

NO. 91048-1

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SUPREME COURT OF THE STATE OF WASHINGTON

SEIU HEALTHCARE 775 NW,

Appellant,

v.

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

Respondents.

**RESPONSE BRIEF OF STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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I. INTRODUCTION

At issue in this appeal are two unique elements of the Public Records Act (Act). First, this Court is asked to interpret the scope of the Act's prohibition on disclosing lists of individuals where the list will be used for a "commercial purpose." RCW 42.56.070(9). This is a matter of first impression. There is no guidance from any Washington appellate court as to what constitutes a commercial purpose and how an agency should determine whether a request may be for a commercial purpose.

The Court also is asked whether the Act's exemption for the release of records that identify welfare recipients, RCW 42.56.230(1), applies in this case. Appellant, Service Employees International Union (SEIU), argues that this exemption also protects information in any record that a requester may use, together with information from other sources, to reveal welfare recipients identifying information or other private information. Washington State Department of Social and Health Services (DSHS) did not apply the exemption so broadly in responding to the public records request from Respondent, Freedom Foundation, concluding instead that nothing within the four corners of the responsive records revealed personal information about welfare recipients.

DSHS would have released the records had it not been restrained by order of the superior court. The agency is still prepared to produce the records if the restraining order is lifted or if directed to do so by the Court.

II. STATEMENT OF THE CASE

On July 2, 2014, the Freedom Foundation made a request for public records from DSHS. Clerk's Papers (CP) at 612-13. Freedom Foundation requested seven categories of records, but only one is at issue: "6. The business/work contact information (including e-mail addresses) for all in-home care providers (individual providers) and translators (language access providers)." CP at 613.

After reviewing the request and receiving clarification from the Freedom Foundation, DSHS determined it had two lists responsive to the request relevant to Individual Providers (IPs)¹. DSHS applied the exemption for home addresses and other contact information under RCW 42.56.250(3) to these lists. The resulting non-exempt records are two lists of IPs. The first list contains the names of approximately 30,968 IPs. CP at 876. The second list provides the names of 95 additional IPs. CP at 876. Both lists also contain the IPs' unique provider numbers. CP at 876. DSHS did not identify any exemption that would block disclosure of the requested records in their entirety.

¹ Translators or Language Access Providers are represented by a different bargaining representative which is not a party to this matter.

IPs are individuals who have contracted with DSHS to provide personal care or respite care under a variety of programs including Medicaid. IPs are selected by and receive daily direction from the care recipient, but they are paid for their work directly by DSHS, under the terms contained in the bargaining agreement negotiated pursuant to RCW 41.56.026. The IPs' bargaining representative is SEIU. CP at 597.

On August 19, 2014, DSHS notified SEIU of the request, as authorized in RCW 42.56.540, and informed SEIU that DSHS would release the records on September 3, 2014, unless SEIU obtained a court order by that date enjoining their release. CP at 610-13. The deadline was extended to October 3, 2014. CP at 626.

On behalf of its members, SEIU objected to the release of the records and filed a Complaint on October 1, 2014, to enjoin DSHS from releasing the two lists. CP at 596-602. On October 3, the trial court granted a Temporary Restraining Order and scheduled a hearing on Preliminary Injunction for October 16. CP at 78-79.

In the interim, SEIU attempted to obtain discovery from the Freedom Foundation through both written discovery and depositions. In an expedited discovery hearing on October 10, the court denied SEIU's request to conduct depositions but authorized limited written discovery on

an accelerated basis.² CP at 446-49. During the discovery hearing, the trial court proposed to consolidate the hearing for temporary injunction with the hearing for a permanent injunction, on the theory that denying the preliminary injunction would result in the release of records, making the permanent injunction moot. CP at 275-77.

