

NO. 91048-1

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU HEALTHCARE 775NW,
Appellant/Plaintiffs,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, and FREEDOM FOUNDATION,
Respondents/Defendants,

BRIEF OF APPELLANT SEIU HEALTHCARE 775NW

Dmitri Iglitzin, WSBA No. 17673
Jennifer L. Robbins, WSBA No. 40861
SCHWERIN CAMPBELL BARNARD IGLITZIN &
LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

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I. INTRODUCTION

Appellant SEIU Healthcare 775NW (“SEIU 775”) is the collective bargaining representative of a statewide bargaining unit of Individual Providers (“IPs”) who provide personal care services to functionally disabled individuals throughout Washington State pursuant to Washington State’s Medicaid program.¹ In this Public Records Act (“PRA”) case,² SEIU 775 appeals the decision of Thurston County Superior Court Judge Erik Price to deny SEIU 775 its request for a preliminary and permanent injunction to prohibit Respondent Washington State Department of Social and Health Services (“DSHS”) from disclosing a list of names of IPs to PRA requester and Respondent the Freedom Foundation.

This case raises an issue of first impression, namely whether an organization can obtain through a PRA request a list of individuals in order a) to contact those individuals to encourage them to support the organization’s economic and political interests, b) to encourage those individuals to cease or withhold financial support from the organization’s declared economic and political adversary, and c) to use such contacts to fundraise from third parties, even though the PRA expressly prohibits an agency from giving, selling or providing access to lists of individuals for “commercial purposes.” RCW 42.56.070(9).

¹ The term “Individual Provider” is defined in RCW 74.39A.240(3).

² Washington’s Public Records Act is codified at Wash. Rev. Code Chapter 42.56.

Because the evidence before the trial court established that SEIU 775 was likely to prevail on the merits of its claim that the Freedom Foundation seeks a list of IP names for commercial purposes within the meaning of RCW 42.56.070(9), the trial court erred in denying SEIU 775 its requested preliminary injunctive relief. The trial court also erred by directing that trial of this action on the merits would be advanced and consolidated with the preliminary injunction hearing, per Superior Court Civil Rule (“CR”) 65(a)(2), given that no earlier notice of that decision had been given to SEIU 775, that SEIU 775’s discovery requests to the Freedom Foundation relating to its intended use of the list of IP names were still outstanding and unanswered, and that SEIU 775 was thereby denied the full opportunity to present its case at the permanent injunction hearing. The trial court further erred by determining that SEIU 775 did not have a clear legal or equitable right to enjoin DSHS from disclosing the list of IP names, because, as a matter of law, the Freedom Foundation’s purposes in requesting the list of IP names were purely political, not commercial.

SEIU 775 moved for injunctive relief on the independent grounds that the release of a list of IP names is tantamount to the release of the identities of Medicaid beneficiaries, and disclosure would therefore infringe upon privacy interests protected by RCW 42.56.230(1), 42 U.S.C.

§ 1396a(a)(7)(A) and 42 C.F.R. § 431.301. The trial court's refusal to grant an injunction on this basis constituted reversible error.

The Court should either a) reverse the trial court's denial of preliminary and permanent injunctive relief and remand for entry of an order permanently enjoining DSHS from disclosing the requested list of IP names to the Freedom Foundation or b) reverse the trial court's denial of preliminary and permanent injunctive relief, reverse the trial court's advancement and consolidation of the preliminary injunction hearing with a hearing on the merits, order a preliminary injunction be entered until SEIU 775 has sufficient time to complete all discovery already issued and a trial to be held, and order the superior court to conduct a trial on the merits of SEIU 775's request for a permanent injunction.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in denying SEIU 775's motion for a preliminary injunction where the evidence presented by SEIU 775 showed a likelihood of ultimately prevailing at a trial on the merits of its claim that the "commercial purposes" prohibition contained in RCW 42.56.070(9) bars DSHS from releasing a list of IP names in response to the Freedom Foundation's PRA request, because the Freedom Foundation requested the list to economically benefit itself and to economically harm SEIU 775.

2. Did the trial court err in advancing and consolidating the trial of this action on the merits with the hearing on SEIU 775's motion for a preliminary injunction, pursuant to Civil Rule 65(a)(2), given that it did not give prior notice to SEIU 775, that SEIU 775's discovery requests were still outstanding and unanswered, and that SEIU 775 was thereby denied the notice and time to prepare necessary to fully present its case at the permanent injunction hearing?

3. Did the trial court err in denying SEIU 775's motion for a permanent injunction on the grounds that "even assuming the accuracy of the allegations by [Plaintiff] as to the motivations of the Freedom Foundation and even assuming that further discovery would support [Plaintiff's] allegations," SEIU 775 did not have a clear legal or equitable right to enjoin DSHS from releasing a list of IP names in response to a PRA request by the Freedom Foundation on the basis that the Freedom Foundation requested the list for "commercial purposes" within the meaning of RCW 42.56.070(9)?

4. Did the trial court err in denying SEIU 775's request for a preliminary and permanent injunction where the evidence presented by SEIU 775 showed a likelihood of ultimately prevailing at a trial on the merits of its claim, and that SEIU 775 had a clear legal or equitable right with regard to its claim, that the Freedom Foundation is not entitled to

receive from DSHS a list of IP names in response to its PRA request, because release of that information is tantamount to the release of the identities of Medicaid beneficiaries and would therefore infringe upon privacy interests protected by RCW 42.56.230(1), 42 U.S.C. § 1396a(a)(7)(A), and 42 C.F.R. § 431.301?

III. STATEMENT OF THE CASE

Individual Providers provide personal care services to functionally disabled individuals throughout Washington State under the Medicaid personal care, community options program entry system, chore services program, or respite care program. RCW 74.39A.240(3). Pursuant to the provisions of RCW 74.39A.270 and RCW 41.56.026, SEIU 775 is the exclusive bargaining representative of all individual providers. CP 605, ¶ 4.

The Freedom Foundation is a Washington-based organization focused on conservative economic issues that has of late focused its staff and budget on a single-minded goal of “defunding the union political machine.” CP 742-43; CP 755-57; CP 797-800. The organization publishes regular vitriolic blogs and web postings attacking SEIU, its activities and its leadership. *E.g.*, CP 742-53; CP 845-51. The Freedom Foundation fundraises from its donors and supporters and from the public in part by advertising its mission to economically cripple unions like SEIU

and by announcing the details of steps it has taken or will take to “defund” unions. CP 755-57. Since the U.S. Supreme Court issued its decision *Harris v. Quinn*, ___ U.S. ___, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014), the Freedom Foundation has sought to contact IPs working in Washington to encourage them to drop their membership in and financial support of SEIU. See CP 834-35; CP 871-72; CP 243-244 at ¶ 4; see also CP 705-707. These efforts are directly linked to the organization’s fundraising both directly from IPs and from donors, supporters and the public at large. CP 705-707; CP 755-57.

On August 25, 2014, SEIU 775 received a notice from DSHS dated August 19, 2014, informing it that DSHS had received a request for public records submitted to it by the Freedom Foundation. According to the August 19, 2014, notice, the sixth item of information sought is “The business/work contact information (including e-mail addresses) for all in-home care providers (individual providers)....” (“Item 6”) CP 610-614. The fifth item of information sought is “All documents, emails, memos or other forms of communication between DSHS and the Service Employee International Union (SEIU) ... for the time period June 25th 2014 to July 2nd 2014.” (“Item 5”) *Id.*

The first document at issue in this case is a list of 30,968 names of persons DSHS has identified as being currently employed as an IP in the

State of Washington. CP 876. The list of names contains each IP's first and last name along with his/her provider number. *Id.* The second document at issue is an email exchange between Adam Glickman of SEIU 775 and Franklin Plaistowe at the State of Washington Office of Financial Management and contains a list of 95 names of IPs and their provider numbers.³ *Id.*

On September 24, 2014, DSHS informed SEIU 775 via e-mail that it intended to produce the requested records on October 3, 2014, absent a court order enjoining disclosure. CP 626. On October 3, 2014, the Honorable Erik Price, Thurston County Superior Court, granted a temporary restraining order ("TRO") prohibiting disclosure of Items 5 and 6 until the matter could be heard on a motion for preliminary injunction on October 16. CP 78-79.

On October 7, 2014, SEIU 775 propounded written discovery to FF. *See* CP 786-795. Prior to the Court's rulings on preliminary and permanent injunctive relief, SEIU 775 did not receive any response to this discovery. *See* RP 74-75. Also on October 7, SEIU 775 sought leave from the Court to conduct a Civil Rule 30(b)(6) deposition of the Freedom Foundation. CP 417. On October 10, 2014, the Court, via oral ruling, denied that motion but authorized SEIU 775 to submit some limited

³ DSHS withheld addresses and e-mail addresses in response to the Freedom Foundation's sixth request pursuant to RCW 42.56.250(3). *See* CP 619.

written discovery to the Freedom Foundation which was to be answered on an expedited basis. CP 419. The Freedom Foundation provided its response to this limited discovery on October 14, 2014, two days prior to the previously scheduled preliminary injunction hearing. *See* CP 228-229; CP 232-41.

