

COURT OF APPEALS
DIVISION II

No. 39224-1-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

WASHINGTON STATE BAR ASSOCIATION,
CANDACE BARBIERI, ELIZABETH TURNER, DAVID POWELL,
and STEPHANIE G. BENSON GREER

Appellants,

vs.

STATE OF WASHINGTON DEPARTMENT OF RETIREMENT
SERVICES and EDWARD HISKES,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE WM. THOMAS McPHEE

BRIEF OF APPELLANTS

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

LAW, LYMAN, DANIEL,
KAMERRER &
BOGDANOVICH, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

By: Jeffrey S. Myers
WSBA No. 16390

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

2674 R.W. Johnson Rd.
Tumwater, WA 98512
(360) 754-3480

Attorneys for Appellants

60/11/12 wd

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I. INTRODUCTION

This is an appeal of a trial court's order refusing to enjoin the disclosure of salary information of individual employees of the Washington State Bar Association under the Public Records Act. The WSBA employees' salaries are not paid with taxpayer or other public funds, and their administrative duties on behalf of the WSBA and its members do not relate to a governmental function. The trial court authorized respondent Department of Retirement Systems, which manages WSBA employee pensions and retirement accounts, to disclose the individual employees' salaries and other personal financial information to respondent Edward Hiskes, holding that this information is akin to the salary information of public employees. Because the WSBA employees have the same expectation of privacy in their personal, financial information as other privately paid employees, the trial court erred. This court should reverse and hold that the Public Records Act does not apply to the personal financial information of WSBA employees.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering its Order Denying Motion For Preliminary Injunction and Dismissing Complaint. (CP 151-56) (App. A)

While this matter was decided on the pleadings and without testimony, the trial court's Order contains enumerated "findings of fact." As discussed below, such findings are superfluous for purposes of appeal. (Arg. at § A, *infra*) In an abundance of caution, appellants assign error to the following findings of fact pursuant to RAP 10.3(g):

The following portion of Finding of Fact 9:

Petitioners have the burden of establishing that the requirements for an injunction under RCW 42.56.540 are met.

(CP 154)

Finding of Fact 10:

Petitioners have not met their burden of showing that release of the salaries of employees of the WSBA would be highly offensive to a reasonable person. Salary information of many public employees, including many other officers and employees in the judicial branch of government, is readily available to the public without a public records request.

(CP 154)

Finding of Fact 11:

Petitioners have not met their burden of showing that the salaries of employees of the WSBA are not of legitimate interest to the public. The public has an interest in the activities of any public agency, which interest is not limited to the public's interest as taxpayers. That the WSBA is a part of the judicial branch and is ultimately subject to the authority of the Washington Supreme Court does not mean its activities are not of legitimate interest to the public. The operations of the WSBA impact not only the attorneys who are compelled by law to be members of the WSBA, but also the public at large. The allocation by the WSBA of its revenues to its various operations, as reflected by the salaries paid to its employees, is of legitimate interest to the public.

(CP 154-55)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. The compensation of Washington State Bar Association employees is not derived from tax dollars or paid from publicly appropriated funds. Are documents provided by the Washington State Bar Association to the state Department of Retirement Systems that reflect the compensation paid to individual employees of the Washington State Bar Association “public records” under the Public Records Act?

B. Do non-governmental employees have a right to privacy in financial records reflecting their personal and individual compensation?

IV. STATEMENT OF THE CASE

A. WSBA Employees Are Paid With Private, Not Public, Funds And Received Assurances That Their Financial Information Was Confidential.

Appellant Washington State Bar Association (“WSBA”) is funded entirely by dues assessed against lawyers admitted to practice in the state of Washington, bar examination fees, advertising revenue, and other private sources. (CP 30; FF 7, CP 154) The WSBA receives no taxpayer funding. (CP 30)

The Washington Supreme Court has held that, as an organization, the WSBA is unique, or “*sui generis*.” **Washington State Bar Ass’n v. State**, 125 Wn.2d 901, 907, 890 P.2d 1047 (1995). As the governing body responsible for the admission and supervision of all lawyers in the State of Washington, subject only to the authority of the Washington Supreme Court, the WSBA is recognized by the Legislature as a “state agency,” under the State Bar Act, RCW 2.48.010. See **Graham v. Washington State Bar Ass’n**, 86 Wn.2d 624, 628-29, 548 P.2d 310 (1976). However, the WSBA is not a true governmental organization or “state agency,” because it is run by a member-elected Board of Governors and it collects and administers at its discretion its members’ own funds to conduct an array of other programs, “the sole aim of which is

improvement in the quality of the practice of law.” **Graham**, 86 Wn.2d at 629. (See Arg. B at 14-19, *infra*).

The individual appellants are each employees of the WSBA. Appellant Stephanie Benson Greer is a Service Center Supervisor, responsible for the operation of the WSBA Service Center and reception desk. (CP 66) Appellant Elizabeth Turner is an Assistant General Counsel. (CP 61) Appellant David Powell served as Professional Responsibility Counsel. (CP 64) Appellant Candace Barbieri is the WSBA’s Payroll and Benefits Coordinator. (CP 59) They are referred to here as the “Employees.”

