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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 39224-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

STATE OF WASHINGTON DEPARTMENT OF RETIREMENT SERVICES

and

EDWARD V. HISKES,

Respondents

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

BRIEF OF RESPONDENT EDWARD V. HISKES

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RESPONSE TO APPELLANTS' STATEMENT OF THE CASE

Appellants state (p.4) that “WSBA Employees are Paid with Private, Not Public Funds and Received Assurances That Their Financial Information Was Confidential”

Comment 1: RE p. 4, ¶1. The fact that WSBA collects license fees from the “private” funds of lawyers does not make the WSBA “private”. WSBA members pay “license fees”, not dues. (CP 119). A WSBA financed with license fees instead of “taxes” is for that reason no more private than, say, a fish and game agency that is financed by fishing license fees. Money in a fisherman's wallet is “private”. However, money paid in exchange for a fishing license is “public” and the public has a right to expect that the money paid will be used to protect and regulate the public resource. The same argument applies to license fees for the practice of law. Private money is paid in exchange for a license to practice law, but the right to practice law is a public franchise regulated by the Court in the public interest. The public has a right to expect that money received in exchange for practice of this franchise will be used for the public purpose of improving the legal system. Those entrusted with this money have a corresponding public duty to render account for the use of this public resource.

Graham v. State Bar Association, 629 86 Wn.2d 624, 548 P.2d 310 (1976) holds that the Bar Association has two functions.

First, it is responsible for “the admission; discipline, and enrollment of lawyers”, in which role it answers to the Supreme Court.

Second, *Graham* holds that “With respect to its other (emphasis supplied) programs ... it is the Board of Governors that determines... what activities [the WSBA] will engage in.”

Graham holds that the WSBA , with respect to its first function, at least, it is a public entity. Employees who work for such a public entity must expect that they will be accountable for the disposition of public funds entrusted to them to perform their public function.

Comment 2: WSBA records have been declared open to inspection by any WSBA member. Graham states that WSBA Members have a right to inspect WSBA records:

The reluctance of respondent to permit the State Auditor to perform a postaudit of its books does not mean it wishes its records to remain closed to any scrutiny. Annual audits of the association's receipts and expenditures have been performed by private certified accountants. The results of these audits have been made known to the members of the bar and the records made available to any who wish to see them.

Graham puts WSBA employees on notice that WSBA records are subject to inspection by individual WSBA members, and that expectations of privacy with respect to salaries are not reasonable. **Graham** does not contemplate that a tyrannical majority may deprive individual WSBA members of the right to have information concerning WSBA affairs.

Even if one accepts the dubious notion that the WSBA is “private”, it is not the private property of the Board of Governors, but rather the private property of WSBA members, including Respondent. Under this view, the Board would retain a fiduciary duty to account to WSBA members for the disposition of WSBA funds, and as a part of this duty, the Board must afford individual WSBA members the right to inspect WSBA records. Democratic control of the WSBA by the members necessarily implies a right of access to information needed for open debate and informed voting. Shareholders,

even minority shareholders and members, have access to the books and records of a corporation pursuant to **RCW 24.06.160**:

Books and records.

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, shareholders, board of directors, and committees having any of the authority of the board of directors; and shall keep at its registered office or principal office in this state a record of the names and addresses of its members and shareholders entitled to vote. All books and records of a corporation may be inspected by any member or shareholder, or his agent or attorney, for any proper purpose at any reasonable time.

. Perhaps this statute applies directly to the WSBA, as a miscellaneous corporation, under **RCW 24.06.005**. Even if it does not, however, the statute is expressive of a democratic norm and fiduciary obligation to minority-viewpoint members, an obligation which is recognized by the common law. See *State v. Merger Mines*, 3 Wn.2d 417,(1940). Two former Chief Disciplinary Counsel of the WSBA allege that salary arrangements for the payment of WSBA disciplinary counsel are inadequate or otherwise undesirable and that a former WSBA Executive Director, who controlled salaries, made an improper attempt to influence a discipline proceeding. (CP 100). The American Bar Association has concurred with concerns of these Disciplinary Counsel. (CP 108). Under this circumstance, WSBA members have a common law right to access salary records in order to have information to debate and seek redress concerning. Members may not be deprived of this right by WSBA management, just as shareholders may not be deprived of a right to inspect corporate records merely because directors wish to stonewall. Courts exist to protect the rights of minorities.