On October 16, the date it had set to hear SEIU 775's application for a preliminary injunction, the superior court made a number of rulings. First, the superior court, citing Civil Rule 65(a)(2), ordered the trial of the action on the merits to be advanced and consolidated with the hearing on the application for a preliminary injunction. RP 6:5-7:1; CP 879. Second, the court denied SEIU 775's motion for a preliminary injunction. CP 881. Third, the court denied SEIU 775's application for a permanent injunction. *Id.* Finally, the court extended the TRO that it had issued on October 3, 2014, until 5:00 p.m. on November 5, 2014 in order to allow SEIU 775 to seek injunctive relief from the Court of Appeals. *Id.* On October 22, 2014, the court entered a written order setting forth these rulings. CP 879-971.

SEIU 775 appealed the final judgment to Division II of the Court of Appeals. CP 972-1069. SEIU 775 successfully obtained an order from Division II extending the TRO and staying the court's October 16, 2014

ruling pending the outcome of the appeal. *See* Appendix to SEIU 775's Answer to Statement of Grounds for Direct Review at 161.

The Freedom Foundation cross-appealed to the Washington Supreme Court, which has chosen to exercise jurisdiction over this matter until such time as it decides the Freedom Foundation's request for direct review (which SEIU 775 has opposed). To date, the requested records have not been disclosed.

IV. ARGUMENT

A. Standard Of Review

The standard of review is de novo. RCW 42.56.550(3) (judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo); *Ameriquest Mortgage Co. v. State Atty' Gen.*, 148 Wn. App. 145, 156, 199 P.3d 468 (2009), *aff'd on other grounds* 170 Wn.2d 418, 241 P.3d 1245 (2010); *Nw. Gas Ass'n v. Wash. Utilities and Transp. Commission*, 141 Wn. App. 98, 114-115, 168 P.3d 443 (2007), *rev. denied* 163 Wn.2d 1049, 187 P.3d 750 (2008).

In order to obtain an injunction, SEIU 775 must show that: (1) it has a clear legal or equitable right; (2) that it has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to it. *Kucera v. State, Dept. of Transportation*, 140 Wn.2d 200, 209, 995 P.2d

63 (2000). These criteria are evaluated by balancing the relative interests of the parties, and if appropriate, the interests of the public. *Id.*

At a preliminary injunction hearing, the plaintiff need not prove and the trial court does not reach or resolve the merits of the issues underlying these above three requirements for injunctive relief. Rather, the trial court considers only the *likelihood* that the plaintiff will ultimately prevail at a trial on the merits by establishing that he has a clear legal or equitable right, that he reasonably fears will be invaded by the requested disclosure, resulting in substantial harm.

Nw. Gas Ass'n, 141 Wn. App. at 116 (emphasis in original) (internal citations omitted); *see also Ameriquest*, 148 Wn. App. at 155 (“a *likelihood* of prevailing at a trial on the merits” is the proper standard of proof at preliminary injunction stage) (emphasis in original).

A third party is entitled to an injunction pursuant to RCW 42.56.540 to prevent an agency from disclosing records where, as here, it establishes that “(1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function.” *Ameriquest Mortgage Co. v. Office of Attorney Gen. of Wash.*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013).

B. The Trial Court Erred By Denying SEIU 775’s Request For A Preliminary And Permanent Injunction Enjoining DSHS From Releasing The Requested List Of IP Names On The Basis Of The “Commercial Purposes” Prohibition, RCW 42.56.070(9).

1. The PRA, RCW 42.56.070(9), Prohibits An Agency From Disclosing A List Of Individual Names For Commercial Purposes.

SEIU 775 has a right to injunctive relief because, under RCW 42.56.070(9), a public agency is not authorized to provide access to lists of individuals when such list is requested for commercial purposes. The legislature expressly excluded such disclosure from an agency’s authority under the PRA:

This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law....

RCW 42.56.070(9) (emphasis added). In contrast to the various exemptions set forth in RCW 42.56.210-.480 and RCW 42.56.600- .610 of the PRA from the otherwise broad mandate that the government release public records, RCW 42.56.070(9) establishes a categorical *prohibition* against disclosing lists of individuals (“agencies...shall not do so...”) where such list is “requested for commercial purposes.” RCW 42.56.070(9).

The trial court erred because, although RCW 42.56.070(9) provides that an agency “*shall not*” provide access to the list of IP names in response to requests like the Freedom Foundation’s here, the court interpreted the law to mandate that the agency *shall* provide such access.

While the PRA does not define what constitutes a “commercial purpose,” and no Washington court has had occasion to interpret the “commercial purposes” provision, formal opinions by the Attorney General’s Office make clear that the term is to be defined broadly.⁴

One Attorney General Opinion (“AGO”) noted the lack of definition of the term “commercial purposes” and opined that the dictionary definitions from Black’s Law and Webster’s should therefore be utilized, leading to the conclusion that the term “commercial” “broadly encompasses any profit expecting business activity.” Wash. Op. Atty. Gen. No 2 at 2 (1998). That opinion concluded that the “commercial purposes” prohibition on disclosure applied *even where* the requester had no intention of contacting individuals for commercial solicitation and intended to use the information for “general business purposes” only, as

⁴ Formal attorney general opinions are “entitled to great weight.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308-09, 268 P.3d 892 (2011) (quoting *Seattle Bldg. & Constr. Trades Council v. The Apprenticeship & Training Council*, 129 Wn.2d 787, 803, 920 P.2d 581 (1996)). This is so in part because “such opinions represent the considered legal opinion of the constitutionally designated “legal adviser of the state officers.” *id.* (quoting Wash. Const. art. III, § 21), and courts presume the legislature is aware of formal AGOs, so failure to amend the statute in response to a formal opinion may be treated as a form of “legislative acquiescence in that interpretation.” *Id.*

the statute does not distinguish between different types of commercial purposes. *Id.* The AGO explained that the commercial purposes provision “is a broadly stated, categorical prohibition. There is absolutely nothing in the statute which narrows the definition of a commercial purpose.” *Id.* at 3. “[T]he statute clearly encompasses a commercial purpose which involves direct contact of the individuals named in a list” but the scope of the term “commercial purpose” is not “limited to situations in which individuals are directly contacted or personally affected.” *Id.*

Governor Locke favorably acknowledged the AGO opinion and incorporated its construction of the commercial purpose prohibition in his 2000 Executive Order regarding public records privacy protections. App. 1-3 (Exec. Order 00-03 (Apr. 25, 2000)). He noted that “commercial purposes” are

not limited...only to situations in which individuals are contacted for commercial solicitation. For that reason, unless specifically authorized or directed by law, state agencies shall not release lists of individuals if it is known that the requester plans to use the lists for *any* commercial purpose, which includes any profit expecting business activity.

App. 2 (emphasis added).

As explained in detail below, the evidence here established that the Freedom Foundation’s intended use falls well within the broad

construction given the term by⁰³ the Attorney General and incorporated by the former Governor in his directive to state agencies. Indeed, the trial court acknowledged that “In [AGO No. 2], the A[ttorney] G[eneral] argues very clearly for a broad view of the “commercial purposes” provision, a view that would support certainly [SEIU 775’s] position here.” RP at 65.

An earlier Attorney General opinion likewise gave the term “commercial purposes” a broad, rather than narrow, read. In the opinion, the AG concluded that the commercial purposes prohibition foreclosed the Department of Licensing from supplying a list of names and addresses “to facilitate the organization of a trade group.” Wash. Op. Atty. Gen. No. 15 at 7 (1975). “Certainly, any use of the information requested to facilitate the organization of a trade group would involve contacts with individuals. Further, the object of contacting those individuals would be to facilitate commercial purposes.” *Id.* The opinion also observed that the word “commercial” should not be construed so narrowly as to “exclude business activities not involved in buying and selling of goods,” as the prohibition was “intended to cover a broader range of business activity.” *Id.* at 6.

Thus, according to the Washington State Attorney General, “commercial purposes” within the meaning of RCW 42.56.070(9) precludes an agency from disclosing to an entity a list of individuals where

the organization seeks the information to promote its own business activities and/or to generate revenue, even where the entity does not intend to commercially solicit the individuals or the activities. *Accord:* Wash. Op. Atty. Gen. No. 38 (1975) (observing that a Public Utilities District could not disclose list of newcomers to a “welcome service” organization because welcome service’s intended use – contacting new residents to make them aware of surroundings, solicit participation in community events, and make them aware of business entities in the area – was “unquestionably” for a commercial purpose and the “exact type of activity” the prohibition was designed to prohibit).

