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SUPREME COURT OF THE STATE OF WASHINGTON

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SEIU LOCAL 925,  
Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,  
Respondent

and

FREEDOM FOUNDATION,  
Respondent/Cross-Appellant,

APPELLANT/CROSS RESPONDENT SEIU 925'S REPLY/CROSS-  
RESPONSE TO APPELLANT FREEDOM FOUNDATION'S OPENING  
BRIEF

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## INTRODUCTION

In this Public Records Act (“PRA”) case, Freedom Foundation (“FF”) has requested the names and extensive personal information about “Family Friend and Neighbor” child care providers (“FFNs”), who provide care for low-income children receiving subsidies through the Working Connections Child Care (“WCCC”) program. Disclosure of the providers’ information would not advance any of the interests advanced by the PRA, but it *would* allow FF to use lists of names to advance their commercial interests. It would also strip away the protections the PRA confers on children and welfare recipients, as well as providers’ right to privacy under the Washington constitution. The Court should reverse the trial court’s denial of injunctive relief and remand for entry of an order enjoining the Department of Social and Health Services (“DSHS”) from disclosing the requested information of providers.

## ARGUMENT IN SUPPORT OF REPLY

- I. **The “Commercial Purposes” Prohibition Forbids Disclosure Of Lists Of Names For Any Commercial Purpose, Including Those For Which FF Seeks The List Of Names.**
  - A. **Because RCW 42.56.070(9) Is A Prohibition, Not an Exemption, It Must Not Be Construed Narrowly.**

This Court should begin its analysis by employing the familiar rule of statutory construction that the use of different terms within the same statute indicates that the legislature intended them to have different

meaning. *State v Tracer*, 173 Wn.2d 708, 718, 272 P.3d 199 (2012). Because RCW 42.56.070(9) absolutely *prohibits* disclosure and does not merely *exempt* certain documents from an affirmative obligation to disclose, the restriction on disclosure cannot be read narrowly.<sup>1</sup>

While conceding that statutory prohibitions on disclosure are not subject to the same narrow constructions as exemptions, and that RCW 42.56.070(9) is “written in the language of a prohibition,” DSHS argues that there is nothing in the statute or case law to suggest whether RCW 42.56.070(9) is an exemption or a prohibition. DSHS Resp. Brf. at 7. Yet the clear text of the statute expressly forbids agencies from disclosing information for commercial purposes (agencies “shall not” provide access to lists of individuals for commercial purposes).

This Court has previously recognized the distinction between ordinary exemptions and prohibitions (“broad categorical exemptions”). In *Newman v. King Cty*, 133 Wn.2d 565, 947 P.2d 712 (1997), the Court recognized the “inherent clash exists between the [PRA’s] presumption and preference for disclosure, prior case law requiring a narrow

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<sup>1</sup> The PRA in several places differentiates between exemptions and prohibitions, as do the various regulations agencies have enacted pertaining to the PRA. Appellant’s Opening Brf. at 18-19. Several Attorney General Opinions recognize this distinction as well. *See* Op Atty Gen. No. 12 at 11 (1988) (“the public disclosure act specifically **prohibits** providing access to lists of individuals when the list is to be used for a commercial purpose.”) (emphasis added), Op Atty. Gen. No 2 (1998) (PRA requires disclosure unless “otherwise exempt from public disclosure **or prohibited from being disclosed.**”) (emphasis added).

interpretation of exemptions, and the broad language of the exemption.” Ultimately, the Court concluded that the “categorical exemption” prevailed over the PRA’s preference for disclosure. *Id.* at 572, 574. *See also, Resident Action Council v Seattle Hous. Auth.*, 177 Wn.2d 417, 327 P.3d 600 (2013), *as amended on denial of reh’g* (Jan. 10, 2014); *In re Request of Rosier*, 105 Wn.2d 606, 631 n. 7, 717 P.2d 1353, 1368 (1986) (Andersen, J. dissenting) (discussing exemptions, “[i]t should be noted that the act also contains a “prohibition” from disclosure in RCW 42.17.260(5)...”).

Exactly the same conclusion should be reached here. While as a general matter exemptions must be construed narrowly, this general rule “clashes” with the unambiguous *prohibition* against disclosing lists of names for commercial purposes. Because a narrow reading of RCW 42.56.070(9) is inconsistent with the Legislature’s decision to deprive agencies of all authority to disclose lists of names for commercial purposes, the prohibition must be read to categorically prohibit disclosure of a list intended for *any* broadly defined commercial purpose.<sup>2</sup>

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<sup>2</sup> Notwithstanding any other provisions in the PRA that obligate agencies to disclose public records, such provisions “shall not be construed” as authorizing agencies to disclose lists of names requested for commercial purposes. RCW 42.56.070(9). The commercial purposes provision is unique in its mandatory language divesting agencies of the authority to provide access to lists of names requested for commercial purposes and

FF argues that RCW 42.56.070(9) cannot be an absolute prohibition because the statute goes on to create an exception under which disclosure is permissible in the case of lists of applicants for professional licenses being made available to professional associations or educational organizations. But this proviso does not diminish the importance of the distinction between an exemption and a prohibition and merely indicates the Legislature's intent to *only* allow disclosure in that isolated circumstance and under the conditions expressly set forth therein.<sup>3</sup>

In short, the trial court erred because, although RCW 42.56.070(9) provides that an agency "*shall not*" provide access to the list of names in response to requests like FF's here, the court interpreted the law to mandate that the agency *shall* provide such access.

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instructing that agencies "shall not do so unless specifically authorized or directed by law." *Id*

<sup>3</sup> FF contends that an injunction against disclosure of the documents in question was inappropriate here, in any event, per RCW 42.56.540. *see* FF Resp. Brf. at 29-30. However, that argument ignores that if a *prohibition* to disclosure applies, the agency is without authority to release the documents (as compared to an exemption, which simply means the document is not subject to compulsory disclosure). In the case of statutory prohibitions against disclosure, the Legislature *has already* decided that disclosure of such records would be contrary to the public interest and harmful to a vital government function.

Similarly, FF contends the commercial purposes prohibition cannot prohibit disclosure unless RCW 42.56.210(2) – which allows a court to disregard an exemption if, after conducting a hearing, the court determines the exemption is unnecessary to protect any individual's right to privacy or vital governmental function – has been satisfied. Again, FF's argument fails to address the fact that an agency has absolutely no statutory authority to release lists requested for a commercial purpose. Moreover, there is no dispute that the Court did not hold a hearing as required by RCW 42.56.210(2).

**B. Attorney General Opinions And Other Persuasive Authority Suggest Freedom Foundation's Intended Use Is Commercial.**

Consistent with the only Washington authority to have addressed the question - Attorney General opinion letters - and consistent with federal authority in other contexts, the Court should interpret RCW 42.56.070(9) to prohibit disclosure of lists of names not only when the list is requested for "profit-making motives," Wash. Op. Atty. Gen. No. 2 at 2 (1998), and not only when the requester's "primary purpose" is "to achieve financial profit through the direct use of the requested records" (as proposed by FF, Resp. Brf. at 21). It should construe the commercial purposes prohibition to also apply when the intent of the requester is to use the list to generate revenue and engage in other activities which promote, support and/or advance an entity's general business purposes, including requesting the list for purposes of soliciting, marketing, advertising, self-promoting, or inducing any person to economically support or to cease or refrain from economically supporting any entity.

