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SUPREME COURT
OF THE STATE OF WASHINGTON

BELO MANAGEMENT SERVICES, INC., a Delaware Corporation;
KIRO-TV, INC., a Delaware Corporation; TRIBUNE
BROADCASTING SEATTLE, LLC, a Delaware Limited Liability
Company; and CBS CORPORATION,

Respondents,

v.

CLICK! NETWORK, a Department of Tacoma Public Utilities
Division of the CITY OF TACOMA; and TACOMA NEWS, INC.

TACOMA NEWS, INC. as

Appellant.

APPELLANT TACOMA NEWS, INC.'S REPLY BRIEF

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I. ARGUMENT IN REPLY

Where a government agency contracts with a private vendor for services, the public has a right to know the contract price. The injunction issued below was premised on the incorrect contentions that “[t]hrough its creation of Click, [the City of Tacoma] essentially determined” what is in the public interest, CBS Br. at 43, and that “CLICK! is not a purely governmental agency,” Fisher Br. at 5, such that the rules of the Public Records Act (“PRA”) somehow do not apply. This Court should reverse.

A. This Court’s Review of Injunctions Denying Access to Public Records Under RCW 42.56.540 is *De Novo*.

This Court has long determined injunctions issued under RCW 42.56.540 are reviewed *de novo*, particularly where the record is only documentary evidence. *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 34–36, 769 P.2d 283 (1989).

In a proceeding brought under this injunction statute [RCW 42.56.540], the party seeking to prevent disclosure has the burden of proof. Although the act does not expressly declare such a proceeding to be *de novo*, the injunction statute by its terms contemplates that the court may go beyond the confines of any agency record in making its decision. *It is clear, therefore, that judicial review of the agency decision is also de novo in actions brought under this statute.*

Id. at 35 (footnotes omitted) (emphasis added).

Since *Spokane Research*, multiple Washington decisions have followed this *de novo* standard of review. *Bainbridge Island Police Guild*

v. City of Puyallup, 172 Wn.2d 398, 407, 259 P.3d 190 (2011) (“Judicial review under the PRA and this injunction statute is *de novo*”); *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009) (decision declining to issue injunction under RCW 42.56.540 reviewed *de novo*); *King County Dept. of Adult & Juvenile Detention v. Parmelee*, 162 Wn. App. 337, 351, 254 P.3d 927 (2011) (“We review *de novo* injunctions issued under the PRA”); *DeLong v. Parmelee*, 157 Wn. App. 119, 143, 236 P.3d 936 (2010) (“We review injunctions issued under the PRA *de novo*”); *Dragonslayer, Inc. v. Wash. State Gambling Comm’n*, 139 Wn. App. 433, 441–42, 161 P.3d 428 (2007) (“Our review of actions under the PDA and the injunction statute is *de novo*. . . . Where 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 witnesses’ credibility or competency, we are not bound by the trial court’s factual findings and stand in the same position as the trial court”).

Fisher cites *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 428, 300 P.3d 376 (2013) and argues this Court now applies abuse of discretion. Fisher Br. at 17–18. Fisher’s argument is incorrect.

First, the injunction at issue in *Resident Action Council* was not issued pursuant to RCW 42.56.540. The statute is not cited in the decision. The PRA injunction statute lists specific limitations on when a court can enjoin

access to public records. RCW 42.56.540 (“The examination of any specific public record may be enjoined if . . .”). The statute does not relate to other injunctions a Court might issue. The injunction issued in *Resident Action Council* commanded the agency “to publish procedures regarding public records requests; to publish a list of applicable exemptions; and to establish policies governing redaction, explanations of withholding, and electronic records.” 177 Wn.2d at 445. It was in the context of this positive injunction that the Court concluded that the trial court acted within its broad discretion. The *Resident Action Council* Court did not review an injunction under RCW 42.56.540 ordering the withholding of documents. This, however, is a RCW 42.56.540 action.

Second, by rendering its decision in *Resident Action Council* this Court did not overrule *Spokane Research*. Under *stare decisis*, this Court does not reinterpret a statute as the legislature is free to amend the statute should it disagree with this Court’s interpretation. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). “This respect for precedent ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” *City of Federal Way v. Koenig*, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d

720 (1991)). Here, this Court has interpreted RCW 42.56.540 as requiring *de novo* review since 1989 without relevant legislative change. *Resident Action Council* did not overrule *Spokane Research* and its progeny.

