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46797-6-II
No. 91048-1

IN THE WASHINGTON STATE SUPREME COURT

SEIU HEALTHCARE 775 NW,
Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES ("DSHS"),
Respondent,

and

FREEDOM FOUNDATION,
Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT
FREEDOM FOUNDATION

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE 2

III. CROSS APPELLANT’S ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO SAME 4

A. THE TRIAL COURT ERRED BY FINDING SEIU HAD STANDING..... 4

1 THE TRIAL COURT ERRED BY GRANTING STANDING TO SEIU TO TO ARGUE THE ALLEGED INTEREST OF WELFARE RECIPIENTS PURSUANT TO RCW 42.56.230(1)..... 5

2 THE TRIAL COURT ERRED BY GRANTING STANDING TO SEIU TO BRING SUIT PURSUANT TO RCW 42.56.070(9). 8

B. THE TRIAL COURT DID NOT ERR WHEN IT CONSOLIDATED THE PRELIMINARY AND PERMANENT INJUNCTIONS UNDER CR 65(A)(2). 13

1. TRIAL COURT CORRECTLY REACHED THE MERITS OF PURELY LEGAL ISSUES AND DISALLOWED DISCOVERY..... 15

2. THE DECLARATIONS PROVIDED A SUFFICIENT BASIS FOR THE TRIAL COURT’ DECISION. 18

3. ADDITIONAL EVIDENCE WILL NOT ALTER THE CASE’S OUTCOME AND SEIU WAS NOT SUBSTANTIAL PREJUDICED BY DENYING FURTHER DISCOVERY. 21

4. DISCOVER WAS ALREADY FULLY DEVELOP. 24

C. THE TRIAL COURT ERRED BY ISSUING A TEMPORARY RESTRAINING ORDER BASED SOLELY ON CR 65(A)(2)..... 28

D. THE TRIAL COURT DID NOT ERR BY DENYING AN INJUNCTION BASED ON RCW 42.56.070(9). 32

1. ATTORNEY GENERAL OPINIONS’ SUPPORT A NARROW— NOT EXPANSIVE—DEFINITION FOR “COMMERCIAL PURPOSES.”	33
2. FEDERAL CASE LAW INTERPRETING THE FREEDOM OF INFORMATION AND LANHAM ACTS DO NOT SUPPORT AN EXPANSIVE DEFINITION OF COMMERCIAL PURPOSES IN RCW 42.56.070(9).....	39
A) SEIU’S CITED FOIA CASES DO NOT SUPPORT AN EXPANSIVE DEFINITION OF “COMMERCIAL PURPOSES.”.....	39
B) SEIU’S CITED LANHAM ACT CASES DO NOT SUPPORT AN EXPANSIVE DEFINITION OF COMMERCIAL PURPOSES.....	42
3. SEIU’S DISTINCTION BETWEEN “PROHIBITION” AND “EXEMPTION” IS IRRELEVANT.	44
4. THE EVIDENCE OF RECORD IS INSUFFICIENT TO CONCLUDE SEIU IS LIKELY TO PROVE THE FOUNDATION INTENDS TO USE THE RECORDS FOR COMMERCIAL PURPOSES.....	45
5. SEIU DID NOT SATISFY THE REQUIREMENTS OF RCW 42.56.540.....	48
6. RCW 42.56.210(2) MANDATES DISCLOSURE.....	49
E. THE TRIAL COURT ERRED BY ALLOWING SEIU TO COMPEL WRITTEN DISCOVERY OF REQUESTOR FREEDOM FOUNDATION.	49
F. THE TRIAL COURT DID NOT ERR IN HOLDING THE NAMES OF IPS ARE NOT EXEMPT.	55
1. TO HOLD THAT RCW 42.56.230(1) EXEMPTS IPS’ NAMES FROM DISCLOSURE VIOLATES THE PROPER CONSTRUCTION OF RCW 42.56.250(3) AND THE PRA IN GENERAL.	56
2. IP NAMES DO NOT CONSTITUTE THE “PERSONAL INFORMATION IN ANY FILES” MAINTAINED FOR WELFARE RECIPIENTS.....	60

3. SEIU’S ARGUMENT CONSTITUTES THE OFT-REJECTED CONNECT-THE-DOTS ARGUMENT.	64
4. RCW 42.56.210(2) MANDATES DISCLOSURE.....	71
5. SEIU DID NOT SATISFY THE REQUIREMENTS OF RCW 42.56.540.....	73
G. FREEDOM FOUNDATION IS ENTITLED TO ATTORNEYS’ FEES AND COSTS.	74
V. CONCLUSION	75

TABLE OF AUTHORITIES

Federal Cases

<i>Brach Van Houten Holding, Inc. v. Save Brach's Coal for Chicago</i> , 856 F. Supp. 472, 476 (N.D. Ill. 1994)	42, 43
<i>Jews for Jesus v. Brodsky</i> , 993 F.Supp. 282, 308 (D.N.J 1978).....	42, 43
<i>Michenfelder v Sumner</i> , 860 F.2d 328 (9th Cir. 1988).....	14, 21
<i>NLRB v Sears, Roebuck & Co.</i> , 421 U.S. 132 (1975).....	39
<i>Nat'l Sec. Archive v U.S. Dep't of Def.</i> , 530 F. Supp. 2d 198 (D.D.C. 2008).....	41
<i>Planned Parenthood Federation of America Inc v. Buett</i> , 1997 WL 133313, *5-6 (S.D.N.Y., March 24, 1997) <i>aff'd</i> , 152 F.3d 920 (2d Cir. 1998),	43, 44
<i>VoteHemp v. DEA</i> , 237 F.Supp.2d 55 (D.D.C. 2002).....	40, 47
<i>Wiley, Rein & Fielding v. U.S. Dep 't of Commerce</i> , 793 F. Supp. 360, 361 (D.D.C. 1992)	47

State Cases

<i>Ameriquest Mortg. Co v. State Att'y Gen</i> , 148 Wn.App. 145, 199 P.3d 145 (2009).....	passim
<i>Ameriquest Mortgage Co v Office of Attorney Gen. of Washington</i> , 177 Wn.2d 467, 300 P.3d 799 (2013).....	passim
<i>Ames v. City of Fircrest</i> , 71 Wn.App. 284, 857 P.2d 1083 (1993).....	28, 30
<i>Atwood v. Shanks</i> , 91 Wn.App. 404, 958 P.2d 332 (1998).....	17
<i>Bainbridge Island Police Guild v City of Puyallup</i> , 172 Wn.2d 398, 259 P.3d 190 (2011).....	61

<i>Bowcutt v. Delta North Star Corp.</i> , 95 Wn.App. 311, 976 P.2d 643 (1999).....	17
<i>City of Seattle v. Fuller</i> , 177 Wn.2d 263, 300 P.3d 340 (2013)	56, 60
<i>Confederated Tribes of the Chehalis Reservation v. Johnson</i> , 135 Wn.2d 734, 958 P.2d 260 (1998).....	74
<i>Cowles Pub. Co. v. Spokane Police Dep't, City of Spokane</i> , 139 Wn.2d 472, 987 P.2d 620 (1999).....	38
<i>Davis v. King Cnty</i> , 77 Wn.2d 930, 468 P.2d 679 (1970)	34
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993)	72
<i>Delagrave v. Employment Sec. Dep't of State of Wash</i> , 127 Wn.App. 596, 111 P.3d 879 (2005).....	59
<i>Des Moines Marina Ass'n v. City of Des Moines</i>	6
<i>Dot Foods, Inc v Washington Dep't of Revenue</i> , 166 Wn.2d 912, 215 P.3d 185 (2009).....	56
<i>Eberle v. Sutor</i> , 3 Wn.App. 387, 475 P.2d 564 (1970).....	14
<i>Five Corners Family Farmers v. State</i> , 173 Wn.2d 296, 268 P.3d 892 (2011).....	34
<i>Hearst v. Hoppe</i> , 90 Wn.2d 123, 580 P.3d 246 (1978).....	39, 51, 61
<i>International Ass'n of Firefighters, Local 1789 v. Spokane Airports</i> , 146 Wn.2d 207, 45 P.3d 186 (2002).....	5, 6, 7
<i>King Cnty. v. Sheehan</i> , 114 Wn. App. 325, 57 P.3d 307 (2002)	passim
<i>Knight v City of Yelm</i> , 173 Wn.2d 325, 267 P.3d 973 (2011)	4
<i>Koenig v. Des Moines</i> , 158 Wn.2d 173, 142 P.3d 162 (2006).....	60, 61, 64, 65

<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998).....	28, 30, 37, 39
<i>Lindeman v. Kelso Sch. Dist. No. 458</i> , 162 Wn.2d 196, 172 P.3d 329 (2007).....	62, 63
<i>Newman v King County</i> , 133 Wn.2d 565, 947 P.2d 712 (1997).....	36
<i>Northwest Gas Ass'n v. Washington Util. & Transp. Comm'n</i> , 141 Wn.App. 98, 168 P.3d 443 (2007).....	29
<i>Rabon v. City of Seattle</i> , 135 Wn.2d 278, 957 P.2d 651 (1998).....	passim
<i>Sargent v. Seattle Police</i> , 179 Wn.2d 376, 389, 314 P.3d 1093 (2013)....	38
<i>Seattle Firefighters Union v. Hollister</i> , 48 Wn.App. 129, 737 P.2d 1302 (1987).....	74
<i>Seattle Times Co. v. Serko</i> , 170 Wn.2d 581, 243 P.3d 919 (2010).....	29, 30, 38
<i>Soter v. Cowles Pub Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007)...	11, 29, 30
<i>Spokane Police Guild v. Washington State Liquor Control Board</i> , 112 Wn.2d 30, 35, 769 P.2d 283 (1989).....	74
<i>Spokane Research & Defense Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	1, 5, 7, 32
<i>State v. Holmes</i> , 98 Wn.2d 590, 657 P.2d 770 (1983).....	64
<i>Tacoma Public Library v. Woessner</i> , 90 Wn.App. 205, 951 P.2d 357 (1998).....	10, 49, 70, 74
<i>Tyler Pipe Indus. v. Dep't of Revenue</i> , 96 Wn.2d 785, 638 P.2d 1213 (1982).....	29
<i>West v. Port of Olympia</i> , 183 Wn.App. 306, 333 P.3d 488, 491 (2014) ..	72

State Statutes

RCW 42.56.030 passim
RCW 42.56.050 71
RCW 42.56.070 35
RCW 42.56.070(1)..... 9
RCW 42.56.070(9)..... passim
RCW 42.56.070(9),..... 75
RCW 42.56.080 passim
RCW 42.56.210(2)..... 33, 56, 71
RCW 42.56.230(1)..... passim
RCW 42.56.250(3)..... 55, 57, 59, 60
RCW 42.56.540 passim
RCW 42.56.550 35
RCW 42.56.550(1)..... 10
RCW 42.56550(3)..... 10, 72
RCW 74.39A.270..... 8

State Rules

CR 65(a)(2) passim
RAP 2.5..... 22

Other Authorities

1975 Wash. Op. Atty. Gen. No. 15 (1975) 36
1988 Letter Op. Att’y Gen. No. 12 passim
1998 Wash. Op. Atty. Gen. No 2 (1998). 36, 37
WEBSTER’S NEW INT’L DICTIONARY 45
Merriam Webster Dictionary..... 7, 61

I. INTRODUCTION

The Freedom Foundation (“the Foundation”) requested access to certain public records pursuant to its rights under the Public Records Act (“PRA”). SEIU 775NW (“SEIU”) argues the PRA bars access to these records. Both the Foundation and the Washington State Department of Social and Health Services (“DSHS”) disagree.

The PRA is a strongly worded mandate for broad disclosure of public records.” *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005)(“*SRDF*”). Its exemptions and, if there is a meaningful distinction, its prohibitions, are clear and unambiguous—as is its strong policy mandating openness and disclosure. If SEIU were to prevail in the instant case, the PRA would become a complicated statute which imposes an intimidating and invasive discovery burden on the State *and* requestors exercising their statutory right to access public records. To prevail, SEIU must persuade this Court to adopt legal theories and definitions that turn the PRA’s guiding policy upside-down. We encourage the Court to reject that invitation.

SEIU’s motivation is simple. It desires to maintain sole access to Individual Providers (“IPs”) so that it can continue to barrage IPs with pro-union materials and solicitations to fund its Political Action Committee. *See* CP 166-74 (Boardman Decl.), CP 157-65 (Aurdal-Olson

Decl.), CP 175-80 (Schulte Decl.). Furthermore, SEIU seeks to prevent any other individual or entity from contacting IPs to notify IPs of newly acknowledged First Amendment rights under the U.S. Constitution to opt out of SEIU membership that SEIU and the State are not publicizing.

SEIU wants to complicate this case and the PRA. It desires to use the PRA to facilitate a “grudge match” between itself and the Foundation. RP 10/10/14 at 27. If the Court were to accept any of SEIU’s arguments, it would be inviting new litigation attempting to define the resulting-blurred borders of the PRA and its provisions. Importantly, adoption of SEIU’s arguments here would set a dangerous precedent for requestors and pave the way for future parties, including the government, to intimidate requestors and seriously chill not only statutory rights under the PRA, but also constitutional rights under the First Amendment and State Constitution. This Court should reject SEIU’s arguments.

II. STATEMENT OF THE CASE

The Foundation adopts DSHS’s *Statement of the Case* except for certain dates pertaining to discovery, which the Foundation includes to correct SEIU’s factual mischaracterizations related to discovery. The Foundation addresses these mischaracterizations in §IV.B. The relevant dates are included here for easy reference.