Each and every Attorney General Opinion to address the issue has endorsed a broad reading of "commercial purpose."<sup>4</sup> The first Opinion to

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<sup>4</sup> Wash. Op. Atty. Gen. No. 12 (1988), cited by DSHS, does not discuss the meaning of "commercial purpose" and instead focuses on the extent to which an agency may take prophylactic measures to ensure a requester does not use a list of names for a commercial

attempt to define “commercial purpose” grappled with the same “inherent clash” this Court would later address<sup>5</sup> between the dictate to interpret PRA exemptions narrowly and the fact that the PRA contains some categorical prohibitions. Wash. Op. Atty. Gen. No. 15 (1975). The Opinion initially observed that the commercial purposes prohibition should be narrowly construed, *Id.* at 8, but went on to correctly conclude that a broad definition of commercial purposes “is most consistent with what we see as the intent of RCW 42.17.260(5); namely, to limit such ease of access to ‘individuals’ by persons with commercial interests as would otherwise be facilitated by the supplying by a public agency of lists of individuals in its possession.” *Id.* at 8, 10.<sup>6</sup> Therefore, the Opinion concluded that the word “commercial,” when narrowly construed, “was intended to cover a broader range of business activity” than merely buying and selling of goods and precludes an agency from disclosing to an entity a list of individuals where the organization seeks the information to promote its own business

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purpose. Wash. Op. Atty. Gen. No. 113 (1972) also does not discuss the meaning of “commercial purpose” and discusses what constitutes a “list of individuals.”

<sup>5</sup> *Newman v. King Cty.*, 133 Wn.2d 565, 572, 574, 947 P.2d 712, 715 (1997).

<sup>6</sup> The Opinion further discussed legislative intent. “Where the work product of an agency in the form of a list of individuals would, if supplied to others, be used by the persons requesting it in such a manner as to contact or otherwise personally affect the individuals identified on the list it was, in our judgment, the intent of the drafters (though somewhat ineptly expressed) to limit access.” *Id.* at 8.

activities and/or to generate revenue.<sup>7</sup>

The next Opinion, Wash. Op. Atty. Gen. No. 38 (1975), found that a list requested for the purpose of “welcoming persons new to an area” by providing information about local businesses and organizations was “unquestionably” a commercial purpose. *Id* at 3.

The most recent Opinion again concluded that the commercial purposes prohibition should be read broadly, and not limited to situations in which an entity sought names in order to personally contact the individuals. Wash. Op. Atty. Gen. No. 2 (1998). Noting that nothing in the statute narrows the definition of “commercial purpose,” the provision is a “broadly stated, categorical prohibition.” *Id*.

In short, the Attorney General Opinions to consider this issue have consistently and correctly determined that the categorical nature of the commercial purposes prohibition and the legislative intent it reflects mandate a broad reading of “commercial purpose,” notwithstanding the fact that the PRA counsels narrow construction of exemptions.<sup>8</sup>

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

<sup>8</sup> The out of state statutes and case law discussed by DSHS are of little guidance to this Court, as comparing dissimilar statutory language is not useful in determining what the Washington Legislature intended. *E.g.* Ariz. Rev. Stat. § 39-121 03 (defining a commercial purpose to include specific activities such as selling or producing lists of names for monetary gam); Cal Civil Code § 1798 60 (defining commercial purpose as

Federal decisions<sup>9</sup> interpreting other statutes likewise provide useful guidance and support a construction of “commercial purpose” sufficiently broad to encompass FF’s conduct, notwithstanding that the organization is a non-profit. *See, e.g., VoteHemp, Inc., v. Drug Enf. Admin.*, 237 F.Supp.2d 55 (D.D.C. 2002) (non-profit organization had a commercial interest in requested documents where group sought information to advance its advocacy goals in association with business who would benefit from achievement of those goals);<sup>10</sup> *All. for Responsible CFC Policy, Inc v Costle*, 631 F. Supp. 1469, 1471 (D.D.C. 1986)(“As representative of users and producers of [chlorofluorocarbons], plaintiff clearly was motivated by their commercial interest in CFC

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“any purpose which has financial gain as a major object”); Kan. Stat. Ann. § 45-230(a) (prohibiting disclosure of lists of names “for the purpose of selling or offering for sale any property information that the requester intends to sell”) Nonetheless, to the extent the Court finds the out of state statutes instructive, it is worth emphasizing that under some of these definitions, FF’s use *would* clearly be a “commercial purpose.”

<sup>9</sup> FF argues that because cases interpreting Freedom of Information Act (“FOIA”) and the Latham Act do not present the precise issue here (whether disclosure should be foreclosed because a request is made for a commercial purpose), they are inapposite. In its Opening Brief, Local 925 explained why these FOIA and Lanham Act cases serve as persuasive authority in interpreting “commercial purposes” in RCW 42.56.070(9). Appellant’s Opening Brf. at n. 10. FF provides no analysis that in any way undermines the rationale why these cases, though distinct, are nevertheless persuasive authority for construing RCW 42.56.070(9).

<sup>10</sup> FF argues that, unlike the non-profit organization in *VoteHemp, Inc.*, it “is not aligned with any commercial interests, so its records will not benefit those who seek to make a profit from FFN’s decision to cease supporting Local 925. FF Resp Brf at 25. But ample evidence of the fallacy of this supposed separation between business interests and FF’s interests exists in the record. *See, e.g.,* CP 112 (“If you want to take down the union political machine and help me be ready to fight off the Obama Administration, you can make a contribution right now.”); CP 109 (describing efforts to bring right to work legislation to Washington cities and seeking donations to “destroy” public sector unions in Washington State like “Scott Walker and my friend did in Wisconsin”).

regulation. In addition, plaintiff was a well-funded entity created for the advancement of the private interests of its constituent entities.”); *Nat’l Sec Archive v. U.S. Dep’t of Def.*, 530 F. Supp. 2d 198, 203 (D.D.C. 2008) (nonprofit had “powerful commercial and private motive” behind its [Freedom of Information Act] requests, namely, a desire to prevail in litigation against the government). *Accord, Brach Van Houten Holding, Inc. v. Save Brach’s Coal. for Chicago*, 856 F. Supp. 472, 474 (N.D. Ill. 1994); *Guam Contractors Ass’n v. U.S. Dep’t of Labor*, 570 F. Supp. 163, 169 (N.D. Cal. 1983)(contractor’s association, “although nominally a non-profit organization, was the tool and surrogate litigant for various commercial entities.”).

Indeed, courts have found conduct to be “commercial” in nature when it was designed to harm the plaintiff commercially, as FF’s conduct is here. *See, e.g. Jews For Jesus v Brodsky*, 993 F. Supp. 282, 308 (D.N.J. 1998), *aff’d* 159 F.2d 1351 (3rd Cir. 1998); *Planned Parenthood 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). Had the Legislature wished to bar disclosure of lists under RCW 42.56.070(9) only where the list was requested for “profit-making” motives, it could have chosen that language, rather than the term “commercial” which has a

broader meaning.<sup>11</sup>

Nor can the Court hold, as FF urges, that the commercial purposes prohibition does not bar disclosure if the requester has other purposes in addition to the commercial one. Resp. Brf. at 21 (urging the Court to adopt a test barring disclosure only where the requester's "primary" purpose is to achieve financial "profit" through the "direct use" of the requested records). There is no statutory basis for such a restrictive interpretation; allowing disclosure where a requester has one non-commercial purpose contravenes the express statutory language.