While the salaries of WSBA employees are not set by state law or public employee collective bargaining agreement, WSBA employees participate in the Public Employees’ Retirement System, which manages their pensions and retirement accounts. (CP 30; FF 2-3, CP 153)¹ WSBA employees are paid based upon a Compensation Plan adopted by the Board of Governors, updated periodically based on current market and economic conditions. (CP 142) The Compensation Plan provides a range of salaries for each position in an attempt to assure “competitive and equitable

¹ The historical origin of the state’s management of WSBA employee’s pension funds is not part of the record.

compensation.” (CP 142) An individual employee’s salary is determined annually within this range based upon job performance and marketplace conditions. (CP 141, 143, 145)

The WSBA assured each of the Employees upon commencement of their employment that their personal financial information, including their monthly salary, would be kept in confidence and not released to the public. (CP 59, 62, 64, 67) The WSBA Employee Handbook expressly provides the assurance that “[p]ersonnel records are confidential.” (CP 147) The WSBA Bylaws similarly provide that personnel records of WSBA employees are exempt from public disclosure, with the sole exception of compensation information by job classification. (CP 29)²

² The trial court found that “the Bylaws, in their entirety, are part of the record.” (FF 8, CP 154) They were not, however, filed in the trial court. They are available as a matter of public record on the WSBA’s website: <http://www.wsba.org/info/bylaws/default.htm>

B. The Department Of Retirement Systems, Which Manages WSBA Employees Retirement Accounts, Agreed To Release The Employees' Financial Information To Respondent Hiskes In Response To A Request For Public Records.

Respondent Edward Hiskes is a practicing Washington lawyer and member of the WSBA who frequently seeks information regarding WSBA programs. (CP 29) In December 2008, Mr. Hiskes sent an e-mail to WSBA General Counsel Robert Welden seeking "salary information for every WSBA employee as of December 1, 2008" in the same detail and format as maintained for every public "employee at the Office of Administrator of the Courts." (CP 38)

General Counsel Welden responded to Mr. Hiskes' request by providing him a copy of the WSBA compensation plan, which designated the minimum and maximum salaries available for each position at the WSBA, from General Counsel to File Clerk. (CP 39-40) In addition, Mr. Hiskes received a list identifying every WSBA employee and corresponding job title. (CP 41-42) Mr. Hiskes thus could determine the salary range for every employee of the WSBA.

Mr. Hiskes appealed the WSBA's refusal to disclose each individual WSBA employee's current salary to the WSBA Board of Governors, and filed a public disclosure request with the Washington Department of Retirement Systems, seeking WSBA Director Paula Littlewood's "monthly compensation and any other information concerning the WSBA's Public Employees Retirement System (PERS) plan 2 account." (CP 29-30, 44) Mr. Hiskes also requested "historical information showing the name of each WSBA employee . . . in the past ten years and a listing [sic] of highest and termination salary for that employee." (CP 55)

The Department notified the WSBA that, under its interpretation of the Public Records Act, the Department was required to "release the requested information unless you take legal action to enjoin the Department from doing so." (CP 44) Because the Employees' salary information is confidential information under the WSBA's Bylaws, the Board authorized this action for injunctive relief to prevent the disclosure, on the ground that WSBA employees are not state employees and that release of the records would violate their privacy rights. At their March 2009 meeting, the WSBA Board of Governors deferred ruling on Mr. Hiskes' appeal

pending consultation with counsel and resolution of the instant litigation. (CP 31)

C. The Trial Court Denied An Injunction, Holding That The Public Had An Interest In WSBA Activities As Part Of The Judicial Branch And That Disclosure Would Not Violate The Employees' Right To Privacy.

The WSBA and the Employees brought this action for injunctive relief against Hiskes and the Department in Thurston County Superior Court on March 19, 2009. (CP 5-13) They sought to enjoin the Department from disclosing any non-taxpayer based salary information in order to prevent a violation of the Employees' right to privacy, as authorized by the Public Records Act, RCW 42.56.540. (CP 7) Each of the Employees asserted that disclosure of personal and financial information could make them more susceptible to identity theft or solicitation by commercial interests. (CP 60, 62, 65, 69) Ms. Turner expressed her concern that disclosure of her personal financial information could be used against her by grievants, who are frequently extremely dissatisfied with the lawyer discipline system. (CP 62)

On April 10, 2009, Judge Thomas McPhee ("the trial court") denied the requested injunction and dismissed the action. (CP 151-56) While the trial court denominated its order "findings of

fact,” it held that there were no facts in dispute, consolidated the hearing on the preliminary injunction with trial on the merits pursuant to CR 65(a)(2), and decided the issues presented as a matter of law. While recognizing that the WSBA’s operations and the Employees’ salaries are not derived from public funds, the trial court held that the WSBA is part of the judicial branch and that “the public has an interest in the activities of any public agency, which interest is not limited to the public’s interest as taxpayers.” (FF 11, CP 154) The trial court held that the Employees had no legitimate privacy right that would justify withholding salary information. (FF 10, CP 159)