- 10/6/14 SEIU issues CR 30(b)(6) dep. notice. CP 813-16

- 10/7/14 SEIU issues its First Interrogatories and Requests for Production. CP 818-27.
- 10/8/14 The Foundation files Response to Motion for Leave to Take Expedited 30(b)(6) Dep. and Mot. for a Protective Order. CP 93-100.
- 10/10/14 Trial court grants the Foundation's Mot. for a Protective Order, quashing SEIU's 30(b)(6) dep. notice and SEIU's First Interrogatories and Requests for Production. RP 10/10/14 at 26-29.
 - Trial court orders SEIU to reissue discovery requests and limits the discoverable subject matter to only those topics addressed in #1-3 of the SEIU's original 30(b)(6) dep. notice. RP 10/10/14 at 26-28.
 - Trial court orders the Foundation to respond to SEIU's reissued written discovery requests by 10/14/14. RP 10/10/14 at 27.
 - Trial court states that the Foundation is not required to file discovery responses with the court. RP 10/10/14 at 28-29.
- 10/10/14 SEIU reissues 2nd set of written disc. requests. CP 834-43.
- 10/14/14 The Foundation responds to SEIU's 2nd set of written discovery. CP 834-74.
- 10/15/14 The Foundation files relevant collective bargaining agreement, CP 183-227, and 4th Decl. of Maxford Nelsen. CP 243-46. Neither are discovery responses.
- 10/15/14 The Foundation files with the trial court its responses to SEIU's 2nd set of written discovery requests. CP 228-46.
- 10/15/14 SEIU files with the trial court selected portions of the Foundation's responses to SEIU's 2nd set of written disc. CP 831-74.

Additionally, this case presents several issues of first impression,

including the proper definition of "commercial purposes" in RCW

42.56.070(9), the extent and nature of permitted discovery under RCW

42.56.070(9), and whether a private party has standing to seek an

injunction based on RCW 42.56.070(9).

III. CROSS APPELLANT'S ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO SAME

Respondent/Cross-Appellant incorporates the errors discussed in its Statement of Grounds for Direct Review.

1. The trial court erred in holding that SEIU possessed associational standing to assert exemptions allegedly covering Medicaid beneficiaries, and by holding that SEIU possessed standing to bring suit under RCW 42.56.070(9).

Issue: Whether SEIU lacked (a) associational standing to assert exemptions allegedly covering Medicaid beneficiaries and (b) standing to bring suit under RCW 42.56.070(9)?

2. The trial court erred by issuing a Temporary Restraining Order (“TRO”) in a PRA case based on CR 65(a)(2) without considering the *Tyler Pipe* and *Ameriquest* requirements.

Issue: Whether CR 65(a)(2) requires a court to grant a TRO in a PRA case without considering the *Tyler Pipe* and *Ameriquest* requirements.

3. The trial court erred by compelling the requestor to respond to discovery from SEIU regarding the requestor’s past communications with IPs and intended uses of the records sought.

Issue: Whether a third party seeking an injunction under the PRA may compel discovery responses from a requestor regarding the requestor’s past communications with IPs and its intended uses of records sought?

IV. ARGUMENT

A. The trial court erred by finding SEIU had standing.

Decisions on standing are reviewed *de novo*. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011).

1. The trial court erred by granting SEIU standing to argue the alleged interest of welfare recipients pursuant to RCW 42.56.230(1).

The PRA grants standing to persons who are “named in the record or to whom the record specifically pertains” to petition a court to enjoin the disclosure of records. RCW 42.56.540. The Division Two holding in *Ameriquest v. AGO* stands for the proposition that such person may base an injunction claim on exemptions unrelated to that person in limited circumstances. 148 Wn.App. 145, 166, 199 P.3d 468 (2009). In the instant case, however, SEIU as Plaintiff must also satisfy the requirements of associational standing as set in *International Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002). Therefore, SEIU only has standing to sue on behalf of its members when each of the following three criteria are satisfied: 1) the members of the organization would otherwise have standing to sue in their own right; 2) the interest that the organization seeks to protect are germane to its purpose; and 3) neither claim asserted nor relief requested requires the participation of the organization’s IP members. 146 Wn.2d at 213-14. *Spokane Airports* requires SEIU to satisfy each of the three criteria for each interest it represents. *Id.*¹ Thus, even if *Ameriquest* stood for the

¹ The first two requirements of *Spokane Airports* are constitutional requirements. Prong two speaks of the “interests” that the organization seeks to protect. The relevant interest

proposition that IPs have standing, it does not stand for the proposition that a party whose sole basis for standing is *associational* standing may bypass the constitutional justiciability requirements of *Spokane Airports*. As stated in *Spokane Airports*, “the first two prongs are constitutional in that they ensure that article III, section 2’s ‘case or controversy’ requirements are satisfied.” *Id.* at 215. The PRA’s grant of standing does not, and cannot, bypass constitutional requirements. SEIU fails to satisfy *Spokane Airports*’ two constitutional requirements.

The first requirement is that the *members* of the organization would otherwise have standing to sue in their own right. *Id.* First, welfare recipients are not *members* of SEIU. The Complaint only alleges that its members are IPs. CP 596. In *Des Moines Marina Ass’n v. City of Des Moines*, the court dismissed an association because there was no evidence in the record that the individuals whose rights were being protected were members of the association. 124 Wn.App. 282, 291-92, 100 P.3d 310 (2004). Similarly, in the instant case, there is no evidence that welfare recipients are SEIU members, thus SEIU cannot represent their interests.

Second, SEIU does not have associational standing because welfare recipients do not have standing. Welfare recipients do not have standing because they are neither “named in the record” nor are they persons “to

here are those of welfare recipients. There is nothing in the record suggesting SEIU or IPs have the ability or right to safeguard the interests of welfare recipients

whom the record specifically pertains,” as is required by RCW 42.56.540. “Specifically” is not defined by the PRA, but Merriam-Webster Dictionary defines it as “clearly and exactly presented or stated; relating to a particular person...”² SEIU argues that disclosure of IP names is “tantamount to disclosure of large numbers of names of welfare recipients.” Appellant’s Brief (“App. Br.”) at 38. SEIU’s convoluted attempts to prove its “tantamount argument” reflect a desperate attempt to get around the oft-rejected “connect-the-dots” argument. Additionally, the mere names of IPs are not located “in any files maintained for...welfare recipients” as is required by the exemption. RCW 42.5 6.230(1). Clearly, a public record comprised only of IP names does not “specifically pertain” to welfare recipients. Therefore, welfare recipients do not have standing to bring this case, and SEIU does not have associational standing.

Third, the *interests* SEIU seeks to protect in this lawsuit are not germane to its purpose. It is important to note that *Spokane Airports* requirement speaks of “interests,” not just claims. *Spokane Airports*, 146 Wn.2d at 213-14. SEIU, as the alleged exclusive bargaining representative for IPs, is legally required to represent *IPs*, not welfare recipients. The welfare recipients in this case are not members of SEIU. They do not pay dues to SEIU. They are not in the bargaining unit represented by SEIU. In

² *Merriam Webster Dictionary*, available at <http://www.merriam-webster.com/dictionary/specifically> (last visited 4/26/15).

fact, should the interests of IPs and the welfare recipients conflict, SEIU is legally required to represent the interests of IPs to the detriment of welfare recipients. Safeguarding the interests of welfare recipients is not SEIU's purpose, it is not the purpose of collective bargaining in the State of Washington, and is not SEIU's purpose in representing individual providers who "solely for the purposes of collective bargaining, are public employees ..." RCW 74.39A.270. And most importantly, welfare recipients have not authorized SEIU 775 to represent them. The interests SEIU 775 alleges to protect are not germane to its purpose. Therefore, SEIU 775 does not have standing on this issue.

2. The trial court erred by granting standing to SEIU to bring suit pursuant to RCW 42.56.070(9).

Alternatively, RCW 42.56.540 does not confer standing on SEIU or IPs to seek relief based on RCW 42.56.070(9).³ RCW 42.56.540 only confers standing on a movant to file a motion to enjoin disclosure if it can show that disclosure "*would clearly not be in the public interest and would substantially and irreparably damage any person or . . . vital government function.*" *Id.* (Emphasis added). It does not confer standing on a movant

³ RCW 42.56.540 states

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination 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

to seek an injunction based on RCW 42.56.070(9)'s commercial purposes prohibition.

RCW 42.56.540 allows a subject named in the records to seek an injunction prohibiting disclosure, but none of §540's necessary showings require or allow a movant to conduct discovery on a requestor. This is also true for application of exemptions. No discovery of the requestor is necessary because exemptions relate to the nature of a record, not the intent of the requestor; nor should any such discovery be allowed. The PRA does not envision a scenario in which a movant needs to, or is allowed to, conduct discovery from a requestor under §540. Only an *agency* may seek information, and then only pursuant to RCW 42.56.080.

The PRA itself contemplates this in RCW 42.56.070(1), which provides that agencies must disclose all requested 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.”⁴ Thus, the PRA grants the agency the authority to determine if the purpose of the request is commercial in nature, *not* “a person who is named in the record or to whom the record specifically pertains.” RCW 42.56.540.

⁴ The Reviser's note states that subsection (6) of this record was renumbered as subsection (9), which prohibits disclosure of records to those who request them for commercial purposes.

Further, the PRA doesn't even give the agency standing to seek an injunction based on RCW 42.56.070(9). Instead, an agency may simply withhold records it contends are requested for commercial purposes. An agency can make a limited inquiry into the purposes of the requestor. RCW 42.56.080. If the agency withholds the records, the requestor may file a motion under RCW 42.56.550(1), "requir[ing] the agency to show cause why it has refused to" disclose the records. RCW 42.56.550(1). *Then*, the requestor may decide how much of its own evidence it wants to offer to prove its noncommercial intent. The PRA does not grant standing to someone "named in the record" or to whom the record "specifically pertains," RCW 42.65.540, to bring suit against the requestor to prove the records are sought for commercial purposes.

If the PRA did grant such standing, §540 would be used as an intimidation device to threaten requestors when someone with standing does not want a public record released—regardless of whether the PRA requires or prohibits disclosure. Requestors would be exposed to the prospect of expensive litigation, invasive discovery, and invasions of privacy. Such an interpretation seriously chills the public's right to access public records and flies in the face of the PRA's policy. RCW 42.56.550(3); *see also Tacoma Public Library v Woessner*, 90 Wn.App. 205, 212, 951 P.2d 357 (1998) ("[T]he public should have full access to

information concerning the working of government.”).

To illustrate this chilling threat, the Court need look no further than SEIU’s Notice of CR 30(b)(6) Deposition and First Set of Interrogatories and Requests for Production, CP 813-27. SEIU’s proposed scope of discovery is, quite frankly, absurd.⁵ It is clear that SEIU is attempting to use the PRA to strategically attack a disfavored requestor.

The commercial purposes provision permits only an agency to inquire into a requestor’s intent. RCW 42.56.080. This *limited* authority is granted to the agency through §070(9), not a private party through §540.⁶

At most, and in the alternative, the “blunt hammer” of RCW 42.56.080 should not be handed over to any party in a court proceeding unless it *first* proves the threshold requirements of §540. After all, SEIU must prove the requirements of §540 *in addition to* proving an exemption or prohibition. *See Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 756-57, 174 P.3d 60 (2007) (holding that “to impose the injunction contemplated by RCW 42.56.540,

⁵ This is another reason why SEIU’s broad definition for “commercial purposes” should be rejected. Such a definition would require invasive discovery into a requestor’s life, beliefs, past conduct, and even activities protected by the Washington and U.S. Constitutions.

⁶ In reality, SEIU’s attempt to distinguish “prohibitions” from “exemptions,” App. Br. at 18-19, actually supports the Foundation’s argument that the PRA does not confer standing on SEIU to conduct a litigious, expensive, and invasive investigation into a requestor’s intentions. If this Court holds there is a distinction between the two terms that is relevant to how an agency or court is to construe its meaning, this supports the idea that SEIU cannot bring a claim based on RCW 42.56.070(9). If this Court holds there is no distinction, on the other hand, then this Court must interpret “prohibitions” in the same manner as “exemptions” in the PRA, i.e. prohibitions must be narrowly construed just as exemptions are. Either way, the end result is disclosure.

the trial court must find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest. RCW 42.56.540”) (emphasis in original). *Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 486-87, 300 P.3d 799 (2013) states that if another party, besides an agency, seeks to prevent disclosure, “then that party must prove (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.⁷

RCW 42.56.540 does not mention exemptions or prohibitions. Regardless, SEIU is forced to, and did, bring suit pursuant to §540. CP 601. SEIU has no other option. Without §540, SEIU cannot bring a claim. Therefore, any party seeking an injunction under §540 must satisfy its requirements regardless of whether a party argues for an exemption or prohibition. Thus, the “blunt hammer” is not necessary if a party seeking to prevent disclosure cannot prove the threshold requirements of §540, even if it can prove a prohibition within the PRA applies. Moreover,

⁷ In fact, “[a] court may even allow for inspection and copying of exempt records if it finds “that the exemption of records is clearly unnecessary to protect any individual’s right of privacy or any vital government function.” *Ameriquest*, 177 Wn 2d. at 487.

attempts to satisfy §540's requirements do not require discovery of a requestor.

B. The trial court did not err when it consolidated the preliminary and permanent injunctions under CR 65(a)(2).

The trial court abided by CR 65(a)(2) when it ordered consolidation of the preliminary and permanent injunction hearings immediately prior to the preliminary injunction hearing. RP 10/16/14 at 6-7. CR 65(a)(2) states, "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. . . ." According to CR 65(a)(2)'s plain language and the case law cited in the court below, there is no prescribed time a trial court must give notice or order consolidation, so long as it is before or after commencement of the preliminary injunction hearing and the trial court "expressly" states that it is doing so. *Ameriquest*, 148 Wn.App. at 155. "What constitutes adequate notice *depends on the facts of the case*. However a court's discretion to so consolidate is *very broad* and will not be overturned on appeal absent a showing of *substantial* prejudice in the sense that a party

was not allowed to present *material* evidence.” *Michenfelder v Sumner*, 860 F.2d 328, 337 (9th Cir. 1988).⁸ (Emphasis added.)⁹

Both Washington and federal case law show that CR 65(a)(2) does not guarantee an unqualified right to conduct discovery or develop facts.¹⁰ For example, “in ruling on a request for a preliminary injunction, the trial court must reach the merits of purely legal issues for the purposes of deciding whether to grant or deny the preliminary injunction.” *Rahon v. City of Seattle*, 135 Wn.2d 278, 285, 957 P.2d 651 (1998). Further, *Ameriquest*, 177 Wn.2d at 493-94, stands for the proposition that further discovery can be denied *even when factual disputes exist* (as argued fully below). Additionally, courts “have on occasion upheld a district court’s failure to give any notice whatsoever before finally determining the merits after only a preliminary injunction hearing, where the complaining party has failed to show how additional evidence could have altered the outcome.” *Sumner*, 860 F.2d at 337.