Federal case law regarding the federal Freedom of Information Act (“FOIA”) and other federal statutes also supports a broad construction of the term “commercial purposes” such that, under RCW 42.56.070(9), where an organization – of whatever type – seeks information to promote the economic interests of itself or on behalf of another individual or entity, it seeks the information for “commercial purposes.”⁵ For example, in *VoteHemp, Inc., v. Drug Enf. Admin.*, 237 F.Supp.2d 55 (D.D.C. 2002), the Court found that the non-profit organization, VoteHemp, had a

⁵ Because our state PRA was modeled after the FOIA, in construing the PRA, Washington courts look to federal courts’ judicial constructions of the FOIA. *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 220, 951 P.2d 357 rev. granted, cause remanded, 136 Wn.2d 1030, 972 P.2d 101 (1998) and amended, 972 P.2d 932 (Wash. Ct. App. 1999); see also *Limstrom v. Ladenburg*, 136 Wn.2d 595, 608, 963 P.2d 869 (1998).

commercial interest in documents it requested from the Drug Enforcement Agency because the group sought the information to advance its interest in advocacy for a free market in hemp in association with businesses with a commercial interest in hemp products. 237 F.Supp.2d at 64-65.⁶ Moreover, the organization’s website asked visitors to donate money to support the “industry’s legal effort” to deregulate hemp. *Id.* at 65. Taken together, the nonprofit’s advocacy amounted to a “commercial interest” in the information it sought:

[P]laintiff’s advocacy for a free market in hemp, its association with businesses with a commercial interest in hemp products, coupled with the potential benefit that businesses would acquire from disclosure support the DEA’s finding that plaintiff has a commercial interest in the disclosure sought. Therefore, the Court concludes that VoteHemp, as an advocate for a free market in industrial hemp, has a commercial interest in the information that it seeks to have disclosed.

Id. at 65. The trial court here agreed that under the articulation of “commercial purpose” in the *VoteHemp* case, “any reasonable construction of Freedom Foundation’s motives and interest in the list of providers would likely be captured within it.” RP at 61.⁷ Other federal

⁶ In *VoteHemp*, the Court decided whether a requester was entitled to a waiver of the copying and processing fees, which is not available where the disclosure is “primarily in the commercial interest of the requester.” 237 F. Supp. 2d at 58 (quoting 5 U.S.C. § 552(4)(A)(iii)).

⁷ Although, as the trial court acknowledged, the state PRA is “more severe” than FOIA in many areas and the “stakes and interests” are distinguishable in determining whether a FOIA fee waiver applies as opposed to whether PRA disclosure may or must be had in the first instance, RP 63, *VoteHemp* and the other FOIA cases relied on herein are

cases are in accord. *See Nat'l Sec. Archive v. U.S. Dep't of Def.*, 530 F. Supp. 2d 198, 203 (D.D.C. 2008) (nonprofit had “powerful commercial and private motive” behind its FOIA requests, namely, a desire to prevail in litigation against the government). Similarly, a federal district court rejected the argument that the Lanham Act’s definition of “commercial activities” did not apply where an organization did not sell, distribute, or advertise goods or services; rather, the court found that the organization engaged in “commercial activities” by doing things like “soliciting donations, preparing press releases, holding public meetings and press conferences...and other activities designed to bring about change in the Brach’s organization and enhance the stability of workers’ jobs.” *Brach Van Houten Holding, Inc. v. Save Brach’s Coal. for Chicago*, 856 F. Supp. 472, 474 (N.D. Ill. 1994). These cases support a broader construction of the term “commercial purposes” than the trial court gave.

persuasive authority for construing the meaning of the term “commercial purposes.” That is because in both the fee waiver cases and a case construing RCW 42.56.070(9), the Court must determine whether the requester’s intended use or purpose is “commercial.” The PRA exemptions are to be construed narrowly to serve the interests of transparent and open government in order to allow public oversight and public knowledge of the inner workings of government. *E.g.*, RCW 42.56.030. The “commercial purposes/interest” provisions of the PRA and FOIA stand as a bulwark to ensure that open access to public records serves *public* interests rather than private gains and that the government will not be burdened with the costs of producing requested records where the interests served are commercial rather than public. Thus, while the context in which the question about whether a requestor’s interests are commercial are somewhat different in the FOIA cases as in the case here, the policies served by the use of “commercial” in each statute are sufficiently aligned so as to render the federal courts’ interpretation of the term “commercial” in public records cases persuasive here.

Moreover, even avowedly political organizations are routinely held by the courts to be acting in a particular instance for “commercial” goals, especially where they use their “political” activities to raise money or to harm other entities financially, as the Freedom Foundation clearly does. *See, e.g. Jews For Jesus v. Brodsky*, 993 F. Supp. 282, 308 (D.N.J. 1998) (finding that “jewsforjesus.org” website was a “commercial” use of the plaintiff’s mark because it was designed to harm the plaintiff commercially by disparaging it and preventing it from benefiting from its own mark and website), *aff’d* 159 F.2d 1351 (3rd Cir. 1998); *Planned Parenthood Federation of America, Inc. v. Bucci*, 1997 WL 133313, *5-6 (S.D.N.Y., March 24, 1997) (holding that defendant’s use of plaintiff’s mark was “commercial” because defendant was engaged in the promotion of a book, defendant was a non-profit political activist who solicited funds for his activities, and defendant’s actions were designed to, and did, harm plaintiff commercially), *aff’d* 152 F.3d 920 (2d Cir. 1998).⁸

Finally, because RCW 42.56.070(9) absolutely prohibits disclosure and does not merely exempt certain documents from an affirmative obligation to disclose, the statute cannot be read within the

⁸ Again, the trial court agreed that this caselaw potentially supported SEIU 775’s argument, noting that “if the construction of ‘commercial purposes’ under the federal Lanham Act is used for our PRA, [the Freedom Foundation’s] request would also likely fall within it, at least with respect to the application of the preliminary injunction standard.” RP at 61-62.

usual narrow construction framework that applies to PRA exemptions generally. RCW 42.56.030 (“exemptions” are to be “narrowly construed”). The PRA elsewhere distinguishes between “exemptions” and “prohibitions,” indicating the terms have different meanings. *E.g.*, RCW 42.56.070(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.”); RCW 42.56.080 (“Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons.”). The use of different terms within the same statute implicates the “basic rule of statutory construction that the legislature intends different terms used within an individual statute to have different meanings.” *State v. Tracer*, 173 Wn.2d 708, 718, 272 P.3d 199 (2012).⁹

⁹ Consistent with the application of this rule to RCW 42.56.070(9), numerous agencies have promulgated regulations providing that they are prohibited by statute from disclosing lists of individuals for commercial purposes. WAC 48-13-060(2) (state auditor); WAC 108-50-060(2) (charter school commission); WAC 200-01-070(4) (department of enterprise services); WAC 314-60-100(2) (liquor control board); WAC

In sum, RCW 42.56.070(9) prohibits agencies from disclosing lists of names where the requester intends to use the list to facilitate commercial activity, for general business purposes or to raise revenues. Given the difference in statutory language of this prohibition as compared to the PRA exemptions, the prohibition is not subject to the same severe, narrow construction as PRA exemptions. Rather, the legislature in enacting the PRA did not intend to and did not in fact grant authority to agencies to disclose lists of names where, as here, they were requested for commercial purposes.

2. The Trial Court Erred By Denying A Preliminary Injunction, Because The Evidence Clearly Establishes That SEIU 775 Is Likely To Succeed On The Merits Of Its Claim That The Freedom Foundation Requested The List Of IP Names For Commercial Purposes And The PRA Therefore Prohibits DSHS From Disclosing The Requested List.

In light of the foregoing, the trial court's failure to follow the Attorney General opinions and federal case law interpreting the FOIA and other federal statutes in applying the "commercial purposes" exemption in

352-40-100(3) (parks and recreation); WAC 390-14-035(7), (8) (public disclosure commission); WAC 458-276-045(2) (department of revenue); WAC 516-09-060(2) (Western Washington University). The structure of these regulations recognizes that the "commercial purposes" prohibition is in addition to and distinct from the various exemptions found in the PRA and in other statutes, because the provision regarding commercial purposes is its own subsection, separate from the subsection discussing other exemptions. *See id.* The Public Disclosure Commission also expressly states that, as regarding the commercial purposes prohibition, the commission does not have the discretion to release requested records despite the applicability of an exemption, if it determines that it is in the public interest and that the rights of third parties will not be prejudiced. WAC 390-14-035.

