

No. 48881-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

SEIU 775,
Appellant/Plaintiff,

v.

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

and

FREEDOM FOUNDATION,
Respondent.

BRIEF OF RESPONDENT FREEDOM FOUNDATION

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II. INTRODUCTION

This case is a frivolous attempt by SEIU 775 (“SEIU”) to delay the disclosure of public records. Respondent Freedom Foundation (“Foundation”) seeks the public records to contact unionized employees and inform them of their constitutional right to opt out of the union. In this case, the requested records relate to the times and locations of trainings of unionized employees. SEIU claims that the disclosure of records of contracting, safety and orientation schedules for homecare aides who provide care to the elderly and disabled (“individual providers” or “IPs”)¹ would violate Washington’s Public Employee Collective Bargaining Act (“PECBA”), RCW 41.56 et seq. SEIU claims PECBA qualifies as an “other statute” that exempts the disclosure of public records pursuant to Washington’s Public Records Act (“PRA”), RCW 42.56 et seq. To succeed in its claim, SEIU must prove that i) PECBA qualifies as an “other statute” which exempts the disclosure of public records under the PRA; ii) Respondant Department of Social and Health Services (“State”) violates PECBA by releasing public records pursuant to the PRA, and iii) the

¹ See RCW 74.39A.240(3): “‘Individual provider’ means a person, including a personal aide, who has contracted with the department to provide personal care or respite care services to functionally disabled persons under the medicaid personal care, community options program entry system, chore services program, or respite care program, or to provide respite care or residential services and support to persons with developmental disabilities under chapter 71A.12 RCW, or to provide respite care as defined in RCW 74.13.270.”

Foundation violates PECBA because it both possesses sufficient control over IPs such that its actions can be substituted for IPs' employer's actions *and* that the Foundation's informing IPs' of their constitutional rights qualifies as unlawful interference under PECBA; iv) disclosure is clearly not in the public interest, and v) SEIU would suffer substantial and irreparable harm if the State disclosed the records. SEIU's arguments fail every step of the analysis.

First, PECBA is not an "other statute" that exempts public records under the PRA. It is well established that the "other statute" *must explicitly prohibit the release of records*. SEIU repeatedly fails to mention that PECBA omits any reference of records whatsoever, let alone prohibits the disclosure of any records. Second, the State's mere disclosure of public records to an independent third party, as required by the PRA, does not constitute unlawful interference under PECBA. Alternatively, the Foundation does not possess any control, let alone sufficient control, over IPs that would rise to the requisite level necessary for the Foundation to be able to violate PECBA. Third, disclosure of public records detailing the schedules of publicly funded meetings for publicly paid employees does not clearly fall outside of the public interest; instead it lies directly within the public's interest. Fourth, SEIU does not suffer substantial and irreparable

harm. For each of these reasons, this Court should affirm the trial court's denial of preliminary and permanent injunctive relief.

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

The Foundation does not assign any error. However, pursuant to RAP 10.3(b), the Foundation restates the issues pertaining to SEIU's assignments of error are as follows:

1. Did the trial court correctly deny SEIU's Motion for Preliminary Injunction when SEIU failed to establish a likelihood that an exemption applied to the records at issue, failed to establish that disclosure was clearly not in the public interest, and failed to establish that SEIU would be substantially and irreparably harmed by the disclosure of the records at issue?

2. Did the trial court correctly deny SEIU's Motion for Permanent Injunction when SEIU failed to establish that an exemption applied, failed to establish that disclosure was clearly not in the public interest, and failed to establish that SEIU would be substantially and irreparably harmed by the disclosure of the records at issue?

IV. STATEMENT OF THE CASE

The Foundation is an independent, non-profit organization that seeks to advance individual liberty, free enterprise, and limited, accountable

government. CP 246-47. As part of its mission, the Foundation seeks to inform bargaining unit members of their constitutional right to choose whether to pay union dues. CP 247. To do so, the Foundation informs union-represented partial and public employees, including IPs, of their constitutional right to choose whether to financially support their union. CP 247. This right was recently acknowledged in *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

The Foundation's goals are particularly important because SEIU lies to or misinforms countless IPs about their rights regarding union dues payments. CP 233-45; 249-51.² Specifically, SEIU informs IPs that union dues are mandatory, CP 233-34, CP 249-251, spreads foreboding, misleading, and outright false information about the Foundation, CP 236-38, and barrages IPs with repeated phone calls and home-visits pleading for IPs to sign membership cards, CP 236-38. Bargaining unit members confirm that absent the Foundation's educational efforts, they would not know of their constitutional right to opt out of union dues. CP 233-45; 249-51. Many IPs are grateful that the Foundation informed them of their freedom to choose whether to financially support SEIU. CP 233-45; 249-51.

² The Foundation has also received and published video footage portraying an affiliate of SEIU's lying to IPs about their freedom of choice in supporting unions in mandatory training appointments with SEIU's representatives. CP 221.