**C. While the Commercial Purposes Prohibition Does Not Require Agencies to Conduct A Rigorous Inquiry Into The Intended Use, RCW 42.56.540 Enables Affected Third Parties To Intervene And Demonstrate That The Intended Use Is Commercial.**

Both FF and DSHS raise arguments about when, how, and by whom the commercial purposes prohibition may be invoked but neither provides any persuasive reason to disregard well-established case law holding that under RCW 42.56.540, a party may invoke *any* basis for

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<sup>11</sup> For the same reason, *Veterans Ed Project*, cited by DSHS for the proposition that informing third parties of their rights is not a commercial purpose under the FOIA, is not instructive. *Veterans Ed Project v Sec'y of Air Force*, 509 F. Supp. 860 (D.D.C. 1981) *aff'd sub nom. Veterans Educ Project v Sec'y of the Air Force*, 679 F.2d 263 (D.C. Cir. 1982). The Court there was careful to note that in that case, "Plaintiff's **only** purpose in obtaining the records was to inform veterans of their statutory rights" *Id.* at 862 (emphasis added). That holding has no applicability here, where FF is motivated not only by what it characterizes as wishing to inform providers of their rights, but also to economically injure Local 925 and increase its own prominence and support. See CP 66-67, 103-106, 108-11, 112, 115-16, 118.

withholding records. Applying the commercial purposes prohibition to this request would not require any change in the way agencies handle PRA requests but would allow affected third parties to be able to protect their interests as intended by RCW 42.56.540.

DSHS notes that nothing on the face of FF's request should have alerted it that the request was made for a commercial purpose, and that the PRA does not impose an obligation to further inquire once a requester has affirmed that the intended use is non-commercial. DSHS Resp. Brf. at 8. DSHS queries, "under what standard and based on what facts should a public records officer be making conclusions regarding commercial purpose?" *Id.* at 8. But Local 925 has not, and does not, suggest that agencies necessarily have a duty to probe further into a requester's intent – relying upon an affidavit will ordinarily be sufficient.<sup>12</sup> However, an agency's preliminary determination that no prohibition or exemption applies is subject to review by the courts, if, as here, a person named in or affected by the record seeks an injunction pursuant to RCW 42.56.540 to prohibit disclosure.<sup>13</sup>

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<sup>12</sup> Admittedly, agencies are placed between a rock and a hard place given the prohibition both from 1) disclosing lists of names for a commercial purpose, and 2) distinguishing among persons making a request or inquiring as to the purpose of the request.

<sup>13</sup> See *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 731, 328 P.3d 905 (2014) ("the voters of Washington State created a privately enforceable cause of action under the PRA and expressly directed courts to review de novo agency action

RCW 42.56.540 allows affected third parties to protect their interests and argue that records are exempt or that disclosure is prohibited, even though an agency would not otherwise have withheld the records. This safeguard performed precisely its intended function here; while DSHS may have had no reason to know to invoke the commercial purposes prohibition, Local 925 presented the trial court with evidence demonstrating that the commercial purposes prohibition did in fact apply. DSHS's concern about agencies being placed in an untenable situation is simply unfounded – allowing affected third parties to invoke the commercial purposes prohibition will place no additional burden on public records officers.

FF takes DSHS's argument further and claims that *only* agencies may invoke the prohibition, and that the *only* thing agencies may do is obtain written assurance that the records are not sought for a commercial purpose. FF Resp. Brf. at 14-16, 22-23.<sup>14</sup> FF's argument is erroneous for two reasons.

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taken or challenged under the PRA. RCW 42.56.540, .550.”), *Soter v. Cowles Pub Co.*, 162 Wn.2d 716, 752, 174 P.3d 60 (2007) (“[E]ither agencies or persons named in the record may seek a determination from the superior court as to whether an exemption applies, with the remedy being an injunction.”).

<sup>14</sup> FF argues both that “no private party has standing...to seek an injunction on the basis of the commercial purposes prohibition.” and also that “even an agency may not seek an injunction on the basis of the commercial purposes prohibition.” FF Resp. Brf. at 16, 15

First, FF's argument means there would be no meaningful way to enforce the commercial purposes prohibition – a result that is inconsistent with the Legislature's mandate that lists of names not be disclosed for commercial purposes. A requester's self-certification that the intended use is not commercial cannot be the only mechanism to ensure the prohibition is followed.<sup>15</sup>

Second, FF's argument against third parties being able to invoke the commercial purposes prohibition is actually an attack on third parties' ability to invoke *any* exemption under RCW 42.56.540 – a proposition that is precluded by existing law. FF claims that allowing third parties to invoke the commercial purposes prohibition would “dramatically alter” the PRA by potentially delaying disclosure and “intimidat[ing] and threaten[ing]” requesters with litigation.<sup>16</sup> But those alleged harms *already* exist within the structure of the PRA, and would be just as implicated by *any* action brought under RCW 42.56.540. While FF may find it inconvenient that RCW 42.56.540 allows third parties to seek to prevent disclosure of records, it has articulated no logical basis why RCW

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<sup>15</sup> Notably, such situations could arise not just when a requester intentionally deceives an agency, but where the requester genuinely believes the intended use would not fall under the category of “commercial.”

<sup>16</sup> While FF claims that disclosure can be stayed “indefinitely,” but in this case, the trial court's TRO long ago expired and the records have not been disclosed due the Court of Appeals' decision to issue a stay – a delay that will only be incurred when the appeals court deems it necessary and appropriate.

42.56.540 should be contorted to singularly exclude the commercial purposes prohibition as a basis for nondisclosure in a RCW 42.56.540 proceeding.

**D. Local 925 Demonstrated That FF's Intended Use Falls Within The Broad Definition Of "Commercial"**

Local 925 produced ample evidence that FF intends to contact providers in order to inflict economic injury on Local 925, attempt to increase its base of supporters and decrease that of Local 925, and benefit the for-profit businesses on behalf of whom it advocates. *See* Opening Brf. at 23-26 (discussing evidence in record demonstrating that FF's intended use is commercial, including that FF's goal is to "defund" public sector unions like Local 925, FF uses litigation to advance this goal, FF fundraises for the purpose of "defunding the union political machine." FF has already begun contacting providers urging them to cease supporting Local 925, etc.).

Although FF is a non-profit corporation, it nevertheless funds its ideologically-driven, virulently anti-union activities with donations from other entities and individuals, which it regularly solicits. It fundraises from its donors and supporters and from the public in part by advertising its mission to economically cripple unions like SEIU, CP 108-10, and by announcing the details of steps it has taken or will take to "defund"

unions, including to contact providers to encourage them to drop their membership in and financial support of SEIU. *See* CP 66, 69-76, 79, 85, 100-01, 108-10, 112-13.

FF has also fundraised on the specific promise that, if it is successful in obtaining the list of names, FF will contact providers and encourage them to cease supporting SEIU through union dues. CP 100-01.