Recognizing that the case presented an issue of first impression, the trial court stayed its order pending appellate review. (CP 155-56) The WSBA and the Employees timely filed a notice of appeal. (CP 149-50)

V. ARGUMENT

A. **Standard of Review: This Court Reviews The Trial Court's Interpretation Of The Public Records Act And Denial Of A Preliminary Injunction De Novo.**

The Public Records Act ("PRA") expressly provides for de novo review of "all agency actions taken or challenged under RCW 42.56.030 through 42.56.520." RCW 42.56.550(3). This Court and the Supreme Court have both adopted a de novo standard in reviewing, and reversing, the denial of an injunction to prevent the release of records under the Public Records Act. See **Dawson v. Daly**, 120 Wn.2d 782, 788, 845 P.2d 995 (1993); **Northwest Gas Ass'n v. Wash. Utilities and Transp. Comm'n.**, 141 Wn. App. 98, 118-19, 168 P.3d 443 (2007), *rev. denied*, 163 Wn.2d 1049 (2008) (both reversing denial of injunction preventing disclosure under Public Records Act).

This court similarly reviews de novo the trial court's refusal to issue an injunction under the PRA, where, as here, the "record consists only of affidavits, memoranda of law, other documentary evidence, and where the trial court has not seen or heard testimony requiring it to assess the witness' credibility or competency." **Dragonslayer, Inc. v. Wash. State Gambling Comm'n.**, 139 Wn. App. 433, 441, 161 P.3d 428 (2007) (reversing trial court's denial of

preliminary injunction under Public Records Act). See **Spokane Police Guild v. Liquor Control Bd.**, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989) (de novo review of decision under the injunction section of the PRA, where the record at trial and on appeal consists only of affidavits and documents). Because this matter was considered on a documentary record, this court gives no deference to the trial court's findings of fact. **Progressive Animal Welfare Soc. v. University of Washington**, 125 Wn.2d 243, 252-53, 884 P.2d 592 (1994) (reviewing court is not bound by the trial court's findings on disputed factual issues where the record in challenge to agency action under Public Records Act consists only of affidavits, memoranda of law, and other documentary evidence).

B. The WSBA Is Not A Public Agency, And The Employees' Salary Information Is Not A Public Record Under the Public Records Act.

As its name implies, the Public Records Act provides for disclosure of *public* records to further open access to governmental activities. RCW 42.56.070(1). See **Amren v. City of Kalama**, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). Because the statute applies only to public records, the party seeking disclosure has the initial burden of proving that the sought after information constitutes a

“public record” within the meaning of the statute. Only then does the burden shift to prove that an exemption to disclosure applies. ***Dragonslayer***, 139 Wn. App. at 441.

The trial court erred in holding that the Employees’ salary information constitutes a “public record” within the meaning of RCW ch. 42.56. Not every written document in the possession of a public agency qualifies as a public record. In order to qualify as a “public record” that must be disclosed under RCW 42.56.070(1), a document must relate to a governmental, and not a private, function:

“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.

RCW 42.17.020(42). See ***Oliver v. Harborview Medical Center***, 94 Wn.2d 559, 565, 618 P.2d 76 (1980). “All three elements of this three-prong test must be satisfied for a record to be a public record.” ***Dragonslayer***, 139 Wn. App. at 444. A document is not used by a government agency unless it has an impact on an agency’s decision-making process. ***Concerned Ratepayers Ass’n***

v. Public Utility Dist. No. 1 of Clark County, Wash., 138 Wn.2d 950, 961, 983 P.2d 635 (1999).

While acknowledging that the Public Records Act is broadly construed in favor of disclosure, this court in **Dragonslayer** nonetheless reversed the trial court's denial of an injunction to prohibit the State Gambling Commission's release of private card rooms' audited financial statements. 139 Wn. App. at 447. This court interpreted the plain language of the term "public record" to require requested information relate "to the government's conduct . . . or decision-making process" and held that the audited financial statements "were prepared by a private, non-public agency and contain information regarding a private, non-public entity." **Dragonslayer**, 139 Wn. App. at 445. The court remanded for additional factual findings "as to how the Commission uses these statements . . . [and] whether they are related to a public function." 139 Wn. App. at 445.

In the instant case, the Employees' compensation records are provided by the WSBA to the Department of Retirement Systems because the WSBA "participates as an employer in the Public Employees' Retirement System" and discloses "reportable

compensation of its employees” to the Department. (FF 2, 3, CP 153) The fact that “the WSBA is provided for by the State Bar Act, RCW 2.48, and by court rules adopted by the Washington Supreme Court,” (FF 6, CP 153), however, does not tie the compensation of each of its employees to a “governmental function.” Moreover, the fact that the individual Employees’ records are maintained by the Department of Retirement Systems does not change the analysis because the Employees’ compensation records have no impact on any governmental decision-making processes of the Department of Retirement Systems.