At the beginning of the hearing on October 16, 2014, the trial court formally notified the parties that it was consolidating the hearing for preliminary and permanent injunction under CR 65(a)(2). CP at 296-98. At the close of the hearing, the trial court denied SEIU's requests for a preliminary injunction and a permanent injunction and continued the temporary restraining order to give SEIU an opportunity to file an appeal. CP at 290, 337-68. These rulings were memorialized in a written Order entered on October 22, 2014. CP at 288-91.³

SEIU timely filed its appeal with Division II of the Court of Appeals and obtained an Order extending the temporary restraining order. The Freedom Foundation cross-appealed directly to the Supreme Court. The temporary restraining order remains in place.

On August 19, 2014, DSHS stated its intent to release the requested records unless a court order prevented it from doing so. It has

² Freedom Foundation provided its discovery responses on October 14, 2014. CP at 834-77.

³ The Order notes that the parties were given advance notice the preliminary and permanent injunction hearings would be consolidated. CP at 290.

been under court order not to release the records from October 3, 2014, to the present. DSHS is prepared to release all records covered by the temporary restraining order when that order is dissolved, or to take any other action ordered by the Court.

III. ARGUMENT

A. Standard of Review.

Judicial review of public disclosure cases, including application of an exemption, is de novo. RCW 42.56.550(3). The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Ameriquest Mortg. Co. v. Office of Atty. Gen.*, 177 Wn.2d 467, 486, 300 P.3d 799 (2013). In this case, that burden falls on SEIU.

To obtain injunctive relief—preliminary or permanent—SEIU must establish the same three basic requirements: (1) it has a clear legal or equitable right; (2) it has a well-grounded fear of immediate invasion of that right by the entity against which it seeks the injunction; and (3) the acts about which it complains are either resulting or will result in actual and substantial injury. *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 995 P.2d 63 (2000). If SEIU fails to satisfy any one of these three requirements, the injunction generally should be denied. *Federal Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946 (1986). At the preliminary injunction hearing, the moving

party need only establish the *likelihood* that it will ultimately prevail on the merits—not the ultimate right to a permanent injunction. *Tyler Pipe Industries, Inc. v. State, Dep’t of Rev.*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982).

Overlaying that general standard for an injunction is the standard in RCW 42.56.540, which specifically governs the court’s power to enjoin the production of a record under the Act. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407 n.2, 259 P.3d 190 (2011). “Under RCW 42.56.540, a court may enjoin production of requested records if an exemption applies and 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.” *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719, 328 P.3d 905 (2014).

B. The Meaning of Commercial Purpose in RCW 42.56.070(9) Is a Question of First Impression for Washington Appellate Courts.

At issue in this case, for the first time on appellate review, is the question of how to interpret RCW 42.56.070(9), which provides in pertinent part: “This chapter shall not be construed as giving authority to any agency . . . to give, sell or provide access to lists of individuals requested *for commercial purposes*, and agencies . . . shall not do so

unless specifically authorized or directed by law” (Emphasis added).

The Act does not define “commercial purposes.”

The Act establishes a presumption that all public records must be made available upon request unless the record falls within a specific statutory exemption or prohibition. RCW 42.56.070(1), .550. It is well established that exemptions are to be construed narrowly and construed in favor of partial disclosure where possible. *Predisik v. Spokane Sch. Dist. No. 81*, 2015 WL 1510443, at *2 (Wash. Apr. 2, 2015). This Court has not applied that same narrow construction to a prohibition from disclosure. In *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 525, 326 P.3d 688 (2014), for example, the Court stated that “other statutes” incorporated in RCW 42.56.070(1) “may exempt or prohibit disclosure of certain records or information,” but the next sentence appears to exclude *prohibitions* on disclosure when applying narrow construction: “[a]ll *exceptions*, including ‘other statute’ exceptions, are construed narrowly” (emphasis added). *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 138–39, 580 P.2d 246 (1978). There is nothing in the statute that establishes whether RCW 42.56.070(9), which is written in the language of a prohibition (an agency “shall not” release a list of individuals requested for commercial purposes unless otherwise authorized by law) is intended to be narrowly construed like exemptions within the Act.