RCW 42.56.050(9) to the instant case was reversible error.

The trial court erred, specifically, by deciding as a matter of law that the “commercial purposes” prohibition must be narrowly construed so as not to encompass efforts by the Freedom Foundation to obtain a list of IP names in order to foster and fund the organization’s activities and to economically harm a political rival for purely political reasons. The evidence before the trial court was sufficient to establish a likelihood of prevailing on its claim that DSHS must not disclose a list of IP names to the Freedom Foundation because the organization requested the list for commercial purposes.

Construing the prohibition narrowly, the court erroneously held that the “intent” of the Freedom Foundation in requesting the names was *only* political and not also commercial. However, the evidence before the trial court establishes without doubt that the Freedom Foundation seeks a list of IP names (and contact information) to economically injure an entity it apparently perceives as an economic competitor, to bring credit or attention to its own extreme political views, to increase its membership and, importantly, its funds, to decrease the membership and funds of SEIU 775, and to assist the commercial businesses with which it is associated. These are commercial purposes within the meaning of RCW 42.56.070(9)

pursuant to the authority set forth in § IV.B.1 *supra*.¹⁰ Based on the existing record, the Court could reasonably infer that the Freedom Foundation requested a list of IP names for commercial purposes, and that SEIU 775 is therefore likely to prevail on the merits of its claim that RCW 42.56.070(9) prohibits DSHS from disclosing the requested names. The evidence establishing this likelihood to prevail on the merits is as follows:

First, the Freedom Foundation has stated publicly that its goal is to “defund” public sector unions, including SEIU 775. *See, e.g.*, CP 797-800 (litigation attorney job announcement stating that to advance the Freedom Foundation’s mission, the organization is working to “expose, defund, and discredit the union political machine”); CP 742-743 (Creative Director David Bramblett calling public sector unions a “rampant disease that is destroying our state” and stating that its focus on defunding public sector unions is connected to the “Freedom and Liberty” that the organization seeks to advance); CP 755-757 (Freedom Foundation CEO Tom McCabe announcing that “We’ve implemented our plan to defund the union machine...”).

¹⁰ That the Freedom Foundation is organized as a non-profit organization does not foreclose it from intending to use the lists of IPs for a “commercial purpose” and triggering the prohibition in RCW 42.56.070(9). Court decisions applying the FOIA make clear that nonprofits may have a “commercial interest” in requesting public records. *See Cause of Action v. Federal Trade Com’n*, 961 F. Supp. 2d 142, 155, n. 2 (D.D.C. 2013) (describing a party’s assertion that it had no “commercial interest” such that it was entitled to a FOIA fee waiver because it was a nonprofit as “flawed,” recognizing that nonprofit status does not automatically demonstrate noncommercial interest in a request).

Litigation is “an essential part of [the Freedom Foundation’s] strategy to take on unions and their political allies.” CP 797-800, CP 755. Its resources are spent, in part, on “[f]iling and aggressively pursuing legal actions against labor unions and their allies.” *Id.*;¹¹ *see also* CP 759 (McCabe describing Freedom Foundation plans for “legal assault on labor” and “this war” as “expensive”). The Freedom Foundation expends its resources on a four-part strategy to implement its plan to “defund the union machine:” legislate, educate, litigate and community activate. CP 755-56 (requesting e-mail recipient’s “financial support to continue taking the battle to the labor unions,” with links to “donate to our effort to defund the union political machine.”).

Second, the Freedom Foundation admits that, upon receiving the list of IP names from DSHS, it will contact and correspond with the IPs to encourage them to drop their membership in and financial support of SEIU 775, and to provide them a means to do so. *See* CP 834-35; CP 871-73; CP 243-244 at ¶ 4; *see also* CP 705-707 (e-mail dated July 23, 2014 referencing sample letter Freedom Foundation prepared for IPs to stop paying dues to SEIU 775 and soliciting donations in order to fund its efforts to contact SEIU members to encourage and assist them to stop

¹¹ Using FOIA requests to further a desire to prevail in litigation has been recognized as a “powerful commercial and private motive.” *See Nat’l Sec. Archive, supra*, 530 F. Supp. 2d at 203.

paying union dues).

If the past is any guide, and that is certainly a reasonable inference, the Freedom Foundation will not only use the list of IP names to contact IPs and encourage and assist them to drop their membership in and financial support of SEIU 775, but it will also seek support for its own views and solicit membership to the Freedom Foundation, to the organization's own financial gain. The Freedom Foundation has in the past affirmatively attempted through e-mails to use its contacts with IPs to enrich its own coffers, and could well do so again in the future. In these e-mails, at least some of which were sent on July 23, 2014, the Freedom Foundation wrote, among other things:

Also, we plan to undertake a public information campaign to inform home health care providers of their new ability to get the SEIU to stop automatically deducting union dues from their Medicaid reimbursements. But we need your help!

Will you consider donating to the Freedom Foundation
so we can get the word out to as many union members as possible?

CP 705-707. That e-mail was sent to at least two other people,¹² but may have been sent to thousands more.

Based on prior contacts between the Freedom Foundation and IPs it is reasonable to infer that if IPs voluntarily contact the Freedom

¹² See CP 865-866, 867-869.

Foundation (in response to the organization's planned letter) with questions about their obligation to pay union dues or agency fees to SEIU 775, they will be provided the Freedom Foundation's website and/or directed to a number of blogs, each of which contain an prominent link to donate to the Freedom Foundation. CP 244-245 at ¶¶ 8, 9; CP 831-32, CP 844-851; CP 837-842; CP 853-869. Email correspondence from Freedom Foundation representatives like Maxford Nelsen to IPs will contain a link to the Freedom Foundation home web page which also contains a link to donate to the organization. CP 245 at ¶ 9; CP 840; CP 845-851. Once a single donation is made by an IP as a result of these contacts, the IP will receive regular solicitation materials, including e-mail blasts and communications, standard donation renewal requests, and newsletters specifically prepared for donors, etc. CP 837-842.

Third, the record evidence – even before full discovery – was overwhelming that the Freedom Foundation fundraises by broadly publicizing its goal to defund SEIU 775 and public sector unions in general. *See* CP 742-753, CP 845-851 (numerous postings from the Freedom Foundation website criticizing SEIU 775, characterizing public sector unions as “a rampant disease that is destroying our state” and SEIU's activities as “deceptive” and attempts to “manipulate home health care providers” and linking to a place to make donations); CP 755-757 (e-

mail from Freedom Foundation CEO Tom McCabe, which states “We’ve implemented our plan to defund the union machine...” and requests financial support “to continue taking the battle to the labor unions” and “to defund the union political machine” with a link to a site to make donations to the Freedom Foundation to “do in Washington State what Scott Walker and my friend did in Wisconsin” (referred to earlier in the e-mail as reform that “destroyed” “once-mighty public employee unions in Wisconsin”)); CP 759-760 (e-mail from Freedom Foundation CEO McCabe dated June 20, 2014, which solicits contributions to Freedom Foundation to “take down the union political machine”); CP 762-763 (Freedom Foundation fundraising e-mail).

Because the record evidence indicates that the Freedom Foundation has requested the IP names to contact them for its own business purposes, including business activity expected to generate revenues for the organization either through donations from the IPs or from publicity to others about its activities vis-à-vis its contacts with the IPs, the trial court erred by holding that SEIU 775 was not likely to prevail on the merits of its claim under the PRA commercial purposes prohibition and by denying the preliminary injunction to which SEIU 775 is entitled.

3. The Trial Court Erred By Advancing And Consolidating The Permanent Injunction Hearing With The Preliminary Injunction Hearing Without Prior Notice, Where SEIU 775's Discovery Requests Were Still Outstanding And Unanswered, And Where SEIU 775 Was Thereby Denied The Full Opportunity To Present Its Case At The Permanent Injunction Hearing.

The Courts of Appeal have repeatedly held that it is error for the trial court to conflate the permanent injunction trial with the preliminary injunction hearing without prior notice or to issue a final order on the merits without giving the parties a full opportunity to present evidence and to prove their respective positions at a trial on the merits. *Ameriquist*, 148 Wn. App. at 155-56; *Nw. Gas*, 141 Wn. App. 114-15. “The purpose of this rule, as with its federal counterpart, is to give the parties notice and time to prepare so that they will have a full opportunity to present their cases at the permanent injunction hearing.” *Ameriquist*, 148 Wn. App. at 155.