It is undisputed that the Employees’ salaries are not funded by taxpayer dollars or other “appropriations from the legislature.” (FF 7, CP 154) See **WSBA v. State**, 125 Wn.2d 901, 907, 890 P.2d 1047 (1995) (“[T]he Bar Association does not receive any appropriation from the Legislature or any other public body.”). The Court in **WSBA v. State** invalidated legislation purporting to establish the WSBA as “a public employer of its employees” for purposes of mandatory collective bargaining between the WSBA and its employees. 125 Wn.2d at 905-10. The Court has also held that the WSBA is not a “state agency” for purposes of state auditing

statutes or the constitutional requirement that the seat of government be located in Olympia. **Graham v. Bar Ass'n**, 86 Wn.2d 624, 548 P.2d 310 (1976); **State ex rel. Schwab v. Washington State Bar Ass'n**, 80 Wn.2d 266, 273, 493 P.2d 1237 (1972).

Instead, the Court has recognized that the WSBA is unique, or “*sui generis*,” **WSBA v. State**, 125 Wn.2d at 907, because, while its role in attorney admission and discipline is ultimately subject to the authority of the Supreme Court, its other activities and programs are not part of any branch of government, as they are conducted under the supervision of a Board of Governors, elected by its members, which collects and administers its own funds:

With respect to the organization's other programs, it is the Board of Governors, elected by the bar association members, not the legislature, that determines what activities it will engage in. If these programs are not efficiently and adequately managed, the membership can select new board members. There are no legislative standards established for the exercise of discretion in the expenditure of funds by the Board of Governors of the bar. Complete discretion is conferred on the board in the collection and disbursement of all association funds. RCW 2.48.050(5) and (7). These funds are expended for a variety of purposes, not the subject of legislative concern, the sole aim of which is improvement in the quality of the practice of law.

Graham, 86 Wn.2d at 628-29.

If the WSBA's expenditure of funds is "not the subject of legislative concern," **Graham**, 86 Wn.2d at 629, it necessarily follows that the amount of WSBA funds paid to the Employees is unrelated to a governmental function under the Public Records Act. The trial court erred in conflating the public's interest in the practice of law with the threshold requirement under the PRA that a document on file with a public agency must relate to the conduct of government or the performance of a governmental function in order to qualify as a "public record" under RCW 42.17.020. Because the WSBA does not perform a governmental function, its Employees' compensation records necessarily do not relate to the functioning of government.

In **Barnard v. Utah State Bar**, 804 P.2d 526 (Utah 1991), the Utah Supreme Court held that the salaries of employees of the Utah State Bar Association were not subject to disclosure under Utah's public disclosure statute. Like RCW 42.17.020(47), the Utah Public Record Act required a "public record" to have a "connection with the transaction of public business by the public offices, agencies, and institutions of the state . . ." 804 P.2d at 527, *citing*

Utah Code Ann. § 63-2-61(1). Citing **Graham**, 86 Wn.2d at 632, the Utah Court recognized that the Bar had an advisory role in regulating the practice of law, but lacked “final decision-making authority in these matters and acts only by recommending to the Court appropriate action. . .” **Barnard**, 804 P.2d at 529. The Utah Bar, while under the state Supreme Court’s oversight for some purposes, acts “as a private organization which aids this Court by rendering advisory services” and does not “transform[] the Bar into a ‘public agency’” under the Public Records Act. 804 P.2d at 530. See also **Keller v. State Bar of California**, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (California State Bar is not a governmental organization, but is more akin to a labor organization, for purposes of member’s First Amendment challenge to compulsory dues requirement).

Even if the WSBA is considered part of the judicial branch, the Washington Public Records Act has been limited to the legislative and executive branches of government, in part, because of constitutional concerns regarding the separation of powers. **Nast v. Michels**, 107 Wn.2d 300, 306-07, 730 P.2d 54 (1986). Thus, despite the statute’s broad statement of legislative purpose and the

public interest in the functioning of the judicial branch, the Supreme Court has held that documents maintained by the judiciary are not within the scope of the Public Records Act. **Nast**, 107 Wn.2d at 307. See also **Spokane & Eastern Lawyer v. Tompkins**, 136 Wn. App. 616, 620-22, 150 P.3d 158, *rev. denied*, 162 Wn.2d 1004 (2007) (communications between judges and WSBA are not “public records”); **Beuhler v. Small**, 115 Wn. App. 914, 918, 64 P.3d 78 (2003) (judge’s notes not subject to disclosure).

Here, the trial court erred in holding that the Employees “have the burden of establishing that the requirements for an injunction under RCW 42.56.540 are met.” (FF 9, CP 154) While the party seeking injunctive relief generally must establish a clear equitable or legal right, once the Employees challenged the disclosure of their compensation information as a “public record,” the respondents, not the Employees, had the initial burden of proving that the WSBA documents contained information related to the conduct of government or the performance of a governmental function, to allow disclosure as a public record. **Dragonslayer**, 139 Wn. App. at 441.

Because they do not relate in any way to the functions of any branch of state government, records relating to the compensation of WSBA Employees are therefore not “public records” within the meaning of the statute, regardless whether they are held by the Bar itself or by the Department. This court should reverse the trial court’s denial of injunctive relief. At a minimum, as in *Dragonslayer*, it should remand for the limited purpose of determining how the Department of Retirement Systems uses the individual Employees’ compensation information, and its relation to a governmental function.