Third, this Court has continuously held that it reviews decisions allowing access to public records *de novo* when the record was limited to documentary evidence. *Bainbridge Island Police Guild*, 172 Wn.2d at 407; *Dragonslayer*, 139 Wn. App. at 441–42. In fact, on the same day *Resident Action Council* was decided, this Court wrote: “Appellate courts stand in the shoes of the trial court when reviewing declarations, memoranda of law, and other documentary evidence.” *Ameriquest Mortg. Co. v. Office of Attorney Gen. of Wash.* (“*Ameriquest II*”), 177 Wn.2d 467, 478, 300 P.3d 799 (2013). Here, the decision is reviewed *de novo* as it was based exclusively on documentary evidence.

B. The Burden is on the Broadcasters to Establish an Exemption Under the Public Records Act.

The Broadcasters boast that they submitted many declarations while TNT submitted few, exclaiming that their evidence is “uncontroverted,” CBS Br. at 39; “unrefuted,” Belo Br. at 7; and “unrebutted,” Fisher Br. at 3. One even goes so far as to assert that “TNT provided no evidence.” *Id.* at 2. Beyond being factually incorrect—TNT submitted unrebutted evidence that the City’s rate negotiations with broadcasters were a matter

of political debate, legislative action, and intense public concern,¹ CP 83-130—it is wrong to assert TNT is obligated to come forward with declarations refuting evidence it is not even allowed to see.

In an action to enjoin the release of public records, “[t]he burden of proof is on the party seeking to prevent disclosure to show that an exemption applies.” *Ameriquest II*, 177 Wn.2d at 486. Similarly, a party asserting the existence of a trade secret “has the burden of proving that legally protectable secrets exist.” *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 49, 738 P.2d 665 (1987).

The burden is *not* on TNT to refute the Broadcasters’ assertions about the contents of documents that TNT cannot see. The trial court made the same observation, VRP 162, with which the Broadcasters agreed:

MS. ARNESON: I would also submit that the TNT has not submitted any evidence indicating that there is any reason to disbelieve the affidavits

THE COURT: How would they know whether there’s any reason to disbelieve if they haven’t seen the redaction? They don’t know what’s in it.

MS. ARNESON: They haven’t made an argument that it appears to be anything else. I do understand what you’re saying, Your Honor

¹ CBS’s suggestion that TNT’s evidence “be ignored” for “obvious bias” is uncited and unfounded. CBS Br. at 49–50. By that measure, no declaration could be considered.

Nor is the burden on TNT to refute declarations by the Broadcasters that, on their face, do little more than speculate about potential horrors that may follow disclosure. App. Br. at 27–31. In both *McCallum* and *Woo*, it was the shortcomings of the supporting declarations alone (rather than contrary evidence from the opposition) that doomed the trade secrets claims. *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 425–26, 204 P.3d 944 (2009); *Woo v. Fireman’s Fund Ins. Co.*, 137 Wn. App. 480, 489, 154 P.2d 236 (2007). Here, where the sum total of the Broadcasters’ declarations establish release of the Retransmission Consent Agreements (“RCA”) may “greatly complicate” future negotiations (CP 575)—each of which is unique (*e.g.*, CP 448)—the Broadcasters have not established the requisite harm under the UTSA *or* the PRA.²

The Broadcasters’ argument is emblematic of the unverifiable assertions of secrecy the PRA was enacted to cure: those in the know dictating to those in the dark what they ought to know. RCW 42.56.030 (“The people. . . do not give their public servants the right to decide what is good for the people to know and what is not good for them to know”). The proposition is equally objectionable here, which is why the burden

² As discussed below, even within the regulatory proceedings cited by the Broadcasters, there was an expectation the parties were aware of the *market value* of their services.

rests on the Broadcasters to establish a trade secret *and* grounds for nondisclosure.

C. Neither Congress Nor the FCC has Determined Retransmission Consent Agreements (“RCAs”) are “Highly Confidential” or That “Confidentiality is Essential” to RCA Negotiations.

Contrary to the Broadcasters’ carefully-worded assertions, neither Congress nor the Federal Communications Commission (“FCC” or “Commission”) has held that RCAs are “highly confidential.” That phrase, found nowhere in any statute or regulation cited by the Broadcasters, is lifted from an uncontested protective order and a letter about another. Similarly, neither Congress nor the FCC has held “confidentiality is essential” to market competition in the television industry. That conclusion is extrapolated by the Broadcasters alone.

1. The FCC merely categorizes RCAs as “not routinely available for public inspection”—meaning disclosure is subject to FOIA.

Far from deeming all RCAs “highly confidential,” the FCC has simply categorized them as “not routinely available for public inspection.” 47 C.F.R. § 0.457(d). This designation distinguishes certain records from those that *are* “routinely available for public inspection”—that is, regularly accessible at either the FCC’s website or its “Reference Information Center.” 47 C.F.R. § 0.451(a); *see also* §§ 0.453; 0.455. This just means that a requestor must satisfy the requirements of FOIA to access RCAs held by the FCC. 47 C.F.R. § 0.461.