1. Examination and Determination of Whether a Public Records Request Is for a Commercial Purpose Is Properly Satisfied by an Agency Examining the Four Corners of the Request.

As a general rule, agencies “shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request.” RCW 42.56.080; *King Co. v. Sheehan*, 114 Wn. App. 325, 336, 57 P.3d 307 (2002). The commercial purposes prohibition in RCW 42.56.070(9) is specifically called out as an exception to that general rule. RCW 42.56.080. But the Act does not provide any guidance as to how an agency is to divine the intended use behind a public records request. Here, DSHS received the request at issue on the letterhead of the Freedom Foundation from a Freedom Foundation email address. The letterhead identifies the requester as “Freedom Foundation . . . Because People Want To Be *free*. Citizen Action Network ‘Connecting, equipping and mobilizing citizens’.”

In the absence of case law construing this statute and without any guidance in the Act, DSHS was left to make its own determination whether to explore the requester’s intent. Is an affirmation from the requester that the intended use of a record is for a non-commercial purpose a sufficient inquiry, as suggested by 1988 Letter Op. Att’y Gen. No. 12? If not, under what standard and based on what facts should the records

officer be making conclusions regarding commercial purpose? More significantly, how does a records officer know that further inquiry is necessary to determine if the requester has a commercial purpose? In other contexts, the Court has instructed that an agency should not look beyond the four corners of a requested document to determine whether an exemption applies. *See, e.g., Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 414, 259 P.3d 190 (2011) (“An agency should look to the contents of the document, and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity.”); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 184, 142 P.3d 162 (2006) (even though the exemption protects “[i]nformation revealing the identity of child victims of sexual assault,” the city could not withhold the record to protect the child’s identity where the requester asked for that specific child’s record; the city could do no more than redact the identity of the victim who already was known to the requester).

Neither the statute nor case law provides guidance as to whether an agency should look beyond the four corners of the request to determine whether the requester has a commercial purpose. Based on the four corners of the request in this case, there was nothing to trigger further inquiry to discern if a commercial purpose existed. SEIU asserts the Freedom Foundation will use the records for a commercial purpose, and

argues the need for adequate discovery to demonstrate its assertion. Is that the burden that should rest on an agency under RCW 42.56.070(9) in discerning whether a requester has a commercial purpose? If not, what is the agency's burden?

Freedom Foundation requested a list of individuals, presumably in order to contact them. Absent guidance from the courts to the contrary, DSHS assumed that "commercial purpose" means a for-profit activity. Nothing on the face of the request notified DSHS that Freedom Foundation intended to sell products to those individuals, or otherwise use the list to make a profit. Should this Court decide that Freedom Foundation's purpose was commercial, the Court should also direct agencies how to make the same determination from the text of the request and the content of the records requested. This Court should be mindful of the burden that would be imposed on agencies if they were required to conduct an investigation into whether a requester's purpose is commercial.

2. Attorney General Opinions Suggest That a Commercial Purpose Is Present Where the Requester's Objective Is Clearly to Gain an Economic Benefit by Using the Records.

Although no court opinion has construed RCW 42.56.070(9) and 42.56.080 as they apply to commercial purposes, there are six Attorney General Opinions that discuss how the commercial purpose provision

could be applied. The first Opinion was issued about a year after the Act was passed by initiative of the people in November 1972. In an opinion dated December 12, 1973, the Attorney General looked only at the question of what is a “list” of individuals requested for commercial purposes. 1973 Letter Op. Att’y Gen. No. 113 (citing former RCW 42.17.260(5), now codified as RCW 42.56.070(9)). The Opinion determined the law precluded access to “lists” which are prepared by the agency having custody of the record. However, the agency could provide access to raw records from which the requester could create their own “list.” In the present case there is no apparent dispute that the records at issue are lists.

