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I. PARTIES SUBMITTING REPLY BRIEF

The individual Employees, Candace Barbieri, Elizabeth Turner, David Powell, and Stephanie G. Benson Greer, submit the instant reply brief. The Washington State Bar Association has withdrawn as an appellant and has asked the court to voluntarily dismiss its appeal, without prejudice to the Employees' appeal.

II. REPLY ARGUMENT

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

1. The WSBA Is Not An Agency Within The Meaning Of The Public Records Act.

This court should reject the trial court's holding that the Washington State Bar Association is a "public agency" under the Public Records Act (FF 11, CP 154-55).¹ Respondents would extend the trial court's ruling even further, asking this court to hold that the WSBA is a state "agency" for all purposes, not just as that term is defined in RCW 42.17.020(2). This court should reject this

¹ As a threshold matter, the Department argues that the Employees failed to articulate that their compensation information was not a "public record" under the Public Records Act. (Dept. Br. at 6). However, the Department concedes that the trial court addressed the issue whether the WSBA is an "agency" under the Act in its order (FF 11, CP 154-55) and dedicates a substantial portion of its brief in addressing this issue on the merits. This court should address it here.

unprecedented characterization of the WSBA, which contravenes Supreme Court precedent and fails to address the broad consequences of holding that the WSBA is an agency of the State of Washington.

a. The WSBA Performs Both Private and Public Functions.

Respondents' characterization of the WSBA as a state agency ignores the unique nature of the Bar, which as respondent Hiskes concedes, serves a private, as well as a public function. (Hiskes Br. at 1-2) See ***Graham v. State Bar Association***, 86 Wn.2d 624, 548 P.2d 310 (1976). Under the authority granted to it by the Washington Supreme Court, the WSBA supervises the practice of law, but it also acts as a private organization on behalf of its members. ***Graham***, 86 Wn.2d at 628-29 (WSBA collects dues from members "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.").

While conceding that the WSBA is not always subject to statutes that otherwise apply to "state agencies," the Department characterizes the ***Graham*** Court's holding as irrelevant dicta, (Dept. Br. at 14). The Department relies instead upon ***Matter of***

Bannister, 86 Wn.2d 176, 543 P.2d 237 (1975), in which the Court held that a three-member administrative committee of the Skagit-Island County Bar Association, to which the Court had delegated the task of investigating attorney grievances under the former disciplinary rules, acted in the “public trust,” and was therefore subject to the common law of agency relating to public, not private functions:

A Local Administrative Committee appointed by the Bar Association's Board of Governors, as an arm of a public agency, must operate in accordance with the above rules of agency applicable to public, rather than private, bodies.

Matter of Bannister, 86 Wn.2d at 186.

Contrary to the Department’s characterization, the **Bannister** Court did not hold that the State Bar Act, RCW 2.48.010, established the WSBA as a “public agency.” Instead, it addressed an issue of common law agency in holding that one of the three members of the local panel, authorized to act under the Court’s disciplinary rules, lacked the power to delegate his authority to the two other panel members. 86 Wn.2d at 185. This holding is consistent with the recognition that the WSBA serves both a public and a private function – a principle ignored by the trial court here.

b. The WSBA's Public Functions Are Those Of The Judicial Branch.

Respondents also ignore the fact that the public functions performed by the WSBA – those related to lawyer licensing and discipline – are judicial functions under authority granted to it by the Washington Supreme Court, not the legislative branch. **Graham**, 86 Wn.2d at 632-33. To the extent the WSBA through its employees acts to “protect and regulate [a] public resource,” as respondent Hiskes asserts in arguing that the WSBA is an “agency” under the PRA (Hiskes Br. at 1), it does so independently of any legislative authority. The State Bar Act, upon which the Department relies in characterizing the WSBA as a state agency, is only a legislative acknowledgment of the Supreme Court’s inherent authority to regulate the practice of law; it is not a delegation of legislative authority. **Application of Schatz**, 80 Wn.2d 604, 607, 497 P.2d 153 (1972).