⁸ “Where a federal rule has been adopted as the state rule, the construction of the former should be applied to the latter.” *Eberle v Sutor*, 3 Wn App. 387, 389, 475 P.2d 564 (1970).

⁹ Clearly, the trial court “expressly state[d] that it is consolidating the injunction hearing and a trial on the merits.” *Ameriquest*, 148 Wn.App at 155; See CP 888-89 Here, the questions is whether the trial court acted properly in doing so.

¹⁰ In both *NW Gas Ass’n v. Wash Utilities and Transp. Commission*, 141 Wn.App. 98, 168 P.3d 443 (2007) and *Ameriquest*, 148 Wn App 145, the appellate courts addressed the trial court’s complete failure to issue notice before consolidating. Therefore, neither case discussed the instant issue.

These cases represent at least three contexts in which the trial court's consolidation is entirely proper. Each applies in the instant case. CR 65(a)(2) does *not* grant SEIU an unqualified right to "fully develop and present evidence at a trial on the merits." App. Br. at 32. Nor, under the present case's circumstances, does CR 65(a)(2) entitle SEIU to earlier notice than it received. Indeed, in the instant case, CR 65(a)(2) did *not* entitle SEIU to either of these things for at least four reasons.

1. Trial Court correctly reached the merits of purely legal issues and disallowed discovery.

First, *Rabon* entitled the trial court to deny SEIU's request for an injunction when it did. 145 Wn.2d at 285. *Rabon* states that "in ruling on a request for a preliminary injunction, the trial court *must* reach the merits of purely legal issues for the purposes of deciding whether to grant or deny the preliminary injunction." *Id.*¹¹ (Emphasis added.)¹² The trial court rightly adopted a narrow definition of "commercial purposes," rendering SEIU's factual allegations moot because, as a matter of law, its allegations do not constitute "commercial purposes."

¹¹ The *Rabon* court also held that this does not change *even if the alleged harm is irreversible*. 145 Wn 2d at 285.

¹² *Rabon*'s statement regarding the well-settled principle that "a court is not to adjudicate the ultimate merits of the case," *Rabon*, 145 Wn 2d at 286, which immediately follows its language about deciding purely legal issues, presumes the existence of relevant factual or other non-legal disputes. This is apparent in the court's use of the term "ordinarily" when it referenced the Court of Appeals' treatment of the matter *Id.* at 285. This is not so in the instant case.

The trial court phrased the question this way: “Having concluded that the ‘commercial purposes’ provision should be construed narrowly, that begs the question under a narrow ruling, is the Freedom Foundation’s request within its scope and do we need more information to discern that.” RP 10/16/14 at 71. The trial court continued at *Id.* at 74:

. . . if I can analyze this “intent” as being outside the scope of the provision, even assuming the facts as alleged by the SEIU and even assuming that further discovery substantiate[s] SEIU’s view of the Freedom Foundation’s “intent,” then I believe I can make this call as [a] matter of law without the need for more discovery.

The trial court concluded, “. . . Even assuming the accuracy of the allegations by [] SEIU as to the motivations of the Freedom Foundation and even assuming that further discovery would support [] SEIU’s allegations, I conclude that the ‘intent’ of the Freedom Foundation in these requests was political, not commercial,” *id.* at 75, and that any commercial implications to the Foundation’s politically-motivated actions are “not the type of ‘commercial purposes’ contemplated by 42.56.070(9) when it is read consistently with our PRA case law.” *Id.* at 65.

SEIU insists “there were not only purely legal issues to be decided” because the Foundation’s intended use of the records “is in serious dispute,”¹³ App. Br. at 28, but this contention clearly ignores the trial

¹³ SEIU alleged the Foundation’s intent was 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

court's clearly stated assumption that SEIU's factual allegations were true. Because of this assumption, there were no facts in dispute when the court rendered judgment. *Rabon*, 135 Wn. 2d at 285-86.

The instant case is similar to *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311, 976 P.2d 643 (1999), where the court discussed whether certain conduct, or "dealings," fell under a statutorily defined category. The court stated, "Whether Cabbell's dealings with Mr. Pitts comprised a single criminal enterprise, subject to sanctions under either the equity skimming statute or the criminal profiteering act, is a question of law." *Bowcutt*, 95 Wn.App. at 322. Similarly, in the instant case, whether the Foundation's alleged (future) conduct falls under the statutorily defined category of "commercial purposes" is a matter of law. The trial court presumed SEIU's allegations were true, answered this question in the negative, and was entitled to do so when it did. *See also Atwood v. Shanks*, 91 Wn.App. 404, 958 P.2d 332 (1998) (where court dissolved a temporary injunction based on determination of legal issues).

Appellant's insistence that further discovery is necessary presumes the trial court erred in failing to adopt SEIU's expansive definition of "commercial purposes." Therefore, if the trial court correctly addressed and rejected SEIU's proffered legal argument—as *Rabon* says it *must*

decrease the membership and funds of Plaintiff, and to assist the commercial businesses with which it is associated." CP 773.

do—then SEIU has no right or need to further develop the factual record under CR 65(a)(2). *Rabon*, 135 Wn. 2d 278, 285-86. Only under an unduly broad definition for “commercial purposes” are (even a portion) of SEIU’s expansive and invasive discovery attempts relevant. *See* CP 809-27; 831-74 (2nd Nelson Decl.).

2. The declarations provided a sufficient basis for the trial court’s decision.

Second, even if SEIU’s factual allegations were relevant and theoretically able to be developed, the Foundation’s declarations provided a sufficient basis for the trial court’s decision to consolidate the preliminary and permanent injunction hearings when it did. A trial court may deny discovery on a disputed issue if the declaration contains enough detail to provide the court with a sufficient basis for its decision. *Ameriquest*, 177 Wn.2d at 493-94. The first and third Nelson Declarations (CP 802-04, 828-30) provide a detailed explanation for the Foundation’s intent in requesting the public records at issue and were sufficient for the trial court to rule.¹⁴

In *Ameriquest*, the court denied the plaintiff’s attempt to fully develop facts related to its argument that an exemption applied because the defendant’s declaration “provided the trial court with a sufficient basis for

¹⁴ The trial court also had the Foundation’s responses to SEIU’s reissued and court-narrowed discovery requests, which discusses in detail the Foundation’s intent for the records and interactions with IPs. CP 834-43.

its decision.” *Ameriquest*, 177 Wn.2d at 500.¹⁵

Ameriquest accords with 1988 Letter Op. Att’y Gen. No. 12, in which the Attorney General was clearly concerned with placing an “unreasonable burden” on a requestor in accessing public records. *Id.* at 11. Given that RCW 42.56.070(9) implied some inquiry into a requestor’s intent, the AG first determined that the PRA’s language and policy demanded a very narrow inquiry that allowed only a “limited barrier to access.” *Id.* The AG advised that at least one barrier would go “beyond the limited barrier to access contemplated by the inquiry permitted under” RCW 42.56.070(9). *Id.* Additionally, the AG determined that simply requiring a requestor to provide written representation that a list will not be used for commercial purposes satisfied the inquiry contemplated by RCW 42.56.070(9), while erecting only a minimal barrier to disclosure. *Id.* SEIU’s scheme of expansive discovery and factual development is simply untenable given the PRA’s language and policy.¹⁶

In the instant case, as in *Ameriquest*, the trial court similarly denied further discovery on SEIU’s allegations related to the Foundation’s future use of the records. RP 10-16-14 at 75. The Foundation clearly stated that it

¹⁵ The *Ameriquest* plaintiff argued a defendant’s declaration was too conclusory and that it needed to take further discovery to prove an exemption applied. 177 Wn.2d at 493. The court held that the plaintiff was not entitled to conduct discovery because the declaration “provided the trial court with a sufficient basis for its decision.” *Id.* at 499-500.

¹⁶ See this brief’s discussion of 1988 Letter Op. Att’y Gen. No. 12 in §IV.D.1.

will not use the records for commercial purposes. The Foundation also provided a detailed explanation of exactly what it will and will not do with the records. Specifically, the Foundation stated in a sworn declaration that the list of IPs will not be used for commercial purposes, the list will not be used to solicit money or financial support from IPs, the list will be used to educate IPs about their constitutional right to opt out of SEIU, and the list is not sought on behalf of any other individual or entity. CP 828-30. The declaration further stated the list will not be used to make IPs aware of businesses in their area or be supplied to any business or third-party individual. *Id.* at ¶¶12-13.¹⁷ Further, the Foundation even provided SEIU with a copy of a letter it intends to send to IPs—which SEIU submitted to the trial court. CP 872-73.

These declarations clearly allayed any fear the trial court may have had related to the Foundation’s intent for requesting the records. The Foundation has been very transparent from the beginning regarding its intent in requesting the records and its declarations reflect this. The trial court was entitled to treat the Foundation’s detailed declarations as sufficient for its decision. Therefore, SEIU is not entitled to develop any allegations further or conduct further discovery.

¹⁷ The first Nelsen Declaration also makes similar statements. CP 802-04.

3. Additional evidence will not alter the case's outcome and SEIU was not substantially prejudiced by denying further discovery.

Third, SEIU has “failed to show how additional evidence would have altered the outcome,” *Sumner*, 860 F.2d at 337, and was not “substantially prejudice[d]” by not being allowed to “present material evidence.” *Id.* Failure to establish either of these defeats SEIU’s argument. The trial court’s proper definition of “commercial purposes” renders SEIU’s sought-after (and acquired) evidence definitively immaterial. Such evidence would allegedly point to conduct that falls outside the definition of “commercial purposes.” Thus, SEIU was not denied the opportunity to present material evidence.

Additionally, the *most* SEIU’s sought-after (and acquired) evidence could do is allow the trial court to *infer* that the Foundation’s intent is to use the records for commercial purposes. SEIU itself repeatedly uses this language. For example, SEIU states, “If the past is any guide, and that is certainly a reasonable inference . . .” App. Br. at 24; “Based on prior contacts between the Freedom Foundation and IPs it is reasonable to infer that . . . *id.*”; “Based on the existing record, the Court could reasonably infer that the Freedom Foundation requested the list of IP names for commercial purposes . . .” *id.* at 22; and “While the court can infer from the existing record that [the Foundation] seeks the requested information

for a commercial purpose . . .” *Id.* at 29. Evidence sought by SEIU would be more of the same, i.e. evidence SEIU claims could be used to *inter* the Foundation intends to use the records for commercial purposes. The trial court obliged SEIU, assumed SEIU’s allegations were true and still ruled against SEIU due to the trial court’s definition for “commercial purposes.” Finding and offering evidence to support allegations the trial court already assumed to be true would not change the outcome.

Further, to the extent SEIU alleges potential evidence acquired outside the limited scope of discovery could change the outcome of the case, this argument is wrong on its face because SEIU has not appealed the trial court’s discovery ruling quashing its deposition notice and severely limiting written discovery.¹⁸ RP 10/10/14 at 24-31. The same is true for SEIU’s argument that it had a right to “fully develop” certain facts, if such facts could only be proven by acquiring evidence via discovery requests which are outside the scope of the trial court’s discovery ruling *Id.* Therefore, the only “facts” SEIU could even theoretically “develop” relate only to the discovery requests deemed proper by the trial court: subjects #1, #2, and a narrowed #3 listed on SEIU’s deposition notice. CP 720-23.

Thus SEIU only had the ability to acquire evidence related to “All

¹⁸ SEIU did not include the trial court’s discovery rulings in its Assignments of Error and did not discuss them in its Appellant’s Brief. If SEIU attempts to challenge the trial court’s discovery rulings at this stage, this Court should refuse to review this challenge pursuant to RAP 2.5

use(s) Freedom Foundation intends to make of the list . . .” (#1) (which the Foundation fully explained in its declarations)¹⁹, “The identity of any person on whose behalf Freedom Foundation has requested the list . . .” (#2) (which the Foundation fully explained in its declarations and answers to SEIU’s second set of discovery requests)²⁰, and “Contacts Freedom Foundation has initiated with any [IPs] since January 1, 2011, and the nature and content of all communications . . .” (#3) (limited by the trial court to communications related to the Foundation’s solicitation of IPs) (which the Foundation explained and provided to SEIU in its answers to SEIU’s second set of interrogatories, several of which SEIU submitted to the trial court)²¹. CP 721; RP 10/10/14 at 28. Thus, even assuming SEIU had a right to more fully develop its alleged “facts,” SEIU is prohibited from “developing” any “facts” outside these three narrow subjects. SEIU did not appeal the trial court’s discovery ruling and, therefore, could not pursue development of facts outside these three narrow subjects even if

¹⁹ CP 802-04, CP 838-30.