Here, the trial court advanced and consolidated the permanent injunction hearing with the preliminary injunction hearing, per Civil Rule 65(a)(2), without advance notice of that decision to SEIU 775 and entered a final order on the disclosure issues presented. RP 5-7. The Court stated that *Rabon v. City of Seattle*, 135 Wn.2d 278, 957 P.2d 651 (1998) required it to reach the merits of purely legal issues for the purpose of deciding whether to grant or deny the preliminary injunction. However, while the Court in *Rabon* held that on ruling on a request for a preliminary

injunction, the trial court must reach the merits of *purely* legal issues, the Court also instructed that the court is not to adjudicate the ultimate merits of the case at the preliminary injunction stage. 135 Wn.2d at 286. Here, the essential fact – the Freedom Foundation’s intended uses of the IP list – is in serious dispute, so there were not only purely legal issues to be decided.¹³

It is a critical distinction that SEIU 775 needed only to establish a *likelihood* of success on the merits at its preliminary injunction hearing, since that hearing occurred at an early stage of the case and on an expedited timeframe. Notwithstanding its effort to quickly and efficiently move forward with its discovery efforts, propounding both written discovery and a CR 30(b)(6) deposition notice, the consolidated preliminary and permanent injunction hearing occurred before SEIU 775 had received a response to its written discovery, and without the opportunity to take its noticed CR 30(b)(6) deposition of the Freedom Foundation.

Through this as yet unanswered discovery, SEIU 775 sought information directly relevant to whether the Freedom Foundation

¹³ Compare, for example, the Freedom Foundation’s self-serving declaration by Maxford Nelsen asserting that the organization did not intend to fundraise from IPs or otherwise use the list of IP names for commercial purposes. CP 802-804, with the allegations and evidence of SEIU 775 that the Freedom Foundation intends to use the names for its own economic advantage and to attempt to “defund” SEIU. See the portions of the record cited in § IV.B.2, *supra*.

requested the list of IP names for commercial purposes, e.g., to obtain additional proof that the Freedom Foundation sought the names for its own financial gains and to economically harm SEIU 775, which it perceives as its political and economic adversary. *See* CP 720-23; CP 786-95. While the Court can infer from the existing record that the Freedom Foundation seeks the requested information for a commercial purpose, SEIU 775 was entitled to fully develop evidence through the discovery process and to present that evidence at a trial on the merits.

Additionally, SEIU 775 had not yet had a chance to fully review, much less respond to, certain pleadings that were filed by the Freedom Foundation *after* the October 13, 2014, deadline set by the Court for the filing of opposition briefs.¹⁴ SEIU 775 had not had the opportunity to challenge or test the credibility of either these declarations or the declarations previously filed by the Freedom Foundation in support of its opposition to SEIU 775's motion, notwithstanding substantial evidence that the representations contained therein may be false or misleading.¹⁵

¹⁴ *See, e.g.*, CP 243-246; CP 183-227.

¹⁵ By way of example, the Freedom Foundation's Answers to Interrogatory 6 say that communications received from IPs may initially be received "by approximately four Freedom Foundation staff members" but are "immediately forwarded to Labor Policy Analyst Maxford Nelson," citing Nelson's Declaration. CP 839. But that Declaration does not actually say this, and the records produced in response to Interrogatory 6, at Attachment 2, rebut this: *see* CP 854-857 (communications from Director of Development Mark Dalan directly to an IP); CP 858-862 (e-mailed responses from David Bramblett to one or more IPs); CP 863 (response by Jami Lund, Senior Policy Analyst, to an IP), CP 864 (same, from Billie M. Roberts, "Receptionist"), etc.

And SEIU 775 had not yet received any responses to the written discovery it propounded on October 7. CP 786-795. This discovery was entirely relevant to the central claim raised by SEIU 775 in this case – namely, what is nature of the purpose and intent behind the Freedom Foundation’s PRA request.¹⁶

Nor did SEIU 775 have the chance to fully evaluate the insufficient responses to the discovery requests the Freedom Foundation served on October 10, 2014, much less address this Court regarding why those responses should properly be supplemented. For example, the organization objected to, and did not answer, SEIU 775 Interrogatory No. 2, which sought to learn specific details about how the Freedom Foundation intends to use the list of provider names it has requested, e.g., whether it intends to use that list to locate or determine physical mailing addresses, domiciles, residences, telephone numbers, and/or e-mail addresses of IPs. CP 835. This request goes to the heart of the question of the Freedom Foundation’s intended use of the list of provider names it has requested. The organization also refused to meaningfully answer SEIU

¹⁶ That such discovery is relevant to the Court’s analysis whether the commercial purposes prohibition applies is evident from RCW 42.56.080, which specifically allows agencies to consider the purpose of the requestor of a list of names. RCW 42.56.080 (“Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons.”) (emphasis added).

775's straightforward request (Interrogatory No. 6) that it identify prior written communications that involved any effort "to solicit funds or donations from any Individual Provider." CP 837-842. The Freedom Foundation also refused to answer Interrogatory No. 7, declining to state whether not the Freedom Foundation has the *authority* – versus merely the current intention – "to give or sell all or part of the list of Individual Providers to any third party." CP 842.

The trial court recognized that its decision to order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for a preliminary injunction deprived SEIU 775 of these opportunities, noting:

As for the rest of the undeveloped facts noted by [SEIU 775], again, there is some merit to [SEIU 775's] position that declarations can and should be challenged, and certainly further factual discovery can challenge the facts as related in the declarations.

RP 75:13-24. But the trial court ruled that the "undeveloped facts" were not important, because as a matter of law, "even assuming the accuracy of the allegations by [SEIU 775] as to the motivations of the Freedom Foundation and even assuming that further discovery would support [SEIU 775's] allegations," the Freedom Foundation's request was motivated by "political," not "commercial," intent. *Id.* It based its conclusions in part on declarations submitted by the Freedom Foundation,

asserting that it did not intend to pass the list of IP names to a third party.
RP 75.

Because the trial court denied SEIU 775 the prior notice to which it was entitled of advancement and consolidation of the permanent injunction hearing, and because it denied SEIU 775 the opportunity to fully develop and present pertinent evidence at a trial on the merits, *Ameriquest*, 148 Wn. App. at 156, this Court should hold that the trial court erred and that reversal is warranted.

4. The Trial Court Erred By Denying A Permanent Injunction Based On The Commercial Purposes Prohibition.

The trial court attempted to avoid the foregoing problems by applying essentially a CR 12(b)(6) standard to SEIU 775's request for an injunction. The court determined it would assume for the purposes of the request for a permanent injunction that all of the allegations made by SEIU 775 about the reasons why the Freedom Foundation requested a list of IP names were true. RP 73-75. Noting that there were further facts that could be developed that would support SEIU 775's allegations that the Freedom Foundation intends to use the list to economically injure SEIU 775 and to economically benefit itself, the trial court determined it could decide whether the list was requested for "commercial purposes" within the meaning of RCW 42.56.070(9) without additional discovery.

Even making all those assumptions, the court held – in a final determination on the merits – that “the ‘intent’ of the Freedom Foundation in these requests was political, not commercial.” This holding was reversible error.

There is no doubt that the Freedom Foundation’s motivations in contacting the IPs to encourage and assist them to drop membership in and economic support for SEIU 775 and to solicit support for and membership in the Freedom Foundation are political. However, such intent is also clearly “commercial” insofar as it benefits the organization’s business interests by economically injuring an entity it sees as its economic and political adversary and by economically benefiting itself by providing it a means to fundraise both from the IPs directly and from past donors, other entities and the public at large by publicizing its efforts to “defund” SEIU and public sector unions generally through contacts with the thousands of IPs. *See* Wash. Op. Atty. Gen. No 2 at 2 (1998); Wash. Op. Atty. Gen. No. 15 at 7 (1975); Wash. Op. Atty. Gen. No. 38 (1975); App 1-3 (Exec. Order 00-03 (Apr. 25, 2000)); *see also* *VoteHemp, Inc.*, *supra*, 237 F.Supp.2d 55; *Nat’l Sec. Archive*, *supra*, 530 F. Supp.2d at 203; *Brach Van Houten Holding, Inc.*, *supra*, 856 F. Supp. at 474; *Jews For Jesus*, *supra*, 993 F. Supp. at 308; *Planned Parenthood Federation of America, Inc.*, *supra*, 1997 WL 133313, *5-6.

The trial court's denial of a permanent injunction was reversible error.

C. The Trial Court Erred By Denying SEIU 775's Request For A Preliminary And Permanent Injunction Prohibiting DSHS From Releasing The Documents At Issue Here On The Basis of RCW 42.56.230(1).