The Department’s characterization of the WSBA as an “agency” under RCW 42.17.020(2) fails to acknowledge the judicial branch’s immunity from the requirements of the Public Records Act. The Supreme Court has recently and definitively rejected the Department’s contention that the Public Records Act applies to the

judicial branch of state government. **City of Federal Way v. Koenig**, ___ Wn.2d ___, 217 P.3d 1172 (2009). In holding that the PRA did not require the disclosure of documents related to the resignation of a municipal court judge, the Court in **Koenig** reaffirmed its holding in **Nast v. Michels**, 107 Wn.2d 300, 730 P.2d 54 (1986), that “the PRA does not apply to the judiciary,” and refused to limit that immunity to court records, as the Department advocates here. **Koenig**, 217 P.3d 1172 at ¶ 1. Moreover, the **Koenig** Court expressly approved two Court of Appeals decisions that relied on **Nast** in holding broadly that the judiciary is not subject to the requirements of the PRA. **Koenig**, 217 P.3d at 1173-74, ¶ 6, discussing **Spokane & Eastern Lawyer v. Tompkins**, 136 Wn. App. 616, 621-22, 150 P.3d 158 (correspondence from county judges to bar association regarding local lawyer exempt from PRA), *rev. denied*, 162 Wn.2d 1004 (2007); **Beuhler v. Small**, 115 Wn. App. 914, 918, 64 P.3d 78 (2003) (judge’s notes and computer records on judge’s sentencing practices exempt from PRA).

Because the WSBA acts under the authority of the judicial branch, it is entitled to the judiciary’s immunity from disclosure under the PRA. Washington Constitution, Art. 4, § 1, which vests

the state's judicial power in the Supreme Court, grants the Court the exclusive right to regulate the practice of law, free from encroachment by the Legislature. ***Hagen & Van Camp v. Kassler Escrow, Inc.***, 96 Wn.2d 443, 453, 635 P.2d 730 (1981) (“the power to regulate the practice of law is solely within the province of the judiciary and this court will protect against any improper encroachment on such power by the legislature or executive branches.”). Accordingly, neither the Legislature’s characterization of the WSBA as an “agency” in the State Bar Act, nor the “public” functions it performs under its judicial authority, is sufficient to bring the Bar within the scope of the Public Records Act. See ***Nast***, 107 Wn.2d at 305-07, (although King County Department of Judicial Administration may meet the definition of “agency” under Public Records Act it is nonetheless entitled to immunity from disclosure requirements).

c. Application Of The PRA To The WSBA Violates The Constitutional Separation of Powers.

The respondents fail to address the separation of power concerns engendered by their broad assertion that the WSBA is an “agency” under the Public Records Act. The Supreme Court, not the Legislature, has established the WSBA and authorized its

activities. GR 12.1. The Supreme Court, and not the Legislature, has delegated to the WSBA the authority to administer its boards and committees, manage its budget, and oversee its staff:

The Supreme Court has delegated to the Washington State Bar Association the authority and responsibility to administer certain boards and committees established by court rule or order. This delegation of authority includes providing and managing staff, overseeing the boards and committees to monitor their compliance with the rules and orders that authorize and regulate them, paying expenses reasonably and necessarily incurred pursuant to a budget approved by the Board of Governors, performing other functions and taking other actions as provided in court rule or order or delegated by the Supreme Court, or taking other actions as are necessary and proper to enable the board or committee to carry out its duties or functions.

GR 12.2. The Supreme Court has further granted to the WSBA, its members, and employees, quasi-judicial immunity in performing its public functions related to admission to practice and lawyer discipline. GR 12.3.

As a result, only the Supreme Court can determine the extent to which the WSBA and its employees' records are open to public inspection. For instance, the Supreme Court, and not the Legislature, determines the scope of confidentiality of lawyer disciplinary proceedings conducted by the WSBA. See ELC 3.2(a)

“All disciplinary materials that are not public information as denied in rule 3.1(b) are confidential, and held by the Association under the authority of the Supreme Court.”), ELC 3.4 (governing disclosure of otherwise confidential information). Acting under authority delegated to it by the Supreme Court, and not the Legislature, the WSBA has determined the extent to which WSBA meetings shall be open to public and its information made “available to the people of Washington.” (WSBA Bylaws, VIII.A.1, <http://www.wsba.org/info/bylaws/default.htm>).

The Department’s contention that only the Legislature may grant a statutory exemption from disclosure under the Public Records Act would divest the Court of its constitutional authority to determine, through rule making, the extent to which the WSBA’s judicial activities are entitled to confidentiality. Such a broad holding would also risk subjecting the WSBA to other laws applicable to state agencies and turn each of its activities into state action – a principle that the Supreme Court has never adopted.² This court should reject the Department’s argument and hold that

² In *Benjamin v. Washington State Bar Ass’n*, 138 Wn.2d 506, 517 n.56, 980 P.2d 742 (1999), the Court was presented with the issue whether the termination of a WSBA employee constituted state action under 42 U.S.C. § 1983, but resolved the case on other grounds.

the WSBA acts under the authority of the judiciary under Wash. Const. Art. 4, § 1 in its public or governmental role, and may not be considered an “agency” within the meaning of the Public Records Act.