As an independent, non-profit organization, the Foundation is neither controlled by the State nor acts on behalf of the State. CP 247. Specifically, the Foundation is unable to levy any threats of reprisal or promises of benefits regarding union membership, which is necessary for a PECBA violation. CP 247. The Foundation has absolutely no authority over IPs, nor has the Foundation claimed otherwise. CP 247. Indeed, the Governor of Washington recently vilified the Foundation. CP 220 (“We know the Freedom Foundation is spending hundreds of thousands of dollars to try to strip people of their rights....I intend to be vigorous in fighting with you against those who want to diminish working people’s rights in the state of Washington.”). Notably, numerous large unions, including SEIU, are listed among the top contributors to the Governor’s campaign. CP 220. The evidence clearly shows the Foundation is not a proxy for the State.

Thus, this lawsuit is another attempt by SEIU and its affiliates to prevent its own bargaining members from learning of their constitutional rights. SEIU and its affiliates fought against the disclosure of nearly every one of the Foundation’s public records requests pertaining to home healthcare workers to prevent the Foundation from informing them of their right to opt out of union membership and to stop subsidizing the union.³

³ CP 220, listing numerous lawsuits filed by SEIU and its affiliates, including *SEIU Healthcare 775 v. DSHS and Freedom Foundation*, Case No. 14-2-26633-2; *Service Employees International Union Local 925 DSHS and Freedom Foundation*, Case No. 14-

On January 12, 2016, the Foundation submitted five requests for public records to DSHS. CP 255-56. The State clearly identified the 62 pages of documents it intended to disclose and notified SEIU and the Foundation that it would disclose the records on March 22, 2016 absent a court order. CP 45. SEIU sued the Foundation and the State to prevent the disclosure of the first two requests. It argued that PECBA qualified as an “other statute” that prevented the disclosure of public records.

After oral argument, the trial court ruled that PECBA did not qualify as an “other statute” under the PRA that exempted records from disclosure. RP 40-41. Specifically, the trial court stated:

I don't find that there is an exemption here that applies. I am persuaded that the vast majority of the case law interpreting the Public Records Act and the other statute's provision contemplate that there be a clear exemption or protection of information or exemption of a record, even if it is in another statute. And here I'm finding the argument of an unfair labor practice by the Foundation as a proxy for the State to be not captured by 41.56. In addition, 41.56 simply does not come close enough to the cases that I looked at, such as the PAW[S] case, that do talk about the presence of a protection.

RP 41. SEIU appealed. The Foundation responds herewith.⁴

2-02359-3; *Service Employees International Union Local 925 v. DEL and Freedom Foundation*, Case No. 14-2-02082-9; *SEIU Healthcare NW Training Partnership v. DSHS and Freedom Foundation*, Case No. 15-2-29484-9.

⁴ Notably, the TRO SEIU mentions in its brief is no longer in place. See Pet'rs Br. at 2: Comm's Ruling Denying Discretionary Review, entered July 22, 2016, in *SEIU 775 v. Evergreen Freedom Foundation*, No. 75446-7-1; Comm's Ruling Denying Mot. for Inj. Relief, entered July 28, 2016, in *SEIU 775 v. Evergreen Freedom Foundation*, No. 75446-7-1. The Court of Appeals Commissioner also held that this determination was not obvious or probable error, and that SEIU's arguments failed to raise "debatable issues." Comm's

V. ARGUMENT

1. Standard of review and burden of proof.

The standard of review is de novo. *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 389, 374 P.3d 63 (2016) (“*Washington State Patrol*”). “The party resisting disclosure bears the burden of proving that an exemption applies.” *Id.* at 389 (citing *Ameriquest Mortg. Co. v. Office of Att’y Gen.*, 177 Wn.2d 467, 486-87, 300 P.3d 799 (2013) (“*Ameriquest II*”). “When (as in this case) the party resisting disclosure is not a state agency, that party must also prove two factual prerequisites to an injunction: (1) that the record in question specifically pertains to that party and (2) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function.” *Id.* at 389 (internal brackets and quotations omitted).

Here, for SEIU to succeed in proving that PECBA prevents the disclosure of the records at issue, SEIU must prove four independent elements: i) that PECBA exempts public records from disclosure; ii) the records at issue specifically pertain to SEIU; iii) disclosure would not be in the public interest; and iv) disclosure would substantially and irreparably

Ruling Denying Mot. for Inj. Relief, entered July 28, 2016, in *SEIU 775 v. Evergreen Freedom Foundation*, No. 75446-7-1. Further, the Court of Appeals declined to modify the Commissioner's decision. Order Denying Mot. to Modify, entered Aug. 31, 2016, in *SEIU 775 v. Evergreen Freedom Foundation*, No. 75446-7-1.

harm SEIU or a vital government function. SEIU fails to meet its burden of proof in at least three categories.

2. SEIU fails to meet its burden in showing an exemption applies.

a. As a PRA exemption, the “other statute” exemption must be narrowly construed in favor of disclosure.