While the revenue generated by these fundraising activities is technically not “profit” to the organization, it is difficult to conceive of a more obviously “commercial purpose” than obtaining a list of names in order to contact individuals to attempt to persuade them to stop giving money to one’s financial adversary and, in turn, to garner financial support, directly from those individuals, and indirectly through fundraising and solicitations to third parties based on one’s efforts to “defund” (e.g., bankrupt) one’s adversary through contacts with such individuals.<sup>17</sup>

FF argues that the evidence relied upon by Local 925 is irrelevant because it pertains to FF’s activities “in other contexts” rather than FF’s “intended use.” FF Resp. Brf. at 20. Yet, FF does not deny that its

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<sup>17</sup> Significantly, nothing in the plain language of the statute limits the prohibition on disclosure to only those requests made for “profit-making” motives RCW 42.56.070(9) (“This chapter shall not be construed as giving authority to any agency ..to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies...shall not do so unless specifically authorized or directed by law...”).

intended use is simply a continuation of the strategy and tactics FF has already deployed. The inquiry for this Court is whether those tactics and goals amount to a “commercial purpose.” FF argues it has provided sworn testimony that it has no intention of using the lists for commercial purposes, *FF Resp. Brf. at 20*, but the parties do not agree as to what constitutes a “commercial purpose” and FF’s unilateral determination that its purposes are not “commercial” does not settle the matter.<sup>18</sup>

This Court should determine that FF’s intended use of contacting providers and encouraging them to cease supporting Local 925, fundraising based on those efforts, and seeking to boost its own membership ranks constitutes a “commercial purpose” for which disclosure of a list of names is prohibited.

## **II. The Trial Court Erred By Denying Local 925’s Request For A Preliminary And Permanent Injunction On The Basis Of RCW 42.56.230(1) and (2).**

Local 925 was entitled to injunctive relief because it demonstrated

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<sup>18</sup> FF contends that an injunction against disclosure of the documents in question was inappropriate here, in any event, per RCW 42.56.540, because it has not been shown that disclosure would not be in the public interest and would harm a vital government function. *See Resp Brf. at 29-30*. However, in crafting a categorical exemption, the Legislature has determined that disclosure of lists of names for a commercial purpose is contrary to the public interest and detrimental to government functions. Moreover, for constitutional as well as statutory reasons, the requirements of RCW 42.56.540 apply only at the *permanent* injunction stage. *See, e.g., Blanchard v. Golden Age Brewing Co.*, 188 Wash 396, 415-16, 63 P2d 397 (1936) (“The granting or withholding of an interlocutory injunction is addressed to the sound discretion of the court, to be exercised according to the circumstances of the particular case.”).

a likelihood of eventually succeeding in establishing that the information requested was exempt “personal information” of a child and welfare recipients. This Court has defined “personal information” as “information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general.” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 411-12 (2011) (citing *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 211 (2008)). While PRA exemptions are construed narrowly, this definition is clearly broad enough to encompass information such as a child’s location on a daily basis, and information about welfare recipients.

First, the information would disclose firsthand information about “a child enrolled in a public...program serving or pertaining to children...including but not limited to early learning or child care services...” RCW 42.56.230(2)(a)(ii). There are obvious and significant safety concerns triggered by making publicly available the location of unmarked homes where children receive care. CP 461; CP 432, ¶ 16; CP 431-432; CP 4. FF incorrectly asserts that Local 925 relies upon a “connect the dots” theory – to the contrary, the requested information will directly disclose personal information about children. That the request was targeted toward *providers’* information does not make the exemption any less applicable to the extent disclosure will necessarily include personal

information of a child. The records DSHS is poised to disclose, absent injunctive relief, would in most instances be no different had the FF directly requested the GPS coordinates for each child receiving subsidized care through the FFN program. *See* CP 9, ¶ 14.

Similarly, the request will necessarily disclose personal information about welfare recipients.<sup>19</sup> For the same reasons discussed above, the information amounts to “personal information” of the child and thus the family receiving welfare. So too is the identity of the care provider the welfare recipient’s WCCC benefits pay for. Washington law is clear that the public does not have a legitimate interest in personal information of individuals who receive welfare benefits, as opposed to individuals acting on behalf of the government; the PRA provides “heightened protection” to the personal information of government agencies clients. *Lindeman v. Kelso School District*, 127 Wn. App. 526, 536, 111 P.3d 1235 (2005), *rev. on other grounds*, *Lindeman v. Kelso School District No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007).<sup>20</sup>

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<sup>19</sup> Neither FF nor DSHS appear to dispute that the WCCC program is undoubtedly a form of “public welfare,” or that information about families or children receiving WCCC subsidies could be exempt if the other elements of RCW 42.56.230(1) are met

<sup>20</sup> “The PDA was not intended to make it easier for the public to obtain personal information about individuals who have become subject to government action due to personal factors such as their age, health, or financial status.” *Id.* at 535

DSHS and FF argue that the exemption should not apply because the disputed information is not held in a “file[] maintained for...welfare recipients” as required by RCW 42.56.230(1). DSHS and FF argue that information kept about FFNs is not information kept in a file “for” a welfare recipient (a child covered by the WCCC subsidy). DSHS Resp. Brf. at 26. FF Resp. Brf. at 34-35.<sup>21</sup> But the *only* reason FFNs were required to provide their personal information was to allow the child’s WCCC benefit to be administered. Regardless of how many databases, spreadsheets, or electronic files the information is transferred into, the *only* reason it ever came into the State’s possession is to benefit the child and family receiving welfare benefits. And, contrary to FF’s suggestion, nothing in the statute limits the type of information included in a welfare recipient’s file. FF Resp. Brf. at 34-35.<sup>22</sup>

Finally, FF argues, for the first time, that even if the records are exempt under RCW 42.56.230(1) or (2), they should nonetheless be disclosed under the exception set forth in RCW 42.56.210(2). FF Resp. Brf. at 38. However, that statute only permits disclosure *after* “a hearing

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<sup>21</sup> FF characterizes the information as being held in files “for purposes related to licensure, billing, and reimbursements paid to FFNs” – but these are *all* purposes directly related to administering WCCC benefits and are for the direct benefit of welfare recipients

<sup>22</sup> *State v. Holmes*, 98 Wn.2d 590, 598, 657 P.2d 770 (1983), cited by FF, does not set parameters on what the “file of a welfare recipient” refers to and instead notes the various types of information a welfare applicant must list truthfully or risk violating the welfare fraud statute.

with notice thereof to every person in interest and the agency” to determine whether “the exemption of such records is clearly unnecessary to protect any individual’s right to privacy or any vital governmental function.” RCW 42.56.210(2). It is undisputed that no such notice or hearing was held in this case. Thus, at the very most, this statute would allow this Court to remand the matter to the trial court to determine whether those conditions are met – it does not allow this Court to order disclosure of the records.

Finally, to the extent this Court determines that *Sheehan* and *Koenig v Des Moines*, 158 Wn.2d 73, 142 P.3d 162 (2006) mandate disclosure, those cases should be overruled. *Sheehan*’s ruling was based on the inoffensive and unremarkable nature of the release of information at issue, not on the grounds that a “linkage” analysis was intrinsically illegitimate.<sup>23</sup> *Sheehan* does not adequately account for the rapid growth of and ease with which modern-day technology allows an individual armed with limited information to uncover a wealth of other information.<sup>24</sup> Because disclosure of the provider names would be tantamount to the

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<sup>23</sup> The *Sheehan* court also recognized that under the PDA, the disclosure of two or more pieces of otherwise unobjectionable identifying information may be barred where the collective practical effect of that information is access to employees’ private affairs. 114 Wn. App. 325, 346, 57 P 3d 307 (2002).