The second Attorney General Opinion, 1975 Letter Op. Att’y Gen. No. 38, dated April 7, 1975, dealt with a welcome service that requested from a public utility district the names of individuals new to the area in order to contact them and tell them about local services. The Opinion concluded that based on the facts as stated, the lists requested would be for commercial purposes, because the apparent purpose of the request was to “facilitate contacts with the new residents in question to make them aware of their new surroundings, to solicit their participation in community activities, *and to make them aware of business commercial entities and their services in the area.*” *Id.* at 3 (emphasis in original).

Another Opinion later that year, 1975 Letter Op. Att’y Gen. No. 15, dated July 17, 1975, and referenced by SEIU, Brief of Appellant at 14, went into more depth about what could be a commercial purpose under the statute. The Opinion began with two general observations: first, that the commercial purpose provision does not prohibit access to raw data from which a person could construct a list of individuals for commercial purposes (making reference to 1973 Letter Op. Att’y Gen. No. 113); and second, that the commercial purpose provision should be narrowly construed to be consistent with the policy declaration in former RCW 42.17.020 (that the statute is intended to *open up* access to public records). 1975 Letter Op. Att’y Gen. No. 15, at 7.⁴

Relying primarily on dictionary definitions, in the absence of any legislative definition, the Opinion concluded a “commercial purpose” is “an intent to use the list of individuals in such a manner as to facilitate commercial activity.” *Id.* at 10. Applying that definition, the Opinion described the statute as intended to prohibit an agency from:

supplying the names of natural persons in list form when the person requesting such information from the public records of the agency intends to use it to contact or in some way personally affect the individuals identified on the list

⁴ The policy statements contained in former RCW 42.17.020 now are codified in RCW 42.17A.001 (compare RCW 42.17A.001 with Laws of 1973, ch. 1, § 2). Their focus is on the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates.

and when the purpose of the contact would be to facilitate that person's commercial activities.

Id. at 10.

The next relevant Opinion, 1988 Letter Op. Att'y Gen. No. 173, dated June 8, 1988, restated the Attorney General's interpretations thus far as a three-part test:

state agencies shall not provide a list of the names of natural persons (not including corporations, associations, etc.) when the list was created by the agency, and (a) the requester is engaged in a commercial (profit-expecting) activity, (b) the requester intends to contact or in some way personally affect the listed individuals, and (c) the purpose of the contact is to facilitate the commercial activity."

Id. at 10 n.4. The Opinion suggested that an agency could require the person requesting access to a list to provide a written representation that the list will not be used for commercial purposes in violation of the statute, observing that "[t]he 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.* at 11.

The final Attorney General Opinion, 1998 Letter Op. Att'y Gen. No. 2, dated Jan. 27, 1998, reiterated the need to look to the dictionary when terms are not legislatively defined, and started with the definition

first derived in 1975 Letter Op. Att’y Gen. No. 15. *Id.* at 3. Finding no definitional limits on the scope of the term “commercial purpose,” the Opinion disagreed that the commercial purpose provision was limited to situations in which individuals are directly contacted or personally affected. 1998 Letter Op. Att’y Gen. No. 2, at 4.

The Opinion buttressed its conclusion by reference to this Court’s holding in *Newman v. King Cnty.*, 133 Wn.2d 565, 947 P.2d 712 (1997). In *Newman*, the Court read the broad language of former RCW 42.17.310(1)(d) [now RCW 42.56.240(1)] as providing a temporary “categorical exemption” for all records contained in open, investigative files. *Newman*, 133 Wn.2d at 574-75. The Court found “[a]n inherent clash exists between the PDA’s⁵ presumption and preference for disclosure, prior case law requiring a narrow interpretation of exemptions, and the broad language of the exemption.” *Id.* at 572 (quoted in 1998 Letter Op. Att’y Gen. No. 2 at 3). The Court resolved the clash by not applying the presumption of disclosure to the records covered by that categorical exemption—since the statute did not limit the scope of the exemption, the Act did not require the narrow interpretation of the

⁵ The statutes governing the disclosure of public records and the financing of political campaigns and lobbying and the financial affairs of elected officials were referred to as the Public Disclosure Act (PDA) until the 2005 Legislature relocated the public records provisions into a new chapter, RCW 42.56, referred to as the Public Records Act, where they currently are codified.

categorical exemption's broad language. *Newman*, at 574-75. The Opinion reasoned that the exemption now codified at RCW 42.56.070(9), like the exemption at issue in *Newman*, is a broadly stated, categorical prohibition, containing no language that narrows the definition of a commercial purpose. 1998 Letter Op. Att'y Gen. No. 2 at 4.

