

NO. 91048-1

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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,

**REPLY/CROSS-RESPONSE BRIEF OF APPELLANT SEIU
HEALTHCARE 775NW**

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ARGUMENT IN SUPPORT OF REPLY

I. 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 trial court here decided the case as if there were no factual issues in dispute, because it asserted that it was assuming for purposes of the injunction request that all facts as alleged by SEIU 775 were true, and that additional discovery would establish that The Freedom Foundation (“FF”)’s intent in requesting the list of IP names was to economically injure SEIU 775, to bring credit or attention to its own extreme political views, to increase membership and, importantly, its funds, to decrease the membership and funds of SEIU 775 and to assist the commercial businesses with which FF is associated. In that sense, the court rendered the central, hotly-contested factual dispute immaterial, essentially applied a CR 12(b)(6) standard and then, in accordance with *Rabon v. City of Seattle*, 135 Wn.2d 278, 286 (1998), decided the merits of purely legal issues.

The trial court erred both because it decided the underlying legal issue incorrectly – for the reasons set forth below and in the Brief of Appellant – and by denying SEIU 775 the time to complete its discovery

so as to have a full opportunity to present its case at a hearing on the merits.

SEIU had promulgated written discovery and sought leave to take a 30(b)(6) deposition on an expedited basis. Contrary to what FF argues, Resp. Brf. at 22-24, the Court denied SEIU 775 leave to take a deposition and instead allowed certain written discovery to be issued and answered on an expedited basis so as to have this discovery before the preliminary injunction hearing.¹ The court's error was in consolidating the preliminary and permanent injunction proceedings before SEIU 775 had the opportunity to conduct the remainder of its discovery in the normal course; however the court did not rule that such discovery would be fruitless, irrelevant or impermissible.

Ultimately, the propriety of the trial court's decision to advance and consolidate the preliminary injunction hearing with the permanent injunction hearing will depend on whether there was any set of facts, alleged and potentially provable by SEIU 775, that would have entitled it to the injunctive relief it sought. For the reasons set forth below, there were such facts, in relation to the actual "purpose" of FF's public records

¹ The trial court did not "quash" the deposition notice. It merely denied SEIU 775's request to take the CR 30(b)(6) deposition on an *expedited* basis. CP 419. Neither did the court "limit the permissible subject of discovery." Rather, it delineated what limited subjects it would order answered on an *expedited* basis. *Id.* The deficiencies in the responses to these requests are set forth in Brief of Appellant at 27-32.

request. FFs’ denial of various of those alleged facts – such as the SEIU 775’s allegation, discussed above, that just like the non-profit organization in *VoteHemp, Inc., v. Drug Enf. Admin.*, 237 F.Supp.2d 55 (D.D.C. 2002), FF does “act in concert with” various business and industry interests – is yet further evidence that such disputed material facts do, indeed, exist. To the extent that the trial court ruled against SEIU 775 in this case without giving it a full and fair opportunity to conduct discovery and present evidence in support of its position, evidence that could have established by a preponderance of the evidence that its claims about FFs’ actual purposes in requesting the list of names it seeks are true, it committed error.

II. The “Commercial Purposes” Prohibition, RCW 42.56.070(9), Bars Disclosure Of Lists Of Names For *Any* Commercial Purpose.

The commercial purposes prohibition of the Public Records Act, RCW 42.56, (“PRA”) categorically and absolutely bars public agencies from providing access to lists of individuals when such lists are requested for commercial purposes.² “Commercial purposes” do not only exist

² An agency’s determination under RCW 42.56.070(1) that no prohibition or exemption applies to bar disclosure of requested records is subject to review by the courts, if, as here, a person named in the record seeks an injunction pursuant to RCW 42.56.540 to prohibit disclosure. *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 731, 328 P.3d 905 (2014) (“the voters of Washington State created a privately enforceable cause of action under the PRA and expressly directed courts to review de novo agency action taken or challenged under the PRA. RCW 42.56.540, .550.”); *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 752, 174 P.3d 60 (2007) (“[E]ither agencies or persons named in the record may seek a determination from the superior court as to whether an exemption applies, with the remedy being an injunction.”).

when the requester seeks financial profit through the direct use of the requested list.

This Court should begin its analysis by employing the familiar rule of statutory construction that the use of different terms within the same statute indicates that the legislature intended them to have different meaning. *State v. Tracer*, 173 Wn.2d 708, 718, 272 P.3d 199 (2012).³ 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 usual narrow construction framework that applies to PRA exemptions generally. *See* RCW 42.56.030 (“exemptions” are to be “narrowly construed”).⁴

Rather, consistent with the only Washington authority to have addressed the question - Attorney General opinion letters - and consistent with federal and out-of-state authority in other contexts, the Court should interpret RCW 42.56.070(9) to prohibit disclosure of lists of names not

³ The PRA distinguishes between “exemptions” and “prohibitions” throughout the statute. *See, e.g.*, RCW 42.56.070(1) (requiring disclosure of 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 (“...persons [requesting records] 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.”).