Many FCC records are automatically available for public inspection. 47 C.F.R. §§ 0.451(a); 0.453; 0.455. However, since parties subject to FCC regulation are regularly *required* to submit documents to the FCC, *e.g.*, 47 C.F.R. § 76.41 (franchise applications); 47 C.F.R. § 76.65(c) (bad faith adjudications), the Commission has established procedures for confidential treatment of certain records. For instance, 47 C.F.R. § 0.457 lists types of records that are “not routinely available for public inspection pursuant to 5 U.S.C. § 552(b)” including “[p]rogramming contracts between programmers and multichannel video programming distributors [(“MVPD”).” 47 C.F.R. § 0.457(d). A party may also request that other information be designated as “not routinely available.” 47 C.F.R. §§ 0.459(a)(1). Additionally, “[t]he Commission will entertain . . . a party’s request to further restrict access” to such information. 47 C.F.R. § 76.9(d). The phrase “highly confidential” is found nowhere in these regulations.

The two “authorities” cited by the Broadcasters for the proposition that the FCC has “designated [RCAs] as ‘Highly Confidential,’” *Belo Br.* at 18, involve what are effectively uncontested applications for protective orders under 47 C.F.R. § 76.9(d) by media companies applying for FCC licenses. The first is not even a ruling, but a letter from an FCC Bureau Chief to two attorneys representing satellite companies objecting to an application for consent to transfer a license. *Fed. Commcn’s Comm’n*

Letter to Michalopoulos & Bjornson, 25 F.C.C.R. 8016 (2010) (“*Letter*”). Notably, that letter explains that the referenced protective order³ merely “permits *persons submitting* . . . documents and information to *designate* those materials as Highly Confidential” *Id.* at 1806 (emphasis added). To stamp a document as “Highly Confidential” is solely within the discretion of the companies and means only that the document contains information that “the *Submitting Party claims*, constitutes some of its most sensitive business data which, if released to competitors, would allow those competitors to gain a significant advantage in the marketplace.” *Id.* at 8017 n.3 (emphasis added).⁴

No one opposed either of these applications for heightened confidential treatment. No court ever cited either of these orders as authority for *any* proposition—let alone the proposition that the “*FCC has*

³ *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.* (“Comcast Appl.”), 25 F.C.C.R. 2140 (2010).

⁴ The underlying order that is the topic of the *Letter* further clarifies that the “highly confidential” designation is one made by broadcasters themselves. *Comcast Appl.*, 25 F.C.C.R. at 2142 (“Stamped Highly Confidential Document” means only that the “*Submitting Party* . . . represents that [the document] contains information that *the Submitting Party believes* should be subject to protection under [FOIA].” (Emphasis added)). The uncontested protective order at issue in *Application of News Corp. & the DirecTV Group, Inc., Transferors, & Liberty Media Corp., Transferee* (“*News Corp. Appl.*”), 22 F.C.C.R. 12797 (2007) is largely the same. Again, the FCC allowed the applicants themselves to “designate . . . materials as highly confidential.” *Id.* at 12798. Again, *applicants* had the discretion to stamp documents highly confidential so long as the *applicant* believed it “should be subject to protection under FOIA[.]” *Id.* at 12799.

determined pricing information to be highly confidential.” Belo Br. at 18 (emphasis added). The net effect of these orders is simply that, in addition to not being routinely available to the public (*i.e.*, subject to FOIA), access to designated records will be limited to outside counsel, their employees, and outside consultants and experts. *Letter*, 25 F.C.C.R. at 8016; *News Corp. Appl.* at 12800. At best, one can glean from these agreed orders that the FCC will typically honor *uncontested* requests, by the media companies, to treat those submissions confidential, but subject to FOIA.

2. There is no federal policy of confidentiality for RCAs.

The Broadcasters also embellish the FCC’s policy statement that RCA negotiations occur “in an atmosphere of honesty, purpose and clarity of process,” by adding their own conclusion: “for which confidentiality is essential.” Belo Br. at 6–7, 20. Of course, the FCC has never held confidentiality is essential to accomplishing the intent of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”). The FCC report cited by the Broadcasters focuses almost exclusively on a hands-off approach, harnessing market forces through good faith negotiation. *In Re Implementation of Satellite Home Viewer Implementation Act of 1999: Retransmission Consent Issues: Good Faith Negotiation & Exclusivity* (“*Negotiation Report*”), 15 F.C.C.R. 5445, 5462 (2000) (“Congress intended . . . that the substance of the agreements

generally should be left to the market”). The FCC identified seven standards to satisfy the requirement of good faith negotiation, *id.* at 5462–64, and four presumptive indicators of bad faith, *id.* at 5470—none of which was confidentiality. *Id.* at 5462–64. At no point does the *Negotiation Report* discuss secrecy, confidentiality, or non-disclosure as an “essential” element (or any element) of federal policy or the requirement of good faith negotiation. In the entirety of the 52-page report—itsself dedicated to the negotiation of RCAs—the term “highly confidential” never appears.⁵