The applicability of an exemption must be considered within the PRA’s overall statutory scheme and interpretive mandate. Interpretations of PRA provisions are “grounded in the PRA’s underlying policy and standard of construction.” *Resident Action Council v. Seattle Housing Authority* (“*RAC*”), 177 Wn.2d 417, 431, 327 P.3d 600 (2013) (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). “The PRA is a strongly worded mandate for broad disclosure of public records.” *RAC*, 177 Wn.2d at 431. “The PRA is to be liberally construed and its exemptions narrowly construed...to assure that the public interest will be fully protected.” *Id.* The PRA’s mandate is so strong that “in the event of a conflict between the [PRA] and other statutes, the provisions of the [PRA] govern.” *Progressive Animal Welfare Soc. v. University of Washington* (“*PAWS II*”), 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (citing RCW 42.17A.904). Such construction aligns with Washington courts’ repeated emphasis on the overriding importance of the PRA’s open government policy objectives:

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of

representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”

PAWS II, 125 Wn.2d at 251 (internal citations omitted). *See also Washington State Patrol*, 185 Wn.2d at 371 (“The PRA’s primary purpose is to foster governmental transparency and accountability by making public records available to Washington’s citizens.”).

Here, the issue of whether PECBA prevents the disclosure of public records must be analyzed under the PRA’s underlying policy and standard of construction. *RAC*, 177 Wn.2d at 431. Thus, the analysis required in this case must be conducted under the umbrella of the PRA’s strong mandate favoring disclosure—which includes narrowly construing exemptions. *PAWS II*, 125 Wn.2d at 262; *RAC*, 177 Wn.2d at 432 (“the PRA’s purpose of open government remains paramount, and thus, the PRA directs that its exemptions must be narrowly construed.”) (citing RCW 42.56.030)); *Planned Parenthood of Great Northwest v. Bloedow*, 187 Wn. App. 606, 620, 350 P.3d 660 (2015) (“All exceptions, including ‘other statute’ exceptions, are construed narrowly.”).

“There are three sources of PRA exemptions.” *White v. Clark County*, 188 Wn. App. 662, 630, 356 P.3d 202 (2015):

First, the PRA itself contains certain enumerated exemptions. Second, the PRA states that public records can be withheld from production if they fall within any ‘other statute which exempts or prohibits disclosure of specific information or records.’ An ‘other statute’ exemption applies only if that statute explicitly identifies an exemption; the PRA does not allow a court to imply such an exemption. Third, the Washington Constitution may exempt certain records from production because the constitution supersedes contrary statutory laws.

Id. at 630-31. *See also* RCW 42.56.070; *PAWS II*, 125 Wn.2d at 261-62; *Washington State Patrol*, 185 Wn.2d at 371-72. If a specific exemption enumerated within the PRA, or any constitutional prohibition, does not apply to the records at issue, a third party seeking an injunction must prove that some “other statute” prevents the disclosure of the records at issue. *See White*, 188 Wn. App. at 630-631.

Here, SEIU omits any reference to an exemption within the PRA or Washington Constitution. *See* Pet’rs Br. The only issue is whether PECBA qualifies as an “other statute” which exempts the disclosure of the records at issue. *See* Pet’rs Br. at 15-28. As discussed below, PECBA does not qualify as an “other statute” which prevents the disclosure of public records.

b. PECBA does not constitute an “other statute.”

SEIU does not meet its burden in proving that PECBA qualifies as

an other statute. The “other statute” exemption applies *only* if “another statute (1) does not conflict with the [PRA], and (2) either exempts or prohibits disclosure of specific public records in their entirety.” *PAWS II*, 125 Wn.2d at (1994).

SEIU relies on various provisions of PECBA as its “other statute” allowing the records to be withheld. Pet’rs Br. at v (citing RCW 41.56.010, .026, .040, and .140). ***However, none of these PECBA provisions pertain to record disclosure at all.*** Nowhere does RCW 41.56.010 reference the disclosure of records:

The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

RCW 41.56.010.

Similarly, RCW 41.56.026 does not mention records at all, it merely applies PECBA to IPs.

Neither does RCW 41.56.040:

Right of employees to organize and designate representatives without interference. No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own

choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

Similarly, RCW 41.56.140 does not mention records or the disclosure thereof:

Unfair labor practices. It shall be an unfair labor practice for a public employer: (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter; (2) To control, dominate, or interfere with a bargaining representative; (3) To discriminate against a public employee who has filed an unfair labor practice charge; (4) To refuse to engage in collective bargaining with the certified exclusive bargaining representative.

For reasons described below, this is not even close to an “other statute” allowing the records to be withheld.

