administration. CP at 160, 293. At that meeting, the Department considered that the records were located at 14 different Area Agency on Aging offices, which were not under the Department's direct control, as well as three regional offices within the Department itself. CP at 137, 159, 171. It also considered the number of other pending public record requests the agency was processing, including numerous requests filed by the Freedom Foundation, and over 2,000 other pending requests. CP at 135-36, 475. Additionally, the Department considered the likely need for third person notification prior to disclosure, as it knew that SEIU 775 was in the midst of ongoing appellate litigation trying to prevent the release of almost identical 2016 records, and that the Court of Appeals had not yet issued a mandate in that case. CP at 137, 155, 157

The Court of Appeals decision applied the well-settled legal standards and properly determined that, based on the information known to the Department at the time of the request, it had reasonably estimated the length of time it might need to produce responsive documents. The Foundation provides no support for its contention that the Department should have spent additional staff time conducting an even more detailed

inquiry into the expected response time. Nor does the Foundation attempt to address that such a requirement would necessarily take time that Department staff would otherwise spend fulfilling records requests. There is no need for this Court to review this issue, as it is not an issue of significant public interest, involves a well-settled area of the law, and is supported by undisputed facts.

B. The Foundation Was Not Similarly Situated To the Partnership

The Department treated the Foundation and the Partnership differently in this case because were not similarly situated. The Foundation was the public record requestor in this instance. The Partnership was a potentially affected third person. The Department appropriately provided the Partnership with notice and an opportunity to review the records that appeared to pertain to it prior to disclosure, as the PRA contemplates. The Court of Appeals correctly held that the Department's provision of records to a potentially affected third person prior to disclosure does not violate the PRA. This issue does not warrant review by this Court. The Foundation was the requester of records. It made a public record request for the dates and times of training prepared and presented by SEIU 775 and the Partnership. CP at 42-43. Additionally, the Department was navigating this public record request in the midst of contentious ongoing appellate litigation between the Foundation and SEIU 775 over the exact type of information requested in

the instant public record request, and it was well aware that SEIU 775 might choose to seek injunctive relief prohibiting the Department from disclosing the information.

The Partnership was a potentially-affected third person. All training presented to providers represented by SEIU 775 must be provided by the Partnership. RCW 74.39A360(1)(a). Specifically, the Partnership is responsible for providing the orientation and safety training for providers. RCW 74.39A.074(1)(d)(i)(A)–(B).

The Department appropriately provided the Partnership, as a potentially-affected third person, an opportunity to review the records that appeared to pertain to it. The Court of Appeals correctly relied on this Court's holding in *Confederated Tribes of Chehalis Reservation*, quoting this Court: "Implicit in the statutory right to seek an injunction to prevent disclosure is a realistic opportunity to apply to the trial court for such an order." Decision at 14, citing 135 Wn.2d at 758. Because preventing disclosure requires identification of the basis for disclosure, a realistic opportunity to apply will frequently require review of the records. Absent the opportunity to review, third persons may not even know what records are at issue, much less whether an exemption applies in the context of that record. This would have the effect of rendering the provisions for notice and an opportunity to seek injunctive relief meaningless.

The Department did treat the Foundation differently in that it was treated as a public record requestor and not as a third person under the statute to whom notice could be provided before release. The Partnership's request to review the records so it could determine whether to seek an injunction, and the Department's subsequent internal administrative tracking of that request in its public record system, did not in and of itself convert the request to a separate public record request. Rather, because the Partnership was unclear about what information was to be disclosed, it understandably sought that information in order to make an informed decision about its options.

The Court of Appeals decision below appropriately applied standards of statutory construction and relied on appropriate case law in deciding that the Department had a reasonable belief that SEIU 775 and the Partnership might be affected third persons under RCW 42.56.540. In this case, the Department worked diligently with all involved parties to provide the Foundation with the information it sought as quickly as possible given the circumstances.

C. The Department Appropriately Provided the Partnership with Two Business Days To Obtain an Injunction

The Department appropriately waited two business days between providing the records to the Partnership and the date that it intended to

provide those records to the Foundation. And, it did so while staying within the reasonable estimated time for release of the records.