The trial court erred in denying SEIU 775's motion for a preliminary injunction where the evidence presented by SEIU 775 showed a likelihood of ultimately prevailing at a trial on the merits of its claim that the Freedom Foundation is not entitled to receive from DSHS a list of IP names in response to its PRA request, because release of that information is tantamount to the release of the identities of Medicaid beneficiaries and would therefore be tantamount to disclosure of exempt information and would infringe upon privacy interests protected by RCW 42.56.230(1), 42 U.S.C. § 1396a(a)(7)(A), and 42 C.F.R. § 431.301. Moreover, SEIU 775 has established that it has a clear legal or equitable right to permanent injunctive relief on this basis. The Court should therefore reverse and remand for entry of a permanent injunction prohibiting DSHS from releasing the list of names.¹⁷

¹⁷ The trial court correctly held that because the records pertain to SEIU 775's members – the IPs – the SEIU 775 had standing to argue the application of any appropriate exemptions to disclosure, including those exemptions that protect interests not related to SEIU 775. RP 49:23-53:11 (citing *Ameriquest, supra*, 148 Wn. App. at 166).

The identity of functionally disabled persons who receive care from individual providers is categorically exempt from disclosure under the PRA. *See* RCW 42.56.230(1) (“Personal information in any files maintained for ... clients of public institutions” and “welfare recipients” is exempt from disclosure); *see also Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 425, 300 P.3d 376 (2013) (PRA requires redaction of public housing tenants’ exempt information, including names, contained in Seattle Housing Authority’s grievance hearing decisions) and *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 133, 737 P.2d 1302, *rev. denied*, 108 Wn.2d 1033 (1987) (a “client” is a person served by a public institution).

However, this PRA exemption does not exist in a vacuum. In fact, the confidentiality of information identifying Medicaid beneficiaries is a requirement imposed on the State of Washington by federal law. Federal Medicaid law requires, in pertinent part, that a state Medicaid plan provide safeguards restricting the use and disclosure of protected information relating to Medicaid applicants or recipients “to purposes directly connected with-(A) the administration of the plan....” 42 U.S.C. § 1396a(a)(7)(A); *see also* 42 C.F.R. § 431.301. Protected information includes, *inter alia*, identifying information of the applicants or recipients (including their names and addresses), as well as their medical data. 42

C.F.R. § 431.305(b)(1), (5). *Accord: G.D. v. Riley*, 2007 WL 2206559 *2 (S.D. Ohio 2007).¹⁸

Individual providers, as a group, have a substantial interest in safeguarding the privacy of the functionally disabled persons they provide care for, and they have independent obligations to maintain the confidentiality of their clients. This duty of confidentiality arises both under the state regulatory scheme pursuant to which the individual providers work, *see* WAC 388-71-0846, and under the individual contracts they enter into with the State to provide the personal care services.¹⁹ These contracts specify that among the personal information that must be kept confidential, are the Medicaid beneficiary's name and address. *See id.*, ¶ 1(b) and (j). Finally, the obligation to maintain the confidentiality of the clients' identities and residences flows from the close personal relationships that exist between the IPs and their clients.²⁰

¹⁸ The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") also prohibits the disclosure of protected health information ("PHI"). *See* PHI includes names. 45 C.F.R. § 164.514.

¹⁹ *See* CP 629-632, General Terms & Conditions ¶¶ 6(a) (individual providers shall not disclose any "Personal Information" without "the prior written consent of the person or personal representative of the person who is the subject of the Personal Information"), 6(b) (individual providers must "protect and maintain all Confidential Information gained by reason of this Contract against unauthorized use, access, disclosure, modification or loss"), and 1(b) and (j) ("Confidential Information" includes, but is not limited to, "Personal Information," which is, in turn, defined as "information identifiable to any person, including, but not limited to, information that relates to a person's name, health...[and] use or receipt of governmental services...").

²⁰ According to a high-ranking representative of DSHS, "the vast majority of [Medicaid] recipients in situations that would be covered by the shared living rule [i.e.,

The Court of Appeals, in *Lindeman v. Kelso School District*, 127 Wn. App. 526, 536, 111 P.3d 1235 (2005), *rev'd on other grounds*, *Lindeman v. Kelso School District No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007), analyzing the identical statutory language then codified in chapter 42.17 RCW (“the PDA”), explained the significance of preserving the privacy of people such as the Medicaid beneficiaries being provided personal care services by IPs as follows:

We further note that subsection (1)(a) reflects the Legislature’s decision to provide heightened protection to a specific, narrow class of persons distinct from those discussed in other PDA exemptions. Unlike the other PDA exemptions, subsection (1)(a) applies to information related to persons in public schools, patients and clients of public institutions or public health agencies, and welfare recipients. RCW 42.17.310(1)(a) [now RCW 42.56.230(1)]. Because of the nature of these agencies, their clients, and the services they provide, much of the personal information gathered in administering these programs relates to a *specific individual’s typically confidential needs or evaluation* rather than to the general administration of government by those acting on behalf of our government.

(italics in original).

The Washington Court of Appeals has prohibited the release of certain personally-identifying information pursuant to a PRA request if disclosure of that information could lead to the discovery or disclosure of personal information exempt under the PRA. *Tacoma Public Library v.*

where the individual provider lives with the recipient] choose providers who are either relatives or long-term personal friends.” CP 661 at ¶ 4 (emphasis added).

Woessner, 90 Wn. App. 205, 951 P.2d 357, *rev. granted, cause remanded*, 136 Wn2d 1030, 972 P.2d 101 (1998) *and amended*, 972 P.2d 932 (Wash. Ct. App. 1999). In *Woessner* as here, the opponent of disclosure argued that disclosure of information not covered by an express exemption – in that case, employee identification numbers – would “provide access” to exempt personal information. The Court of Appeals agreed and held that disclosure of the employee identification numbers would violate the employees’ right to privacy within the meaning of the PRA. As the court explained:

[T]he Library argues that that disclosure of an employee’s name coupled with his or her identification number would provide access to other exempt personal information, such as the social security number, home address, and telephone number. We agree that release of employees’ identification numbers would be highly offensive, because disclosure could lead to public scrutiny of individuals concerning information unrelated to any governmental operation and impermissible invasions of privacy....

Id. at 221-23 (emphasis added). Thus the Washington Court of Appeals has prohibited the disclosure of certain non-exempt information where it could lead to the disclosure of exempt information.

The same logic and rationale should be employed by this Court to prohibit disclosure of the list of IP names requested by the Freedom Foundation, because disclosure of the IP names is tantamount to disclosure of large numbers of the names of Medicaid beneficiaries. As

explained above, this information is exempt under RCW 42.56.230(1) and disclosure would violate their privacy rights; disclosure cannot therefore be justified under RCW 42.56.210(2).

Because a significant number of IPs reside in the homes of the Medicaid beneficiaries – 11,300 out of 24,864, or just slightly less than 44%, as of 2007, CP 606-607, there is a substantial risk that the identity of functionally disabled persons could effectively be revealed through disclosure of the identities of IPs. This is not mere speculation or baseless paranoia. Leigh Hearon, a private investigator who specializes in database and Internet research attested that, with the names of twenty IPs chosen at random, she was able, using a commercially available internet-based research application that is easily accessible to and used by any interested lay person, to identify 27 persons who live with IPs. *See* CP 668-671. She determined that the likelihood of each of those persons being a functionally disabled Medicaid beneficiary ranges from 11% to 44%. *Id.*

Ms. Hearon's conclusions are consistent with assertions made by Columbia Legal Services attorney, Amy Crewdson, who attested that release of the list of IP names would enable anyone to use an Internet search engine to identify many in-home personal services clients. CP 676 at ¶ 15. They are also consistent with the conclusions of legislators and executive branch officials who have acted to protect individual privacy,

including privacy in one's name, in response to the ever-increasing ease with which individuals can use technology to locate personally-identifying information.

For example, recognizing the harm to the public resulting from access to and misuse of individuals' personal information, Washington's identity theft statute prohibits the possession or use of a "means of identification," of another person, including a person's name, with the intent to commit a crime. RCW 9.35.020; *State v. Sells*, 166 Wn.App. 918, 923-24, 271 P.3d 952 (2012). In 2000, then-Governor Gary Locke issued Executive Order 00-03 regarding public records privacy protections. He wrote "As the Internet comes of age, we are experiencing an explosion in the growth of commercial and government electronic databases that contain highly sensitive personal information about individuals." App. 1. He noted that "[t]he information age has created an urgent need for the custodians of data to exercise special care in safeguarding [personal] information," and he issued a number of directives to state agencies to protect citizens' privacy. *Id.*

In short, the realities of the digital age ensure that disclosure of the identities of all IPs is tantamount to disclosing the identities of potentially 44% of the functionally disabled persons receiving personal care services

through Washington’s Medicaid program.²¹ Any interested lay person could investigate the names of each of the nearly 31,000 IPs on the list requested by the Freedom Foundation and could therefore identify with a high degree of confidence many thousands of people who are likely to be functionally disabled Medicaid beneficiaries. CP 668-671.