<sup>24</sup> Even FF admits that this “modern life in this age of technology” often “makes it possible to connect disclosed nonexempt information to undisclosed exempt information.” FF Resp Brf. at 38

disclosure of the location of children and would contravene the statutory determination to exempt such information, and would not advance the purposes which the PRA was designed to further, this Court should reverse the trial court decision and remand with instructions to enter a permanent injunction prohibiting DSHS from disclosing the requested lists.

**III. The Trial Court Erred By Denying Local 925's Request For A Preliminary And Permanent Injunction Where the Constitution Prohibited Disclosure.**

This Court should find that providers *did* have a constitutionally protected right not to have their addresses and personal information publicly disclosed where the government only came into possession of that information because providers were obligated to provide it to receive a public benefit.

In determining whether disclosure would violate the constitution, the Court should start with the premise that the PRA must be read to incorporate at least as much protection as Article I, Section 7 of the Washington Constitution; RCW 42.56.050's definition of when privacy is invaded for purposes of demonstrating that a PRA exemption applies cannot be read as a limitation on parameters of Article I, Section 7. A contrary interpretation would create an irreconcilable conflict between the

PRA and the constitution that the drafters of the PRA surely did not intend.<sup>25</sup>

Local 925 does not advocate for a “generalized” right to privacy, but contends that in the particular circumstances here, providers held a constitutionally protected right not to have their addresses disclosed to the general public, and this should have served as the basis for enjoining disclosure.<sup>26</sup> The trial court erred by not engaging in an analysis of whether, under the specific facts of this case, providers held a right to privacy in the nondisclosure of their personal information and instead erroneously held as a matter of law that disclosure of an address did not violate the Constitution. VRP 39 (January 9, 2015); CP 561. For the reasons more fully explained in Local 925’s opening brief, there is a right to privacy under the unique facts of this case. *See* Opening Brf. at 44-47.

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<sup>25</sup> DSHS does not challenge this fundamental premise except to note that “this Court has not addressed whether the analysis should be different where a constitutional privacy claim is asserted as an exemption under the PRA.” DSHS Resp. Brf. at 28. FF does not dispute this contention at all, but emphasizes the fact that “the PRA is a strongly worded mandate for broad disclosure of public records.” FF Resp. Brf. at 42. But the PRA’s mandate for broad disclosure cannot be read to override constitutionally protected rights. The PRA must be harmonized with Article I, Section 7, and the fact that the constitutional question happens to arise in a PRA case cannot influence the Court’s determination of whether a right exists under Article I, Section 7.

<sup>26</sup> DSHS notes that it would have been unable to assert a constitutional privacy interest on behalf of providers. DSHS Resp. Brf. at 28. But whether or not that is true has no bearing on whether the providers’ constitutional privacy rights may be raised as the basis for nondisclosure in an action brought under RCW 42.56.540.

FF argues that providers had no reasonable expectation of privacy and sacrificed any rights they might otherwise have enjoyed when their information was “voluntarily” disclosed in order to receive public funds. FF Resp. Brf. at 45. While providers’ disclosure may have been nominally “voluntary,” doing so was a requirement of participating in the WCCC program and receiving reimbursement for caring for children of low-income families.<sup>27</sup> “While government need not subsidize the exercise of a constitutional right, it also cannot condition the receipt of benefits on the waiver of such rights.” *Bedford v. Sugarman*, 112 Wn.2d 500, 518, 772 P.2d 486 (1989) (Utter, J. concurring). *See also, Lindeman v. Kelso School District*, 127 Wn. App. 526, 536, 111 P.3d 1235 (2005), *rev’d on other grounds, Lindeman v. Kelso School District No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007) (“[t]he PDA was not intended to make it easier for the public to obtain personal information about individuals who have become subject to government action due to personal factors such as their age, health, or financial status.”). Providers may not be forced to give up the right not to make public their personal information merely

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<sup>27</sup> It is also extremely pertinent that at least some providers were assured that their information would be held confidentially. *See* CP 462 at ¶ 9 (FFN was promised confidentiality).

because they provide care for a family that has chosen to take advantage of a public subsidy.<sup>28</sup>

### ARGUMENT IN SUPPORT OF CROSS-RESPONSE

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

RAP 2.2(a) provides a list of decisions of the superior court that may be appealed. The list includes a final judgment, which is “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney’s fees) and enforcement of the judgment.” *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003) (quoting BLACK’S LAW DICTIONARY 847 (7th ed. 1999)). FF is not an “aggrieved party” entitled to seek review of the final judgment disposing of Local 925’s claims. RAP 3.1 (“Only an aggrieved party may seek review by the appellate court.”). An “aggrieved party” within the meaning of RAP 3.1 is “one whose personal right or pecuniary interests have been affected.” *State v. Taylor*, 150 Wn.2d at 603. “[T]he pertinent inquiry is whether the trial court entered a judgment that substantially affects a legally protected interest of the would-be appellant.” *Polygon Nw Co. v. Am. Nat Fire Ins. Co.*, 143 Wn. App. 753, 768, 189

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<sup>28</sup> FF’s characterization that providers “voluntarily expose[d]” their information to the “general public” is even more misplaced – it is undisputed that providers have never disclosed their personal information to the public. FF Resp Brf. at 45

P.3d 777, *rev denied* 164 Wn.2d 1033 (2008).

FF is not aggrieved by the trial court's final judgment because, to the extent the Court's rulings affected FF's rights, it affected those rights *in its favor*. FF has no right to appeal the final judgment, declining to issue a preliminary or permanent injunction, issued by the court below.

**II. Appellate Review Of Any Sort Of The Court's Interlocutory Ruling to Issue a TRO Is Inappropriate Because FF Is Not Currently Aggrieved By The Rulings And There Is No Risk That FF Might Become Aggrieved By Such Rulings Upon Reversal Of The Final Judgment.**

The Court's order granting a TRO is interlocutory in nature and thus is not appealable as a matter of right. RAP 2.2, 2.3; *see also*, Task Force Comment to RAP 2.2, reproduced in Karl Tegland, 2A WASHINGTON PRACTICE: RULES PRACTICE 2.2, commentary following RAP 2.2, heading 32 (7th ed.) (specifically identifying an order granting a TRO motion as nonappealable and review of such order as discretionary).

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

The legal issues involved in Local 925's request for a TRO and its request for injunctive relief are identical; both motions required the trial court to decide whether Local 925 is entitled to an injunction prohibiting disclosure of the requested records because a) RCW 42.56.070(9) prohibits DSHS from providing access to lists of individuals for commercial purposes; b) the records are exempt under RCW 42.56.230(1) and/or RCW 42.56.070(1); or c) the constitution forbids disclosure. Thus, if Local 925 obtains reversal as a matter of law on appeal, the appellate decision will require the issuance of an injunction and the trial court's grant of the TRO will be both consistent with the ruling on appeal and moot, precluding review by this court. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 316, 319-20 (1974) (court lacks "power to decide questions that cannot affect the rights of the litigants in the case before them") (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).<sup>29</sup> It will not be "repeated on remand" and therefore could not fall within the scope of an order appropriately reviewed pursuant to RAP 2.4(a).