⁴ The proviso in RCW 42.56.070(9) pertaining to lists of license applicants and licensees does not diminish the importance of the distinction between an exemption and a prohibition. To the contrary, the proviso indicates the legislature’s intent to *only* allow disclosure in that isolated circumstance and under the conditions expressly set forth therein.

only when the list is requested for “profit-making motives,” Wash. Op. Atty. Gen. No. 2 at 2 (1998), and not only when the requester’s “primary purpose” is “to achieve financial profit through the direct use of the requested records” (as proposed by Respondent/Defendant Freedom Foundation, Resp. Brf. at 33, n. 33). It should construe the commercial purposes prohibition to also apply when the intent of the requester is to use the list to generate revenue and engage in other activities which promote, support and/or advance an entity’s general business purposes, including requesting the list for purposes of soliciting, marketing, advertising, or self-promoting, or inducing any person to economically support or to cease or refrain from economically supporting any entity.

Although FF is a Washington non-profit corporation, it nevertheless funds its ideologically-driven, virulently anti-union activities with donations from other entities and individuals, which it regularly solicits. It fundraises from its donors and supporters and from the public in part by advertising its mission to economically cripple unions like SEIU, CP 755-57, and by announcing the details of steps it has taken or will take to “defund” unions, including to contact IPs 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 705-707.⁵

FF has also fundraised on the specific promise that, if it is successful in obtaining the list of IP names, FF will contact IPs and encourage them to cease supporting SEIU 775 through union dues. CP 705-707; CP 865-866; CP 867-869.

While the revenue generated by these fundraising activities is technically not “profit” to the organization, it is difficult to conceive of a more obviously “commercial purpose” than obtaining a list of names in order to contact individuals to attempt to persuade them to stop giving money to one’s financial adversary and, in turn, to garner financial support, directly from those individuals, and indirectly through fundraising and solicitations to third parties based on one’s efforts to “defund” (e.g., bankrupt) one’s adversary through contacts with such individuals.⁶

The Attorney General opinions support an interpretation that encompasses general business purposes, including encouraging people on the list to financially support certain entities and to cease financially

⁵ That IPs may not have been contacted by virtue of their status as IPs in the past begs the question, since once the list of IP names is turned over, FF intends to contact them all precisely because they are IPs to encourage them to cease paying dues to SEIU 775 and to encourage them to support FF.

⁶ Significantly, nothing in the plain language of the statute limits the prohibition on disclosure to only those requests made for “profit-making” motives. RCW 42.56.070(9) (“This chapter shall not be construed as giving authority to any agency...to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies...shall not do so unless specifically authorized or directed by law....”).

supporting others. Wash. Op. Atty. Gen. No. 15 at 6 (1975) (observing the word “commercial,” when narrowly construed, “was intended to cover a broader range of business activity” than merely buying and selling of goods and 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);⁷ Wash. Op. Atty. Gen. No. 38 (1975) (barring disclosure where the intended use was to contact new residents to make them aware of surroundings, solicit participation in community events, and make them aware of business entities in the area).⁸

The AGO’s broad construction of the phrase “commercial purposes” in AGO 1998 No. 2 is persuasive, notwithstanding subsequent treatment of *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997), upon which the AGO relied in part, and later cases construing

⁷ The AG acknowledged: “a narrower definition of “commercial” could lead to the granting of access to one type of business activity and not to another - a result which would not only be inconsistent with our general analysis herein but would also be inconsistent in the treatment of similar enterprises.” *Id.* at *6.

⁸ Wash. Op. Atty. Gen. No. 12 (1988), which FF cites as support for a narrower interpretation. Resp. Brf. at 35-36, n. 36, does not support that proposition. In that Opinion, the Attorney General purported to “synthesize” certain prior Attorney General Opinions as stating, collectively, that under certain enumerated circumstances, “agencies shall not provide a list of the names of natural persons.” AGO No. 12 at n. 4. The Opinion does not state that this is an exclusive or comprehensive description of all of the circumstances under which a request might be seen as having been made for “commercial purposes.” Later AG opinions have repeated the conclusion that the prohibition “*broadly encompasses*” profit-expecting activity but has not limited the application to such. See Wash. Op. Atty. Gen. No 2 at *2 (1998) (emphasis added) (in concluding that the prohibition applies even where the requester does not seek to commercially solicit the individuals, AG 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.”).

PRA exemptions narrowly. The Attorney General there concluded that the statute is applicable where the requester intends to use the list to facilitate commercial activity, regardless of whether the individuals on the list are personally contacted or affected. AGO 1998 No. 2. While the AG stated that this conclusion was “solidified” by *Newman*’s treatment of the investigative files exemption, and this exemption has subsequently been applied narrowly, in RCW 42.56.070(9) (unlike the investigative records exemption of RCW 42.56.240(1)) the legislature has expressly directed that the agency wholly lacks the authority to disclose lists where the conditions of the provision are met.⁹ *Newman* did not serve as the basis of the AG’s conclusions, and, in any event, this court recently reaffirmed its holding in *Newman* that to protect the integrity of an ongoing police investigation, a categorical exemption may apply to an “open active police investigation file.” *Sargent v. Seattle Police Dep’t*, 179 Wn.2d 376, 389, 392, 314 P.3d 1093 (2013) (declining to extend the investigative records exemption to internal investigation records). That courts have declined to

⁹ Notwithstanding any other provisions in the PRA that obligate agencies to disclose public records, such provisions “shall not be construed” as authorizing agencies to disclose lists of names requested for commercial purposes. RCW 42.56.070(9). The commercial purposes provision is unique in its mandatory language divesting agencies of the authority to provide access to lists of individuals requested for commercial purposes and instructing that agencies “shall not do so unless specifically authorized or directed by law.” RCW 42.56.070(9).

interpret PRA exemptions in other contexts¹⁰ as categorical prohibitions should not dissuade the court from interpreting the “commercial purposes” prohibition as a categorical bar.