The most pressing requirement of the “other statute” exemption is that the other statute *must explicitly prohibit disclosure of the records or information; “its language does not allow a court to imply exemptions but only allows specific exemptions to stand.” PAWS II*, 125 Wn.2d at 262 (internal quotations omitted) (emphasis added). *See also White*, 188 Wn. App. at 630-31 (2015) (“[the] other statute” exemption applies only if that statute explicitly identifies an exemption.”); *Planned Parenthood*, 187 Wn. App. at 619 (“RCW 42.56.070 expressly incorporates into the PRA other statutes...*that either exempt or prohibit disclosure of specific information or records.*”) (emphasis added). The Washington State Supreme Court

recently affirmed the stringent explicit-prohibition rule in *Washington State Patrol*:

Our review of Washington case law shows that courts consistently find a statute to be an “other statute” when the plain language of the statute makes it clear that a record, or portions thereof, is exempt from production...In contrast, when a statute is not explicit, courts will not find an “other statute” exemption.

Washington State Patrol, 185 Wn.2d at 371-72.

The Legislature adopted the “other statute” exemption in response to the Washington Supreme Court’s holding in *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986), where the court in that case found that a portion of the PRA implied a general privacy exemption. See *Washington State Patrol*, 185 Wn.2d at 372-73. “The legislature responded swiftly by explicitly overruling *Rosier* and amending what is now RCW 42.56.070 to include the ‘other statute’ exemption.” *Washington State Patrol*, 185 Wn.2d at 372. “Therefore, if the exemption is not found within the PRA itself, [courts] will find an ‘other statute’ exemption only when the legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response to a public records request.” *Washington State Patrol*, 185 Wn.2d at 373. Thus, when a statute does not *explicitly* prohibit the *disclosure of records*, courts may not apply the “other statute” exemption:

In contrast, when a statute is not explicit, courts will not find an “other statute” exemption. In *Belo Management Services, Inc. v. Click! Network*, five broadcasters sought to enjoin the disclosure of unredacted retransmission consent agreements (RCAs) between themselves and Click!, a cable system owned by the city of Tacoma. The broadcasters claimed that federal regulation was an “other statute” under the PRA and exempted the RCAs from disclosure. *The Court of Appeals held that the regulations were not an “other statute” because they did not “specifically state that RCAs are confidential and protected from disclosure....*

Washington State Patrol, 185 Wn.2d at 377 (internal citations omitted) (emphasis added). *See also id.* at 386 (“The PRA, and our case law surrounding it, demands that an ‘other statute’ exemption be explicit. Where the legislature has not made a PRA exemption in an ‘other statute’ explicit, we will not.”). For an example of the stringency in which courts apply the explicit-prohibition rule, even a statute that grants a right to closed meetings does not qualify as an “other statute” when it does not specifically exempt anything from disclosure. *See Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 800, 791 P.2d 526 (1990) (“The union argues that the Legislature created an exemption by granting teachers a right to a closed hearing on certificate revocations. The closed hearing provision does not specifically exempt anything from disclosure. The language of the statute does not authorize us to imply exemptions but only allows specific exemptions to stand.”).

Washington State Patrol is directly on point. There, the party resisting disclosure argued that RCW 4.24.550, the Community Protection Act,

qualified as as “other statute” that exempted records from disclosure under the PRA. *Id.*, 185 Wn. App. at 369. In analyzing the “other statute” exemption, the Supreme Court reviewed a series of “other statute” cases (nearly all of which SEIU relies on in its brief) that support the explicit-prohibition rule:⁵

Recently, in *Planned Parenthood of Great Northwest v. Bloedow*,...the Court of Appeals held that RCW 43.70.050(2) was an “other statute” exempting the disclosure of Department of Health records ... because ... ***[t]he statute expressly states that health care “data in any form where the patient or provider of health care can be identified shall not be disclosed,*** subject to disclosure according to chapter 42.56 RCW, discoverable or admissible in judicial or administrative proceedings.”

In *Hangartner*, this court held that RCW 5.60.060(2)(a), which provides that ***“[a]n attorney or counsellor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her,*** or his or her advice given thereon in the course of professional employment,” was an “other statute.”

In *Ameriquet I*,... a lawyer requested documents from the attorney general's office that it had received from Ameriquet pursuant to an investigation. There, this court examined the Gramm–Leach–Bliley Act...and the relevant Federal Trade Commission rule.... The statute provided that

⁵ SEIU relies on the following cases in support of its “other statute” argument: *Ameriquet Mortg. Co. v. Office of Att’y Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (“*Ameriquet I*”); *Fisher Broadcasting-Seattle LLC v. City of Seattle*, 180 Wn.2d 515, 525–28, 326 P.3d 688 (2014); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004); PAWS II, 125 Wn.2d at 262; *Freedom Foundation v. Dep’t of Transp.*, 168 Wn. App. 278, 289, 276 P.3d 341 (2012).

“the receiving nonaffiliated third party *may not reuse or redisclose the nonpublic personal information to another nonaffiliated third party* unless an exception applies or the reuse or redisclosure would be lawful if done by the financial institution.” We held this was an *explicit* “other statute” and that the documents were not subject to a PRA request.

This court last addressed the “other statute” exemption in *Fisher Broadcasting–Seattle TV LLC v. City of Seattle*. There, we considered whether RCW 9.73.090(1)(c), which directs that “[n]o sound or video recording [made by a dashboard camera] may be duplicated and made available to the public ... until final disposition of any criminal or civil litigation which arises from the event or events which were recorded,” was an “other statute.” We held that it was, and that dashboard camera videos were exempt from production until the litigation ended.