Even if this Court were to choose to apply the considerations relating to the granting of discretionary review set forth in RAP 2.3(b) in determining whether to grant review of the interlocutory ruling

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<sup>29</sup> *See also, State ex rel Carroll v. Simmons*, 61 Wn 2d 146, 149, 377 P 2d 421 (1962) (the temporary order merges with the final judgment and any question as to the propriety of the temporary order becomes moot) (modified in part by RAP 2.2).

complained of by FF, such review should be denied, as none of the considerations set forth in RAP 2.3(b)(1)-(4) exist here, and FF has neither appropriately filed a notice of discretionary review nor filed a motion seeking such review within the applicable timeframes. *See* RAP 2.3; RAP 5.1; RAP 6.2(b).

**III. The Trial Court's Conclusion That Local 925 Has Standing To Pursue An Injunction Barring Disclosure Of The List Of Names And To Raise Any Potentially Applicable Basis For Preventing Disclosure Should Be Affirmed.**

FF misconstrues the trial court's standing ruling and misrepresents the basis of Local 925's standing. It also conflates the issues of associational standing and the standard for obtaining injunctive relief under RCW 42.56.540

Local 925 has never asserted it has standing to assert the privacy interests of the children for whom Local 925 members provide care.<sup>30</sup> Instead, Local 925 asserted (and the trial court correctly held) that it had associational standing to bring suit on behalf of childcare providers for whom it is the exclusive bargaining representative.<sup>31</sup> Once Local 925

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<sup>30</sup> Because Local 925 does not bring this action on behalf of the rights of non-members. *Des Moines Marina Ass'n v City of Des Moines*, 124 Wn. App. 282, 100 P.3d 310 (2004) is inapposite.

<sup>31</sup> *See* CP 7 at ¶ 1 (Plaintiff's Complaint, asserting that Local was bringing action on behalf of the providers for whom it is the exclusive bargaining representative. VRP 33, lines 14-23 (January 9, 2015) (incorporating by reference rationale on ruling on associational standing from *SEIU Health Care 775 vs State Department of Social and Health Services*, Case No 14-2-01903-1); CP 206, lines 12-19 (VRP from October 16,

satisfied the standing criteria established by *Int'l Ass'n of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 213-214, 45 P.3d 186 (2002), the Union can raise any basis that applies to obtain an injunction prohibiting disclosure. *Ameriquest Mortgage Co. v Attorney General*, 148 Wn. App. 145, 166, 199 P.3d 468 (2009).<sup>32</sup> The interests of children and welfare recipients do not, therefore, need to be germane to Local 925's interests in order for the Union to seek to bar disclosure, and the Court need not decide whether children or welfare recipients have standing.

The well-established rules for associational standing are easily met with regard to the providers on behalf of whom Local 925 brings suit, because the providers who are named in the records sought by FF would have standing to sue in their own right, the interests that Local 925 seeks to protect are germane to its purpose and neither the claim nor the asserted relief requires the participation of the providers. *Int'l Ass'n of Firefighters*, 146 Wn.2d at 213-214. The providers are named in the records sought by the FF and would therefore have standing to sue in their own right to prohibit disclosure. RCW 42.56.540; *Branson v. Port of*

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2014 ruling in *SEIU Health Care 775 vs State Department of Social and Health Services*, Case No 14-2-01903-1)

<sup>32</sup> A third party does not lose standing by asserting an exemption that does not relate to its rights: were that the case, the Court of Appeals would have found Ameriquest did not have standing by virtue of its having asserted the AGO's work product and attorney-client privileges. To the contrary, Ameriquest had standing because the record pertained to it, and it had that standing notwithstanding that it raised exemptions that relate to interests other than its own *Ameriquest*, 148 Wn. App. at 166.

*Seattle*, 152 Wn.2d 862, 875-876, 101 P.3d 67 (2004) (person has standing to bring action where his/her interest is “arguably within the zone of interests to be protected by the statute or constitutional guaranty in question.” and he/she alleges an “an injury in fact, economic or otherwise,” flowing from violation of said guaranty).<sup>33</sup> As the providers’ exclusive representative, protecting their rights to not have a list that includes their names disclosed to FF for commercial purposes is clearly germane to the purposes of Local 925, as is the goal of assisting providers to protect the privacy of their clients and the children for whom they care. Participation of individual childcare providers is not required in order for this Court to determine whether Local 925 is entitled to injunctive relief prohibiting DSHS from producing the records requested by FF.

The *Ameriquist* Court of Appeals decision conclusively establishes that any party that will be affected by a disclosure of documents pursuant to the PRA has standing to challenge an agency’s decision to disclose on any grounds. *Ameriquist*, 148 Wn. App. at 166; *see also* VRP 33, lines 14-23 (January 9, 2015) (incorporating by reference rationale on ruling on

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<sup>33</sup> Contrary to FF’s argument, FF Resp. Brf. at 14-16, that DSHS has the inherent authority (preserved in RCW 42.56.070) to require a requester to provide information that would tend to prove or disprove the “commercial purpose” of a request for a list of names in no way implies that named individuals may not independently assert their *own* rights under the statute, in the same way that an agency’s determination as to the applicability of an exemption in no way diminishes an individual’s right to invoke that same exemption using RCW 42.56.540.

associational standing from *SEIU Health Care 775 vs. State Department of Social and Health Services*, Case No. 14-2-01903-1); CP 206, lines 12-19. The trial court therefore correctly held that Local 925 could raise any applicable exemption, prohibition or other grounds for non-disclosure: “The Court of Appeals has made clear that a complainant under the PRA may assert any exemption, including ones that do not relate specifically to the claimant’s interest.” CP 514; *see also*, CP 204 (relying on *Ameriquest*, 148 Wn. App. at 166) (holding that because Ameriquest was a party that will be affected by disclosure of the work product of the Attorney General’s Office (“AGO”) it had standing to challenge the decision to disclose such and to raise the attorney client privilege and work product doctrine, though such privileges were unrelated to Ameriquest).<sup>34</sup>

Because the individual members of Local 925 are “named in the record” that FF seeks and could sue individually under RCW 42.56.540 they satisfy the *Firefighters* test for associational standing, and establish that Local 925 clearly has standing under RCW 42.56.540 to sue to enjoin the disclosure by DSHS of that record under any legal theory it might choose to invoke.

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<sup>34</sup> As the trial court observed in the *SEIU 775* decision, Case No. 14-2-01903-1, “One would be challenged to find an exemption that is less related to the interest of a private party – yet the Court of Appeals permitted Ameriquest standing to make those arguments.” CP 204

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

**A. There Is No Inconsistency Between *Tyler Pipe* And The Cases Cited By FF.**

In arguing that the trial court erred by granting Local 925 a TRO enjoining disclosure of the list of names, FF erroneously asserts that *Northwest Gas Ass'n v. Wash. Util. & Transp. Comm'n*, 141 Wn. App. 98, 168 P.3d 443 (2007), *Ameriquist Mortgage Co v Attorney General*, 148 Wn. App. 145, 199 P.3d 468 (2009) and *Tyler Pipe Indus v Dep't of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982) conflict with *Ameriquist Mortgage Co v Attorney General*, 177 Wn.2d 467, 491, 241 P.3d 1245 (2010), cases cited in *Ameriquist*, and the PRA itself. This contention is not supported by the case law.

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

the agency to disclose the requested records. *Id.* at 114. The Court of Appeals in *Ameriquest* made similar holdings. 148 Wn. App. at 156.