Court decisions in other contexts likewise support a construction of “commercial purposes” sufficiently broad to encompass FF’s conduct, notwithstanding that the organization is non-profit, rather than for-profit. *See, e.g., VoteHemp, Inc., supra* (non-profit organization had a commercial interest in requested documents where group sought information to advance its advocacy goals in association with business who would benefit from achievement of those goals); *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 [Freedom of Information Act] requests, namely, a desire to prevail in litigation against the government). *Accord Brach Van Houten Holding, Inc. v. Save Brach’s Coal. for Chicago*, 856 F. Supp. 472, 474 (N.D. Ill. 1994).

Indeed, courts have found conduct to be “commercial” in nature when it was designed to harm the plaintiff commercially, as FF’s conduct is here. *See, e.g. Jews For Jesus v. Brodsky*, 993 F. Supp. 282, 308 (D.N.J. 1998), *aff’d* 159 F.2d 1351 (3rd Cir. 1998); *Planned Parenthood*

¹⁰ *E.g., Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998) (work product); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010) (effective law enforcement exemption).

Federation of America, Inc. v. Bucci, 1997 WL 133313, *5-6 (S.D.N.Y., March 24, 1997), *aff'd* 152 F.3d 920 (2d Cir. 1998).¹¹ Had the Washington legislature wished to bar disclosure of lists under RCW 42.56.070(9) only where the list was requested for “profit-making” motives, it could have chosen that language, rather than the term “commercial” which has a broader meaning.¹²

FF argues that, unlike the non-profit organization in *VoteHemp, Inc.*, it “does not act in concert with any business or industry interests” and poses the hypothetical question “Indeed, what commercial entities would benefit because government employees choose to cease financially supporting a union?” Resp. Brf. at 40. But that raises a factual dispute, such that a ruling against SEIU 775 on this basis, absent a meaningful opportunity for discovery and an evidentiary hearing, was clearly improper.

¹¹ In its Brief of Appellant, SEIU 775 explained why these FOIA and Lanham Act cases serve as persuasive authority in interpreting “commercial purposes” in RCW 42.56.070(9). FF provides no analysis that in any way undermines the rationale why these cases, though distinct, are nevertheless persuasive authority for construing RCW 42.56.070(9) to encompass its request. Indeed, its discussion of cases like *Jews for Jesus* and *Planned Parenthood*, Resp. Brf. 43-44, show how analogous these cases are, since there, like here, the entities appropriated the trademark to gain access to individuals in a manner that would cause economic harm to an entity the group opposed, to the potential economic benefit of the appropriating organization.

¹² Nor can the Court hold, as FF urges, that the commercial purposes prohibition does not bar disclosure if the requester has other purposes in addition to the commercial one. Resp. Brf. at 33, n. 33 (urging the Court to adopt a test barring disclosure only where the requester’s “primary” purpose is to achieve financial “profit” through the “direct use” of the requested records). There is no statutory basis for such a restrictive interpretation, and indeed allowing disclosure where a requester has one non-commercial purpose contravenes the express statutory language.

Moreover, ample evidence of the fallacy of this supposed separation between business interests and FF's interests exists in the record. *See, e.g.*, CP 759 ("If you want to take down the union political machine and help me be ready to fight off the Obama Administration, you can make a contribution right now."); CP 745 ("Please join us in stopping this disease (public sector unions) and support our mission of individual liberty, free enterprise and limited, accountable government") (emphasis added); CP 756 (describing efforts to bring right to work legislation to Washington cities and seeking donations to "destroy" public sector unions in Washington State like "Scott Walker and my friend did in Wisconsin").¹³

Applying a CR 12(b) standard, SEIU 775's allegations before the trial court were clearly sufficient to establish FF's commercial purpose, which inheres in FF's close relationship with its business allies.

As explained above, the trial court stated that it assumed as true SEIU 775's allegations that FF requested the list of IP names for commercial purposes. However, it did not seriously address the Union's

¹³ Additionally, FF's own website adopts by implication an assertion made on the record by undersigned counsel in the proceedings below that connects the dots between FF's effort to "defund" public-sector unions and FF's true and ultimate goal, which is to thereby assist businesses in obtaining or maintaining political control of the instruments of government. *See* <<http://www.myfreedomfoundation.com/what-seiu-is-saying-about-us>> (Freedom Foundation is attempting to "prevent[] SEIU from financially supporting Democratic candidates for governor and \$15-an-hour minimum wage campaigns").

contention that FF requested the list to economically benefit businesses with whom it is associated and denied SEIU 775 an evidentiary hearing at which it could present additional evidence on this point.