2. The Salary Information Of WSBA Employees Are Not Public Records Merely Because That Information Is “Retained” By The Department Of Retirement Systems.

The trial court did not base its ruling on the fact that the Employees’ salary information is “retained” by the Department of Retirement Systems. The Department now argues that the Employees’ salary information meets the definition of a “public record” once in the hands of the Department. The Department’s argument falters on the threshold requirement that the Employees’ individual salary information must relate to a governmental function. RCW 42.56.010(2).

The respondents contend that the administration of retirement programs is related to a governmental function (Hiskes Br. at 6-7; Dept. Br. at 10-12, *citing Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 137, 737 P.2d 1302, *rev. denied*, 108 Wn.2d 1033 (1987)) In *Hollister*, however, Division One dealt with disability payments to publicly paid

firefighters. The amount and administration of disability benefits paid by taxpayers to public employees is directly related to a governmental function.

In *Dragonslayer, Inc. v. Washington State Gambling Com'n*, 139 Wn. App. 433, 444-45, ¶¶ 17-19, 161 P.3d 428 (2007) (App. Br. at 14), by contrast, this court held that the fact that non-public information is being held by a governmental agency, does not, without more, establish that it relates to a governmental function. Here, as well, but for the fact that Employee salary information is turned over to the Department, there is no connection to any governmental function.

The Department recites how “compensation earnable reported by the WSBA for its employees” forms the basis of its statutory obligation to administer the Public Employment Retirement System pension plan. However, as the Department notes, each PERS member’s retirement allowance is based on a statutory formula. (Dept. Br. at 3) Moreover, the experience and financial condition of the funds managed by the Department, and the returns that the Department reaps from the pooled contributions, may be determined without regard to the individual

contributions of the Employees. (Dept. Br. at 3; Hiskes Br. at 6-7)
Respondents fail to explain how the Employees' individual salary information relates to a function of government.

B. 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' compensation records constitute public records once they are turned over to the Department, the Employees' are entitled to the statutory exemption "to the extent that disclosure would violate their right to privacy." RCW 42.56.230(2). Characterizing the Employees as "public employees," the Department engages in the circular argument that since public employees have no privacy rights in their publicly paid salaries, neither should the Employees here. The Department's tautology ignores the reasoning of the cases that hold that public employees have diminished privacy expectations in their "tax supported salaries," *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 218, 951 P.2d 357, *rev. granted and remanded*, 136 Wn.2d 1030 (1998), because the public has a right to know that government uses "public funds responsibly." *Yakima Newspapers*,

Inc. v. City of Yakima, 77 Wn. App. 319, 328, 890 P.2d 544 (1995) (App. Br. at 22-23).

The Department compares the WSBA Employees to members and employees of state agricultural boards and commissions, funded by revenue assessments, such as the Washington Apple Commission, arguing that the source of an agency's funding is irrelevant. (Dept. Br. at 20) However, there is a significant distinction between the privacy expectations of members and employees of commissions whose powers, duties and compensation are established by the Legislature as part of the Executive branch of state government, and WSBA Employees, whose positions and funding are not.³

The WSBA Employees' salaries are negotiated by the Executive Director under the broad authority granted by the WSBA Bylaws. The Employees have a reasonable expectation of privacy in their compensation, not merely because the Bylaws provide a

³ See, e.g., RCW 15.24.070 (powers and duties of Washington Apple Commission); 15.24.215 (authorizing adoption of rules by Apple Commission to fund staff support); 43.03.230 (Commission salaries set by legislature); 43.23.033(2) (limiting funding of staff support for commodity boards and commissions).

promise of confidentiality,⁴ but because the Employees are not paid with public funds, do not work for an organization whose existence and authority is dependent upon legislative enactments, and are therefore unlike any Washington “public employee.” The fact that the judicial branch discloses the taxpayer funded salaries of judges, which are set by statute, and other judicial employees, many of whom are subject to civil service protection, does not support the Department’s assertion that the Employees have a diminished privacy interest in their compensation information, which the WSBA, under authority delegated to it by the Supreme Court, has chosen to keep confidential.