C. The Individual Employees, Who Are Not Public Employees, Have A Right Of Privacy In Their Personal Compensation And Pension Benefits That Precludes Disclosure Under the Public Records Act.

Even if the Employees’ individual compensation information provided by the WSBA to the Department constitutes a “public record” of a “public agency” under RCW 42.56.070(1), the trial court erred in refusing to grant an injunction because disclosure of the Employees’ compensation information violates their right to privacy. “Personal information in files maintained for employees” is exempt from public inspection and copying under the Public Records Act “to the extent that disclosure would violate their right to privacy.”

RCW 42.56.230(2). That right of privacy is violated when “disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.56.050. The trial court erred in holding that the Employees failed to establish that disclosure of their personal compensation information would violate their right to privacy under this standard.

While the trial court correctly held that the Employees have the burden of establishing the exemption (FF 9, CP 154), it erred in holding that disclosure of their individual salaries is not “highly offensive to a reasonable person,” because “[s]alary information of many public employees, including many other officers and employees in the judicial branch of government, is readily available to the public . . .” (FF 10, CP 154) The trial court ignored the different privacy expectations of public employees, whose salaries are funded by legislatively appropriated funds, from the expectations of private employees, such as the WSBA Employees here, in holding that the public has a legitimate interest in the activities of the WSBA as a “public agency,” and “a part of the judicial branch.” (FF 11, CP 154-55)

The WSBA Employees had a valid and legitimate expectation of privacy in their personal financial information, which they should be free to withhold from the public at large. The WSBA Bylaws treat this information as confidential. (CP 29) The WSBA Employee Handbook similarly provides that “[p]ersonnel records are confidential.” (CP 147). Together, these provisions create a genuine expectation of privacy upon which each of the Employees’ justifiably relied in a way that a public employee could not.

This court has held that that disclosure of public employee salaries is not “highly offensive to a reasonable person,” and “of legitimate concern to the public” because employees of public agencies are paid with taxpayer funds. **Tacoma Public Library v. Woessner**, 90 Wn. App. 205, 218, 951 P.2d 357, 972 P.2d 932 (1998) (“the public has a right to know the tax-supported salaries” of public employees.) *Accord*, **Yakima Newspapers, Inc. v. City of Yakima**, 77 Wn. App. 319, 328, 890 P.2d 544 (1995) (disclosure of terms of settlement agreement between City and former fire chief did not violate right to privacy; “[c]ertainly, there exists a reasonable concern that government conduct itself fairly and use public funds responsibly.”) But even a *public* employee has a right to privacy

“whenever information which reveals unique facts about those named is linked to an identifiable individual.” ***Tiberino v. Spokane County***, 103 Wn. App. 680, 689, 13 P.3d 1104 (2000) (quotation omitted). Thus, for instance, disclosure of performance evaluations violates a public employee’s right to privacy because most individuals reasonably expect that the results of IQ tests, and the comments of their peers and supervisors on their abilities would not be revealed to the public at large. ***Dawson v. Daly***, 120 Wn.2d 782, 794-800, 845 P.2d 995 (1993). See ***Tiberino***, 103 Wn. App. at, 691 (disclosure of content of public employee’s private emails would violate right to privacy even though personal use of county email was reason for her termination).

Unlike public employees, private employees do not have a diminished expectation of privacy in their privately negotiated compensation. While disclosure of the compensation paid with public funds to public employees is not deemed “highly offensive to a reasonable person,” these Employees “are . . . private individuals with legitimate privacy concerns” regarding their personal financial information. ***Pochat v. State Farm Mut. Auto. Ins. Co.***, 2008 WL 5192427 (D.S.D. 2008) (granting protective order preventing

dissemination of insurance company employee's compensation in bad faith litigation). Moreover, disclosure of the salary information to the Department of Retirement Systems for purposes of managing the Employees' pensions does not diminish the Employees' privacy interests, because "[i]nformation disclosed to a few people may remain private," and thus its disclosure would be highly offensive to a reasonable person. ***M.G. v. Time Warner, Inc.***, 89 Cal. App.4th 623, 107 Cal. Rptr. 2d 504, 511 (2001) (cause of action for invasion of privacy exists notwithstanding plaintiff's limited disclosure of information).