It is one thing to argue broadcasters cooperatively reached an understanding that negotiated prices should remain a secret among themselves to leverage higher prices from MVPDs. VRP 50 (“We don’t know their rates. We don’t want to know their rates.”). It is quite another to argue that there is an established federal policy endorsing (or requiring) this kind of conduct. That is just not the case.⁶

⁵ It is notable that the Commission acknowledged there may be circumstances where MVPDs would be entitled to discover a broadcaster’s RCAs with other MVPDs. *Id.* at 5479. In discussing the availability of discovery where a complaint is made that a party failed to engage in good faith negotiations, the Commission expressly identified RCAs with other MVPDs as potential evidence of bad faith. *Id.* It explained discovery may be permitted “[w]here complainants can demonstrate that such information is not available (e.g., agreements entered into with other MVPDs).” *Id.* (emphasis added).

⁶ The Broadcasters’ reliance on statements by legislators to establish Congressional intent to “even out the playing field,” *Belo Br.* at 18 n.2, is misplaced. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (“one legislator’s comments from the floor are

D. RCAs Held by the FCC are Subject to Disclosure Under FOIA.

As discussed above, when the FCC deems a document “not routinely available for public inspection,” it simply means that the document is not automatically accessible at the FCC’s website or offices. *See* 47 C.F.R. § 0.451. Rather, a party wishing to access those documents must satisfy FOIA. 47 C.F.R. § 0.461.⁷ As CBS rightly acknowledges:

FOIA contains wholly different standards for disclosure than the PRA, and the federal statute—which by its terms applies only to federal agencies—simply does not govern review of the instant case.

CBS Br. at 36 (underlining in original); *see also* App. Br. at 34–35.

As noted in TNT’s opening brief, one of the primary reasons FOIA does not govern this case is that FOIA analysis requires a balancing of interests between the requestor, the government, and the public. App. Br.

considered inadequate to establish legislative intent”); *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 154–55, 839 P.2d 324 (1992) (“we have cautioned that a legislator’s comments from the floor are not necessarily indicative of legislative intent”) (citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 63, 821 P.2d 18 (1991) (citing *N. Coast Air Servs., Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 326–27, 759 P.2d 405 (1988))); *Snow Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972) (“statements and opinions of individual legislators generally are not considered by the courts in construing legislation”). In turn, the assertion that the confidentiality of retransmission fees are “the result of Congressional intent to level the playing field,” *Belo Br.* at 11, is unfounded.

⁷ Regardless of whether a submission is presumed to be (§ 0.457) or granted status as (§ 0.459) “not routinely available,” its remains subject to disclosure under FOIA. *See* 47 C.F.R. § 0.461. Requests for inspection “shall be captioned ‘Freedom of Information Act Request,’” 47 C.F.R. § 0.461(b)(1), sent to the FCC’s FOIA department, § 0.461(d)(1), and assigned to the FOIA Control Office, § 0.461(e)(1).

at 34 n.13. In contrast, the PRA expressly forbids courts from engaging in this kind of “freewheeling policy judgment.” *Id.* n.14 (quoting *Boroumet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990)).

It is for this reason that the FCC adjudications cited by the Broadcasters have no bearing on a request under the PRA. The FCC’s regulations expressly contemplate the very balancing of interests that the PRA forbids. For instance, “the Commission will entertain requests from members of the public under § 0.461 for permission to inspect” documents not routinely available. 47 C.F.R. § 0.457. But in doing so, the Commission “will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in light of the facts of the particular case.” *Id.* To facilitate this FOIA balancing, a requestor of such records must submit “a statement of the reasons for inspection and the facts in support thereof.” 47 C.F.R. § 461(c).

In stark contrast, under the PRA “agencies may not inquire into the identity of the requestor or the reason for the request” as these questions are irrelevant to whether disclosure is required. *Cornu-Labat v. Hospital Dist. No. 2 Grant County*, 177 Wn.2d 221, 240, 298 P.3d 741 (2013) (citing RCW 42.56.080).