²⁰ CP 802-04; CP 838-30, CP 834-43

²¹ CP 834-73. It is important to note the Foundation was liberal in its production of emails with IPs, as well as its explanation of all its communications with IPs—both of which responded to interrogatory #6 of SEIU’s reissued discovery requests. *Id.* at 837-42. The Foundation’s response to #6 is detailed and meaningful, contrary to SEIU’s claim otherwise. App. Br. at 30-31. No doubt, SEIU would have twisted the meaning of the Foundation’s production without the Foundation’s detailed response. As for interrogatory #2, it is unclear how information about *how* the Foundation plans to contact IPs “goes to the heart of the question” about the Foundation’s intent. *Id.* It is the *content* of the communications which is relevant, not its method of delivery. Regarding interrogatory #2, SEIU’s question seeks a legal conclusion and, further, is irrelevant to the issue of what the Foundation intends to actually do with the records.

this case is remanded. Therefore, this Court should not consider any of SEIU's allegations that fall outside the narrow scope of these three subjects in ruling on SEIU's CR 65(a)(2) argument.

Further, the Foundation fully responded to the reissued discovery requests which *did* fall under the category of these three subjects. CP 834-73. Therefore, the facts were, indeed, "fully developed" prior to the preliminary and permanent injunction hearing on 10/16/14. The fact that SEIU does not like the facts of this case as they actually developed does not mean SEIU may conduct a harassing fishing expedition to seek so-called "full development" of irrelevant facts they could not pursue on remand anyway. Due to the foregoing, SEIU is unable to show that further development of facts through discovery could change the outcome of this case; nor did the trial court substantially prejudice SEIU by preventing it from offering material evidence.

4. Discover was already fully develop.

Fourth, discovery *was* fully developed and SEIU submitted evidence to the trial court which it acquired through the discovery process. SEIU seriously mischaracterizes the status of discovery in this case by stating "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.” App. Br. at 28.

SEIU issued its 30(b)(6) deposition notice and first set of written discovery requests on 10/6/14 and 10/7/14, respectively. CP 813-27. However, the Foundation filed a Motion for a Protective Order on 10/8/14, seeking to quash the deposition and disallow, or at least severely limit, SEIU’s written discovery requests. CP 93-111. The trial court agreed with the Foundation and quashed SEIU’s 30(b)(6) deposition notice and limited the permissible subjects of discovery. RP 10/10/14 at 26-27.²² The trial court then informed the parties it expected SEIU to reissue a second set of written interrogatories to the Foundation the same day (10/10/14). *Id.* at 26-27.²³

SEIU then reissued its Second Set of Interrogatories on 10/10/14. The Foundation provided answers to these interrogatories on Tuesday 10/14/14. CP 834-43. Contrary to SEIU’s contention otherwise, App. Br. at 30-31, the Foundation *fully* answered SEIU’s second discovery requests consistent with the trial court’s discovery ruling which severely limited the proper subjects of discovery. RP 10/10/14 at 24-31. The Foundation explained why each answer to each interrogatory comported with the trial

²² The trial court delineated the proper subject of discovery using the subjects listed in SEIU’s CR 30(b)(6) deposition notice. CP 720-23.

²³ Again, SEIU has not appealed the trial court’s rulings at the discovery hearing.

court's discovery ruling. CP 834-43.

This Court should draw two conclusions from this. First, there is no "unanswered discovery," as alleged by SEIU with reference to its first set of discovery requests issued on 10/7/14. App. Br. at 28-30; CP 786-795. The trial court rendered SEIU's first discovery requests moot when it limited the scope of discovery and ordered SEIU to reissue a second set of discovery requests—which SEIU did. Second, the trial court's consolidation of the preliminary and permanent injunction hearings did not deprive SEIU of its opportunity to take its requested deposition. It was the trial court's *discovery ruling* which did so (a decision SEIU has not appealed). In other words, SEIU's handwringing about how the consolidation left discovery unanswered and deprived SEIU of its deposition is much ado about nothing. The consolidation had absolutely no effect on these two issues.

Therefore, even if each of the Foundation's three CR 65(a)(2) arguments in the sections above fail, SEIU's only argument can be that the Foundation's responses to SEIU's reissued discovery requests were somehow insufficient—which it unconvincingly attempts to do regarding interrogatories #2, #6 and #7. App. Br. at 30-31. (The Foundation responded to this attempt above in footnote 21.)

As for “certain pleadings” filed by the Foundation after the trial court’s 10/14/14 discovery deadline, SEIU’s clamor is similarly misplaced App. Br. at 29. One document is simply a collective bargaining agreement verified by the Foundation’s counsel—an agreement SEIU negotiated and possesses. CP 183-227. This document was not a discovery response. The other is the Fourth Nelsen Declaration which is also *not* in response to SEIU’s discovery requests. Thus, neither were filed late. Moreover, the Nelsen Declaration merely reiterates previous Nelsen declarations and explains the nature of certain past contacts Foundation employees had with IPs.²⁴

The trial court recognized SEIU’s motivation behind its discovery requests when it called a portion of them “entirely inappropriate.” RP 10/10/14 at 27. The trial court warned it did not want this case to turn into a “grudge match between two politically opposite parties.” *Id.* As noted by the trial court, this is a simple public records request. *Id.* SEIU’s attempt to exploit a simple public records case to attack a nonprofit organization it perceives as a political opponent is disingenuous. SEIU’s proposed subject of discovery #5 in its deposition notice reflects this disingenuousness. CP 721-22, Further, the facts in such cases lead to bad law, as illustrated by

²⁴ Further, SEIU had more time with these documents than the Foundation had with SEIU’s Reply in Support of its Motion for a Preliminary Injunction, which was served after these two documents were served, and filed after SEIU’s noon deadline.

SEIU's broad definition for "commercial purposes" which, incidentally, would be unconstitutional because it requires discovery into constitutionally protected matters such as subject #5.²⁵

There is no unanswered discovery and no 30(b)(6) deposition to be had, even if this case is remanded. The Foundation's responses to SEIU's reissued discovery requests are proper in light of the limited scope of discovery set by the trial court. Thus, the facts *were* fully developed at the time of the preliminary and permanent injunction hearing.

C. The trial court erred by issuing a temporary restraining order based solely on CR 65(a)(2).

As this Court held in *Ameriquest*, 177 Wn.2d at 486-87 and the cases cited therein:

The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Limstrom v. Ladenburg*, 136 Wash.2d 595, 612, 963 P.2d 869 (1998); RCW 42.56.540, .550(1); *see also Ames v. City of Fircrest*, 71 Wash.App. 284, 296, 857 P.2d 1083 (1993). Thus, if an agency is claiming an exemption, the agency bears the burden of proving it applies. RCW 42.56.550(1). If it is another party, besides an agency, that is seeking to prevent disclosure, then that party must seek an injunction. RCW 42.56.540. ***In such a case, the party must prove (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. Id.; see Soter v. Cowles***

²⁵ Unlike SEIU, which has acquired millions of dollars over the years by forcing contributions through the heavy hand of the law, the Foundation relies on the generous and voluntary donations of individuals and possesses a duty to protect the First Amendment rights of these individuals—individuals who have, at all times, *voluntarily* associated with the Foundation.

Publ'g Co., 162 Wash.2d 716, 757, 174 P.3d 60 (2007); *see also* Seattle Times Co. v. Serko, 170 Wash.2d 581, 591, 243 P.3d 919 (2010).

Therefore, under RCW 42.56.540, a party seeking nondisclosure must prove each of the three elements cited by the Supreme Court in *Ameriquest*, 177 Wn.2d at 487; RCW 42.56.540.

The trial court granted a TRO despite the movant's failure to satisfy the requirements of *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). RP 10/3/14 at 41, 48-49.²⁶ Further, at the TRO hearing, the trial court did not conduct the required *Tyler Pipe* analysis. *See Tyler Pipe*, 96 Wn.2d at 792. In both *Northwest Gas Ass'n v Washington Util. & Transp. Comm'n*, 141 Wn.App. 98, 168 P.3d 443 (2007), and *Ameriquest*, 148 Wn.App. 145, Division Two held that a trial court must grant a temporary restraining order and preliminary injunction in a PRA injunction case even when a movant fails to prove the necessary requirements later articulated by the Supreme Court in *Ameriquest*, 177 Wn.2d at 485-86 and *Tyler Pipe*. Division Two claimed to be using the *Tyler Pipe* standard, 148 Wn.App. at 157, but in fact held that unless the court notified the parties prior to the hearing that it was merging the preliminary and permanent injunctions, CR 65(a)(2) required trial courts to forego the normal *Tyler Pipe* analysis and grant an injunction. *Id.* at

²⁶ *Tyler Pipe* requires a party to show it is likely to prevail on the merits of the underlying claim.

154-55. Thus, published Division Two precedent conflicts with the Supreme Court's holdings in *Ameriquest*,²⁷ *Limstrom*,²⁸ *Soter*,²⁹ *Serko*,³⁰ Division One's holding in *Ames*,³¹ and the PRA's own language³² by compelling a court to grant an injunction merely to preserve the status quo until a full trial on the merits or permanent injunction hearing.

Division Two's holding in *Ameriquest* essentially forces courts to issue automatic and reflexive TROs, regardless of parties' inability to prove the *Tyler Pipe* and §540 requirements. As a legal matter, this standard has been rejected by the Supreme Court, which clearly defined the "burden" and the party to which that burden attaches. *Ameriquest*, 177 Wn.2d at 491. Division Two's *Ameriquest* decision also violates the PRA's unequivocal policy demanding that limitations on disclosure be "narrowly construed to promote this public policy [of the people "remaining informed so that they may maintain control over the instruments that they have created"] and to assure that the public interest will be fully protected." RCW 42.56.030. Division Two's *Ameriquest* holding has already caused meritless cases to persist on court dockets and allowed lawfully requested public records to remain undisclosed. The

²⁷ 177 Wn 2d at 486-87.

²⁸ *Limstrom v Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998).

²⁹ *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007).

³⁰ *Seattle Times Co v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010)

³¹ *Ames v City of Fircrest*, 71 Wn.App. 284, 292, 857 P.2d 1083 (1993).

³² RCW 42.56.540

Supreme Court, in *Ameriquest*, set forth the proper standard for obtaining an injunction under RCW 42.56.540. To the extent it deviates from the Supreme Court's standard, Division Two's holding in *Ameriquest*, 148 Wn.App. 145, should be overturned.

This Court can also provide guidance by adopting one of the Foundation's arguments in the section of this brief dealing with CR 65 (see §IV.B of this brief), i.e. adopt one of the Foundation's arguments for why the trial court properly merged the preliminary and permanent injunction hearings in this case when it did. That way, a trial court would not be forced to grant an unmerited TRO or preliminary injunction simply because of CR 65 if one of those scenarios exists.

Neither the requirements of §540 nor the question of whether an exemption applies requires any discovery or "development" of facts. These are matters of law that can be properly adjudicated on a motion for a TRO or preliminary injunction, pursuant to *Rabon's* requirement that a court determine matters of law at the TRO or preliminary injunction stage. *Rabon*, 135 Wn.2d at 285. Therefore, determinations at the TRO or preliminary injunction stage under §540 or the PRA's exemption provisions do not implicate CR 65.

Additionally, the Foundation's argument that third parties do not have standing to bring heavily discovery-laden lawsuits pursuant to the PRA's

commercial purposes provision (§070(9)) comports with the above analysis. This is because, according to the Foundation's argument, only an agency can inquire into the intent of a requester, and then only at the initial stage of determining whether it will produce the records in the first place. A dispute related to §070(9), then, could only occur in the context of a show cause hearing initiated by the requester.

Under this view, an injunction could never be issued pursuant to §070(9). Thus, no complications arise under CR 65(a)(2), and the whole issue disappears. The Foundation's interpretation, therefore, harmonizes the PRA, CR 65, as well as the requirements of *Ameriquest*, and *Tyler Pipe*. Under the standard rules of statutory construction, the Foundation's interpretation is preferable.

D. The trial court did not err by denying an injunction based on RCW 42.56.070(9).

The PRA "is a strongly worded mandate for broad disclosure of public records." *SRDF*, 155 Wn.2d at 100. Despite this, SEIU urges this Court to adopt an expansive definition for "commercial purposes" which eviscerates the PRA's policy and would sweep a great many noncommercial activities under its umbrella. The Foundation, on the other hand, offers a definition for "commercial purposes" which arises from the phrase's plain meaning, accords with Attorney General Opinions *and* case

law, and honors the PRA's language and policy.³³

SEIU argues that RCW 42.56.070(9) prohibits DSHS from disclosing the list of IPs to the Foundation because the Foundation seeks access to the list for "commercial purposes." For the reasons set forth below, both SEIU's expansive legal definition of "commercial purposes" and its characterizations of the Foundation's purpose fail. SEIU cannot rely on any Washington Court's construction of the statute. Instead, it attempts to cobble together a definition from two AG opinions, inapposite federal case law, and an assertion that §070(9)'s "prohibition" must be construed broadly even though all other PRA "exemptions" must be construed narrowly. This Court should decline to accept SEIU's definition and uphold the trial court's holding. Alternatively, the trial court did not err by denying an injunction because SEIU did not satisfy the requirements of RCW 42.56.540. Additionally, RCW 42.56.210(2) mandates disclosure.

1. Attorney General Opinions' support a narrow—not expansive—definition for "commercial purposes."

Opinions of the Washington Attorney General ("AGO") are persuasive authorities. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308,

³³ The Foundation's definition is as follows: for an agency to properly withhold records under RCW 42.56.070(9), a requestor primary purpose for the requested records must be to achieve financial profit through the direct use of the requested records.