As the district court in ***Pochat*** noted, courts generally recognize a private individual's interest in confidentiality in their personal financial information, particularly where, as here, they have not put their financial information at issue as a party to litigation. 2008 WL 5192427 at *6. This privacy interest is reflected in statutory provisions, court rules and the common law. See ***Banaitis v. Mitsubishi Bank, Ltd.***, 129 Or. App. 371, 879 P.2d 1288, 1294-95 (1994) (finding well established public policy prohibits bank from discharging at will employee who refused to disclose confidential customer financial information), *rev.*

dismissed, 321 Or. 511, 900 P.2d 508 (1995). This privacy interest is of constitutional dimension, as both the federal and state constitutions protect a private individual's financial information from disclosure in the absence of a legitimate, if not compelling, countervailing interest. ***State v. Miles***, 160 Wn.2d 236, 156 P.3d 864 (2007) (Art. I, § 7's guaranty that "no person shall be disturbed in his private affairs without authority of law" protects personal financial information contained in bank records). See also ***Denius v. Dunlap***, 209 F.3d 944, 957 (7th Cir. 2000) (following "[s]even of our sister circuits [that] have found that the constitutional right or privacy in confidential information covers some financial disclosures.");³ ***Fortunato v. Superior Court***, 114 Cal. App.4th

³ The Seventh Circuit cited: ***Sheets v. Salt Lake County***, 45 F.3d 1383, 1388 (10th Cir.), *cert. denied*, 516 U.S. 817 (1995) (finding a constitutionally protected privacy interest in matters concerning "marriage, finances, and business"); ***Doe v. City of New York***, 15 F.3d 264, 267 (2^d Cir.1994) (recognizing a constitutionally protected privacy interest in financial information); ***Alexander v. Peffer***, 993 F.2d 1348 (8th Cir.1993) (recognizing a constitutionally protected privacy interest in "highly personal medical or financial information"); ***Walls v. City of Petersburg***, 895 F.2d 188, 194 (4th Cir.1990) (same); ***Fraternal Order of Police v. City of Philadelphia***, 812 F.2d 105, 115 (3rd Cir.1987) (same); ***Plante v. Gonzalez***, 575 F.2d 1119, 1135 (5th Cir.1978) (recognizing a "substantial" privacy interest in confidential financial information), *cert. denied*, 439 U.S. 1129 (1979); ***James v. City of Douglas, Ga.***, 941 F.2d 1539, 1543 n. 7 (11th Cir.1991) (recognizing Fifth Circuit precedent in this area finding a right to privacy in confidential financial information as binding). ***Denius***, 209 F.3d at 957.

475, 8 Cal. Rptr.3d 82, 85-86 (2003) (recognizing constitutional right of privacy in private financial information); **Mogul v. Mogul**, 730 So.2d 1287, 1290 (1999) (Fla.App. 1999) (Florida constitution protects disclosure of financial information “if there is no relevant or compelling reason to compel disclosure.”).

Every private individual “has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most, only to his family or to close personal friends.” **Hearst Corp. v. Hoppe**, 90 Wn.2d 123, 136, 580 P.2d 246 (1978), *quoting* Restatement (2nd) Torts § 652D (1977). The trial court erred in holding that disclosure of this information was not “highly offensive to a reasonable person.” RCW 42.56.050.

Mr. Hiskes, whose bar dues go toward the individual Employees’ salaries, may have a legitimate interest in knowing how his money is spent by the WSBA, but his remedy, which he availed himself of before filing this action, was to request the salary information available pursuant to the WSBA Bylaws. If Mr. Hiskes wishes to obtain a more detailed disclosure, he may lobby other members of the Bar to amend the Bylaws to provide the level of

transparency he seeks. His remedy is therefore akin to that of any member of a non-profit corporation under Washington law, including those that act in the public interest.

Because no portion of the Employees' salaries is paid from public funds, the compensation paid to the individual Employees is not of "legitimate concern to the public." (FF 11, CP 154) The trial court reasoned that the public has a legitimate interest in activities of the WSBA, but did not explain how the public interest is served by disclosure of identifying information and the amount paid each individual employee. For instance, it is difficult to see how the WSBA's payroll coordinator's salary, or that of the person supervising receptionists, is a matter of concern to anyone except the lawyers whose dues support these functions. The public's interest must be both articulable and reasonable. See *Dawson*, 120 Wn.2d at 799 ("While we recognize that the public has some degree of interest in disclosure of the evaluations of prosecutors, . . . we hold that *legitimate* public concern is lacking") (emphasis in original). The trial court erred in holding that the "salaries paid to [WSBA] employees is of legitimate interest to the public." (FF 11, CP 155)

VI. CONCLUSION

Because the WSBA is not a public agency, the Employees' salaries are not public records under the Public Records Act. The Employees are not public employees, and retain a protected privacy right in their personal financial information, which is exempt from disclosure under RCW 42.56.050 and RCW 42.56.230(2). This court should reverse the trial court's order denying a preliminary injunction, with directions to enjoin the release of the Employees' personal financial information.

Dated this 11th day of August, 2009.

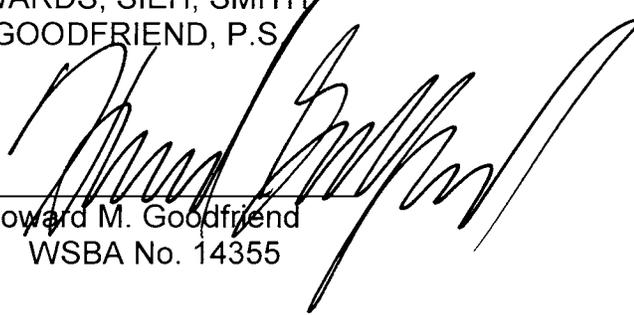
LAW, LYMAN, DANIEL,
KAMERRER &
BOGDANOVICH, P.S.