Washington State Patrol, 185 Wn.2d at 376 (internal citations omitted) (emphasis added). For each “other statute” case, the court quoted the exact statutory language that explicitly prohibited the release of information found within specific records. For example, one of the statutes at issue in *PAWS II* explicitly stated that “[i]n appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order” and provided broad means for courts to preserve the secrecy of trade secrets. *PAWS II*, 125 Wn.2d at 262. The second statute at issue in *PAWS II* explicitly allowed injunctive relief (i.e., a procedural mechanism to prevent the disclosure of records in that case) to prevent harassment. *PAWS II*, 125 Wn.2d at 264-65. The statute at issue in *Hangartner* explicitly prohibited attorneys from

publicizing communications specifically pertaining to attorney-client communication. *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (“The language the legislature used in RCW 42.17.260(1) is clear and plainly establishes that documents that fall within the attorney-client privilege are exempt from disclosure under the [PRA].”). The statute at issue in *Ameriquet I* explicitly prohibited the dissemination of records specifically pertaining to an ongoing investigation. *See Ameriquet I*, 170 Wn.2d at 426 (“These federal restrictions also prohibit a nonaffiliated third party from reusing or redisclosing any protected information received from a financial institution.”). *See also Washington State Patrol*, 185 Wn.2d at 376. The statute at issue in *Fisher Broadcasting–Seattle TV LLC* explicitly prohibited the disclosure of records specifically pertaining to recordings taken from a dashboard camera. *Fisher Broadcasting–Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 526-28, 326 P.3d 688 (2014) (quoting at length the specific statutory text that prohibited the public dissemination of law enforcement vehicle recordings). *See Washington State Patrol*, 185 Wn.2d at 376. In light of the extensive case law mandating the explicit-prohibition rule for the “other-statute” exemption, the court in *Washington State Patrol* observed that “there is no language in the [Community Protection Act] that prohibits an agency from producing records.” *Id.* at 377. Thus, the court held that the Community Protection Act did not qualify as

an “other statute” exemption under the PRA. *Id.*

Belo Management Services, Inc. v. ClickANetwork, 184 Wn. App. 649, 343 P.3d 370 (2014) is also instructive. In *Belo Management Services*, broadcasters claimed that a federal statute and regulations, 47 U.S.C. § 325(b) and 47 C.F.R. § 0.459(a)(1), qualified as an “other statute” that exempted disclosure under RCW 42.56.070(1). *Id.* at 660. This Court noted that 47 U.S.C. § 325(b) involves consent to retransmission of broadcasting station signals and that 47 C.F.R. § 0.459(a)(1) allows parties to submit materials to FCC to request that the information “not be made routinely available for public inspection.” *Id.* This Court held:

Contrary to the broadcasters' assertions, the federal regulations the broadcasters cited do not specifically state that [the requested records] are confidential and protected from disclosure. The regulations do not preclude disclosure of any *specific* information or records. Rather, they allow a party to request that information submitted to the FCC “not be made routinely available for public inspection.” 47 C.F.R. § 0.459(a)(1). The PRA “other statute” exemption only applies if the other statute “exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). Thus, the federal regulations the broadcasters cited do not qualify as an “other statute.”

Id. at 660-61 (emphasis in original). Thus, even if a statute notes that some records are “not routinely made public,” they are still discloseable absent an explicit prohibition within the language of the statute itself.

Here, the trial court was quite right when it stated that “all the other cases that [SEIU] cited in using the other statutes’ reference of the [PRA] reference another statute that clearly has a prohibition of disclosing records[.]” RP 11. *Washington State Patrol* has since affirmed the trial court’s analysis in its discussion of the very same cases. SEIU’s cited cases, as discussed by the Washington State Supreme Court, unequivocally demonstrate that “other statutes” must *explicitly* prohibit the disclosure of the records at issue.⁶

Further, unlike *every statute* that may qualify as an “other statute” under the PRA, PECBA does not even mention records pertaining to contracting, safety and orientation classes, let alone explicitly prohibit it. *See* RCW 41.45.010, .026, .040, and .140. Because SEIU’s case hinges on the text of