The *Northwest Gas* and *Ameriquest* court of appeal decisions rely on the *Tyler Pipe* three-part standard for injunctive relief.<sup>35</sup> At a *preliminary* injunction hearing, which the courts acknowledge serves the same general purpose as a TRO hearing – to preserve the status quo – the courts consider only the likelihood that the plaintiff will ultimately prevail at a trial on the merits by establishing he has a clear legal or equitable right, that he reasonably fears will be invaded by the requested disclosure, resulting in substantial harm. *Northwest Gas*, 141 Wn. App. at 115-16; *Ameriquest*, 148 Wn. App. at 157 (both cases citing *Tyler Pipe*, 96 Wn.2d at 792-93). “At a preliminary injunction hearing, the plaintiff need not prove and the trial court does not reach or resolve the merits of the issues” underlying the requirements for injunctive relief. *Northwest Gas*, 141 Wn. App. at 116.

Reading these cases together with this Court’s decision in *Ameriquest* (and cases cited therein), 177 Wn.2d at 491, the party seeking the TRO or preliminary injunction on the basis of a PRA exemption or

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<sup>35</sup> To obtain injunctive relief under CR 65, a plaintiff must establish (1) he has a clear legal or equitable right; (2) he has a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which he complains are either resulting or will result in actual and substantial injury to him. *Tyler Pipe Indus.*, 96 Wn.2d at 792

prohibition need only establish a *likelihood* of prevailing on the merits as to whether a PRA exception or prohibition applies. *Northwest Gas*, 141 Wn. App. at 114-15; *Ameriquest*, 148 Wn. App. at 156. But to obtain a *permanent* injunction under RCW 42.56.540, the party must prove the *Tyler Pipe* elements and “(1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function.” *Ameriquest*, 177 Wn.2d at 487. These cases are not in conflict.<sup>36</sup>

**B. The Trial Court Correctly Determined Local 925 Was Entitled To Temporary Injunctive Relief Under Tyler Pipe.**

The trial court below acknowledged the standards set forth in these cases and expressly found that the requirements of a TRO were met.<sup>37</sup>

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<sup>36</sup> Moreover, none of the cases cited by FF require a third party to meet the elements of RCW 42.56.540 in a case involving a prohibition (rather than an exemption). RCW 42.56.070(9) affirmatively precludes agencies from disclosing lists, stating that the agencies “shall not do so.” This is significant because RCW 42.56.540 contemplates a balancing between the general PRA goal of favoring public disclosure, versus the public interest harm that could flow from the same. Yet provisions affirmatively *prohibiting* disclosure cannot reasonably be read to require that same balancing that ordinarily applies. The people (through Initiative Measure No. 276, Laws of Washington 1973, c 1 § 26) forbade certain documents from being disclosed under certain circumstances, predefining the outcome of a balancing test. Therefore, at the preliminary injunction stage, Local 925 need only show the likelihood that a basis for nondisclosure applies, and at the permanent injunction stage, it need only show that the commercial purposes prohibition applies – the balancing envisioned by RCW 42.56.540 is unnecessary in the case of a prohibition.

<sup>37</sup> See CP 79 (trial court finding “a sufficient showing has been made under the applicable law as described in oral ruling dated October 3, 2014”), VRP 40-42 (October 3, 2014) (acknowledging that under *Tyler Pipe* the Court must assess the merits of the dispute in

The Court did not, as FF claims, feel compelled “to grant an injunction merely to preserve the status quo” even where the Court did not find a likelihood of success on the merits. FF Resp. Brf. at 29-30.<sup>38</sup> Contrary to FF’s claim, the court below made clear that it *did* apply *Tyler Pipe*.<sup>39</sup> While the court acknowledged the “complexity” added by the fact that it had previously decided that the commercial purposes prohibition and “personal information” exemption invoked by Local 925 were not applicable to a case involving very similar facts, the court *did not* hold that Local 925 had failed to show a likelihood of success on these exemptions. VRP 32-33 (December 19, 2014).

More importantly, in deciding to grant a TRO the court focused on the “new issue...that this court has not decided” – namely, whether disclosure must be restrained because the requested lists amounted to a union list, disclosure of which would infringe upon providers’ First

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order to deny or grant the TRO, and also acknowledging the “novelty” of the commercial purposes argument, granting the TRO)

<sup>38</sup> While the court below found sufficient likelihood of success to issue a TRO, if the court had not, it could have denied injunctive relief, and the subsequent procedure that would ensue would look much like what eventually occurred in this case when the court denied preliminary and permanent injunctive relief. Namely, the court could exercise its equitable power to temporarily enjoin release of the records to allow the plaintiff to seek a stay from the Court of Appeals.

<sup>39</sup> “[T]he *Tyler Pipe* standard, while still applicable, is construed in the context of the *Ameriquest* case which causes this court great hesitancy to deny a temporary restraining order in a public records case ...” VRP 32.10-17 (December 19, 2014).

Amendment right to free association.”<sup>40</sup> VRP 33 (December 19, 2014). Not only did the court find a likelihood of success sufficient to grant a TRO on this basis, in its final order denying injunctive relief, “the court [found] merit in Plaintiff’s claim that disclosure of FFN child care providers’ membership status would violate the right to freedom of association embedded in the First Amendment.” CP 513.<sup>41</sup> The court’s decision to grant a TRO and that Local 925 had shown a likelihood of success was well-founded and consistent with *Tyler Pipe*

### **C. The Trial Court Properly Balanced The Equities In Issuing A TRO.**

The court in *Northwest Gas* decided that preliminary injunctive relief should have been ordered in part based on its balancing of the equities. *Northwest Gas*, 141 Wn. App. at 122 (“because injunctions are addressed to the court’s equitable powers, the court must examine the above three preliminary injunction requirements in light of competing equities. This examination includes balancing the relative interests of the

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<sup>40</sup> Of course, Local 925 need not have demonstrated a likelihood of success on each of the bases for nondisclosure argued. See *Nw Gas Ass’n v Washington Utilities & Transp Comm’n*, 141 Wn. App. 98, 120-21, 168 P 3d 443, 455 (2007) (plaintiff met burden for preliminary injunctive relief where it showed a likelihood of clear legal or equitable right “to an exemption from disclosure under the Public Records Act **of at least some of the requested ... data.**”)

<sup>41</sup> While the parties were able to reach a factual stipulation that allowed the court to conclude that the records could be released in a manner that would not disclose providers’ membership status, no such stipulation had been reached at the time of the TRO hearing and the court reasonably concluded that Local 925 had made the requisite showing of a likelihood of success

parties and, where appropriate, as here, the interests of the public.”) (cites omitted). The court below conducted the same balancing of the equities and correctly concluded that a TRO was warranted.

In *Northwest Gas*, the court recognized the great harm that would occur if a TRO was not issued, because “the [] data, once released, cannot be retrieved...” *Id.* at 121. “Under these circumstances, prevailing at a trial on the merits would be meaningless for [Plaintiff] and for the public, whom the Legislature’s exemption seeks to protect. Irreparable damage would already have occurred...” *Id.* at 121-22. In contrast, the court found little or no harm would be caused by issuing the TRO: “citizens’ need to oversee governmental functions will [not] be harmed if disclosure ...is postponed pending the permanent injunction trial.” *Id.* at 123.