By: _____


Jeffrey S. Myers
WSBA No. 16390

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: _____


Howard M. Goodfriend
WSBA No. 14355

Attorneys for Appellants

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 11, 2009, I arranged for service of the foregoing Brief of Appellants, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Jeffrey S. Myers Law, Lyman, Daniel, Kamerrer & Bogdanovich, PS P.O. Box 11880 Olympia WA 98508-1880	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Spencer W. Daniels Assistant Attorney General Office of the Attorney General P.O. Box 40108 Olympia WA 98504	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Edward Hiskes 22614 Hickory Way Brier, WA 98036	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 11th day of August, 2009.

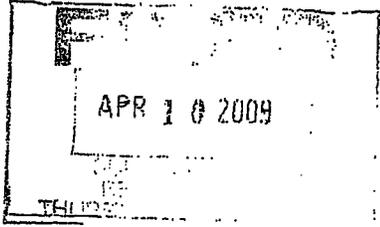


 Tara D. Friesen

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EXPEDITE
 Hearing is Set:
Date:
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STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

WASHINGTON STATE BAR
ASSOCIATION, CANDACE
BARBIERI, ELIZABETH
TURNER, DAVID POWELL, and
STEPHANIE G. BENSON GREER,

Petitioners,

NO. 09-2-00692-7

**ORDER DENYING MOTION
FOR PRELIMINARY
INJUNCTION AND
DISMISSING COMPLAINT**

v.

STATE OF WASHINGTON,
DEPARTMENT OF RETIREMENT
SYSTEMS, and EDWARD
HISKES,

Respondents.

This matter came before the Court on April 10, 2009, on Petitioners' motion for an order granting a preliminary injunction pursuant to RCW 42.56.540 to enjoin Respondent Department of Retirement Systems (Department) from disclosing records of salary information (compensation earnable) of current and former employees of the Washington State Bar Association (WSBA) in its possession in response to a public records request by Respondent Edward Hiskes. Petitioners were represented by Jeffrey S. Myers, Attorney at Law. Respondent Department was represented by

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AND DISMISSING COMPLAINT

ATTORNEY GENERAL OF WASHINGTON
Government Operations Division
7141 Cleanwater Drive SW
PO Box 40108
Olympia, WA 98504-0108
(360) 586-3636

1 Spencer W. Daniels, Assistant Attorney General. Respondent Edward Hiskes
2 represented himself pro se.

3 The Court heard oral argument for counsel for Petitioners and counsel for
4 Respondents. The Court considered the pleadings filed in this action and the following
5 evidence:

6 Complaint filed March 19, 2009.

7 Motion for preliminary injunction, filed March 20, 2009.

8 Declaration of Robert Welden.

9 Declaration of Jeffrey S. Myers.

10 Declaration of Candace Barbieri.

11 Declaration of Elizabeth Turner.

12 Declaration of David Powell.

13 Declaration of Stephanie G. Benson Greer.

14 Respondent Edward Hiskes's Response to Motion for Preliminary Injunction.

15 Declaration of Edward V. Hiskes and Appendices A-E thereto.

16 Response of State Department of Retirement Systems to Motion for Preliminary
17 Injunction.

18 Declaration of Spencer W. Daniels.

19 Declaration of Allen T. Nguyen.

20 Petitioner's Reply Brief in Support of Motion for Preliminary Injunction.

21 Second Declaration of Jeffrey S. Myers in Support of Motion for Preliminary
22 Injunction.

23 The Court has determined that there are no issues of fact that require resolution
24 through further proceedings and that the court should consolidate the hearing on the
motion for preliminary injunction with the trial on the merits pursuant to CR 65(a)(2)
and so announced that determination to the parties during the hearing.

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Findings of Fact

1
2 Based on the argument of counsel and the evidence presented and being fully
3 advised in the premises, the Court finds:

4 1. The State of Washington Department of Retirement Systems is a state
5 agency located in Thurston County, Washington, which is established pursuant to
6 RCW 41.50. The Department administers public pension systems established by
7 Washington statute.

8 2. The WSBA participates as an employer in the Public Employees'
9 Retirement System, one of the systems administered by the Department, and WSBA
10 employees, including the individual Petitioners, are members of the retirement systems
11 administered by the Department.

12 3. The WSBA reports to the Department the monthly compensation
13 earnable (reportable compensation) of its employees. Compensation earnable equates
14 to salary, with certain additions and subtractions specified in statute and rule.

15 4. On December 11, 2008 Edward Hiskes submitted to the Department a
16 public records request under the public records act, RCW 42.56, for the salaries of
17 individual current employees of the Bar Association, as well as for the highest and
18 termination salaries for WSBA employees in the previous 10 years.

19 5. The Department advised Mr. Hiskes and the WSBA that the Department
20 did not believe the records fell within any exemption to RCW 42.56 and was prepared
21 to provide Mr. Hiskes with the public records requested unless precluded from doing
22 so by order of the court. The Department has not provided Mr. Hiskes with any public
23 records.