In short, 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 FF’s here, the court interpreted the law to mandate that the agency *shall* provide such access.¹⁴

III. 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).

It does not follow that because information is not exempt under one PRA provision, it cannot be held exempt under another PRA provision. SEIU 775 does not claim that the list of IP names is prohibited by RCW 42.56.250(3) (which exempts certain information of public employees, including IPs, and their dependents). While RCW 42.56.250(3) does not itself exempt IP names, because the release of a list

¹⁴ FF contends that an injunction against disclosure of the documents in question was inappropriate here, in any event, per RCW 42.56.540, *see* Resp. Brf. at 48. However, for constitutional as well as statutory reasons, the requirements of RCW 42.56.540 apply only at the *permanent* injunction stage. *See, e.g., Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415-16, 63 P.2d 397 (1936) (“The granting or withholding of an interlocutory injunction is addressed to the sound discretion of the court, to be exercised according to the circumstances of the particular case.”). Moreover, because the trial court ruled as a matter of law and without any evidentiary hearing that FF’s request was not made for commercial purposes, it never gave SEIU 775 any opportunity to show either that disclosure of the lists of names sought by FF “would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.”

of IP names is tantamount to the release of the identities of Medicaid beneficiaries, it 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.

IPs are unique from other public employees, because in a high percentage of cases, the IP lives with the Medicaid beneficiary for whom s/he provides care. Thus, while the Court of Appeals in *Sheehan*¹⁵ held there was no privacy right in protecting from disclosure public employee names, and acknowledged that names can be used to locate other personal information, the Court was not faced with the question at issue here - does RCW 42.56.230(1) exempt IP names, where disclosure of such names can easily lead to the discovery of the names of Medicaid beneficiaries.

To the extent *Sheehan* and *Koenig v. Des Moines*, 158 Wn.2d 73, 142 P.3d 162 (2006) mandate disclosure of IP names, they should be overruled. *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.¹⁶ *Sheehan* does not adequately account for the rapid ease with which modern-day

¹⁵ *King County v. Sheehan*, 114 Wn. App. 325, 57 P.2d 307 (2002).

¹⁶ 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.

technology allows an individual armed with merely a name to find other information. 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.

ARGUMENT IN SUPPORT OF CROSS-RESPONSE

I. FF Was Not Aggrieved By The Trial Court's Rulings And Therefore Lacks Standing to Cross-Appeal.

RAP 2.2(a) provides a list of decisions of the superior court that may be appealed. The list includes a final judgment, which is “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney’s fees) and enforcement of the judgment.” *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003) (quoting BLACK’S LAW DICTIONARY 847 (7th ed. 1999)). FF is not an “aggrieved party” entitled to seek review of the final judgment disposing of SEIU 775’s claims. RAP 3.1 (“Only an aggrieved party may seek review by the appellate court.”). An “aggrieved party” within the meaning of RAP 3.1 is “one whose personal right or pecuniary

interests have been affected.” *State v. Taylor*, 150 Wn.2d at 603. “[T]he pertinent inquiry is whether the trial court entered a judgment that substantially affects a legally protected interest of the would-be appellant.” *Polygon Nw. Co. v. Am. Nat. Fire Ins. Co.*, 143 Wn. App. 753, 768, 189 P.3d 777, *rev. denied* 164 Wn.2d 1033 (2008).

Here, FF is not aggrieved by the trial court’s final judgment because, to the extent the Court’s rulings affected FF’s rights, it affected those rights *in its favor*. *See id.* at 768-69. FF has no right to appeal the final judgment issued by the court below.

II. Appellate Review Of Any Sort Of The Two Interlocutory Rulings Of The Court Below Is Inappropriate Because FF Is Not Currently Aggrieved By Either Of These Rulings And There Is No Risk That FF Might Become Aggrieved By Such Rulings Upon Reversal Of The Final Judgment.

The other two orders that FF seeks this court to review – its order granting a TRO and its ruling allowing SEIU 775 to submit interrogatories to FF and to have answers to those interrogatories on an expedited basis - are interlocutory in nature and thus are not appealable as a matter of right. RAP 2.2, 2.3; *see also* Task Force Comment to RAP 2.2, reproduced in Karl Tegland, 2A WASHINGTON PRACTICE: RULES PRACTICE 2.2, commentary following RAP 2.2, heading 32 (7th ed.) (specifically identifying an order granting a TRO motion as nonappealable and review of such order as discretionary); *State Bank of Goldendale v. Beeks*, 119

Wash. 42, 45, 204 P. 771 (1922) (order refusing to strike interrogatories interlocutory and not appealable in advance of an appeal from the final judgment in an action).

Where, as here, the party seeking review is not currently aggrieved by interlocutory rulings of the lower court, and there is no risk that it might become aggrieved by the interlocutory rulings upon reversal on direct appeal, appellate review of such decisions is improper. *See* RAP 2.4(a) (“The appellate court will, at the instance of the respondent, review those acts in the proceeding below **which if repeated on remand would constitute error prejudicial to the respondent.**”) (Emphasis added).