The trial court here agreed with the Freedom Foundation that SEIU 775’s so-called “connect-the-dots” argument, though reasonable and attractive because it recognizes that access to unprotected information can lead to ascertainment of categorically exempt information, such as the identities of Medicaid recipients, fails under *Koenig v. Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) and *King County v. Sheehan*, 114 Wn. App. 325, 57 P.2d 307 (2002). RP 55-56.²² Respectfully, to the extent *Koenig* and *Sheehan* mandate the disclosure of non-exempt information that is tantamount to disclosure of exempt information, those cases should be reversed, because they fail to adequately acknowledge that the disclosure of personalized, unprotected, non-exempt information, such as

²¹ This is especially true because, as of 2005, approximately 40% of IPs were relatives of the functionally disabled persons to whom they were rendering personal services. *See* CP 650 at ¶ 6. This fact makes it that much easier for an interested person to infer the identity of the Medicaid beneficiary from among the people who reside with an IP in the manner described by Ms. Hearon, because the beneficiary is likely to share the IP’s surname.

²² In *Koenig*, the Washington Supreme Court held that crime victim records must be disclosed notwithstanding that such disclosure would effectively disclose the identity of a child sexual assault victim – information exempt from disclosure under the act. In *Sheehan*, the Court of Appeals held that the PRA did not exempt from disclosure the full names of police officers employed by King County.

IP names, is the de facto disclosure of protected, PRA-exempt information, such as the names of Medicaid beneficiaries.

The trial court focused on the passage of *Sheehan* in which the Court of Appeals acknowledged that

[i]t is a fact of modern life in this age of technology that names can be used to obtain other personal information from various sources, but we conclude that this is not sufficient to prevent disclosure of the names of police officers under the act.

RP at 58 (quoting *Sheehan*, 114 Wn. App. 325). However, the “linkage” argument presented in *Sheehan* (that release of the names should be precluded because “it could somehow lead to other, private information tracked down from other sources,” *Sheehan*, 114 Wn. App. at 345-346) was rejected based on the fact that the public agency “routinely release[d]” the names in question (the names of police officers). *Id.* at 346. *Sheehan*’s ruling was based on the inoffensive and unremarkable nature of the release of information at issue, not on the grounds that a “linkage” analysis was intrinsically illegitimate.²³

Moreover, *Sheehan* was issued 13 years ago, and *Koenig* nearly ten years ago. The speed and ease with which technology can be wielded today to aid someone armed with specific information about individuals to

²³ The *Sheehan* court also recognized that under the PDA, the disclosure of two or more pieces of otherwise unobjectionable identifying information may be barred where the collective practical effect of that information is access to employees’ private affairs. 114 Wn. App. at 346.

obtain other private information must be directly and honestly accounted for when determining the validity of a “linkage” claim. Where personally-identifying information is concerned, such ease is manifest. The better-reasoned approach to determining whether a PRA exemption applies and whether an individual’s right to privacy will be violated by disclosure is to prohibit disclosure of individually identifiable information where such disclosure could easily lead to identification and disclosure of other exempt, individually identifiable information.

This Court can find support for such a holding in *Woessner, supra*, and in cases from other jurisdictions. For example, the Arizona Supreme Court upheld several school districts’ refusal to disclose teachers’ birth dates under the state public records law when they were requested by a news agency for purposes of conducting criminal background checks. *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 955 P.2d 534 (1998). In so holding, the Court recognized the teachers’ privacy interest in their birth dates, in part because that information, when combined with other individualized information, can lead to discovery of a whole host of highly personal information.

Like social security numbers, birth dates may be used to gather great amounts of private information about individuals. With both a name and birth date, one can obtain information about an individual’s criminal record, arrest record (which may not include disposition of the

charges), driving record, state of origin, political party affiliation, social security number, current and past addresses, civil litigation record, liens, property owned, credit history, financial accounts, and, quite possibly, information concerning an individual's complete medical and military histories, and insurance and investment portfolio. Based on the foregoing, we conclude that a person, including a public school teacher, has a privacy interest in his or her birth date.

Id. at 302. *Accord Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 365 (5th Cir. 2001) ("The privacy concern at issue...is that the simultaneous disclosure of an individual's name and confidential [Social Security Number] exposes that individual to a heightened risk of identity theft and other forms of fraud."). Inherent in the Courts' reasoning in *Woessner* and *Scottsdale* is an acknowledgement of the reality that disclosure of one or more pieces of information about an individual effectively constitutes disclosure of a whole host of other highly personal information about that individual and their cohabitants.

Because disclosure of a list of IP names would be tantamount to the disclosure of the names of large numbers of Medicaid beneficiaries and would contravene the statutorily-protected privacy rights of functionally disabled persons without benefiting the purposes which the PRA was designed to further, this Court should reverse the trial court decision and remand with instructions to enter a permanent injunction prohibiting DSHS from disclosing the requested list of IP names.

V. CONCLUSION

For the reasons set forth herein, the Court should either a) reverse the trial court's denial of preliminary and permanent injunctive relief and remand for entry of an order permanently enjoining DSHS from disclosing the requested list of IP names to the Freedom Foundation or b) reverse the trial court's denial of preliminary and permanent injunctive relief, reverse the trial court's advancement and consolidation of the preliminary injunction hearing with a hearing on the merits, order a preliminary injunction be entered until SEIU 775 has sufficient time to complete all discovery already issued and a trial to be held, and to order the superior court to conduct a trial on the merits of SEIU 775's request for a permanent injunction.

Respectfully submitted this 2nd day of February, 2015.

By: 
Dmitri Iglitzin, WSBA No. 17673
Jennifer L. Robbins, WSBA No. 40861
Schwerin Campbell Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Ste 400
Seattle, WA 98119-3971
Ph. (206) 257-6003
Fax (206) 257-6038
Iglitzin@workerlaw.com
Robbins@workerlaw.com

Counsel for SEIU Healthcare 775NW

DECLARATION OF SERVICE

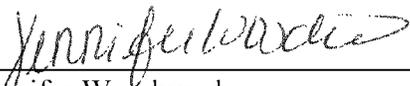
I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the State of Washington that on March 2, 2015, I caused the foregoing Brief of Appellant SEIU Healthcare 775NW to be filed with the Supreme Court of the State of Washington, via email to *supreme@courts.wa.gov* and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

Morgan Damerow
Janetta Sheehan
Assistant Attorney Generals
7141 Cleanwater Drive SW
PO Box 40145
Olympia, WA 98504-0145
MorganD@atg.wa.gov
JanettaS@atg.wa.gov

Michele Earl-Hubbard
Allied Law Group
P.O. Box 33744
Seattle, WA 98133
Michele@alliedlawgroup.com

David Dewhirst
Freedom Foundation
PO Box 552
Olympia, WA 98507
ddewhirst@myfreedomfoundation.com

SIGNED this 2nd day of March, 2015 at Seattle, WA.



Jennifer Woodward
Paralegal

NO. 91048-1

SUPREME COURT OF THE STATE OF WASHINGTON

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Appellant/Plaintiffs.

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v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, and FREEDOM FOUNDATION,
Respondents/Defendants.

**APPENDIX TO BRIEF OF APPELLANT SEIU HEALTHCARE
775NW**

Dmitri Iglitzin, WSBA No. 17673
Jennifer L. Robbins, WSBA No. 40861
SCHWERIN CAMPBELL BARNARD IGLITZIN &
LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

APPENDIX PAGE NUMBER	DESCRIPTION
1-3	Executive Order 00-03 Public Records Privacy Protections

Respectfully submitted this 2nd day of March, 2015.

By: 
Dmitri Iglitzin, WSBA No. 17673
Jennifer L. Robbins, WSBA No. 40861
Schwerin Campbell Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Ste 400
Seattle, WA 98119-3971
Ph. (206) 257-6003
Fax (206) 257-6038
Iglitzin@workerlaw.com
Robbins@workerlaw.com

Counsel for SEIU Healthcare 775NW

DECLARATION OF SERVICE

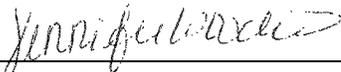
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Morgan Damerow
Janetta Sheehan
Assistant Attorney Generals
7141 Cleanwater Drive SW
PO Box 40145
Olympia, WA 98504-0145
MorganD@atg.wa.gov
JanettaS@atg.wa.gov

Michele Earl-Hubbard
Allied Law Group
P.O. Box 33744
Seattle, WA 98133
Michele@alliedlawgroup.com

David Dewhirst
Freedom Foundation
PO Box 552
Olympia, WA 98507
ddewhirst@myfreedomfoundation.com

SIGNED this 2nd day of March, 2015 at Seattle, WA.