In the years since *Newman* was decided, this Court has limited the circumstances under which RCW 42.56.240(1) provides a categorical exemption. *See, e.g., Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 314 P.3d 1093 (2013). The effect of that limitation on the commercial purpose provision in RCW 42.56.070(9) is unknown, since no appellate court has addressed the scope of the commercial purpose provision.

3. Authorities From Other Jurisdictions Provide Useful Guidance in Interpreting the Commercial Purpose Provision.

A few other states and the federal Freedom of Information Act (FOIA) have statutes comparable to RCW 42.56.070(9), which may be helpful to this Court.

a. Other States' Public Disclosure Laws.

Arizona's broad public records mandate contains a narrow "commercial purpose" exception. Under Arizona law, a commercial

purpose exists when a requester intends to use the public record. Arizona law states:

for the purpose of sale or resale or for the purpose of producing documents containing all or part of the copy, printout or photograph for sale or the obtaining of names and addresses from such public records for the purpose of solicitation or the sale of such names and addresses to another for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from direct or indirect use of such public record.

Ariz. Rev. Stat. § 39-121.03. This language is specifically “aimed at the direct economic exploitation of public records, not at the use of information gathered from public records in one’s trade or business.” *Star Pub. Co. v. Parks*, 178 Ariz. 604, 605, 875 P.2d 837 (Ariz. Ct. App. 1993). In that case, the Arizona Court of Appeals held that a newspaper publisher’s request for autopsy reports was not for a commercial purpose. The court recognized that information gleaned from public records might have indirect commercial value to the newspaper as news, but such indirect value was not enough to constitute a commercial purpose. To read commercial purpose any more broadly would be “inconsistent with the whole tenor of the public record statutes to make access freely available so that public criticism of governmental activity may be fostered” *Star Pub Co.*, 178 Ariz. at 605.

California law is similar. It provides that, “[a]n individual's name and address may not be distributed for commercial purposes, sold, or rented by an agency unless such action is specifically authorized by law.” Cal. Civil Code § 1798.60. “Commercial purpose” is defined in statute to mean “any purpose which has financial gain as a major object. It does not include the gathering or dissemination of newsworthy facts by a publisher or broadcaster.” Cal. Civil Code § 1798.3(j). But it is not clear how this definition is applied. The California Constitution (art. I, § 3(2)) includes a provision mandating broad construction of statutes providing access to public records and narrow construction of statutes that limit access. However, a companion statute to those just cited, “[T]he provisions of this chapter shall be liberally construed so as to protect the rights of privacy arising under this chapter or under the Federal or State Constitution.” Cal. Civil Code § 1798.63. We have found no California decision attempting to apply these provisions.

There appears to be no analogous commercial purpose provision in Kansas. In Kansas, when a request is for information that the requester intends to sell, Kansas may withhold records. In *Data Tree, LLC v. Meek*, 279 Kan. 445, 447-48, 109 P.3d 1226 (2005) (additional citations omitted), the Kansas Supreme Court considered whether the government was required to honor an information broker's request for certain

personally identifying records. As in Washington, the Kansas Court started with a presumption in favor of disclosure and a narrow reading of any exceptions. *Data Tree*, 279 Kan. at 454-55. And, as in Washington, the statute did not define “commercial purpose.” The Kansas court held that the requester’s apparent intent to gather and sell facts obtained from public records constituted a commercial purpose:

[T]he information being sought by Data Tree is not for its public notice properties but for commercial purposes, *i.e.* the sale of the information to business interests which have no relationship to the transaction recorded. The public interest to be served by releasing unredacted documents with social security numbers, mothers’ maiden names, and dates of births to a data collection company which intends to sell this information for a profit is at best insignificant.