The legal issues involved in SEIU 775’s request for a TRO and its request for preliminary and permanent injunctive relief are identical; both motions required the court to decide whether SEIU 755 is entitled to an injunction prohibiting disclosure of the requested records because a) RCW 42.56.070(9) prohibits DSHS from providing access to lists of individuals for commercial purposes; or b) the records are categorically exempt under RCW 42.56.230(1) and/or RCW 42.56.070(1). Thus, if SEIU 775 obtains reversal as a matter of law on appeal, the appeals decision will require the issuance of an injunction and the trial court’s grant of the TRO will be both consistent with the ruling on appeal and moot, precluding review by this court. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 316, 319-20

(1974) (court lacks “power to decide questions that cannot affect the rights of the litigants in the case before them”) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).¹⁷ It will not be “repeated on remand” and therefore could not fall within the scope of an order appropriately reviewed pursuant to RAP 2.4(a).

Similarly, as to the lower court’s discovery ruling, if SEIU 775 obtains reversal on the commercial purposes prohibition and the case is remanded to allow discovery into whether FF’s purposes for requesting the provider list are “commercial,” then the protective order issue likewise will be moot.

Even if this Court were to choose to apply the considerations relating to the granting of discretionary review set forth in RAP 2.3(b) in determining whether to grant review of the interlocutory rulings complained of by FF, such review should be denied, as none of the considerations set forth in RAP 2.3(b)(1)-(4) exist here, and FF has neither appropriately filed a notice of discretionary review nor filed a motion seeking such review within the applicable timeframes. *See* RAP 2.3; RAP 5.1; RAP 6.2(b).

¹⁷ *See also State ex rel. Carroll v. Simmons*, 61 Wn.2d 146, 149, 377 P.2d 421 (1962) (the temporary order merges with the final judgment and any question as to the propriety of the temporary order becomes moot) (modified in part by RAP 2.2).

III. The Trial Court's Conclusion That SEIU 775 Has Standing To Pursue An Injunction Barring Disclosure Of The List Of IP Names Should Be Affirmed.

FF misconstrues the trial court's standing ruling and misrepresents the basis of SEIU 775's standing. It also conflates the issues of associational standing and the standard for obtaining injunctive relief under RCW 42.56.540.

SEIU 775 never asserted that it had standing to assert the privacy interests of the Medicaid beneficiaries for whom SEIU 775's members provide care.¹⁸ Instead, SEIU 775 asserted (and the trial court correctly held) that it had associational standing¹⁹ to bring suit on behalf of the individual providers for whom it is the exclusive bargaining representative.²⁰ Once SEIU 775 satisfied the standing criteria established by *Int'l Ass'n of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 213-214, 45 P.3d 186 (2002), the Union can raise any basis that applies to obtain an injunction prohibiting disclosure. *Ameriquest* 148 Wn. App. at

¹⁸ Because SEIU 775 does not bring this action on behalf of the rights of non-members, *Des Moines Marina Ass'n v. City of Des Moines*, 124 Wn. App. 282, 100 P.3d 310 (2004) is inapposite.

¹⁹ In its Answer to Foundation's Statement of Grounds for Direct Review at 13 and n. 17, SEIU 775 referred to this as organizational standing, which was an inadvertent misstatement. SEIU 775 has consistently, throughout the proceedings in this matter, asserted its associational standing pursuant to *Int'l Ass'n of Firefighters* and its progeny.

²⁰ See CP 597 at ¶ 1 (Plaintiff's Complaint, asserting that SEIU 775 was bringing action on behalf of the individual providers for whom it is the exclusive bargaining representative pursuant to RCW 74.39A.270 and Chapter 41.56 RCW); VRP 53, lines 12-19 (October 16, 2014).

166.²¹ The interests of “welfare recipients” do not, therefore, need to be germane to SEIU 775’s interests in order for the Union to seek to bar disclosure, and the Court need not decide whether “welfare recipients” have standing.

The well-established rules for associational standing are easily met with regard to the IPs, because the IPs who are named in the records sought by FF would have standing to sue in their own right, the interests that SEIU 775 seeks to protect are germane to its purpose and neither the claim nor the asserted relief requires the participation of the IPs. *Int’l Ass’n of Firefighters*, 146 Wn.2d at 213-214. The IPs are named in the records sought by the FF; they therefore have standing to sue in their own right to prohibit disclosure. RCW 42.56.540; *Branson v. Port of Seattle*, 152 Wn.2d 862, 875-876, 101 P.3d 67 (2004) (person has standing to bring action where his/her interest is “arguably within the zone of interests to be protected by the statute or constitutional guaranty in question,” and he/she alleges an “an injury in fact, economic or otherwise,” flowing from violation of said guaranty).²² As the exclusive representative for all IPs in

²¹ A third party does not lose standing by asserting an exemption that does not relate to its rights; were that the case, the Court of Appeals would have found Ameriquest did not have standing by virtue of its having asserted the *AGO*’s work product and attorney-client privileges. To the contrary, Ameriquest had standing because the record pertained to it, and it had that standing notwithstanding that it raised exemptions that relate to interests other than its own. *Ameriquest*, 148 Wn. App. at 166.

²² That DSHS has the inherent authority (preserved in RCW 42.56.080) to require a requester to provide information that would tend to prove or disprove the “commercial

Washington State, protecting the rights of IPs to not have a list that includes their names disclosed to FF for commercial purposes is clearly germane to the purposes of SEIU 775,²³ as is the goal of assisting IPs to protect the privacy of their clients, who are very often their relatives or long-term personal friends.²⁴ Participation of individual IPs is not required in order for this Court to determine whether SEIU 775 is entitled to the relief sought herein, enjoining DSHS from producing the records sought by FF.