268 P.3d 892 (2011).³⁴ A 1988 AGO reflects a proper definition for “commercial purposes”—one which comports with the PRA’s language and policy as well as Washington case law. In that opinion, the Attorney General (“AG”) discussed two possible barriers to the access of public records under the “commercial purposes” provision: (1) that a requester provide written representation that the list will not be used for commercial purposes, and (2) that a requester enter into a hold harmless agreement. The AG advised that the second barrier would go “beyond the *limited barrier to access contemplated by the inquiry permitted under*” the commercial purposes provision. 1988 Letter Op. Att’y Gen. No. 12 at 11. (Emphasis added.) Further, the AG evaluated both barriers in the context of not placing an “unreasonable burden” on the requester, concluding the first barrier is permissible because it “does not add a burden to access that would be impermissible under the statute.” *Id.* In sum, the 1988 AGO contemplates a *limited*, government-facilitated inquiry under §070(9).³⁵

SEIU’s expansive definition for “commercial purposes” would blow this limited inquiry wide open. The endless scope of inquiry under RCW 42.56.070(9) necessitated by SEIU’s definition is illustrated by its Notice

³⁴ However, courts “remain[] the final authority on the proper construction of a statute *Davis v King Cnty*, 77 Wn.2d 930, 934, 468 P.2d 679 (1970). When AGOs conflict with court opinions, they decrease in persuasiveness *Five Corners*, 173 Wn.2d at 308

³⁵ Which is why, as discussed *infra*, permitting a third party to undertake discovery of a requester inherently frustrates the PRA’s policy.

of CR 30(b)(6) Deposition. CP 813-16. Requesters of all kinds, both organizations and individuals, would be subject to invasive discovery of personal communications with friends, family, and associated organizations, demands for commercial, personal, vocational, and transactional records, and inquests into requestors' intimate political, philosophical, or even religious beliefs because that information could be evidence, under SEIU's expansive definition, of a requestor's "commercial" intent. Such a precedent is especially dangerous because it would allow future third parties, *including the government*, to subject a requester to discovery requests similar to SEIU's in this case. As discussed earlier in this brief, the chilling effect this would have on individuals exercising their right to access public records would be staggering. SEIU's discovery requests themselves speak louder than its arguments. The PRA does not grant such invasive power to the government (or any third party) to inquire into the intimate realms of life implicated by SEIU's definition. Holding otherwise turns the PRA's policy, *see, e.g.*, RCW 42.56.030, .070, .540, .550, and case law, completely on its head and impermissibly empowers the State beyond a proper reading of the inquiry permitted under §070(9).³⁶

³⁶ Further, this AGO synthesized prior AGOs' treatment of the commercial purposes provision by stating a three-part definition for "commercial purposes," which require the requester to be "engaged in a commercial (profit-expecting) activity," the requester must

Additionally, the two AGOs cited by SEIU are unpersuasive. In the 1975 AGO, the AG adopted a “broad definition [of commercial purposes] encompassing any ‘profit expecting business activity.’” 1975 Wash. Op. Atty. Gen. No. 15 at 7 (1975). Though this broad definition would certainly “cover a broader range of business activity” than the “buying and selling of goods,” the Foundation’s status as a not-for-profit organization and its stated purpose in procuring the list from DSHS falls outside even this “broad definition” of commercial purposes.

The 1998 AGO adopted the same broad definition of commercial purposes, stating that the prohibition on disclosure applies where the requester intends to use the list to facilitate “any profit expecting business activity.” 1998 Wash. Op. Atty. Gen. No 2 at 2 (1998). The 1998 AGO supports its broad definition by relying upon *Newman v. King County*. 133 Wn.2d 565, 574-75, 947 P.2d 712 (1997) (refusing to force King County to produce nonexempt documents contained within an open investigation file because the entire file was exempt, holding that the investigative file exemption provided “a broad categorical exemption from disclosure.”) The 1998 AGO concludes the PRA’s commercial purposes prohibition is

“intend to contact or in some way personally affect the listed individuals,” and the purpose of the requester’s contact must be to “facilitate the commercial activity.” 1988 Letter Op. Atty Gen. No. 12 at fn 4. The Foundation is not a “profit-expecting” organization. It neither seeks to facilitate commercial activity with or by the IPs and communication is not to facilitate commercial activity. CP 802-03.

likewise “broadly stated” and “categorical.” 1998 Wash. Op. Atty. Gen. No 2 at 3 (1998). However, as the AG states, commercial purposes is triggered only where the requester intends to use the list to facilitate “any profit expecting business activity.” *Id.*³⁷ The Foundation cannot engage in profit-expecting business activity, and its stated purpose in procuring the list (to inform IPs of their newly acknowledged First Amendment right to opt out of a union) does not fall within even the “broad definition” expressed by the 1975 and 1998 Attorney General Opinions.³⁸

Assuming, arguendo, the Foundation’s activities fall under these two AGOs’ definition of “commercial purposes,” subsequent case law indicates that Washington Courts are unwilling to adopt such a definition. For instance, in *Limstrom*, the Washington Supreme Court chose not to extend *Newman*’s adoption of “broad, categorical exemption[s] from disclosure” because the Court acknowledged it was bound by “statutory and case law mandate that require[] a narrow construction of exemptions.” 136 Wn.2d at 613.³⁹

Indeed, the Supreme Court has repeatedly limited *Newman*’s broadly

³⁷ SEIU’s citation to Exec. Order 00-03 (Apr. 25, 2000) does not change this analysis, because the Governor’s Order merely incorporated the definition set forth in the AGOs.

³⁸ SEIU has repeatedly asserted that Freedom Foundation is aligned with commercial interests who would benefit from its work to reform SEIU’s undue influence on politics and government. First, SEIU has presented no evidence (because none exists) that this is true. Second, this is an illogical allegation given the Foundation’s focus on *public* sector union reform. However, SEIU must make this allegation to strengthen its otherwise baseless assertion that the Foundation is, somehow, facilitating a “commercial interest.”

³⁹ The *Limstrom* decision was issued just ten months after 1998 AGO.

constructed exemption.⁴⁰ The AG’s primary basis for the broadness of his commercial purposes definition, therefore, has been rejected by Washington courts. Given the dearth of case law addressing RCW 42.56.070(9), *Sargent v. Seattle Police* best describes the appropriate judicial posture when construing any and all limitations on disclosure under the PRA: “The text of the PRA mandates narrow construction of its exemptions. *The categorical exemption of broad categories of information conflicts with this policy.*” 179 Wn.2d 376, 389, 314 P.3d 1093 (2013).

The commercial purposes prohibition, like any limitation on disclosure under the PRA, must be construed narrowly. It must accord with the Act’s underlying policy favoring disclosure. If it were to adopt SEIU’s broad definition of commercial purpose—which far exceeds even that expressed in the 1998 AGO—this Court would violate the PRA’s overriding policy. The Foundation’s proposed definition, on the other hand, comports with the PRA’s language, policy, and Washington’s case law on the PRA.

⁴⁰ See *Cowles Pub. Co. v. Spokane Police Dep’t, City of Spokane*, 139 Wn.2d 472, 474, 987 P.2d 620 (1999) (“The ‘investigative records’ exception to the PDA does not provide categorical exemption from disclosure to police investigative records in cases where the suspect is arrested and the case referred to the prosecutor. In such cases, police incident reports are presumptively disclosable upon request, unless it can be shown that nondisclosure in a given case is essential to effective law enforcement in that particular case.”); see also *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 594, 243 P.3d 919 (2010) (reversing the trial court’s decision to apply *Newman*’s categorical exemption of investigative files where the investigation was neither ongoing nor leading to enforcement proceeding); *Sargent v. Seattle Police Dep’t*, 179 Wn.2d 376, 389, 314 P.3d 1093 (2013) (“[T]he categorical application created in *Newman* applies only to a small class of information[.]”)

2. Federal case law interpreting the Freedom of Information and Lanham Acts do not support an expansive definition of commercial purposes in RCW 42.56.070(9).

a) SEIU's cited FOIA cases do not support an expansive definition of "commercial purposes."

SEIU next argues that federal cases interpreting provisions of the Freedom of Information Act ("FOIA") and the Lanham Act support an expansive definition of "commercial purposes." Washington courts often look to judicial constructions of FOIA in construing *similar* provisions in the PRA. *Limstrom*, 136 Wn.2d at 608. But these cases are far from similar.

It must be noted that "[d]espite the close parallel between the state act and the FOIA, the state act is more severe than the federal act in many areas." *Hearst v. Hoppe*, 90 Wn.2d 123, 129, 580 P.3d 246 (1978). Also, SEIU's cited FOIA cases addressing "commercial purposes" deal with fee waivers for requests and the award of attorneys' fees, not the decision to disclose or withhold records. This distinction is key because, as observed in *Hoppe*, the U.S. Supreme Court "has observed that the FOIA seeks to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language... The federal courts have also recognized a mandate to construe the FOIA broadly, and to construe the exemptions narrowly." *Id.* at 128-29 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136-37 (1975) and other federal cases). The

FOIA cases SEIU cites were not interpreted by the federal courts under this standard because those cases did not involve disclosure itself, but only fee waivers. Thus, the FOIA cases cited by SEIU are not even helpful in interpreting FOIA's own appropriate disclosure standard, which is exactly what is at stake in the instant case. This indicates the federal cases cited by SEIU are of *no help at all* when construing Washington's PRA—which has a policy of disclosure even more severe than the federal FOIA.

SEIU first looks to *VoteHemp, Inc. v. Drug Enforcement Admin* to shed light on the PRA's commercial purposes prohibition. 237 F.Supp.2d 55, 64-65 (D.D.C. 2002). Again, *VoteHemp* addresses a fee waiver, not the disclosure of records. Either way, the Foundation's interests in obtaining IP names are not analogous to *VoteHemp*'s interests. First, the Foundation does not act in concert with any business or industry interests. Second, even if IPs learned of their constitutional rights, there are no commercial interests that will “directly benefit those who seek to make a profit from” IPs' newly-gained knowledge. *Id.* at 65.⁴¹ Moreover, *VoteHemp*'s website contained links to businesses that bought and sold hemp products and solicited donations to support the “industry's legal effort” to deregulate hemp. *VoteHemp*, 237 F. Supp. at 65. None of that is true in the instant case. Further, as noted by the trial court, if “furthering interest through

⁴¹ Indeed, what commercial entities would benefit because *government* employees choose to cease financially supporting a union?

litigation” constitutes commercial purposes, no public records request is safe. RP 10/16/14 at 63-64.⁴²

SEIU also relies on *Nat'l Sec. Archive v. U.S. Dep't of Def.*, a case that also does not deal with the *disclosure* of records, and is likewise inapposite. 530 F. Supp. 2d 198, 201 (D.D.C. 2008). As the federal magistrate noted, National Security Archive’s (“NSA”) motion for attorneys’ fees and costs under FOIA was unusual because “there was no benefit to the public in the traditional sense of the disclosure of documents pertaining to matters of public concern. Instead, NSA procured a ruling that it no longer had to pay the search costs for its FOIA requests.” *Id.* at 200-01. Additionally, *Nat'l Sec. Archive* addressed whether NSA was entitled to attorneys’ fees for winning its claim that it was organizationally entitled to a FOIA fee waiver. The court concluded that even though NSA was a nonprofit, its own commercial interest in procuring FOIA materials as cheaply as possible was enough of a motivating factor in its underlying lawsuit to bar the award of attorneys’ fees for litigating the suit. These cases cannot be legally or factually analogized to the instant dispute. Neither *VoteHemp* nor *Nat'l Sec. Archive* support an expansive definition of commercial purposes in the PRA.

⁴² Incidentally, the Foundation did not initiate this litigation, SEIU did

b) SEIU's cited Lanham Act cases do not support an expansive definition of commercial purposes.

Next, SEIU asks this Court to rely upon a series of Lanham Act cases to support its expansive definition, although SEIU fails to cite any authority indicating that Lanham Act cases are relevant in construing the PRA. However, even assuming these cases have some bearing on the instant question, they are unpersuasive. The most obvious difference is that the policy of the Lanham Act is to prevent confusion about sponsorship, approval, and association between entities. *Brach Van Houten Holding, Inc. v. Save Brach's Coal. for Chicago*, 856 F. Supp. 472, 476 (N.D. Ill. 1994).⁴³ Another distinction is the relevant inquiry in Lanham Act cases relates to whether the *actual use of the plaintiff's mark* is commercial in nature. *Jews for Jesus v. Brodsky*, 993 F.Supp. 282, 308 (D.N.J 1978). Though SEIU may argue otherwise, most of its evidence relates to whether the Foundation is engaged in commercial enterprises in general, not to the use to which the Foundation will put the actual list of IP names—which *should* be the only issue.

In *Brach*, Brach sued a union-backed community group that utilized Brach's logo to protest and seek reversal of Brach's decision to close one

⁴³ For instance, in *Brach*, the District Court concluded that Save Brach's use of Brach's logo was a violation of the Lanham Act 856 F. Supp at 474. Save Brach's usage of Brach's mark while undertaking attempts to prevent Brach from closing one of its production facilities was sufficiently commercial so as to make the average observer believe that Brach endorsed Save Brach's activities.

of its candy production facilities in Chicago. *Id.* at 474. The Court concluded that the Lanham Act, 15 U.S.C.A. § 1125, prohibited the Save Brach's Coalition from using in its logo a copy of Brach's corporate logo because of the potential for general confusion as to its affiliation with or approval of Save Brach's proposals. *Id.* at 476. In *Jews for Jesus*, the Jews for Jesus organization sought an injunction against an internet developer who built and maintained website domains markedly similar to Plaintiff organization's domain, "jews-for-jesus.com." 993 F. Supp. at 286-88. There, Brodsky maintained similarly named websites precisely because he disapproved of Jews for Jesus' teachings and mission and sought to harm it commercially by intercepting the organization's audience "through the use of deceit and trickery." *Id.* at 308. The Foundation is not deceiving anyone or preventing anyone's access to SEIU. The Court found that Brodsky's use of the similar marks was "commercial" because he clearly intended to harm Jews for Jesus commercially "*and prevent[] the Plaintiff Organization from exploiting the Mark and the Name of the Plaintiff Organization.*" *Id.*

SEIU also cites *Planned Parenthood 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), but this case is also inapposite. The court in *Bucci* held that the defendant's *actual use of the plaintiff's mark* in its website address

was “classically competitive” because the defendant “has taken plaintiff’s mark as his own in order to purvey his Internet services—his web site—to an audience intending to access plaintiff’s services.” *Id.* at *6. Again, the Foundation’s alleged behavior, even if true, does not attempt to deceive, or deceptively misdirect through the use of confusion, IPs who actively seek SEIU’s services. Further, the defendant’s website was a “showcase” for a book it was openly soliciting by offering excerpts, information about the author (including how to contact the author for speaking engagements), and providing endorsements. *Id.* at *5.