24 6. The WSBA is provided for by the state bar act, RCW 2.48, and by court
rules adopted by the Washington Supreme Court, GR 12.1, GR 12.2, GR 12.3. All

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1 active attorneys admitted to practice in Washington State must be members of the
2 WSBA and pay the required dues to the WSBA.

3 7. The WSBA's operations and the salaries of its employees are funded by
4 mandatory dues collected from members (attorneys admitted to practice in Washington
5 State), bar examination fees, revenue from advertising, and other sources, and are not
6 funded by appropriations from the legislature.

7 8. ~~The by-laws of the WSBA provide that salaries of individual employees~~
8 ~~of the WSBA Association are confidential.~~ However, promises of confidentiality of
9 information in public records cannot override the requirement in the public records act
10 to disclose public records that are not exempt under an exemption in or incorporated
11 into RCW 42.56. *The By-Laws, in their entirety, are part of the record.*

12 9. Petitioners have the burden of establishing that the requirements for an
13 injunction under RCW 4².56.540 are met. Petitioners have the burden of establishing
14 that the disclosure of salaries of individual WSBA employees would violates the
15 employees' right of privacy, which requires a showing that the salaries would be
16 highly offensive to a reasonable person and that they are not of legitimate interest to
17 the public.

18 10. Petitioners have not met their burden of showing that release of the
19 salaries of employees of the WSBA would be highly offensive to a reasonable person.
20 Salary information of many public employees, including many other officers and
21 employees in the judicial branch of government, is readily available to the public
22 without a public records request.

23 11. Petitioners have not met their burden of showing that the salaries of
24 employees of the WSBA are not of legitimate interest to the public. The public has an
interest in the activities of any public agency, which interest is not limited to the
public's interest as taxpayers. That the WSBA is a part of the judicial branch and is

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1 ultimately subject to the authority of the Washington Supreme Court does not mean its
2 activities are not of legitimate interest to the public. The operations of the WSBA
3 impact not only the attorneys who are compelled by law to be members of the WSBA,
4 but also the public at large. The allocation by the WSBA of its revenues to its various
5 operations, as reflected by the salaries paid to its employees, is of legitimate interest to
6 the public.

7 12. The WSBA has not asserted, nor does the Court find, any other
8 exemption in or incorporated into RCW 42.56 under which the salaries of individual
9 WSBA employees would be exempt from disclosure.

10 Conclusions of Law

11 Based on the foregoing Findings of Fact, the court enters the following
12 Conclusions of Law:

- 13 1. The court has jurisdiction over the subject matter and parties.
- 14 2. Petitioners are not entitled to relief. Disclosure of salary information of
15 employees of the WSBA would not violate the employees' right to privacy as defined
16 by RCW 42.56.050 and is not exempt from disclosure under RCW 42.56.230(2).
- 17 3. The salary information of employees of the WSBA is not exempt under
18 any other provision in or incorporated into RCW 42.56.
- 19 4. Petitioners' complaint should be dismissed.

20 Order

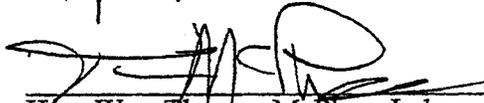
21 For the reasons set forth in the above Findings of Fact and Conclusions of Law,
22 IT IS ORDERED:

- 23 1. Petitioners' motion for a preliminary injunction is denied, and
24 Petitioners' complaint for a permanent injunction is dismissed with prejudice.
2. This is a final, appealable order. However, release of salary information
of individual WSBA employees by the Department is stayed ^{during the pendency of} ~~for thirty days from entry of~~ *of*

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1 of this order in order to allow Petitioners to exercise their right to seek appellate
2 review, ^{pursuant to CR 62(a)} ~~if appellate review is timely sought, any further stay shall be determined by~~
3 the appellate court. ~~The Department shall be authorized to~~ ^{disclose the requested records upon completion of appellate}
4 ~~disclose the requested records upon completion of appellate~~ ^{review.}
5 3. Each party shall bear its own costs and attorneys fees.

6 DATED this 10 day of April, 2009.

7 
8 Hon. Wm. Thomas McPhee, Judge

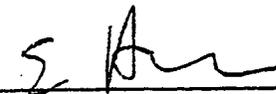
9 Presented by:

10 ROBERT M. MCKENNA
11 Attorney General

12 
13 SPENCER W. DANIELS, WSBA No. 6831
14 Assistant Attorney General
15 Attorneys for Defendant

16 Approved as to form and notice of presentation waived:

17 
18 JEFFREY S. MYERS, WSBA No. 16390
19 Law, Lyman, Daniel, Kamerrer & Bogdanovich, PS
20 Attorney for Petitioners

21 
22 EDWARD HISKES, WSBA No. 8322
23 Pro Se
24

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RCW 42.17.020(42). Definitions:

(42) "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.

RCW 42.56.050. Invasion of privacy, when:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

RCW 42.56.070(1). 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.

RCW 42.56.230(2). Personal information:

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

...

(2) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy;

...

RCW 42.56.540. Court protection of public records:

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.