The *Ameriquist* Court of Appeals decision conclusively establishes that any party that will be affected by a disclosure of documents pursuant to the PRA has standing to challenge an agency's decision to disclose on any grounds. *Ameriquist*, 148 Wn. App. at 166; *see also* VRP 53, lines 12-19 (October 16, 2014). The trial court therefore correctly held that SEIU 775 could raise any applicable exemption, prohibition or other grounds for non-disclosure. VRP at 51 (October 16, 2014) (relying on *Ameriquist*, 148 Wn. App. at 166) (holding that because *Ameriquist* was a party that will be affected by disclosure of the work product of the

purpose" of a request for a list of names in no way implies that named individuals may not independently assert their *own* rights under the statute.

²³ SEIU 775's stated mission is "to unite the strength of all working people and [their] families, to improve [their] lives and lead the way to a more just and humane world." *See* <http://seiu775.org/about-us-2/>. CP 678. Moreover, SEIU 775's Constitution states that it is the "vision" of SEIU 775 to, among other things, "be a powerful voice for long-term care and disability services workers and clients..." CP 684.

²⁴ *See* CP 661 (Declaration of Bea-Alise Rector, Ex. J, at ¶ 4).

Attorney General's Office ("AGO") it had standing to challenge the decision to disclose such and to raise the attorney client privilege and work product doctrine, though such privileges were unrelated to Ameriquest).²⁵

Because the individual members of SEIU 775 are "named in the record" that FF seeks and meet the *Firefighters* test for associational standing, they clearly have standing under RCW 42.56.540 to sue to enjoin the disclosure by DSHS of that record under any legal theory they might choose to invoke.

IV. The Court Correctly Issued a Temporary Restraining Order Where It Found the *Tyler Pipe* Standard Met.

In arguing that the trial court erred by granting SEIU 775 a TRO enjoining disclosure of the list of IP names, FF erroneously asserts that *Northwest Gas Ass'n v. Wash. Util. & Transp. Comm'n*, 141 Wn. App. 98, 168 P.3d 443 (2007), *Ameriquest Mortgage Co. v. Attorney General*, 148 Wn. App. 145, 199 P.3d 468 (2009) and *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982) conflict with *Ameriquest Mortgage Co. v. Attorney General*, 177 Wn.2d 467, 491, 241

²⁵ The trial court here, relying on *Ameriquest* to hold that SEIU 775 had standing to address PRA exemptions that protect interests unrelated to the Union, noted that "One would be challenged to find an exemption that is less related to the interest of a private party – yet the Court of Appeals permitted Ameriquest standing to make those arguments." VRP 51 (October 16, 2014).

P.3d 1245 (2010), cases cited in *Ameriquest*, and the PRA itself. This contention is not supported by the case law.

Northwest Gas held, in a PRA case, “that the trial court erred when it conflated the permanent injunction trial into the preliminary injunction hearing without notice to the parties, contrary to CR 65” and when it issued a final order on the merits “without giving the original parties a full opportunity to present evidence and to prove their respective positions at a trial on the merits.” 141 Wn. App. at 114-15. The order on the request for preliminary injunctive relief was essentially a final order on the merits, because it denied the plaintiffs’ request for injunctive relief and ordered the agency to disclose the requested records. *Id.* at 114. The Court of Appeals in *Ameriquest* made similar holdings. 148 Wn. App. at 156.

The *Northwest Gas* and *Ameriquest* courts of appeal decisions rely on the *Tyler Pipe* three-part standard for injunctive relief.²⁶ At a *preliminary* injunction hearing, which the courts acknowledge serves the same general purpose as a TRO hearing – to preserve the status quo – the courts consider 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

²⁶ To obtain injunctive relief under CR 65, a plaintiff must establish (1) he has a clear legal or equitable right; (2) he has a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which he complains are either resulting or will result in actual and substantial injury to him. *Tyler Pipe Indus.*, 96 Wn.2d at 792.

right, that he reasonably fears will be invaded by the requested disclosure, resulting in substantial harm. *Northwest Gas*, 141 Wn. App. at 115-16; *Ameriquest*, 148 Wn. App. at 157 (both cases citing *Tyler Pipe*, 96 Wn.2d at 792-93). “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 the requirements for injunctive relief. *Northwest Gas*, 141 Wn. App. at 116.

Reading these cases together with the Supreme Court’s decision in *Ameriquest* (and cases cited therein), 177 Wn.2d at 491, the party seeking the TRO or preliminary injunction on the basis of a PRA exemption or prohibition need only establish a *likelihood* of prevailing on the merits as to whether a PRA exception or prohibition applies. *Northwest Gas*, 141 Wn. App. at 114-15; *Ameriquest*, 148 Wn. App. at 156. But to obtain a *permanent* injunction under RCW 42.56.540, the party must prove the *Tyler Pipe* elements and “(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*, 177 Wn.2d at 487. These cases are not in conflict.

Moreover, none of the cases cited by FF require that in a case involving a prohibition, as opposed to an exemption, a third party is

required to meet the elements of RCW 42.56.540. RCW 42.56.070(9) does not merely exempt “lists of individuals requested for commercial purposes” from the scope of documents that agencies must disclose; it affirmatively precludes agencies from such disclosure, stating that the agencies “shall not do so.” By using different words to describe different types of provisions that might pertain to any particular public records request, i.e., those that “exempt” and those that “prohibit” disclosure, see, e.g., RCW 42.56.080, the PRA recognizes a difference between these two concepts.