Id. at 462. The court concluded that fulfilling Data Tree’s request would be an unwarranted invasion of personal privacy. *Id.* at 462-63.

b. Federal Freedom of Information Act.

Because federal cases have examined a variety of fact patterns relating to commercial purposes in the context of the federal FOIA,⁶ those cases may be useful here—albeit with three caveats.

First, a court interpreting FOIA looks to “commercial benefit” in order to determine whether to award attorneys’ fees—not to determine whether to disclose the record at all. 5 U.S.C. § 552(4)(A)(ii). Unlike the

⁶ 5 U.S.C. § 552 *et seq.*

Act, FOIA does not provide that a commercial purpose standing alone is a reason to withhold a record.

Second, courts interpreting FOIA typically analyze commercial benefit together with the plaintiff's interest. *See, e.g., Tax Analysts v. U.S. Dep't of Justice*, 965 F.2d 1092, 1095 (D.C. Cir. 1992) ("when a litigant seeks disclosure for a commercial benefit or out of other personal motives, an award of attorney's fees is generally inappropriate") (superseded on other grounds by 5 U.S.C. § 552(a)(4)(E)(i)). That analysis is not found in the Act.

Third, FOIA balances the private benefit of disclosing the information against the public benefit. *See, e.g. Lacy v. U.S. Dep't of the Navy*, 593 F. Supp. 71 (D. Md. 1984); *Mayock v. I.N.S.*, 736 F. Supp. 1561, 1564 (N.D. Cal. 1990); *Whalen v. I.R.S.*, 1993 WL 532506 (N.D. Ill. 1993). Again, that balancing is absent in the Act.

(1) Purposes Generally Recognized as Commercial.

As a general rule, a FOIA request is made for a commercial purpose if the requested information, in itself, has direct pecuniary value to the requester. This is true where the requester is engaged in the business of selling the type of information requested. *Aviation Data Service v. F.A.A.*, 687 F.2d 1319 (10th Cir. 1982) (requester's business

sold information regarding the aviation industry). It is also true where the requested information will assist the requester in setting bids or prices. *Isometrics, Inc. v. Orr*, 1987 WL 8709 (D.D.C. 1987); *Nat'l Ass'n of Med. Equip. Suppliers v. Health Care Financing Admin.*, 1987 WL 26448 (D.D.C. 1987); *Guam Contractors Ass'n v. U.S. Dep't of Labor*, 570 F. Supp. 163, 169 (N.D. Cal. 1983) (contractors' association, "although nominally a non-profit organization, was the tool and surrogate litigant for various commercial entities.").

A commercial purpose also exists where the requester seeks the information in order to acquire new customers. *Nat'l Western Life Ins. Co. v. United States*, 512 F. Supp. 454, 463 (N.D. Tex. 1980) (life insurer sought disclosure of list of United States Postal Service employees). A commercial purpose may exist where the information tends to induce potential clients to do business with the requester. *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979) (government contracting firm obtained disclosure of auditing manual). A commercial purpose may also exist where the information would help the requester to render better service to its existing clients. *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977) [(overruled on other grounds recognized by *Burka v. U.S. Dep't of Health and Human Servs.*, 142 F.3d 1286 (D.C. Cir. 1998))].

Finally, it sometimes may be a commercial purpose under FOIA where the requester intends to use the requested information to obtain favorable policy on the regulation of its own industry. See *Alliance for Responsible CFC Policy, Inc. v. Costle*, 631 F. Supp. 1469, 1471 (D.D.C. 1986) (“As representative of users and producers of CFCs, plaintiff clearly was motivated by their commercial interest in CFC regulation.”).