The declarations of the WSBA Employees refute the Department’s contention that disclosure of individualized salary information is not “highly offensive to a reasonable person.” (Dept. Br. at 33) (See CP 52-67) The Department’s argument relies on ***King County v. Sheehan***, 114 Wn. App. 325, 57 P.3d 307 (2002), a case that did not consider disclosure of personal financial

⁴ Respondents argue that a promise of confidentiality *made by a public agency* cannot trump the requirements of the Public Records Act. (Dept. Br. at 29-30, citing ***Spokane Police Guild v. Washington State Liquor Control Bd.***, 112 Wn.2d 30, 40, 769 P.2d 283 (1989); ***Hearst Corp. v. Hoppe***, 90 Wn.2d 123, 137, 580 P.2d 246 (1978); Hiskes Br. at 8) That argument again begs the question whether the WSBA is a public agency.

information, but a listing of only the full names of employees. 114 Wn. App. at 330. Unlike **Sheehan**, the trial court order in this case directs the release of private information linked to the identity of individual employees. The WSBA is not contending, as King County did in **Sheehan**, that disclosure of the names would start down a slippery slope ultimately leading to unintended disclosure of private information “from other sources”. 114 Wn. App. at 344-45. Instead, the order here discloses the personal salary information of individual employees that would, without dispute, be protected, were these Employees considered “private” and not “public” employees. (App. Br. at 23-26) The Employees’ personal financial information is protected from disclosure under the right to privacy secured by RCW 42.56.230(2).

Respondent Hiskes also contends that the Employees have forfeited their privacy expectations because the WSBA had disclosed to him their “actual names” and “the general range of [their] salaries.” (Hiskes Br. at 7, citing **Laborers Intern. Union of North America v. City of Aberdeen**, 31 Wn. App. 445, 642 P.2d 418, rev. denied, 97 Wn.2d 1024 (1982)) However, in **Laborers International**, a contractor was “required under 40 U.S.C. § 276c

to submit certified copies of its payroll records to the city to permit monitoring of compliance with the prevailing wage provision of the Davis-Bacon Act.” 31 Wn. App. at 446. The City was then required by federal law to “deliver copies, together with a report of any violations, to the U.S. Department of Labor.” 31 Wn. App. at 447. The contractor was also required by federal law to post the prevailing wage at the jobsite. 31 Wn. App. at 449. Moreover, there was no evidence “that any of the employees had complained” about these statutorily mandated disclosures. 31 Wn. App. at 449.

Given the public disclosures already mandated by federal law, the Court of Appeals in *Laborers Intern.* rejected the contractor’s argument that its employee payroll records should not be disclosed to the union seeking their release under the Public Records Act. Not only had no employee asserted a right to privacy in his or her wage information, but the contractor’s compliance with the Davis-Bacon Act on a public works contract was a matter of legitimate public concern. 31 Wn. App. at 448 (City’s compliance with Davis-Bacon Act “was a governmental function”). Moreover, the information sought was limited to the specific wages paid under one public works contract that was subject to the Davis-Bacon Act,

and was not disclosure of the workers' entire salary, which was ordered by the trial court in this case.

That nexus to a matter of legitimate public concern is lacking here. While respondent Hiskes has forcefully argued why the Employee salary information is of concern to him as a dues paying member of the WSBA, he has not explained why it is of interest to the public at large.

DRS argues that there is no right to privacy because the manner in which the Department administers public pension plans is of legitimate interest to the public. (Dept. Br. at 33-34) DRS fails to show the public interest in disclosure of individualized salary information of the Employees. Moreover, it ignores the mandate of the Public Records Act to redact information that would violate the employees' right to privacy. RCW 42.56.070(1); 42.56.210(1). Any interest in administration of the pension system can be protected by providing redacted financial information that protects individualized identification of the WSBA employee's salary or by providing "statistical information not descriptive of any readily identifiable person." RCW 42.56.210(1). The Department fails to demonstrate how linking salary information with individual employees aids in

review of the administration of public pension plans, or why it cannot protect individual rights of privacy by redacting employee names, as specifically directed by RCW 42.56.210(1).

III. CONCLUSION

This court should hold that the Employees retain a right to privacy in their individualized salary information and reverse the trial court's finding that "the salaries paid to [WSBA] employees is of legitimate interest to the public." (FF 11, CP 155) The court should remand with instructions to enjoin the release by the Department of the Employees' confidential salary information pursuant to RCW 42.56.540.

Dated this 14th day of December, 2009.

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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 December 14, 2009, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to counsel for the parties to this action as follows:

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