Lanham Act cases are inapposite to the issue of defining “commercial purposes” in RCW 42.56.070(9). Not only is there no precedent for applying Lanham Act cases to PRA provisions, the facts underlying the above cases are squarely dissimilar to the facts of the instant case. The trial court correctly concluded that “based upon powerful preferences for disclosure, conclusion[s] under federal Lanham Act law, with completely different interests, are simply not helpful.” RP 10/10/14 at 64.

3. SEIU’s distinction between “prohibition” and “exemption” is irrelevant.

It is precisely because SEIU’s definition of “commercial purposes” is so insupportably broad that its distinction between a “prohibition” and an “exemption” matters not. Even if RCW 42.56.070(9) were an absolute

prohibition on disclosure of lists for commercial purposes,⁴⁴ SEIU cannot establish that the Foundation's purpose is "commercial"—under both the common understanding of "commercial"⁴⁵ and its legal definitions, discussed above. Thus, the distinction between the commercial purposes "prohibition" and other PRA "exemptions" lacks relevance.⁴⁶ Further, any meaningful distinction between "prohibition" and "exemption" militates against SEIU's ability to bring suit, as argued in §IV.A of this brief.

4. The evidence of record is insufficient to conclude SEIU is likely to prove the Foundation intends to use the records for commercial purposes.

Section IV(B)(2) of Appellant's Brief, which discusses evidence of the Foundation's political beliefs and activities, perfectly illustrates how SEIU wants to use the PRA to put a requestor's beliefs on trial. The Foundation does not hide its belief that compulsory public sector unionism is an affront to liberty and bad political policy. However, this Court should decline SEIU's invitation to turn the PRA's commercial purposes provision into a political weapon capable of being wielded by the State and third parties to silence requestors, chill the public's right to access

⁴⁴ Which is inherently suspect given the latter portion of Section 070(9) explicitly allows such disclosure in certain circumstances.

⁴⁵ Webster's Dictionary provides two definitions of "commercial." WEBSTER'S NEW INT'L DICTIONARY 538 (2d ed. 1954). The first, unhelpfully, states "of or pertinent to commerce; mercantile; hence, variously occupied with commerce;" etc. The second, more relevantly, states "Having financial profit as the primary aim."

⁴⁶ This distinction also jeopardizes SEIU's ability to bring this suit under RCW 42.56.540, which, as it acknowledges, forces the party seeking an injunction to prove, inter alia, that an exemption applies to the record. App. Br. at 10.

public records, and attack political opponents. The people did not adopt the PRA to give the State invasive discovery powers to probe the intimate realms of their lives. Indeed, its policy is exactly the opposite.

SEIU's argument is essentially that the Foundation will directly solicit donations from IPs because the Foundation, in general, contacts people to seek donations. App. Br. at 24. This argument is a non sequitur. Not every endeavor by a nonprofit organization is meant to raise funds. The relevant inquiry is the Foundation's intended use for the *list of IP names*, not what the Foundation does in *other contexts*. That said, the Foundation responds to this section of SEIU's brief only to address SEIU's mischaracterization of the evidence.

First, SEIU implies the Foundation has directly solicited donations from IPs in the past in virtue of their status as IPs. *See* App. Br. at 23-24. However, the email dated 7/23/14 was not sent to IPs, it was sent to a general email list which recipients voluntarily joined of their own initiative. CP 705-07. There is absolutely no evidence in the record suggesting the Foundation contacts IPs in virtue of their status as IPs to solicit donations. In fact, the Foundation's response to SEIU's second set of discovery requests adequately explains that any prior contacts with IPs were the result of incidental contact from generalized fundraising emails or the result of an IP initiating contact with the Foundation. CP 834-43.

Second, the best SEIU can allege is that the Foundation may correspond with an IP who voluntarily contacts the Foundation as a result of the Foundation's letter informing the IP of her constitutional rights. Such correspondence, alleges SEIU, will contain the Foundation's website and phone number in the signature of the email. App. Br. at 25. Surely this paltry showing does not constitute "commercial" activity. This kind of contact does not satisfy *any* of the requirements set forth in the 1988 AGO. Op. Att'y Gen. No. 12 (1988) at fn. 4. The rest of SEIU's "evidence" consists of a selective recitation of the Foundation's political views, which SEIU hopes to put on trial.⁴⁷

The trial court correctly concluded that the Foundation's purpose in obtaining the instant list is not commercial. SEIU's proffered definition of commercial purposes cannot coexist with the PRA's overriding policy favoring disclosure, and the facts of this case clearly demonstrate that the Foundation's purpose was not commercial. Every authority reinforces the Foundation's asserted belief that RCW 42.56.070(9), like any limitations on disclosure, must be construed narrowly and directed at profit-expecting

⁴⁷ By claiming that the trial court erred in concluding that the Foundation's intent was political rather than commercial, SEIU ignores *VoteHemp*, a case it cited, in which a federal court analyzing FOIA acknowledged that political activity may indirectly create commercial ramifications. 237 F. Supp. 2d at 65, *see also Wiley, Rein & Fielding v US Dep't of Commerce*, 793 F. Supp. 360, 361 (D D C. 1992) (recognizing that the requester "would receive a commercial benefit from a change in policy," the court nevertheless held that the request was not commercial because the requester was not seeking to *solicit business* from parties named in the documents).

activity. This Court should not accept SEIU's invitation to dramatically weaken the PRA and incoherently elasticize the definition of the plain and unambiguous term, "commercial."

5. SEIU did not satisfy the requirements of RCW 42.56.540.

RCW 42.56.540 contains requirements SEIU must meet over and above proving an exemption applies. A party seeking to prevent disclosure of requested records must seek an injunction through RCW 42.56.540 and prove, (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. Thus, simply showing the application of an exemption does not show disclosure would not be in the public interest, that someone would be substantially and irreparably harmed, or that disclosure would harm a vital government function.

RCW 42.56.540 does not mention exemptions or prohibitions. Regardless, SEIU is forced to, and did, bring suit pursuant to §540. CP 601. SEIU has no other option. Without §540, SEIU cannot bring a claim. Therefore, any party seeking an injunction under §540 must satisfy the requirements of §540 regardless of whether the party attempts to enforce

an exemption or prohibition. Thus, SEIU must prove the requirements of §540, even if it can prove a prohibition within the PRA applies.

SEIU has produced no authority or evidence to prove that the public lacks a legitimate interest in the list of IP names. *See Ameriquest*, 177 Wn. 2d at 493. Indeed, there is case law directly to the contrary. *See Woessner*, 90 Wn.App. at 222 (“disclosure of names would ‘allow public scrutiny of government.’ . . . the public could then ensure that the government is not paying one employee twice, funneling money to non-existent employees, or engaging in nepotism.”) Nor has SEIU produced any authority or evidence to prove a person or vital government function would be substantially and irreparably damaged by disclosure of IP names. *Id.* SEIU must prove the former, as well as one of the two latter.

6. RCW 42.56.210(2) mandates disclosure.

See argument presented in §IV.F.4.

E. The trial court erred by allowing SEIU to compel written discovery of requestor Freedom Foundation.

On 10/10/14 the trial court granted, in part, Freedom Foundation’s motion for a protective order. The court denied SEIU’s request to conduct a CR 30(b)(6) deposition but permitted SEIU to compel expedited discovery of three questions involving a very narrow subject matter. Those three questions/subject matter areas are as follows:

1. All use(s) Freedom Foundation intends to make of the list of

- Individual Providers it has requested from the Department of Social and Health Services, State of Washington (“DSHS”) pursuant to Washington’s Public Records Act, RCW 42.56.
2. The identity of any person on whose behalf Freedom Foundation has requested the list of Individual Providers from DSHS.
 3. Contacts Freedom Foundation has initiated with any Individual Provider(s) since January 1, 2011, and the nature and content of all communications between the Freedom Foundation and Individual Providers, including but not limited to any efforts Freedom Foundation has made to solicit funds from Individual Providers.

RP 10/10/14 at 26-29; CP 721. Further, the trial court limited #3 to contacts soliciting funds. RP 10/10/14 at 28. On 10/14/14, Freedom Foundation filed with the court the Nelsen Declaration, which stated that Freedom Foundation would not use the list for commercial purposes, it would not attempt to solicit money or support from IPs, and it was not seeking the list on behalf of any other individual or entity. CP 802-03. Thus, when the trial court issued its discovery ruling, the record contained evidence rendering any discovery unnecessary. *Id.* SEIU translated the three court-approved inquiries into seven interrogatories, and served them on the Foundation on the afternoon of 10/10/14. With this declaration in the record, any further discovery into the Foundation’s intended use of the list and its confidential communications with IPs exceeds the scope of inquiry permitted by RCW 42.56.070(9) and violates the PRA’s overriding policy favoring disclosure.

The PRA establishes its own rule of statutory construction. RCW 42.56.030. Because the Act is a principal means by which the sovereign people “maintain control over the institutions they have created,” PRA provisions must be construed liberally to promote disclosure and narrowly to prevent it. *Id.*; *see also King Cnty. v. Sheehan*, 114 Wn. App. 325, 335, 57 P.3d 307 (2002) (“The central purpose of the act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.”) (internal quotations omitted). “The Washington [PRA] is a strongly-worded mandate for broad disclosure of public records... [F]ull access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.” *Hoppe*, 90 Wn.2d at 127.

To honor that policy, the PRA strictly regulates agencies’ behavior in response to public records requests.⁴⁸ Central amongst the statutory restraints is the directive that agencies “shall not distinguish among persons requesting records, and such persons shall not be required to

⁴⁸ *See, e.g.* RCW 42.56.520 (requiring agencies to respond promptly to public records requests), RCW 42.56.152 (requiring agencies to appoint and train public records officers), RCW 42.56.150 (requiring local and statewide elected officials to undergo PRA compliance training); RCW 42.56.120 (limiting the costs agencies may charge for reproduction of public records).

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.” RCW 42.56.080. Under the PRA, therefore, requestors can be forced to “provide information as to the purpose for the request” *only* to determine the applicability of disclosure exemptions or prohibitions. *Id.* To comport with the commercial purposes prohibition, public agencies have traditionally followed the guidance of the Washington Attorney General and required requestors to submit sworn promises that the requested records will not be used for commercial purposes.⁴⁹ 1988 Letter Op. Att’y Gen. No. 12. It is appropriate for

⁴⁹ The Washington Attorney General described the appropriate measures agencies should take to ensure that they do not provide records in violation of the commercial purposes prohibition 1988 Letter Op. Att’y Gen. No. 12. In response to the question whether public agency 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, the Attorney General concluded

Accordingly, an agency must ask an individual who is requesting access to a list of names whether the list will be used for commercial purposes. It also seems to us that it would be permissible for an agency to require the person requesting access to the list to provide a written representation that the list will not be used for commercial purposes in violation of [RCW 42.56.070(9)]. We believe that such written representation could be in the form of an affidavit, as you suggested in your letter to us, if the agency provides the form to be signed and the services of a notary public, so that providing the affidavit does not become an unreasonable burden to obtaining the requested record. In our opinion, requesting such a promise or representation is consistent with the prohibition contained in RCW 42.17.260(5). The statute itself prohibits the agency from providing the list of names for commercial purposes, and we believe that requiring the requester to provide a written assurance to that effect does not add a burden to access that would be impermissible under the statute.

Id.

agencies⁵⁰ to undertake such limited inquiries in the contexts of both the commercial purposes prohibition *and other statutory exemptions*. RCW 42.56.080. Therefore, in evaluating what discovery is appropriate when determining the applicability of the commercial purposes prohibition, courts may find instructive case law that addresses what discovery is appropriate when determining the applicability of *other statutory exemptions*.

Ameriquest, 177 Wn.2d 467, is especially instructive. In that case, Ameriquest was seeking to enjoin the disclosure under the PRA of certain proprietary financial files the Attorney General obtained from Ameriquest during a previous investigation. The Supreme Court held it was proper to deny Ameriquest the opportunity to conduct discovery of the Attorney General regarding its decision not to withhold disclosure under seemingly applicable exemptions. The Court did so because the Attorney General

⁵⁰ Both RCW 42.56.080 and the Attorney General Opinion recognize that it is the *public agency* tasked and empowered to undertake limited inquiry into a requestor's intent—not third parties who sue to enjoin disclosure. *See* RCW 42.56.080; *see also* 1988 Letter Op. Att'y Gen. No. 12 ("Accordingly, an *agency* must ask an individual... whether the list will be used for commercial purposes. It also seems to us that it would be permissible for an *agency* to require the person requesting access to the list to provide a written representation that the list will not be used for commercial purposes... The statute itself prohibits the agency from providing the list of names for commercial purposes, and we believe that requiring the requester to provide a written assurance to that effect does not add a burden to access that would be impermissible under the statute."). This harmonizes with the PRA's policy expressed in RCW 42.56.080, that agencies may not distinguish between requestors and that any inquiry into a requestor's intended use of records should be sharply limited. It is therefore clear that (1) the *agency* must perform this "inquiry" into a requestor's purpose; and that (2) obtaining written assurance from the requestor that the requestor will not use the information for commercial purposes should end the inquiry.

submitted a declaration that provided sufficient information as to its decision not to invoke an exemption from disclosure. In this case, the Declaration of Maxford Nelsen declared unequivocally and under oath that the Foundation would not use the list for commercial purposes, it would not attempt to solicit money or support from IPs, and it was not seeking the list on behalf of any other individual or entity. CP 802-03. The Declaration further stated the Foundation's purpose: to educate IPs about their recently acknowledged constitutional rights to opt out of the union. As in *Ameriquest*, this should have ended the need for any future discovery. The trial court acknowledged that the Nelsen Declaration was sufficient to deny SEIU further discovery. RP 10/16/14 at 75. Unfortunately, the Court had already allowed SEIU to conduct limited discovery.