The Court of Appeals released its stay of disclosure on June 9, 2017. The Department immediately provided the remaining records it had obtained to the Partnership on Friday, June 9, 2017, stating that any order prohibiting the release of records would need to be obtained by close of business on the next business day, Monday, June 12, 2017. Before the Department provided the records on June 13, 2017, this Court issued a stay prohibiting the release of the records until July 10, 2017. On July 11, 2017, the day after the Supreme Court stay ended, the Department released the 2017 records to the Foundation. CP at 121–23; 163.

The PRA expressly contemplates that notification of third persons will require “[a]dditional time . . . to respond to a request.” RCW 42.56.520(2). Additionally, the PRA provides for a mechanism for a third person to seek an injunction to withhold public records from disclosure. RCW 42.56.540. When interpreting the PRA, the Court is to “consider the PRA in its entirety to effectuate the PRA’s overall purpose.” *Hobbs v. Wash. State Auditor’s Office*, 183 Wn. App. 925, 935; 335 P.3d 1004 (2014) Further, when construing statutes, the Court “cannot ‘simply ignore’ express terms. “[The court] must interpret a statute as a whole so that, if possible, no clause, sentence, or word shall be superfluous, void, or

insignificant.” *Ralph v. State Dep’t of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (citations omitted). Here, the Department complied with the express terms of the PRA, providing one business day of “additional time,” and with the spirit of the PRA, by providing a third person a meaningful opportunity to seek an injunction.

Once it received notice of the 2017 records request, the Partnership rightfully pointed out that it would be unable to determine if it believed an injunction was appropriate without seeing what information the Department intended to disclose. CP at 296. In its initial notification to the Partnership, the Department was unable to produce an advance copy of the information at issue because it had not yet collected it. CP at 167–68, 294–95.

This case is factually and legally distinguishable from this Court’s decision in *Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor and Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016). One issue in *Wade’s* concerned an agency’s withholding of nonexempt records after the third persons “failed to obtain a protective court order.” *Id.* at 293. Here, while the third person did not obtain an injunction by close of business on the deadline, SEIU 775 did seek an injunction by the deadline, and this Court stayed the release of records the next business day, before the Department had provided the records. This readily distinguishes this case from *Wade’s*.

There are additional material factual distinctions between this case and *Wade's*. In *Wade's*, the agency waited six months between receiving the public record request and notifying the third persons. *Id.* at 288. Here, the Department notified SEIU 775 and the Partnership five business days after receiving the Foundation's request, on the same day that the Department sent its five-day letter to the Foundation. CP 68, 137, 294–95. In *Wade's*, the agency allowed the third persons two weeks to file a motion for a protection and later extended that deadline even though no documents had been filed with the court. *Wade's*, 185 Wn.2d at 288, 290–92. Here, the Department allowed the Partnership only one business-day after providing it with the records to obtain a protection order. CP at 299.

The Department allowed a realistic opportunity for the affected third persons to seek a protective order, as the records were not ready when the first extension of time was given on May 12, 2017, and the second installment of records was provided to the Partnership on Friday, June 9, 2017, when the Court of Appeal's stay was lifted. The Department immediately continued processing the request and forwarded the remaining documents to the Partnership, allowing for one business day, from Friday, June 9, 2017, to Monday, June 12, 2017, for the Partnership to seek relief from the courts.

On Monday, June 12, 2017, SEIU 775 filed a motion with the Supreme Court asking that it prevent the Department from releasing the 2017 records. This Court granted a stay on June 13, 2017. Once the Supreme Court's stay had expired, the Department promptly provided the information to the Foundation.

The Department acted properly in this case under the PRA. The Court of Appeals correctly applied the appropriate legal standards, and this case does not warrant review by this Court.

V. CONCLUSION

The Court of Appeals decision below is consistent with principles of statutory construction and relevant case law. Additionally, the Foundation's Petition does not raise issues of significant public interest that require further review when the Department acted diligently and reasonably in estimating the time it would need to respond to the public record request and appropriately provided third person notification. The Department respectfully requests that this Court deny the Foundation's Petition.

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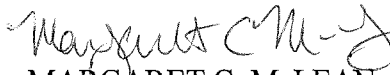
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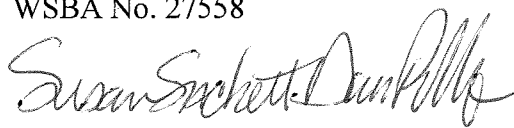
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RESPECTFULLY SUBMITTED this 6th day of November,

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CERTIFICATE OF SERVICE

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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 6 day of November, 2019, at Tumwater, WA.



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