(2) Purposes Generally Recognized as Non-Commercial.

Not every purpose that involves money is a commercial purpose. For example, where an author requests information in order to write a book that will be sold commercially, the author is not necessarily a commercial requester. *Piper v. U.S. Dep’t of Justice*, 339 F. Supp. 2d 13, 22 (D.D.C. 2004). This is because “Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within the scope of their professional roles.” *Campbell v. Dep’t of Justice*, 164 F.3d 20, 35 (D.C. Cir. 1998).

Typically, a FOIA request is not for a commercial purpose if it is made in order to enable scrutiny of government conduct. For example, a request for information about a high-profile public controversy is not a commercial request. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Justice*, 820 F. Supp. 2d 39 (D.D.C. 2011), *subsequent*

determination, 2011 WL 5830746 (D.D.C. 2011) (requester sought information about torture policies). Nor is a request for a commercial purpose where it is investigating allegations of governmental waste and abuse. *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851 (D. Colo. 1994). And finally, it is not a commercial purpose to critique government processes and policies. *Conservation Law Found. of New England, Inc. v. Dep't of Air Force*, 1986 WL 74352 (D. Mass. 1986).

Importantly, a policy purpose may be non-commercial even if the desired change in policy would run to the requester's commercial benefit. *Wiley, Rein & Fielding v. U.S. Dep't of Commerce*, 793 F. Supp. 360 (D.D.C. 1992). In that case, the requester sought documents to assist it in preparing a legislative initiative to change United States policy concerning the Paris Air Show. *Id.* at 361. While 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. *Id.*

Another important type of non-commercial purpose is informing third parties of their rights. In *Veterans Educ. Project v. Sec'y of Air Force*, 509 F. Supp. 860, 861 (D.D.C. 1981), *aff'd without published op.*, 679 F.2d 263 (D.C. Cir. 1982), the requester was a nonprofit organization

created to assist veterans with less than honorable discharges. The organization requested a list of all such veterans who were eligible to apply for an upgrade in status pursuant to new standards and procedures. *Id.* The court held that the organization had no commercial purpose; rather, its “only purpose in obtaining the records was to inform veterans of their statutory rights.” *Id.* at 862.

C. Based on the Four Corners of the Record, DSHS Did Not Identify the List of IP Names as Exempt Under RCW 42.56.230(1) Because The Record Did Not Identify Welfare Beneficiaries.

SEIU argues that the trial court erred in denying SEIU’s request for preliminary and permanent injunction, because the records contained the names of IPs. SEIU argues that the list of IPs in turn allows for potential identification of welfare recipients and therefore constitutes prohibited disclosure of personal information in a file maintained for welfare beneficiaries exempted under RCW 42.56.230(1). Br. of Appellant at 34-44.

RCW 42.56.230(1) exempts from disclosure any “personal information in any files maintained for . . . welfare recipients.” While the records at issue do not contain any personal information of welfare beneficiaries, SEIU asserts that their release is “tantamount to the release of the identities of Medicaid beneficiaries.” Br. of Appellant at 34. In

part, this argument is based on the frequency of IPs residing with the care recipients and the relative ease in drawing the association between the two with limited research. Br. of Appellant at 39.

Currently, when an agency determines whether an exemption applies, it looks to information within the four corners of the record. *Predisik*, No. 90129-5, at *4 (Apr. 2, 2015); *Koenig*, 158 Wn.2d at 187, *Sheehan*, 114 Wn. App. at 341. Guided by that principle, DSHS did not identify RCW 42.56.230(1) as an exemption applicable to the records in question, because no personal information of welfare beneficiaries was contained within the four corners of the requested record.

D. Any Error in Consolidating the Preliminary Injunction Hearing With the Permanent Injunction Hearing Under CR 65(a)(2) Was Harmless, Because the Trial Court Found That an Injunction Was Not Justified Even Under the Less Rigorous Preliminary Injunction Standard.