Interest balancing was fundamental in the *only* FCC adjudication of a FOIA request cited by the Broadcasters. *In the Matter of National Rural*

Telephone Cooperative on Request for Inspection of Records, 5 F.C.C.R. 502 (1990) (“the Bureau found that the subject carriers’ interests . . . outweighed the public benefits which might be gained from disclosure”). Whether FOIA’s Exemption 4 (5 U.S.C. § 552(b)(4)), regarding trade secrets or commercial information, applied to the requested contracts was never at issue as the requestor never “challenged the applicability or Exemption 4.” *In re Nat’l Rural Tel. Coop.*, 5 F.C.C.R. at 503. Rather, the requestor relied on a notion foreign to the PRA: “that FOIA exemptions are not mandatory and that the Government is afforded discretion to release arguably exempt information if disclosure is in the public interest.” *Id.* at 502. Without ever ruling on whether the contracts at issue fell within Exemption 4, the FCC denied the request on the sole basis that disclosure would not serve the public interest.”⁸ *Id.* at 503. The ruling was never appealed to a court and has never been cited by any court.⁹

⁸ Had the issue actually been put before the FCC, it may well have ruled, consistent with the majority of federal courts, that line-item prices in government contracts are not trade secrets exempt from disclosure under Exemption 4. App. Br. at 35–36 (discussing among others Gregory H. McClure, *The Treatment of Contract Prices Under the Trade Secrets Act and Freedom of Information Act Exemption 4: Are Contract Prices Really Trade Secrets?*, 31 Pub. Cont. L.J. 185, 196 (2002) (“The vast majority of cases have held that unit prices are releasable”); *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 41 (D.D.C.1987) (“The public . . . is entitled to know just how and why a government agency decided to spend public funds as it did”).

⁹ The remaining FCC decisions cited by the Broadcasters are even less instructive as neither involved any dispute whether RCAs were trade secrets under Exemption 4 or otherwise. *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 F.C.C.R. 15070

The FCC's handling of RCAs is controlled by FOIA. Even then, the administrative decisions applying those regulations are not premised on what CBS refers to as "the generic FOIA exemption for trade secrets and commercial information"—also known as Exemption 4. CBS Br. at 36–37. Regardless, since FOIA "simply does not govern" this case, it follows that any FCC decisions applying FOIA would not govern it either.

E. FCC Regulations are Not an "Other Statute" as They Merely Enact FOIA Standards, Which Washington Does Not Recognize.

A federal regulation may only constitute an "other statute" exemption under the PRA where a statute passed by Congress expressly authorizes an administrative agency to promulgate a specific rule. *Ameriquist Mortg. Co. v. Wash. State Office of Attorney Gen.* ("Ameriquist I"), 170 Wn.2d 418, 241 P.3d 1245 (2010); *Freedom Found. v. Wash. State Dep't of Transp.*, 168 Wn. App. 278, 276 P.3d 341 (2012). Here, the Broadcasters

(2001) involved a complaint by an MVPD alleging that a broadcaster failed to negotiate in good faith. As a preliminary matter, the Commission addressed whether certain exhibits should receive confidential treatment under 47 C.F.R. § 0.459 (thus subjecting any future request to FOIA). 16 F.C.C.R. at 15072. The challenge to the request for confidential treatment was not premised on the existence of a trade secret but an allegation that the MVPD had engaged in an abuse of process, initially requesting confidential treatment of documents but subsequently disclosing the same in a "Charlie Chat" program on its own channels. *Id.* at 15073–76. *EchoStar* has never been cited by any court. *In the Matter of: Mediacom Communications Corp.*, 22 F.C.C.R. 35 (2007), involving another complaint for failure to negotiate in good faith, offers even less analysis. The footnote that the Broadcasters cite merely provides that the FCC granted the respective parities' unopposed requests for confidential treatment under 47 C.F.R. § 0.459. The case has never been cited by any court.

rely on a federal statute that does not direct the FCC to promulgate a confidentiality regulation. The FCC regulation itself is not authorized by that statute but by FOIA. This Court has long held FOIA is not an “other statute” under the PRA. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 265–66, 884 P.2d 592 (1994).

The authorities cited by the Broadcasters are not to the contrary. In *Ameriquest I*, this Court held that the Gramm–Leach–Bliley Act (“GLBA”), 15 U.S.C. §§ 6801–09, in conjunction with a Federal Trade Commission (“FTC”) rule, was an “other statute” under the PRA. 170 Wn.2d at 439–40. Based on the express directive, the FTC adopted 16 C.F.R. § 313, under which financial institutions may not disclose a consumer’s personal information without affording the consumer notice and an opportunity to opt out. *Id.* In describing the federal requirement, this Court cited *both* the statute and its parallel FTC regulation in nearly every instance. *E.g., id.* at 425–26. The Court “conclude[d] that the GLBA (together with the FTC rule enforcing it) is an ‘other statute[,]’” also noting it perceived no conflict between the GLBA and the PRA. *Id.* at 440.