This is significant because RCW 42.56.540, which is a “procedural statute” granting trial courts “the authority to enjoin the release of a specific record if it falls within a specific exemption found elsewhere in the act,” *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 807-808, 246 P.3d 768 (2011), clearly contemplates a balancing test between the general PRA goal of favoring public disclosure, versus the public interest harm that could flow from the same. Yet provisions that affirmatively prohibit disclosure, and do not merely exempt certain documents from an affirmative obligation to disclose, cannot reasonably be read through that prism. Instead, where, as here, the people (through Initiative Measure No. 276, Laws of Washington 1973, c 1 § 26) directed that certain documents not be made available to the public under certain

circumstances, the pertinent language must be read as defining the outcome of a balancing test that the law already incorporates. In deciding whether SEIU 775 is entitled to preliminary or permanent injunctive relief under RCW 42.56.070(9), a trial court should not reweigh the factors that might have led to that (eminently reasonable) determination. Instead, at the preliminary injunction stage, the trial court should determine simply whether SEIU 775 was likely to “ultimately prevail at a trial on the merits” by establishing, in this case, that the requested disclosure would violate the statute. At the permanent injunction stage, SEIU 775 need only prove that the commercial purposes prohibition applies, and the trial court can order injunctive relief barring disclosure on that basis.

The trial court below acknowledged the standards set forth in these cases and expressly found that the requirements of a TRO were met.²⁷ The Court did not, as FF claims, feel compelled “to grant an injunction merely to preserve the status quo” even where the Court does not find a likelihood of success on the merits. Resp. Brf. at 29-30.

A Court that finds there is not a likelihood of success on the question whether a PRA exemption or prohibition applies can deny the

²⁷ See CP 79 (trial court finding “a sufficient showing has been made under the applicable law as described in oral ruling dated October 3, 2014”); VRP 40-42 (October 3, 2014) (acknowledging that under *Tyler Pipe* the Court must assess the merits of the dispute in order to deny or grant the TRO, and also acknowledging the “novelty” of the commercial purposes argument, granting the TRO).

request for injunctive relief, and the subsequent procedure would follow what actually occurred in this case when the Court issued its order denying a preliminary and permanent injunction. Here, the trial court's TRO was only in effect under a *CR 65/Tyler Pipe* analysis from October 3 to October 16, 2014. Subsequent to October 16, a temporary injunction restraining DSHS from fulfilling FF's PRA request was briefly in place by order of the superior court not in the context of *CR 65/Tyler Pipe* analysis, but as an exercise of judicial authority intended to ensure that the fruits of SEIU 775's appeal would not otherwise be totally destroyed. *See* VRP 77, lines 9-17 (October 16, 2014). Since November 3, 2014, the injunction exists not as a result of any trial court ruling, but instead as a result of the Court of Appeals' analysis pursuant to *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291-92, 716 P.2d 956 (1986). *See* Appendix to SEIU Healthcare 775NW's Answer to Statement of Grounds for Direct Review at 161 (November 3, 2014, ruling from Court of Appeals staying trial court's October 16, 2014 order.)

There is nothing unusual about this procedure. All the rights and remedies exist for the parties under the aforementioned standards which are not in conflict, but rather operate in harmony to ensure that a TRO or preliminary injunction only issues when the Court finds there is a likelihood of success on the merits. To the extent such likelihood is

lacking in a PRA case (e.g., the *Tyler Pipe* standards are not met), a court can deny a TRO and it is then up to the party opposing disclosure to seek interim injunctive relief from the trial and/or appellate courts to maintain the status quo pending the outcome of the appeal.²⁸

FF would have this Court categorically prohibit third party (e.g., non-agency) challenges to disclosure based on RCW 42.56.070(9). Resp. Brf. 31-32. To so hold, this Court would have to re-write the PRA and contravene settled case law, which expressly provides that a person named in the record can obtain an injunction if all the elements for such an injunction can be proven. RCW 42.56.540; *Ameriquest*, 177 Wn.2d at 487; *Northwest Gas*, 141 Wn. App. at 115-16.

V. Because The Civil Rules Govern Discovery In A PRA Case, SEIU 775 Was Entitled To Conduct Discovery, Including The Limited Discovery Permitted By the Trial Court, Related To The FF's Purposes In Requesting A List Of IP Names.