Exactly the same circumstances exist here and led the court below to reach the same conclusion. The court applied the *Tyler Pipe* standard, but did so “in the context of the *Ameriquest* case which causes this court great hesitancy to deny a temporary restraining order...” VRP 32:10-13 (December 19, 2014). The court was appropriately wary of denying temporary injunctive relief, which would have effectively disposed of the case and caused irreparable damage to Local 925, which would have no way of retrieving the records once wrongfully disclosed. In contrast, the court’s order to delay production of the records by less than two weeks so

that the parties could fully address the issue of whether injunctive relief should be issued caused FF little or no harm.<sup>42</sup>

**V. FF's Request for Fees and Costs Should Be Denied Where Local 925 Sought A TRO To Protect Its Rights.**

While the FF is correct in asserting that attorney fees *may* be awarded to a party who prevails in dissolving a wrongfully issued injunction or temporary restraining order, the award of attorney's fees is discretionary and FF is not entitled to attorney's fees as a matter of right. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998) (At its discretion, the trial court may award attorney fees to a party who prevails in dissolving a wrongfully issued TRO.)

An award of attorney's fees should be denied where, as here, filing for a TRO is necessary to preserve individual rights pending resolution of the action. *Id.*; *Morgan v. City of Federal Way*, 166 Wn. 2d 747, 213 P.3d 596 (2009) (defendant's motion for fees properly denied, even though defendant succeeded in dissolving temporary restraining order, where temporary restraining order was necessary to protect plaintiff's rights until a decision could be reached on the merits of the case); *Bellevue John Does 1-11 v Bellevue Sch. Dist #405*, 129 Wn. App. 832, 868-69, 120 P.3d 616, 634 (2005) *rev'd on other grounds sub nom Bellevue John Does 1-*

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<sup>42</sup> FF attempts to characterize the court as having caused months long delay, but the court's initial TRO was only in effect from December 19 - January 9.

*11 v. Bellevue Sch. Dist. #405*, 164 Wn. 2d 199, 189 P.3d 139 (2008) (plaintiffs “had no other means to prevent the disclosure of their names and identifying information pending trial. A trial on the merits would have been fruitless if the names had already been disclosed. In these circumstances the equitable rule does not compel an award of fees.”). *See also, Quinn Const Co v. King Cty. Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 35, 44 P.3d 865, 873 (2002):

Here, an injunction was not only necessary to preserve any rights Quinn might have: it was the *only* relief available to Quinn. *See Dick*, 83 Wash.App. at 569, 922 P.2d 184. Thus, for all practical purposes, the hearing on the injunction *was* the trial on the merits. The purpose of the equitable rule allowing attorney fees for wrongful injunction is to encourage plaintiffs to prove the merits of their cases before seeking relief. That purpose would not be served by deterring plaintiffs from seeking the only relief available to them under the law. Accordingly, an attorney fee award premised upon the theory of wrongful injunction would have been inappropriate in this case....

Therefore, “any award of fees for wrongful injunction would run afoul of the Supreme Court’s decision in *Johnson*”

In *Johnson*, the Washington Supreme Court, sitting *en banc*, explained that “[t]he purpose of the rule permitting recovery for dissolving a restraining order is to deter plaintiffs from seeking relief prior to a trial on the merits.” *Johnson*, 135 Wn.2d at 758. Consequently, “[t]he purpose of the rule would not be served where injunctive relief prior to trial is necessary to preserve a party’s rights pending resolution of the action.” *Id.*

As a result, the Supreme Court affirmed the trial court's order denying fees to a public records requestor on the grounds that "the trial on the merits would have been fruitless if the records had already been disclosed." *Id.*

This case is virtually identical to *Johnson*. There is no dispute that Local 925's suit to enjoin the release of the requested records would have been "fruitless" if the records were disclosed before a full hearing on the merits. A temporary order protecting the information about providers from disclosure was necessary to preserve Local 925's ability to preserve the fruits of a full hearing on the merits.

As in *Johnson*, awarding fees in this context would not serve the purpose of the rule allowing for fees to be awarded. "The rule of equity under which a party may recover fees incurred in dissolving a wrongful injunction recognizes a unique harm that is suffered when a party's freedom to act is constrained before a trial court is presented with all of the parties' evidence and argument." *Burt v. Washington State Department of Corrections*, slip op., \_\_\_ Wn. App. at \_\_\_, 2015 WL 6951191 (Nov 10, 2015). But that simply was not the case here. The FF was never enjoined, and its "freedom to act" was thus never restrained. Consequently, there is no "unique harm" to recompense with fees.

Further, the Court in *Johnson* held that in the case of a PRA appeal, any fees awarded must be limited to those necessary to dissolve the TRO, *not* those connected with the appeal. *Johnson*, 135 Wn.2d at 758-59. This is true even where the requester ultimately prevails on appeal, and even where the appellate court stays the trial court's TRO pending resolution of the appeal – precisely the situation here.<sup>43</sup> Thus, while no fees are appropriate, in situations that do warrant fees (unlike here) they must be limited to efforts to dissolve the TRO.

Finally, FF's request for fees must be denied because it was not timely raised with the trial court. It is well established that whether to award fees in connection with dissolving a wrongfully issued TRO is a decision that rests with the discretion of the trial court. *See Johnson*, 135 Wn. 2d at 758; *Burt*, \_\_\_ Wn. App. at \*4. The trial court ordered the TRO dissolved at the January 9, 2015 hearing – FF could have made a request for fees at that time but failed to do so.<sup>44</sup> This Court may not address this

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<sup>43</sup> The Court in *Confederated Tribes* observed that “harm occasioned by the appellate delay” shall be measured and protected against through a bond – not attorney’s fees. *Id* at 759.

<sup>44</sup> As discussed, the order currently in effect preventing the release of the records was entered by the Court of Appeals Commissioner under RAP 8.3 – FF may not argue that its delay in seeking fees was permissible because trial court’s order is still in effect. In the case of stays pending appeal, like the one here, “If the harm occasioned by the appellate delay can be measured in terms of a monetary amount, then a bond is appropriate.” *Johnson*, 135 Wn 2d at 759 (finding that requester was not entitled to bond despite prevailing in dissolving injunction entered under RAP 8.3 where requester failed to allege or demonstrate any harm, “monetary or otherwise.”).

issue raised for the first time on appeal where the trial court never had occasion to consider it.

In sum, the Washington Supreme Court has made clear that an award of fees necessary to dissolve a TRO is not appropriate in a situation like the one here, where a party seeks a TRO in order to preserve its rights pending resolution of the action and FF's request for fees and costs should be denied.

### CONCLUSION

For the reasons set forth herein, the Court should reverse the trial court's denial of preliminary and permanent injunctive relief and remand for entry of an order permanently enjoining DSHS from disclosing the requested list of provider names.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of December, 2015.

By:



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## DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the State of Washington that on December 4, 2015, I caused the foregoing Appellant/Cross Respondent SEIU 925's Reply/Cross-Response To Appellant Freedom Foundation's Opening Brief to be filed with Supreme Court of the State of Washington via email, and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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SIGNED this 4<sup>th</sup> day of December, 2015, at Seattle, WA.

  
\_\_\_\_\_  
Jennifer Woodward, Paralegal

## OFFICE RECEPTIONIST, CLERK

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Good Afternoon,

Attached for filing is the Reply/Cross Response Brief of SEIU 925.

Case Name: SEIU Local 925 v. DSHS and Freedom Foundation  
Case No.: 91715-9

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Sincerely,

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