In *Freedom Foundation*, the Court of Appeals recognized that “*Ameriquest I* [I] establishes the rule that federal regulations *with their enabling statutes* qualify as ‘other statute’ exemptions” 168 Wn. App. at 287 (emphasis added). As in *Ameriquest I*, the court observed that

the U.S. Department of Transportation (“USDOT”) regulation at issue was promulgated upon a Congressional directive to “prescribe regulations that protect the confidentiality of employee post-accident drug and alcohol test results[.]” *Id.* at 289 (listing specific statutory directives). The court held that the statute, together with the USDOT regulation, was an “other statute.” *Id.* In doing so, it described both the case before it and *Ameriquest I* as situations “where a federal regulation has been promulgated under authority of a federal statute to fulfill the statute’s directive.” *Id.* at 292.

Here, there is no similar directive by Congress for the FCC to treat RCAs as confidential. The Broadcasters cite 47 U.S.C. § 325(b) as the enabling statute and 47 C.F.R. § 0.459 as the enforcement provision. But the statute, which directs the FCC to promulgate rules requiring good faith negotiations among media companies, makes no mention whatsoever of any confidentiality requirement. *See* 47 U.S.C. § 325(b)(3)(C)(ii), (iii).

Unsurprisingly, the list of enabling authorities at the end of 47 C.F.R. § 0.459, a generic confidentiality regulation, does not include 47 U.S.C. § 325(b). Instead, 47 C.F.R. § 0.459, like all other FCC regulations concerning confidentiality is, by its terms, authorized under FOIA. *E.g.*, 47 U.S.C. § 0.459(d)(2) (confidentiality only maintained if “non-

disclosure is consistent with the provisions of [FOIA], 5 U.S.C. 552”).¹⁰ Even 47 C.F.R. § 76.9, the regulation allowing parties to request confidential treatment, makes clear that FOIA governs: “If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating . . . that the material . . . falls under the standards for nondisclosure *enunciated in FOIA*.” (Emphasis added.)

The statutes and parallel regulations in *Ameriquest I* and *Freedom Foundation* share no parity with the disjointed statutes and regulations identified by the Broadcasters. The FCC’s confidentiality scheme is premised upon and solely authorized by FOIA, which this Court has long held does not constitute an “other statute.”

F. The Broadcasters Fail to Cite a Single Case Holding That the Price Paid by a Government Agency is a Trade Secret.

Not one of the non-binding authorities¹¹ identified by the Broadcasters supports the conclusion that prices in a government contract are trade

¹⁰ 47 C.F.R. § 0.459 lists two statutory provisions as authorities, “unless otherwise noted.” The same is true of §§ 0.457 and 0.461. Each regulation references FOIA.

¹¹ The Broadcasters chiefly rely upon unpublished federal decisions. *Belo Br.* at 26–27 (citing *Keystone Fruit Mktg., Inc. v. Brownfield*, CV-05-5087-RHW, 2006 WL 1873800 (E.D. Wash. July 6, 2006); *StoneCor Group, Inc. v. Campton*, No. C05-1225JLR 2006 WL 314336 (W.D. Wash. Feb. 7, 2006)); *CBS Br.* at 25–26 (citing same). While it is true that the Ninth Circuit issued an unpublished appellate opinion in *Keystone* in 2009, that decision affirmed that the customer list at issue “was *not* a trade secret under Washington’s [UTSA].” 352 F. App’x 169, 173 (9th Cir. 2009) (unpublished) (emphasis added).

secrets. Rather, the Broadcasters cite cases in support of a proposition that TNT does not dispute: that customer or pricing lists compiled by private businesses may be trade secrets. But tellingly, not one of the five Broadcasters cites a single case from any jurisdiction in the United States holding the price a government agency pays for services is a trade secret.

Several of the Broadcasters' cases concern company price or customer lists, *not* government contracts. *See e.g., Nat'l City Bank, N.A. v. Prime Lending, Inc.*, 737 F. Supp. 2d 1257, 1266 (E.D. Wash. 2010) ("Plaintiffs' allegation that Defendants misappropriated their customer list . . . unlikely to succeed").¹² Just two of the cases concern financial data submitted to a government agency as part of a *regulatory* scheme. Neither is helpful to the Broadcasters. *Gannett River States Publishing Co., Inc. v. Entergy Mississippi, Inc.*, 940 So.2d 221 (Miss. Sup. Ct. 2006) did not involve a