SEIU argues that the trial court erred when it consolidated the preliminary injunction hearing with the permanent injunction hearing. But to obtain *any* kind of injunctive relief—preliminary or permanent—SEIU bears the burden to establish the same three basic requirements: (1) it has a clear legal or equitable right; (2) it has a well-grounded fear of immediate invasion of that right by the entity against which it seeks the injunction; and (3) the acts about which it complains are either resulting or will result in actual and substantial injury. *Kucera*, 140 Wn.2d at 209. In addition,

overlaying that general standard for an injunction is the standard in RCW 42.56.540, which specifically governs the Court's power to enjoin the production of a record under the Act. Under RCW 42.56.540, a court may enjoin production of requested records if a statutory exemption applies and 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. RCW 42.56.540; *Bainbridge Island Police Guild*, 172 Wn.2d at 407 n.2; *Robbins*, 179 Wn. App. at 719. If SEIU fails to satisfy any of these requirements, the injunction should generally be denied. *Federal Way Family Physicians*, 106 Wn.2d at 265; *Bainbridge Island Police Guild*, 172 Wn.2d at 407 n.2.

CR 65(a)(2) permits a court to consolidate a hearing for preliminary injunction with the trial on the merits rendering a final decision, provided it notifies the parties that it is consolidating. *Northwest Gas Ass'n v. Wash. Utils. & Transp. Comm'n*, 141 Wn. App. 98, 113-14, 168 P.3d 443, (2007); *League of Women Voters of Wash. v. King Cnty. Records, Elections & Licensing Servs. Div.*, 133 Wn. App. 374, 382, 135 P.3d 985 (2006). Notice is required to give the parties time to prepare so that they have a full opportunity to present their cases. *Northwest Gas Ass'n*, 141 Wn. App. at 114. Here, the court notified both parties at the

discovery hearing that the injunction hearings were being consolidated. CP at 275-77.

A preliminary injunction is easier to obtain than a permanent injunction, because the moving party need only establish the likelihood that it will ultimately prevail on the merits—not the ultimate right to a permanent injunction. *Tyler Pipe*, 96 Wn.2d at 793. The trial court found that the facts presented by SEIU did not satisfy this standard. Although both the preliminary injunction *and* the permanent injunction were at issue, the trial court applied the less rigorous preliminary injunction standard, finding that SEIU did not “establish a likelihood of establishing a clear legal or equitable right.” CP at 368.

Since SEIU did not demonstrate a likelihood of prevailing on the merits, a later permanent injunction hearing would have been moot and any error in consolidating under CR 65(a)(2) was harmless.

IV. CONCLUSION

The definition of “commercial purpose” under RCW 42.56.070(9) in the Act is a matter of first impression in the Washington appellate courts. This Court should address an agency’s responsibility when receiving a request for a list that may fall within the prohibition on disclosure in RCW 42.56.070(9). The Court should hold that the agency may determine whether a request is for a commercial purpose by looking

within the four corners of the request. Requiring the agency to conduct an investigation into a requester's purpose would be unduly burdensome. Requiring the agency to secure a promise from a requester that the requested information will not be used for commercial purposes is not authorized by current law.

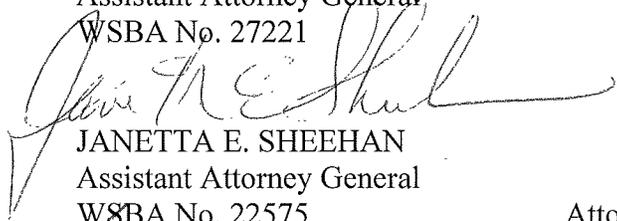
Procedurally, based on the trial court's application of the more lenient standard for a preliminary injunction, any error in consolidating the hearings for preliminary and permanent injunction is harmless.

RESPECTFULLY SUBMITTED this ____ day of May, 2015.

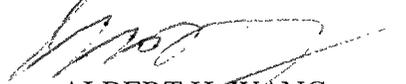
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