This Court should reverse the Court's 10/10/14 decision compelling the Foundation to answer SEIU's discovery because it is beyond the permissible scope of inquiry under RCW 42.56.070(9) and establishes a dangerous precedent for future records requests. To rule otherwise will open future requestors to intimidating lawsuits and abusive discovery. A holding from this Court prohibiting expansive discovery under §070(9) will conserve judicial resources which would otherwise be consumed on this issue in the future, and prevent requestors from being abused into

withdrawing public records requests. Under the PRA, requestors should not be forced to choose between exposing their most intimate relationships and beliefs and exercising their rights under the PRA. The trial court's decision to permit discovery of Freedom Foundation was reversible error, and this Court should reverse on this issue.

F. The trial court did not err in holding the names of IPs are not exempt.

RCW 42.56.230(1) does not exempt the names of IPs from disclosure. To prove otherwise, SEIU must show that the names of IPs constitute “[p]ersonal information in any files maintained for . . . welfare recipients.” RCW 42.56.230(1). It cannot. Further, SEIU's argument that a list of IP names is the functional equivalent of a list of welfare recipients is unavailing. Additionally, no other statute or regulation cited by SEIU prevents disclosure of the requested IP names.

Like all exemptions, RCW 42.56.230(1) must be “liberally construed” toward disclosure and “narrowly construed” toward nondisclosure. RCW 42.56.030. RCW 42.56.230(1) does not exempt IP names for at least five independent reasons: 1) to hold otherwise would be to violate the proper construction of RCW 42.56.250(3) and the PRA; 2) IP names do not constitute the “personal information in any files” maintained for welfare recipients. RCW 42.56.230(1); 3) SEIU's “functional equivalent”

argument constitutes the connect-the-dots argument that Washington Courts routinely reject; 4) RCW 42.56.210(2) mandates disclosure; and 5) SEIU failed to satisfy the requirements of RCW 42.56.540.

1. To hold that RCW 42.56.230(1) exempts IPs' names from disclosure violates the proper construction of RCW 42.56.250(3) and the PRA in general.

The “fundamental purpose” in construing statutes is to “ascertain and carry out the legislative intent.” *City of Seattle v Fuller*, 177 Wn.2d 263, 269, 300 P.3d 340 (2013). The Legislature’s intent can be discovered from the plain meaning of the statute, which is determined from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. The court must not add words where the Legislature has chosen not to include them, and the statute must be construed so that all language is given effect. 177 Wn.2d at 269-70. SEIU’s interpretation of the PRA requires this Court “to import additional language into the statute that the legislature did not use.” *Dot Foods, Inc v. Washington Dep’t of Revenue*, 166 Wn.2d 912, 920, 215 P.3d 185 (2009), because it would be adding IP *names* to the already exhaustive list of information specifically related to IPs already exempted by RCW 42.56.250(3). Yet, this Court “cannot add words or clauses to a statute when the legislature has chosen not to include such language.” 166 Wn.2d at 920.

The PRA specifically exempts information related to IPs and their dependents in RCW 42.56.250(3); namely, IPs'

Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information..., and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents...

RCW 42.56.250(3). Before 2006, the categories of information exempted by RCW 42.56.250(3) only included the residential addresses and residential telephone numbers of public agency employees or volunteers, and did not apply to IPs. However, the 2006 amendment to RCW 42.56.250(3) added an extensive list of informational categories and extended the provision to cover IPs *and* their dependents. RCW 42.56.250(3), 2006 c 209 §6.⁵¹

It is clear the PRA itself, through RCW 42.56.250(3), is concerned with the individuals who reside with IPs. Thus, the PRA already envisions a scheme which safeguards information related to those who reside with IPs, some of which are welfare recipients—as argued by SEIU. The categories of information in this provision *related specifically to IPs* is quite exhaustive. However, the PRA specifically does *not* exempt IP

⁵¹ <https://app.leg.wa.gov/DLR/bills/summary/default.aspx?year=2005&bill=2520> (last visited 5/15/15).

names in RCW 42.56.250(3). Thus, to the extent the legislature sought to protect those who reside with IPs, it did not believe disclosing the names of IPs implicated that interest—at least not to the extent that it overrode the PRA’s strong policy of openness and disclosure. To hold otherwise would contradict the PRA’s language and policy.

Sheehan, 114 Wn.App. 325, supports this argument. *Sheehan* analyzed RCW 42.56.250(3)’s exemption four years before the 2006 amendment (when it was recodified) and stated, “Washington’s Public records act contains no blanket exemption for names, as it does for addresses. [RCW 42.56.250(3)] exempts from disclosure ‘the residential addresses and residential telephone numbers of employees...’ Generally, however, absent such a statute so providing, lists of names and addresses are not private.” *Id.* at 343. Four years later, had the legislature intended to exempt the names of IPs, it would have explicitly done so. Yet, when the Legislature had a chance to implement just such a scheme by specifically including IPs’ names in the PRA, it did not do so. The Legislature still has not done so 13 years after *Sheehan*.

Additionally, it is no mystery that every person receiving the services of an IP is, by definition, a welfare recipient. This much is obvious to the Legislature as well. Yet, the names of IPs remain notably absent from any PRA exemption, even in the provision which exempts a large amount of

IP-specific information (RCW 42.56.250(3).) Reference to the names of IPs is also notably absent from RCW 42.56.230(1), which exempts “personal information” in “files maintained” for welfare recipients. If the Legislature had intended to exempt the names of IPs, the logical place to include this exemption would be within these provisions. *See Delagrave v Employment Sec. Dep't of State of Wash.*, 127 Wn.App. 596, 605, 111 P.3d 879 (2005) (holding that the court would not add a provision to a statute, in part, because the proposed additions were notably absent from where they would be logically located).

Also in support of this argument is the fact that SEIU’s statistical analysis and argument could be used for *any* lists of names which are otherwise disclosable. After all, using the same method as SEIU’s investigator, it would allegedly be possible to determine who resides with public employees on the list. There is a chance a number of those who reside with the people on the list would be an employee’s dependents or welfare recipients. This means that, using SEIU’s logic, releasing the names of public employees would be “tantamount” to releasing the identities of dependents of public employees and/or welfare recipients residing with them, i.e. information specifically exempted by RCW 42.56.250(3) and .230(1), respectively. Further, it is also possible to determine the residential addresses of public employees by using internet

tools even though such residential addresses are specifically exempt. Therefore, adoption of SEIU's argument would mean that *no lists of public employees would ever be disclosable*. Yet, this is obviously not the case. The PRA itself as well as decades of case law, especially *Koenig v Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) and *Sheehan*, 114 Wn.App. 325, render this conclusion manifestly unreasonable.

“Related statutory provisions must be harmonized to effectuate a consistent statutory scheme that maintains the integrity of the respective statute.” *Koenig*, 158 Wn.2d at 184. In sum, considering “all that the Legislature has said in the statute and related statutes” and giving effect to all the statute’s language, *Fuller*, 177 Wn.2d at 269, PRA exemptions intended to protect non-public employee third parties do not render exempt the names of public employees.⁵² Holding otherwise would not only “add words where the Legislature has chosen not to include them,” *Fuller*, 177 Wn.2d at 269, it would drastically rewrite the PRA and directly violate the PRA’s strong mandate of disclosure and openness.

2. IP names do not constitute the “personal information in any files” maintained for welfare recipients.

RCW 42.56.230(1)’s exemption requires a record to contain “personal information in any files maintained for . . . welfare recipients.” IP names

⁵² RCW 42.56.250(3) includes IPs as “employees” for the purposes of the provision’s exemptions.

do not constitute the “personal information” of welfare recipients. Nor are IP names in “files maintained for” welfare recipients. *Id.*

“Personal information” is “information relating to or affecting a particular individual. . .” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 411-12, 259 P.3d 190 (2011) (emphasis added). The Merriam-Webster dictionary defines “particular” as “used to indicate that one specific person or thing is being referred to and no others.”⁵³ As before, this “personal information” exemption must be “liberally construed” toward disclosure and “narrowly construed” toward nondisclosure, RCW 42.56.030, to honor the PRA’s status as “a strongly worded mandate for broad disclosure of public records.” *Hoppe*, 90 Wn.2d at 127. Thus, the records released must “indicate that one specific [welfare recipient] is being referred to and no others.” The mere name of an IP does not indicate one specific welfare recipient and no others, especially not on the face of the record, i.e. the “four corners” of the record —the only evidence this Court may consider in assessing the application of an exemption. *See Koenig*, 158 Wn.2d at 183 (“The dissent cites no statutory language or case law to support the notion we may look beyond the four corners of the records at issue to determine whether they were properly withheld.”).

⁵³ *Merriam Webster Dictionary*, available at <http://www.merriam-webster.com/dictionary/particular> (last visited 1/5/15).

Additionally, the names of IPs do not constitute “personal information in any files maintained for . . . welfare recipients.” RCW 42.56.230(1) (emphasis added). It is insufficient to simply prove the records contain personal information for welfare recipients. The personal information must also be located in “files maintained for” welfare recipients. *See Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 202, 172 P.3d 329 (2007) (distinguishing between types of personal information by stating, “The student file exemption does not exempt any and all personal information—it only exempts personal information ‘in any files maintained for students in public schools.’”). The *Lindeman* court concluded, “Thus, we construe the student file exemption narrowly, in accordance with the directive of the PDA [now the PRA], by exempting information only when it is both ‘personal’ and ‘maintained for students.’” 162 Wn.2d at 202. (Emphasis added.) This same analysis applies to welfare recipients who are also named in RCW 42.56.230(1). Therefore, the names of IPs must not only be “personal” to welfare recipients, but also be in “files maintained for welfare recipients.”

The Supreme Court in *Lindeman*, held that a record was disclosable because it “differs significantly from the type of record that schools maintained in students personal files. Merely placing the videotape in a location designated as a student’s file does not transform the videotape

into a record maintained for students” *Id.* at 203. In *Lindeman*, the plaintiff had requested a videotape of a school bus fight but the school refused disclosure saying that it was personal information for a student. *Id.* at 201-03. The Court said the videotape was disclosable even though it also happened to contain information about the student, i.e. even though the record did, in fact, contain some kind of *personal information* about the student. The Court wrote,

The phrase “files maintained for students in public schools” denotes the collection of individual student files that public schools necessarily maintain for their students. The student file exemption contemplates the protection of material in a public school student's permanent file, such as a student's grades, standardized test results, assessments, psychological or physical evaluations, class schedule, address, telephone number, social security number, and other similar records. See *Weems v. N. Franklin Sch. Dist.*, 109 Wn.App. 767, 37 P.3d 354 (2002) (referring *passim* to “student files” and “a student's file”). Here, the surveillance camera serves as a means of maintaining security and safety on the school buses. The videotape from the surveillance camera differs significantly from the type of record that schools maintain in students' personal files. Merely placing the videotape in a location designated as a student's file does not transform the videotape into a record maintained for students.

Id. at 202. Thus, the fact that a requested record may constitute “personal information” of a student does not “transform” the information into the type of personal information exempted by the PRA. As in *Lindeman*, the requested records in the instant case differ significantly from the type of record that is maintained in files for welfare recipients. The types of

information in files for welfare recipients relate to the recipient's "assets, resources, income, family circumstances, health, age, educational skills, training, [and] financial expectancies and contingencies . . ." *State v Holmes*, 98 Wn.2d 590, 598, 657 P.2d 770 (1983). A list of IPs, however, does not relate to this typically held information—especially considering most welfare recipients do not receive the services of an IP. On the other hand, a list of IPs' names is maintained by DSHS for purposes related to licensure, billing, and reimbursements paid to IPs.⁵⁴ Even if SEIU had shown the names of IPs constitute the "personal information" of welfare recipients, it has not shown and cannot show that this is the type of personal information maintained in files for welfare recipients.

3. SEIU's argument constitutes the oft-rejected connect-the-dots argument.

RCW 42.56.230(1) does not exempt the requested records because SEIU's claim that release of IPs' names "is tantamount to the release of the identities of Medicaid beneficiaries," App. Br. at 34, constitutes the connect-the-dots argument routinely rejected by Washington courts. *See Koenig*, 158 Wn.2d at 187 and *Sheehan*, 114 Wn.App. 325. The connect-the-dots argument occurs when a party argues that otherwise nonexempt records are exempt because the disclosed records can be used to acquire

⁵⁴ Also, the records literally do not contain information in files maintained for welfare recipients, in a locational sense—either electronically or physically

exempt information *not* in the disclosed records.

Two cases illustrate this failed argument well. First, the State Supreme Court rejected this argument in *Koenig v. Des Moines*. The Court held that otherwise nonexempt records did not become exempt due to the possibility that a requester may learn of exempt information “by referencing sources other than the requested documents . . .” *Koenig*, 158 Wn.2d at 187. In *Koenig*, the requester requested police records related to a specific child victim of sexual assault. *Id.* at 178. Thus, even if the victim’s name were redacted, someone could learn the identity of the child victim of sexual assault by comparing the produced records with the request naming the victim, i.e. by comparing the disclosed documents with other non-disclosed documents. The city claimed this rendered the records exempt because (former) RCW 42.17.31901 exempted “information revealing the identity of child victims of sexual assault.”

The Supreme Court held that this was not enough to render the records exempt. The Court noted there was “no statutory language or case law to support the notion that we may look beyond the four corners of the *records at issue* to determine whether they were properly withheld.” 158 Wn.2d at 183 (emphasis added). The fact that a requester can deduce exempt information from nonexempt records is an insufficient ground for exempting otherwise nonexempt records. *Id.* at 187 (rejecting a Court of

Appeals concern about such deduction).