¹² See also, *Pac. Aerospace & Electronics, Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1200–01 (E.D. Wash. 2003) (company's compilation of "customer project information, purchasing history, detailed information about customer's needs, technical project details, and the identities of individual contact people"); *Glacier Water Co., LLC v. Earl*, C08-1705RSL, 2010 WL 3430518 at *4 (W.D. Wash. Aug. 30, 2010) (unpublished) (defendant recognized in asset purchase agreement that plaintiffs were contributing their "designs, customer and supplier lists, pricing and cost information, and marketing"); *Frantz v. Johnson*, 116 Nev. 455, 999 P.2d 351 (Nev. Sup. Ct. 2000) ("We emphasize that not every customer and pricing list will be protected as a trade secret."; former salesman took customer and pricing lists to work for competitor); *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 297, 849 A.2d 451 (Md. Ct. App. 2004) (salesman copied company computer containing "detailed technical specifications relating to [company's] product" as well as preferred distributors, and data compiled in budgeting software); *In re Union Pac. R. Co.*, 294 S.W.3d 589, 591 (Tex. Sup. Ct. 2009) (pre-UTSA analysis of private railroad company's rates "for rail shipping and the methods used in computing those rates").

public contract but one between a private utility and a high-volume user. *Id.* at 222. It was submitted to a government agency under a Mississippi law requiring approval of such contracts. *Id.* at 222 n.1. Following *in camera* review of the records, the trial court found for the utility company. *Id.* at 223. The Mississippi court did not address the issue presented here.¹³

The Broadcasters' reliance on a 2012 Iowa Supreme Court decision to *disclose* financial information contained in applications for tax credits by movie producers is surprising. *Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207 (Iowa Sup. Ct. 2012). That case provides both a sharp critique of vague declarations of financial harm and a ringing endorsement of the public's right to know how public money is spent.

In *Iowa Film*, a law providing tax credits to film production companies became a topic of public interest "as certain irregularities came to light." *Id.* at 213. Two television stations made records requests for these applications, for which the tax credits totaled over \$14 million. *Id.*

¹³ In interpreting a Mississippi statutory provision expressly granting the public access to "information . . . related to the establishment of, or changes in, rates" charged by utilities, Miss. Code § 79-23-1(1), the Mississippi court explained: "'Public' defined as an adjective [means] 'accessible to or shared by all members of the community.'" *Gannett*, 940 So.2d at 226 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1836 (3rd ed. 1986)). This "plain and unambiguous" meaning is instructive here in considering the *public* contract between the City and the Broadcasters.

The court first rejected the producers' argument that they would suffer substantial harm based on the vague and conclusory nature of supporting affidavits. *Id.* at 223. While the suggestion that disclosure could impair profits was "a reasonable theoretical argument," the court explained that "the Producers offered nothing in support of it other than theory. As in *U.S. West Communications*,^[14] 'hard facts' are missing." *Id.* The court provided an example of one such conclusory affidavit:

[R]eleasing this summary information would hurt any chances of making a profit on the film by letting the buyers at the distributing companies know the true and exact cost of making the film. This budget information is not ordinarily available in the film industry when representing a film for sale, and it would be difficult to seek a price of more than cost for the project, inhibiting the ability of the film to secure a profit.

Id. (quoting affidavit). The court observed: "No examples were given. And several points in the record tend to undermine this argument." *Id.*

"Evidence" such as this closely resembles the speculative declarations submitted by the Broadcasters. While financial harm to the Broadcasters is a *theory*, the hard facts are missing. Moreover, numerous points in the

¹⁴ The Iowa Supreme Court quoted extensively from *U.S. West Communications, Inc. v. Office of Consumer Advocate*, 498 N.W.2d 711, 715 (Iowa Sup. Ct. 1993): "While affidavits and testimony by West and its subsidiary employees provide opinions concerning the deleterious effects disclosure will have on West or its affiliates, such evidence is self-serving and does not contain hard facts. . . . While reference is made to competitors, the record is vague concerning the extent of the advantage the lease information will provide competitors."

record tend to undermine the argument. *See, e.g.*, App. Br. at 29–31 (for instance, Broadcaster insistence that every RCA is separately negotiated based on market conditions).¹⁵

The Iowa court held the public had a substantial and legitimate interest in knowing how tax exemptions were expended. *Iowa Film*, 818 N.W.2d at 225–26. Applying a provision exempting disclosure only if release would “serve no public purpose[.]” Iowa Code § 22.7(6) (similar to the PRA’s requirement that disclosure “clearly not be in the public interest,” RCW 42.56.540), the court noted: “Because public funds are involved here, the public has a right to know how those funds have been spent—what services were provided for these funds and how efficiently the funds were spent.” *Id.* at 226 (citation omitted). “[A] private entity is receiving taxpayer money in furtherance of a public purpose.” *Id.* “The public would appear to have an interest in knowing how this money was used.” *Id.*

The same is true here but with even greater force. The City is not holding an application, a contract between private entities that it has a regulatory obligation to approve, or a company’s compilation of its