When civil litigation arises out of the PRA (typically an action seeking documents or seeking to prohibit disclosure of documents held by a governmental agency), the rules of discovery are the same as they are in

²⁸ FF's suggestion that all PRA injunction requests can be decided as a matter of law without findings of fact. Resp. Brf. at 31. is nonsensical and contravenes cases which expressly incorporate the CR 65 procedure and standards of proof to injunctions requested under the PRA. *See, e.g., Ameriquest*, 148 Wn. App. at 154-55, 157; *Northwest Gas*, 141 Wn. App. at 115-16; *see also San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 154, 157 P.3d 831 (2007) ("To facilitate appellate review, a trial court must enter findings of fact and conclusions of law and set forth its reasons for issuing a preliminary injunction."). This Court need look no further than this case to see how material facts pertaining to the applicability of a PRA exemption or prohibition may arise.

any other civil action. In this sort of case, the scope of discovery available to the plaintiff is limited only by the general principles of CR 26. As DSHS correctly acknowledged in its Response brief, CR 81 dictates that the civil rules, including the rules of discovery, “shall govern all civil proceedings.”²⁹ Specifically addressing the scope of discovery in a PRA case, the Washington Supreme Court held that “the civil rules control discovery in a PRA action” and “discovery is therefore governed only by relevancy considerations.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 708, 716, 261 P.3d 119 (2011) (holding that county’s refusal to respond to organization’s discovery requests was improper and rendered the record in the case incomplete, requiring remand). The plaintiff in a PRA action is entitled to the same scope of discovery allowed other civil plaintiffs under Washington’s civil discovery rules. *Id.* “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” CR 26(b)(1).³⁰ Of course, it may be within the trial court’s discretion to narrow discovery, but it must not do so in a way that prevents

²⁹ Proceedings under the PRA are not special proceedings subject to special rules. *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011).

³⁰ The usual civil rules regarding discovery already protect against over-broad discovery requests into irrelevant subjects, discovery abuses and/or discovery into private affairs that may warrant protective treatment. Thus, the Foundation’s concerns about discovery overreach are already accounted for.

discovery of information relevant to the issues that may arise in a PRA lawsuit. *Neighborhood Alliance of Spokane Cnty.*, 172 Wn.2d at 717. The reasons why documents were withheld are relevant in a PRA action. *Id.* at 718. Certainly, the propriety of the agency's determination that a PRA prohibition does *not* apply to bar disclosure, including facts that are probative of whether or not a particular exemption or prohibition applies, is likewise a topic subject to the liberal CR 26 discovery principles. *See id.* at 716-17.

RCW 42.56.080 does not operate to limit the scope of discovery here, because SEIU 755's discovery requests, including those allowed by the trial court to be issued and then answered on an expedited basis, relate to the applicability of the commercial purposes prohibition. Determining whether disclosure would violate the commercial purposes prohibition is an express exception to the provision that a requester shall not be required to provide information about the purpose of the request. RCW 42.56.080 (“...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).³¹ FF proposes an approach found nowhere in the statute that before a party is entitled to discovery it must first prove the requirements of RCW 42.56.540 are met. Yet, to obtain an injunction, SEIU 775 must prove in the first instance that an exemption or prohibition applies to prevent disclosure, so SEIU 775's entitlement to discovery on that issue (under the broad CR 26 standard) exists independently from its ability to prove other necessary elements of its injunctive relief claim. As FF acknowledged, some agencies do ask requesters to attest that a requested list will not be used for a commercial purpose. Resp. Brf. at 52; *see, e.g.*, WAC 44-14-06002(6) (Attorney General); WAC 390-14-035(7) (Public Disclosure Commission); WAC 257-02-100(1)(e) (Home Care Quality Authority). However, nothing in the PRA, these regulations or the Attorney General opinion cited by the FF, 1988 Letter Op. Att'y Gen. No. 12, limits the inquiry into commercial purposes to only such an attestation.³²

³¹ The Court should not read any limitation on discovery into the PRA, where none exists. Had the legislature intended to limit discovery, it was more than capable to do so. *Compare* RCW 36.70C.120 and RCW 19.86.110.

³² The 1988 AGO opinion No. 12 confirmed that a public agency may condition access to a public record containing a list of individuals on the requester's promise that the record will not be used for a commercial purpose, but held that the agency may not require the requester to enter into a hold harmless agreement to that effect. This case exemplifies why such a certification is not adequate to prevent disclosure of lists of names for commercial purposes in every instance. Here, though FF admits that it seeks the names to encourage IPs to cease economically supporting SEIU 775 – its declared political and economic adversary – and to encourage IPs to support FF, declarations submitted by FF attest that the intended use is not “commercial.”

This Court may reverse the trial court’s exercise of its discretion to order discovery only on a clear showing that the court’s decision was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Although FF contends that its own self-serving declarations were sufficient to preclude any further inquiry into the central question before the court, whether or not it requested the list of IP names for commercial purposes, FF has not met its high burden of proof in this regard.³³

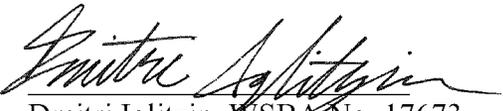
CONCLUSION

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 FF 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

³³ *Ameriquest* does not require a different result. *Ameriquest* was not a “commercial purposes” case, and the Court there merely deferred to the trial court’s discretion to decline to order additional discovery in circumstances in which it determined a declaration provided by an *agency* employee (the division chief of the consumer protection division of the AGO) contained sufficient factual information to conclude that the PRA investigative records exemption does not apply. These were factual circumstances wholly different than those here, where it is the self-serving declaration of the *entity seeking the information* for commercial purposes that is at issue.

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 29th day of June, 2015.

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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 Reply/Cross-Response 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:

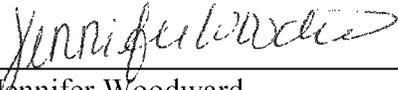
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SIGNED this 29th day of June, 2015 at Seattle, WA.



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