⁶ *See Ameriquist I*, 170 Wn.2d at 440 (limiting the application of to the “other statute” exemption only to personally identifying information that federal law *explicitly* prohibited from disclosure); *Fisher Broadcasting*, 180 Wn.2d at 525–28 (holding that RCW 9.73.090(1)(c), which mandated that “[n]o sound or video recording made under this subsection...may be duplicated and made available to the public...” satisfied the “other statute” exemption of the PRA); *Hangartner*, 151 Wn.2d at 453 (“Because RCW 5.60.060(2)(a) [the “other statute”] is unquestionably a statute other than RCW 42.17.260(6), 42.17.310, or 42.17.315 that prohibits the disclosure of certain records, documents that fall under RCW 5.60.060(2)(a) are exempt from the public disclosure act.”); *PAWS II*, 125 Wn.2d at 262 (“The UTSA...provides that “[i]n appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order”, RCW 19.108.020(3), and provides broad means for courts to preserve the secrecy of trade secrets.”); *Freedom Foundation v. Dep’t of Transp.*, 168 Wn. App. 278, 289, 276 P.3d 341 (2012) (“Here, both the federal regulation and its underlying statute speak to confidentiality of these particular test results. 49 C.F.R. § 40.321 provides in relevant part that an employer is “prohibited from releasing individual test results or medical information about an employee to third parties without the employee’s specific written consent.”).

its cited PECBA provisions, and now with a full understanding of Washington cases on the “other statute” exemption, it bears repeating what SEIU’s cited statutes say—and do not say.

Nowhere does RCW 41.56.010 reference the disclosure of records:

The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

RCW 41.56.010.

Similarly, RCW 41.56.026 does not mention records at all, it merely applies PECBA to IPs.

Neither does RCW 41.56.040:

Right of employees to organize and designate representatives without interference. No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

Similarly, RCW 41.56.140 does not mention records or the disclosure thereof:

Unfair labor practices. It shall be an unfair labor practice for a public employer: (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter; (2) To control, dominate, or interfere with a

bargaining representative; (3) To discriminate against a public employee who has filed an unfair labor practice charge; (4) To refuse to engage in collective bargaining with the certified exclusive bargaining representative.

None of the provisions contain any reference to records, let alone the disclosure thereof. None of the provisions contain an explicit prohibition of data release, like in *Planned Parenthood*. Neither do they include a confidentiality mandate on an entire category of communications, like in *Hangartner*. Nowhere do any of the statutes specifically name the records at issue, like in *Ameriquest I* and *Fisher Broadcasting*.

Clearly, none of the PECBA provisions contain any reference to the disclosure of information whatsoever. Given the lack of explicit reference to records or the disclosure thereof, SEIU is actually requesting this Court to *imply* that PECBA is an “other statute” based on how an independent third party intends to use the public records—which this Court is explicitly prohibited from doing. Courts may not imply an exemption in an “other statute” where none exists. *See PAWS II*, 125 Wn.2d at 262 (“***[the PRA’s] language does not allow a court to imply exemptions*** but only allows specific exemptions to stand.”) (emphasis added); *Ameriquest II*, 177 Wn.2d at 498 (“We should not write an exemption for voluntary production into the statute. This deviation from federal law is firmly ‘rooted in our own statutes.’”) (internal citations omitted); *Blewett v. Abbott*, 86 Wn. App. 782,

788, 938 P.2d 842 (1997); *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 799 (1990) (“The language of the statute does not authorize us to imply exemptions but only allows specific exemptions to stand.”). This well-established prohibition against implying an exemption is categorical and unequivocal. *See id.* SEIU invites this Court to contradict clearly established, binding authority. This Court should decline SEIU’s invitation.

SEIU tries unsuccessfully to distance this case from the controlling outcome in *Washington State Patrol*. Yet SEIU concedes the weakness of its position by admitting that: “Wash. State Patrol appears to support the Foundation’s position that the PECBA does not operate as a prohibition against disclosure of the requested records.” Pet’rs Br. at 29. SEIU also highlights that it filed a Notice of Appeal after *Wash. State Patrol* was decided. *Id.*

Finally, SEIU’s “legislative intent” argument is inapposite. As SEIU concedes, courts consider the legislative intent of other statutes only *after* determining whether the “other statute” exemption applies at all. *See Washington State Patrol*, 185 Wn.2d at 377-78 (“We also note that **when courts have found an “other statute” exemption**, they have also identified a legislative intent to protect a particular interest or value.”) (emphasis added). Thus, legislative intent is a secondary consideration, evaluated only after the threshold determination of the applicability of the “other statute”

exemption. *See also Fisher Broadcasting*, 180 Wn.2d at 527 (“Of course, we turn to extrinsic evidence of legislative intent only when the plain language of the statute does not answer the question.”). Here, the plain language of PECBA disqualifies it as an “other statute” exemption, and thus any legislative intent analysis is superfluous.

c. SEIU fails to meet its burden in proving that the State commits a ULP by complying with the PRA.

Even if PECBA qualified as an “other statute,” which it clearly does not, SEIU still must prove that disclosure of the records violates PECBA. However, the idea that the State violates one law (PECBA) by complying with another (PRA), is, quite frankly, absurd. However, the Foundation will undertake the analysis of this issue.