Comment 3: RE p.7, ¶2. The WSBA provided Hiskes with no information about the salary of the Executive Director. WSBA says it provided Hiskes with “maximum and minimum salaries for each position at the WSBA from General Counsel to File Clerk” and that “Mr. Hiskes thus could determine the salary range for every employee at the WSBA.” However, the range “General Counsel to File Clerk” (CP39-40) does not include the WSBA Executive Director, and WSBA presents no document showing her salary range. Besides, this case is about disclosure by DRS of particular DRS records. Discussion about about other records not at DRS is pointless since disclosure of one public record does not substitute for that of another.

RESPONSE TO ARGUMENT OF APPELLANTS

Comment 4: RE p.12, ¶B. Appellants state that “WSBA is not a Public Agency”. But WSBA participation in PERS (CP30) is impossible unless it is a public agency as defined in RCW 41.40.010.

Comment 5: RE p.12, ¶B. WSBA's status as a public agency is not relevant since DRS owns the records. Appellants state that “WSBA is not a Public Agency”. But records at issue in this case are records of the Department of Retirement Systems(DRS), not the WSBA. DRS is obviously a public agency. DRS is not a passive archive holding records. DRS is responsible for administering pension plans containing money contributed by plan members. In order to do this, DRS must use the records on employee contributions not only to calculate sums eventually due to retirees, but also the size and nature of reserve funds required to prudently administer the system. Thus, records of financial inputs to the system by employees “contain information relating to the conduct of government” as defined in RCW 42.17.020(42) and they have a “direct impact” on decision-making concerning the size of retiree payments and reserve requirements.

Appellants say that “*Because the WSBA does not perform a government function, its employee compensation records necessarily do not relate to the functioning of government*” (Appellants Brief, p. 17). But the records kept by DRS are not about the functioning of the WSBA, but rather are essential to decision-making

by DRS concerning PERS. Taxpayers have a right to know the basis for all payments, as reflected in contribution records maintained by DRS. This has nothing to do with what the WSBA does or does not do, but has only to do with how DRS itself decides to pay out money and set reserve levels, in conjunction with the State Actuary per RCW41.45.010(9) and RCW 44.44. Payouts and payments into PERS, including those connected with the WSBA, are necessarily part of the Actuary's analysis required under RCW 41.45.030. This information is thus necessarily a “public record”.

Comment 6: Even the records of private persons can be subject to the Public Records Act, so the particular status of the WSBA is irrelevant to Public Records Act analysis. *Laborers International Union v. Aberdeen*, 31 Wn. App. 445, 642 P.2d 418 (Div II, 1982) dealt with the issue of private salary information in the hands of a public agency in the context of the Public Records Act. In that case, the actual names of the employees were already known, as they are in this case due to WSBA disclosure. Also, the general ranges of salaries were known, as they are in this case (except for the Executive Director). This Court squarely held that privacy considerations would not block disclosure in these circumstances.

Comment 7: Promises of confidentiality do not expand the scope of privacy under the Public Records Act. *Police Guild v. Liquor Control Board*, 112 Wn.2d 230 (1989). Unjustified and reckless promises made by a third party to its own employees should not be allowed to override the obligations of DRS under the Public Records Act.

CONCLUSION

Because DRS is a public agency and because employee contribution records are necessarily used by DRS in computing future retiree payouts and in determining proper levels of reserves that must be kept, all employee contribution records are necessarily public records, subject to disclosure. The peculiar status of the WSBA is not relevant since we are here concerned with the records of DRS, not those of the WSBA.

In any event, WSBA members have an inherent right of access to WSBA records. The existence of this right negates any expectation of privacy asserted by WSBA employees.

Respectfully submitted,



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STATE OF WASHINGTON,
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CERTIFICATE OF
SERVICE

I hereby certify that on September 9, 2009, I served a copy of the

~~Motion for Extension of Time to File Brief of Respondent State of~~ *E. Hiskes*

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