Jennifer Woodward
Paralegal

Appendix

EXECUTIVE ORDER 00-03
PUBLIC RECORDS PRIVACY PROTECTIONS

PREAMBLE

WHEREAS, Citizens of the state of Washington are gravely concerned about their privacy, and that concern is well founded. As the Internet comes of age, we are experiencing an explosion in the growth of commercial and government electronic databases that contain highly sensitive personal information about individuals. The businesses and governments that control those databases must be responsible. It is state government's added responsibility to protect the personal privacy rights of Washington's citizens and lead the private sector by example and by law.

I am a strong believer in open government and the people's right to know. The very existence of our democracy depends on the fundamental principles embodied in our laws ensuring that we never have secret government. People must be able to trust their government.

There is a critical distinction, however, between public information and private personal information that happens to be held by the government or a business. Simply because certain personal information is in the hands of a third party does not mean that it should be made public or available to anybody willing to pay for it. A taxpayer's sensitive tax information has never been subject to public scrutiny. Nor do citizens expect that their health records, bank account, or credit card numbers will be open for inspection or available to others.

Unfortunately, as citizens, our expectations may exceed the privacy protections provided in law and the practices and policies established by the private sector and public agencies to protect personal information. The information age has created an urgent need for the custodians of data to exercise special care in safeguarding that information.

With this executive order, it is my intent to ensure that state agencies comply fully with state public disclosure and open government laws, while protecting personal information to the maximum extent possible by:

- Placing the government of Washington state at the forefront in protecting the personal information of its citizens;
- Minimizing as much as possible the collection, retention, and release of personal information by the state;
- Prohibiting the unauthorized sale of citizens' personal information by state government;
- Providing citizens with broad opportunities to know what personal information about them the state holds, and to review and correct that information; and
- Making certain that businesses that contract with the state use personal information only for the contract purposes and cannot keep or sell the information for other purposes – and that those who violate this trust are held accountable.

NOW THEREFORE, I, Gary Locke, Governor of the State of Washington, declare my commitment to strengthen privacy protections for personal information held by state agencies, and to the principles of open government and the people's right to know.

WHEREAS, an increasing number of citizens are concerned that personal information held by the state might be used inappropriately, that unauthorized people may have access to it, and that some information may be inaccurate, incomplete, or unnecessary.

WHEREAS, citizens have a right to know how information about them is handled by state agencies and the extent to which that information may be disclosed or kept confidential under the law.

WHEREAS, many state agencies collect, maintain, and dispose of public records that contain highly confidential and sensitive personal information that must be carefully safeguarded. These records contain sensitive and private health, financial, business, or other personally identifiable information. Their inadvertent release, careless storage, or improper disposal could result in embarrassment or harm to individuals and potential liability for the state.

WHEREAS, state agencies have an obligation to protect personal information about citizens, as required by law. They must exercise particular care in protecting records containing sensitive and private health, financial, and other personally identifiable information about individuals, such as social security numbers.

WHEREAS, the purpose of this executive order is to direct state agencies, as responsible information custodians, to institute additional privacy protections for personal information and to ensure that people who supply personal information to state agencies know how it will be handled and protected under state law.

I HEREBY ORDER as follows:

For purposes of this executive order, "personal information" means information collected by a state agency about a natural person that is readily identifiable to that specific individual.

1. **Protecting the Confidentiality of Sensitive Personal Information.** Each state agency shall immediately establish procedures and practices for the handling and disposal of public records and copies to provide reasonable assurances that those containing confidential personal information are properly safeguarded.
2. **Protecting Social Security Numbers and other Sensitive Personal Identifiers.** To the extent practicable, each state agency shall eliminate the use of Social Security numbers and other sensitive personal and financial identifying numbers from documents that may be subject to public scrutiny. Each state agency shall also take steps designed reasonably to ensure that appropriate personnel are aware of the new confidentiality requirement under Ch. 56, Laws of 2000, for credit card and debit card numbers, electronic check numbers, card expiration dates, and other financial account numbers connected with the electronic transfer of funds.
3. **Prohibiting the Sale of Personal Information.** Except as otherwise provided by law, state agencies may not sell personal information that they collect from the public or obtain from other public or private entities.
4. **Limitation on Collection and Retention of Personal Information.** State agencies shall limit the collection of personal information to that reasonably necessary for purposes of program implementation, authentication of identity, security, and other legally appropriate agency operations. Agencies shall examine their record retention schedules and retain personal information only as long as needed to carry out the purpose for which it was originally collected, or the minimum period required by law.
5. **Protection of Personal Information used by Contractors.** State agencies that enter into contracts or data sharing agreements with private entities and other governments that involve the use of personal information collected by the agencies shall provide in those contracts that the information may be used solely for the purposes of the contract and shall not be shared with, transferred, or sold to unauthorized third parties. A state agency that receives personal information from another state agency must protect it in the same manner as the original agency that collected the information. Each state agency shall establish reasonable procedures to review, monitor, audit, or investigate the use of personal information by contractors, including, when appropriate, the "salting" of databases to detect unauthorized use, sale, sharing, or transfer of data. Contractual provisions related to breach of the privacy protection of state contracts or agreements shall include, as appropriate, return of all personal information, termination, indemnification of the state, provisions to hold the state harmless, monetary or other sanctions, debarment, or other appropriate ways to maximize protection of citizens' personal information.
6. **Prohibiting the Release of Lists of Individuals for Commercial Purposes.** RCW 42.17.260 prohibits public agencies from giving, selling, or allowing the inspection of lists of individuals, unless specifically authorized or directed by law, if the requester intends to use the information for commercial purposes. The Attorney General in AGO 1998 No. 2 has interpreted "commercial purposes" broadly and has not limited those purposes only to situations in which individuals are contacted for commercial solicitation. For that reason, unless specifically authorized or directed by law, state agencies shall not release lists of individuals if it is known that the requester plans to use the lists for any commercial purpose, which includes any profit expecting business activity.
7. **Internet Privacy Policies.** Within 30 days of the effective date of this executive order, the Department of Information Services shall, in consultation with other state agencies and affected constituency groups as appropriate, develop a clear and concise model privacy policy for use by state agencies that operate an Internet web site. The privacy policy shall contain at least the following elements: a) the manner in which the personal information is collected; b) the intended uses of the information; c) a brief description of the laws relating to the disclosure and confidentiality of the information with a link to the state public records act and other laws, as appropriate; d) information on the purpose and anticipated effects of the web site's data security practices; e) the consequences of providing or withholding information; f) the agency's procedures for accessing personal information, verifying its accuracy, and making corrections; g) the method by which an individual may make a request or provide notice to the agency concerning the use or misuse of a person's personal information; and h) how the agency may be contacted. Within 60 days of the completion of the model policy, each state agency that operates an Internet web site shall, after consultation with affected constituency groups, adopt the model policy, modified to the minimum extent

necessary to address practical and legal considerations specific to that agency. Links to agency privacy policies should be located prominently on each agency's web site home page and on any other page where personal information is collected.

8. **Notification and Correction.** Each state agency that collects personal information shall, to the extent practicable, provide notice to the public at the point of collection that the law may require disclosure of the information as a public record. Upon request, state agencies shall provide a written statement generally identifying a) the known circumstances under which personal information in public records may be disclosed, and b) the agency's procedures for individuals to review their personal information and recommend corrections to information that they believe to be inaccurate or incomplete. This notice and statement may be included in an agency privacy policy, as specified in item 7 above.
9. **Citizen Complaints and Oversight.** Citizen complaints, questions, or recommendations regarding the implementation of this executive order or the collection and use of personal information by state agencies shall be submitted to the agency that is the custodian or collector of the information. Each agency shall designate a person to handle complaints, questions or recommendations from, and provide information to, the public regarding the collection and use of personal information and the agency's privacy policies. I will designate a person within the Governor's office to monitor and oversee the administration of this executive order and to serve as a point of contact for complaints from the public not addressed by an agency.
10. **Miscellaneous.** Nothing in this executive order shall be construed to prohibit or otherwise impair a lawful investigative or protective activity undertaken by or on behalf of the state. This order does not create any right or benefit, substantive or procedural, at law or in equity, that may be asserted against the state, its officers or employees, or any other person. It prohibits the release of public records only to the extent allowable under law. State agencies shall, in all cases, comply with applicable law. This order is intended only to improve the internal management of the executive branch and enhance compliance with the law. The Governor may grant exceptions to the requirements of this executive order if an agency can demonstrate that strict compliance results in excessive and unreasonable administrative burdens or interferes with effective administration of the law.

This executive order shall take effect immediately.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the State of Washington to be Affixed at Olympia this 25th day of April A.D., Two thousand.

GARY LOCKE
Governor of Washington

BY THE GOVERNOR:

Secretary of State