Similarly, in the instant case SEIU argues the list of IP names is exempt because the “personal information” of welfare recipients could be discovered by using the list of IPs to try and find out where the IPs live, and then determine if they live with someone, and then determine if that someone was a Medicaid recipient for whom the IP cares. A list of those residing with IPs, if any, was not requested, and will not be disclosed by the government agency. It may not even exist. In *Koenig*, where someone could compare the disclosed records with *another* existing document *not* disclosed the identity of the child victim could be deduced with 100% accuracy by such comparison. The Supreme Court rejected this argument as the connect-the-dots approach. Here, the identity of a welfare recipient in the instant case could not be discovered with assurance.⁵⁵ In the instant case, SEIU claims that if an IP lives with someone that there is an 11% to 44% chance that someone is a welfare recipient.⁵⁶ Thus, even if this Court

⁵⁵ Although rejecting SEIU’s argument, the trial court still gave SEIU’s argument too much credit. The trial court said SEIU’s argument was that one could deduce the identity of a Medicaid recipient. RP 10/16/14 at 55 But, as stated above, this is not so. According to SEIU, the closest someone could come to “identifying” a welfare recipient is pointing at someone on the list of 27 determined to be living with an IP and saying, “There is an 56% to 89% chance she is not a welfare recipient.” That is not “deducing” a welfare recipient’s “identity.” That is deducing the percentage chance that someone *might* be a welfare recipient. Additionally, it’s quite possible that *none* of the 27 are welfare recipients at all.

⁵⁶ Additionally, this is rather unhelpful information considering approximately 24.3% of the population of Washington is a Washington-based welfare recipient (of Washington Medicaid, which does not include all welfare recipients in Washington)

buys SEIU's statistical analysis (which is seriously flawed⁵⁷), SEIU arguments fail to even rise to the level of the failed connect-the-dots argument, i.e. there is even *less* reason to consider it meritorious.⁵⁸

Sheehan also rejected the connect-the-dots argument because the possibility that nonexempt records could be "used to obtain other personal information from various sources . . . is not sufficient to prevent disclosure" of otherwise nonexempt records. 114 Wn.App. at 346. In

(http://www.hca.wa.gov/medicaid/reports/Documents/enrollment_totals.pdf, last visited 5/11/2015.) This means that there is a 24.3% chance that *any* person on *any* list of Washington residents is a welfare recipient. Ironically, according to SEIU, there is a chance a list of those who reside with IPs provides an observer with even *less* than the normal 24.3% chance one would expect from the general population. The U.S. Census Bureau reports that Washington's 2014 population was 7,061,530. (<http://quickfacts.census.gov/qfd/states/53000.html>, last visited 5/11/2015).

⁵⁷ First, the list of names given Hearon is not claimed to be randomly generated. Second, she fails to analyze if 20 people is a statistically significant sample. Third, no analysis was performed to determine if the 20 people were representative of the over 30,000 individual providers. Each of these three flaws alone prevents any extrapolation that conclusions about the 20 can also be drawn about the 30,000. Analysis concerning these three points must be performed by an expert in statistics and probability. They are not private investigative methods. Additionally, she could not even determine if 35% of the 20 lived in the State of Washington at all! This means that only 13 of the names on the list were used in her conclusions about 30,000 individuals. This would be like trying to learn about the characteristics of the people in a city with a population of 10,000 by interviewing four people. This would be absurd. Lastly, her 11% to 44% conclusion is seriously misleading. For example, the 44% must assume that all individual providers live with one and only one person, which we know from Hearon's own study to be untrue. Thus, the 44% conclusion is an impossibility. Lastly, Hearon's figures also assume that each residence only contains one IP. See CP 668-71 (Hearon Decl.)

⁵⁸ In these analogous cases, it was possible to discover with 100% assurance the exact information that would be exempt under the PRA, e.g. the specific identity of a child sexual assault victim with 100% assurance. SEIU's argument does not get us that far. After all, this is what Hearon's testimony shows: "Joe" the IP is on the list. Using search tools on the internet, a requester finds out that Joe resides with someone named Mary (assuming for a moment it's possible to connect Mary to *Joe's* residence and not simply an anonymous IP's residence—which Hearon does not allege). SEIU claims there is an 11% to 44% chance Mary is a welfare recipient. Because of this 11% to 44% chance, SEIU argues disclosing Joe's name is tantamount to disclosing Mary's name, and it's Mary's name that is the "personal information" "maintained in any files for welfare recipients."

Sheehan, a county argued releasing a list of police officers' names "could allow someone to track down their home address and other personal, nondisclosable information from other sources . . ." *Id.* at 344-45. Similarly, in the instant case, SEIU argues releasing a list of IPs' names could allow someone to track down the names of welfare recipients. That "modern life in this age of technology" makes it possible to connect disclosed nonexempt information to undisclosed exempt information, does not operate to render exempt the otherwise nonexempt information. *Id.* at 346. SEIU's attempts to distinguish *Sheehan* are unpersuasive. First, SEIU argues *Sheehan* based its holding on the fact that police officers names were routinely released, rather than on a connect-the-dots analysis. App. Br. at 42. This is not so. *Sheehan* discussed the routine disclosure of the names, but this was only relevant vis-à-vis a claim that release of the names *themselves* was "highly offensive," 114 Wn.App. at 346, which was an issue that only became relevant *after* the court rejected the argument that the names were exempt because they could be connected to other information that would be highly offensive (and therefore exempt). *Sheehan*'s rejection of the connect-the dots argument cannot be denied.⁵⁹

SEIU also attempts to distinguish *Sheehan* and *Koenig* based on the

⁵⁹ *Sheehan* also discussed the routineness of disclosing the names in its discussion related to the PRA's exemptions related to "intelligence information" and records "essential for effective law enforcement." *Sheehan*, 114 Wn.App. at 337-38. These exemptions are not at issue here.

idea that they are 13 and 10 years old, respectively. First, that is not very long ago. Many of the same tools in existence today were in existence than. Second, the analysis is the same, i.e. “[i]t is a fact of modern life in this age of technology the 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.” 114 Wn.App.at 346.

Lastly, SEIU argues *Sheehan* and *Koenig* should be overturned because “they failed to adequately acknowledge that the disclosure of personalized, unprotected, nonexempt information . . . is the de facto disclosure of protected, PRA-exempt information . . .” App. Br. at 41-42. First, release of IP names is not a de facto release of welfare recipient names because undisclosed documents must be referenced to determine who resides with IPs, i.e. a list created by website searches. Second, *Sheehan* and *Koenig* acknowledged SEIU’s claim because they both rejected the idea that otherwise nonexempt records are exempt because the disclosed records could be used in some way to discover information that would be exempt under the PRA. The method used to discover the exempt information is irrelevant. *The fact that tools must be used and other documents referenced to discover exempt information prevents the nonexempt list from being a de facto list of any other kind.*

Woessner, 90 Wn.App. 205, also does not help SEIU. First, the issue of *Woessner* was strikingly different from the instant case “[b]ecause redacted reports with salary and benefits information *were provided* to *Woessner*, the issue here is whether coupling such information with individual employee names and identification numbers is exempt.” 90 Wn.App. at 216. In the instant case, DSHS has not coupled the list with other information that would allow the list to be used to discover the identities of welfare recipients. The list of IP names is the only record to be disclosed. Second, *Woessner* specifically held the release of mere names is not problematic. *Id.* at 222-23. Third, *Woessner* analyzed whether release of names along with each’s employee identification number was “highly offensive” to the employees on the list, not if mere names themselves constituted the exempt information of third parties.

Fourth, *Sheehan*’s rejection of *Woessner*’s broad application is also apt in the instant case; namely that SEIU’s interpretation of *Woessner* is “far too broad in light of the *Woessner* court’s holding that release of public employees’ names, without more, is not highly offensive.” *Sheehan*, 114 Wn.App. at 346. This is especially true considering the PRA is a strong mandate for openness and disclosure, and the fact that *Koenig* was decided three years after *Sheehan* and 18 years after *Woessner*. No court has adopted SEIU’s proposed expansive application of *Woessner* in 18 years

since its decision.

In conclusion, this is not the kind of “personal information” of welfare recipients the PRA is attempting to protect in RCW 42.56.230(1)—especially given the PRA’s strong mandate of openness and disclosure. Nor is it the type of information protected by 42 U.S.C. §1396(a)(7)(A), 42 C.F.R. §431.301, or 42 C.F.R. §431.305(b)(1), (5).

4. RCW 42.56.210(2) mandates disclosure.

Disclosure of the requested records is mandated by RCW 42.56.210(2) even if this Court finds RCW 42.56.230(1)’s exemption applies.

Disclosure of IP names does not violate the privacy of any welfare recipient due to the indirect nexus connecting IP names to welfare recipients; nor does nondisclosure protect any vital government function. RCW 42.56.210(2) states that disclosure of any otherwise exempt record may be permitted if the exemption of such records is “clearly unnecessary to protect any individual’s right of privacy or any vital government function.” The act provides a person’s right to privacy “is invaded or violated only if disclosure of information about the person: (1)[w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.56.050. “Interpreting ‘legitimate’ to mean ‘reasonable,’ we have also held that where ‘the public interest in efficient government could be harmed *significantly more* than the public would be

served by disclosure,' the public concern is not legitimate and disclosure is not warranted." *Dawson v. Daly*, 120 Wn.2d 782, 798, 845 P.2d 995 (1993). SEIU dedicates only two lines of its brief to its unsupported legal conclusion that "disclosure would violate their privacy rights; disclosure cannot therefore be justified under RCW 42.56.210(2)." App. Br. at 39. SEIU has not shown that disclosure of IP names, through its indirect statistical analysis, would be highly offensive to a reasonable person; nor has SEIU shown the IP list is not of legitimate concern to the public. In fact, the opposite is true in light of RCW 42.56.550(3)⁶⁰ and case law.

First, the IP list, even if viewed as the functional equivalent of a list of welfare recipients, does not specifically identify any single person as a welfare recipient. Simply knowing with imprecision (11% to 44%) the percentage chance that someone *might* be a welfare recipient does not violate that person's privacy. Second, "No Washington case has held that public employees' names are private and subject to the personal privacy exemption. Washington's Public records act contains no blanket exemption for names..." *Sheehan*, 114 Wn.App. at 343. SEIU has not

⁶⁰ "The PRA does not provide a definition of 'highly offensive' in RCW 42.56.050. But RCW 42.56.550(3) emphasizes that the PRA's policy is that 'free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.' Reading these statutes together suggests that the legislature intended the term 'highly offensive' to mean something more than embarrassing." *West v. Port of Olympia*, 183 Wn App. 306, 313, 333 P.3d 488, 491 (2014).

overcome this hurdle. The release of names is simply not an invasion of privacy, especially when those names are not the actual names of welfare recipients.

5. SEIU did not satisfy the requirements of RCW 42.56.540.

RCW 42.56.540 contains requirements SEIU must meet over and above proving an exemption applies. A party seeking to prevent disclosure of requested records must seek an injunction through RCW 42.56.540 and prove, (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. Thus, simply showing the application of an exemption does not show disclosure would not be in the public interest, that someone would be substantially and irreparably harmed, and that disclosure would harm a vital government function.

Assuming, arguendo, SEIU has met the other two elements, it has completely failed to produce any authority or evidence to prove that the public lacks a legitimate interest in the list of IP names. *See Ameriquest*, 177 Wn. 2d at 493. In fact, case law directly contradicts any such

suggestion.⁶¹ SEIU has also failed to produce any authority or evidence to prove a person or vital government function would be substantially and irreparably damaged by disclosure of IP names. Having failed to meet or even address its full burden under RCW 42.56.540, SEIU's attempt to prevent disclosure of the list of IP names under RCW 42.56.230(1) fails.

G. Freedom Foundation is entitled to attorneys' fees and costs.

The Foundation is entitled to costs and fees associated with its attempt to argue against and dissolve the trial court's temporary restraining order, because under the PRA "costs and fees may be awarded where a party succeeds in getting a wrongfully issued injunction dissolved." *Spokane Police Guild v. Washington State Liquor Control Board*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989). Further, "Attorney's fees are recoverable as a cost of dissolving a wrongfully issued temporary injunction or restraining order." *Seattle Firefighters Union v. Hollister*, 48 Wn.App. 129, 138, 737 P.2d 1302 (1987). Additionally, "if fees were to be awarded based on this equitable rule, they would be limited to those necessary to dissolve the temporary restraining order, not those connected with the appeal." *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758-59, 958 P.2d 260 (1998) (citing *Seattle Firefighters*). SEIU's

⁶¹ See *Woessner*, 90 Wn.App. at 222 ("disclosure of names would 'allow public scrutiny of government.' . . . the public could then ensure that the government is not paying one employee twice, funneling money to non-existent employees, or engaging in nepotism.")

arguments in this case are frivolous and motivated by its pecuniary interest in collecting fees from IPs throughout the pendency of the TRO. It wrongfully obtained a TRO below and a stay on appeal. The Foundation should be compensated for its fees and costs waging against this meritless action.

V. CONCLUSION

For the foregoing reasons, this Court should uphold the trial court's decision to deny a preliminary and permanent injunction when it did. This Court should reverse the trial court's decision with respect to 1) its issuance of a TRO based solely on CR 65(a)(2), 2) SEIU's associational standing to bring suit in the interest of welfare recipients, 3) SEIU's standing to bring suit pursuant to RCW 42.56.070(9), and 4) its decision to allow SEIU's second set of discovery requests. This Court should also grant the Foundation payment of its attorneys' fees and costs below and on appeal.

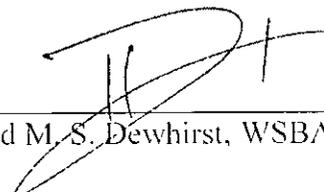
RESPECTFULLY SUBMITTED this 15th day of May, 2015

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 15, 2015, I filed with the Court by U.S. Mail and I served by U.S. Mail the foregoing document and this certificate of service on:

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Dated this 15th day of May, 2015, at Seattle, Washington.



Michele Earl-Hubbard