RCW 41.56.040 provides:

No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

“The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, and must be established by preponderance of the evidence.” *Pasco Housing Authority*, Decision 5927-A 1997, 1997 WL 810882 (PECB, 1997), *aff’d*,

98 Wn. App. 809, 991 P.2d 1177 (2000). *See also City of Seattle*, Decision 3566 (PECB, 1990). “An interference violation will be found when *employees could reasonably perceive* the employers actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees.” *Pasco Housing Authority*, Decision 5927-A 1997 (PECB, 1997), *aff’d*, 98 Wn. App. 809, 991 P.2d 1177 (2000) (emphasis in original).⁷ “If the setting, the conditions, the methods, or other probative context can be appraised, in reasonable probability, as having the effect of restraining or coercing the employees in the exercise of such rights, then his activity on the part of the employer is violative of [Section 8(a)(1)] of the Act.” *Taylor Rose Mfg. Corp.*, 205 NLRB 262, 265 (1973), *enforcement granted*, *NLRB v. Taylor-Rose Mfg. Corp.*, 493 F.2d 1398 (2d Cir. 1974).

Courts evaluate the following when considering whether an employer unlawfully interfered with an employees’ collective bargaining rights:

1. Is the communication, in tone, coercive as a whole?
2. Are the employers’ comments substantially factual or materially misleading?
3. Has the employer offered new benefits to employees outside of the bargaining process?
4. Are there direct dealings or attempts to bargain with the employees?

⁷ Federal labor law is also persuasive. “The phrase “ ... no threat or reprisal or force or promise of benefit” found in RCW 41.59.140(3) must be interpreted in the same context as the identical language of Section 8(c) of the National Labor Relations Act.” *Lake Washington School District*, Decision 2483 (PECB, 1986).

5. Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?
6. Did the union object to such communications during prior negotiations?
7. Does the communication appear to have placed the employer in a position from which it cannot retreat?

Pasco Housing Authority, Decision 5927-A 1997, 1997 WL 810882 (PECB, 1997), *aff'd*, 98 Wn. App. 809, 991 P.2d 1177 (2000) (citing *City of Seattle*, Decision 3566 (PECB, 1990); *Lake Washington School District*, Decision 2483 (PECB, 1986)). Courts will not find an interference if the communication is informational and substantially factual. *See City of Seattle*, Decision 3566 (PECB, 1990) (“As a whole, the evident purpose of the [employer’s] letter appears informational rather than persuasive or coercive. The letter was ‘substantially factual’. Judged by its overall purpose and tone, we find the letter was a permissible communication between the employer and its employees.”); *Lake Washington School District*, Decision 2483 (PECB, 1986) (employer’s memo’s “purpose was clearly informational, rather than persuasive or coercive.”).

Notably, an employer’s direct or indirect unlawful interference is limited to ***an employer’s actions directed to its employees***, either through a the employer itself or a third party. This is in accordance with well-established PERC and NRLB case law. In *Pasco Housing Authority*, PERC held that the *employer’s* memo to employees constituted unlawful

interference. In *City of Seattle*, PERC held that the *employer's* letter to its employees was appropriate because it was substantially factual and informational. In *Taylor Rose Manufacturing Corp.*, the NLRB held that an *employer's* interrogations and threats of and to employees qualified as interference, restraint, or coercion within the meaning of Section 8(a)(1) of the NLRA. *Taylor Rose Manufacturing Corp.*, 205 NLRB 262, 265 (1973). In *City of Longview*, the *employer* “interrogated the union president about what transpired behind the closed doors of the union meeting.” *City of Longview*, Decision 4702, 1994 WL 900095 (PECB). The *employer* “then confronted [the employee] about what that bargaining unit employee said at the union meeting.” *Id.* SEIU fails to cite any authority where someone other than an employer (like a third party such as the Foundation) violated PECBA without ever communicating with, or otherwise engaging in actions directed at, bargaining unit members.

This reasonable limitation on an employer’s liability makes sense. Just like any other actor, an employer can only be, and should only be, liable for its own actions. To hold otherwise would impermissibly broaden the scope of PECBA violations and create an insurmountable burden on employers who have no control over third parties who may otherwise engage in unlawful interference. To the extent that the employer facilitates a third

parties' unlawful interference, such interference falls within the purview of employer-facilitated PECBA violations. *See infra*.

Here, SEIU claims that “a typical IP attending contracting appointments or orientation meetings with her employer (and set up by her employer) could reasonably see DSHS’s decision to enable—indeed, to effectively invite—the Foundation to attend these meetings to disparage and discredit SEIU 775 and to encourage and assist IPs to cease or refrain from union membership and dues payments as DSHS itself discouraging union activity.” Pet’rs Br. at 21. Nothing could be further from established law or the record. There are at least **five** reasons why no IP could reasonably perceive the State’s compliance with the PRA “as a threat of reprisal or force or promise of benefit associated with the union activity.”

First, IPs cannot reasonably perceive the State’s actions as a threat of reprisal or force or promise of benefit associated with the union activity when the State never “enabled” or “invited” the Foundation to the contracting, safety and orientation meetings in the first place. The State will merely disclose public records stating meeting *times* and *locations*—the bare minimum of what it must do under the PRA’s strong mandate. SEIU cannot point to any evidence that demonstrates otherwise. *See Pasco Housing Authority*, Decision 5927-A 1997, 1997 WL 810882 (PECB, 1997), *aff’d*, 98 Wn. App. 809, 991 P.2d 1177 (2000). In no universe can the mere

disclosure of public records of state-sponsored meeting times and locations, and nothing more, cause a reasonable IP to believe that the State is unlawfully interfering with union activity.