¹⁵ FCC decisions cited by the Broadcasters suggest the Broadcasters are not as blind to market rates as they claim. *E.g.*, *Mediacom*, 22 F.C.C.R. at 41 (“Mediacom and Sinclair are sophisticated, well established media corporations that can determine for themselves whether particular proposals reflect market conditions”); 43 (“It seems reasonable that the fair market value of any source of programming would be based in large part on the measured popularity of such programming”).

customers' prices and preferences. The City has a contract, containing no trade secrets, which the public has an interest in reviewing.¹⁶

G. Withholding Non-financial Consideration is Without Justification.

In addition to the contract rates, the lower court also sanctioned the withholding of the non-financial consideration between Fisher and the City. CP 534-36. While Fisher broadly argues that all “Consideration in its RCA is an exempt trade secret[,]” Fisher Br. at 19, the company provides no justification as to how the non-financial terms of the agreement are a trade secret, why the public is without reason to know what the City exchanged, or how anyone will be harmed by disclosure. Other Broadcasters testified “the only information that had been redacted from the RCAs was information related to pricing[,]” Belo Br. at 45, but clearly this is not the circumstance with the Fisher contract. CP 447. Unidentified non-financial consideration between the government and a third party vendor is not a trade secret. On this record, and in the absence of *in*

¹⁶ Without analysis, the Broadcasters contend that in any lawsuit with the City over breach of the RCA, the RCA itself would remain confidential. Belo Br. at 33 n.5 (citing RCW 19.108.050); CBS Br. at 22 (citing GR 15). But the RCA would be Exhibit 1 in any such breach of contract trial (RCW 19.108.050 only applies to “action[s] under [the UTSA]”) and would necessarily be part of the court or jury’s decision-making process. On these facts, it seems incomprehensible that a trial court could either seal the record under *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004) or clear the courtroom under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) based on an assertion that a disputed contract *with the opposing party* is actually a trade secret. See WASH. CONST. art. I, § 10 (“[j]ustice in all cases shall be administered openly”).

camera review, the injunction was without legal justification and this Court should reverse.

H. The Assertion That RCAs are “Reflective” of “Negotiating Methods” Does Not Establish a Trade Secret.

CBS claims that unreviewed information “[b]eyond money issues” is not disclosable, arguing that RCAs are “reflective of CBS’s negotiating methods and business practices, and are therefore trade secrets.” CBS Br. at 10–11. This notion—that others could extrapolate “CBS’s ideas concerning the way in which it negotiates,” *id.* at 10, or where “CBS *may* ‘hold the line,’” *id.* at 11 (emphasis added)—is indicative of the Broadcasters’ speculated harms and overbroad view of trade secret protections. *Every* negotiated contract reflects the terms to which the parties are willing to agree. That is the whole point. But this does not mean the contract itself is a trade secret—a playbook of corporate policies and negotiation strategies (which TNT does not seek).

CBS tacitly concedes no court could make this determination without reviewing the RCA: “While a given term may or may not be a trade secret, *when the terms are put together in the agreement the resulting final document* constitutes a trade secret . . .” *Id.* (emphasis added). How can a court conclude a document, read as a whole, constitutes a trade secret, if it has not had an opportunity to read the document as a whole?

I. Broadcasters Do Not Justify the “Related Records” Injunction.

The Broadcasters spend little, if any, attention on the “related records” injunction. This injunction, by its terms, applies to TNT, CP 549, 551, and not just the “exact same” records as suggested by CBS. CBS Br. at 45. As acknowledged, TNT requested documents that were withheld pursuant to the injunction. Belo Br. at 50 n.10.

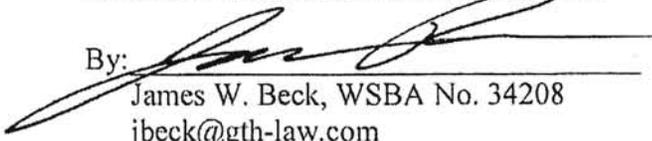
Instead of applying RCW 42.56.540, the trial court’s order turns the PRA upside down. The lower court’s order allows the Broadcasters to determine which records are “related” and prohibits the disclosure of the records until the Broadcasters consent. CP 551. RCW 42.56.540 limits the authority of the trial court to enter injunctions restricting public access to documents. Here, the injunction issued below is inconsistent with these limitations, and therefore, this Court should reverse.

II. CONCLUSION

Tacoma News, Inc. requests that this Court reverse the injunction.

Dated this 11th day of October, 2013.

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CERTIFICATE OF SERVICE

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I, Christine L. Scheall, declare under the penalty of perjury of the laws of the State of Washington that on October 11, 2013, I caused Appellant Tacoma News Inc.'s Reply Brief to be served via email, pursuant to the parties' mutual consent for service by email, as follows:

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Attached for filing in Supreme Court Case No.88934-1 is **Appellant Tacoma News, Inc.'s Reply Brief.**

Thank you.

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