For similar reasons, the State is not engaging in unlawful “surveillance” of IPs. *See* Pt’rs Br. at 27-29. The nexus of unlawful surveillance depends on the employer’s improper oversight, or other acquisition of information, pertaining to employees’ communications regarding unionization. *See City of Longview*, Decision 4702, 1994 WL 900095 (PECB). Yet here, the State already possesses the records at issue, thus nipping the “acquisition” prong for surveillance in the bud. *Id.* Releasing the records to a third party requester does not constitute surveillance because it is merely the disclosure of public records, and not a facilitation of the third party’s engagement in IP union activities.

Second, in disclosing meeting times and locations, the State is in no way communicating with or acting in a manner directed towards IPs. Without any action by the State directed to IPs, the factors analyzing an employer’s communications for unlawful interference are rendered irrelevant. *See Pasco Housing Authority*. It is impossible to evaluate the tone of the communication if communication did not occur. *Id.* Comments cannot be substantially factually or materially misleading if the State refrained from making any comments whatsoever. *Id.* If the State did not communicate with

or otherwise engage in actions directed at IPs, then it necessarily did not offer benefits to IPs outside of the bargaining process, engage in direct dealings or attempts to bargain with IPs, disparage, discredit, ridicule, or undermine the union, or offer argumentative statements to IPs. *Id.* For the similar reasons, all of SEIU's cited cases about an employer's unlawful interference are inapposite because they deal with an employer's communications to employees. *See supra.* Without any evidence of State action directed towards IPs, the State is categorically precluded from engaging in unlawful interference.

Third, IPs cannot reasonably perceive the State's actions as a threat of reprisal or force or promise of benefit associated with the union activity when the disclosure of public meeting times and locations is required by law absent an explicitly stated exemption. The State cannot even inquire into a requester's purpose absent very limited, and inapplicable, circumstances. *PAWS II*, 125 Wn.2d at 252 ("agencies 'shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request' except under very limited circumstances.".)⁸ SEIU's argument forces the State to make an

⁸ RCW 42.56.080 prohibits an agency from inquiring into the purpose of a requester "except to establish whether *inspection and copying* would violate RCW 42.56.070(9) or other statute *which exempts or prohibits disclosure of specific information or records* to certain persons." (emphasis added). In other words, the "other statute" must relate directly *to the disclosure of records*. SEIU has cited no such statute.

absurd Hobson's choice of either violating PECBA or the PRA. Statutory interpretation laws mandate against such a result. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001) (“The court must also avoid constructions ‘that yield unlikely, strange or absurd consequences.’”).

Yet even if such a Hobson's choice exists, the PRA prevails. “[W]hen there is a possibility of conflict between the PRA and other acts, the PRA governs.” *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010); *see also Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 578, 983 P.2d 676 (1999) (if another statute conflicts with the PRA, “it is resolved by the application of RCW 42.17.920 that provides the Act is to be liberally construed with conflicts between the Act and other statutes resolved in favor of the Act.”). This is because the PRA is one of the strongest laws in Washington that heavily protects the revered and cherished principles for Washington citizens—that of open and transparent government. *See* RCW 42.56.030. Agencies are tasked with the responsibility of ensuring open and transparent governments to Washington's citizens, and face heavy penalties for failing to do so. RCW 42.56.550. It defies logic and common sense that a reasonable IP would perceive an agency's compliance with one of the strongest laws in Washington, *that protects the sovereignty of Washington citizens over its government*, as a threat of reprisal or force or promise of benefit associated

with the union activity. In disclosing meeting times and locations, the State is simply following the strong mandate of the Washington legislature by disclosing public records—no more, no less.

Fourth, public records of state-sponsored meeting times are not synonymous with union activity or organizing. RCW 41.56.140 applies to union organizing and employee designation of a union. Yet IPs are already organized. *See In re: Service Employees International Union, Local 775*, Decision 8241 Case 17799-E-03-2876 (PECB, 2003).⁹ In 2016, every IP is forcibly represented by SEIU, and thus there is no right to unionize or organize that can be interfered with. Interference is thus a moot point.

d. SEIU fails to meet its burden in proving that the State commits a ULP through the Foundation.

An employer may also commit a ULP by a third party if the employer utilizes a third party to engage in unlawful conduct. *Maidsville Coal Co., Inc.*, 257 NLRB 1106, 1136 (1981), *enf. denied on other grounds by NLRB v. Maidsville Coal Co.*, 693 F.2d 1119 (4th Cir. 1983).

In *Maidsville Coal Co.*, the employer directed a large man to threaten an employee about his union involvement. *Maidsville Coal Co.*, 257 NLRB at 1134. The court held that an employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the NLR Act in part by

⁹ Available at http://www.perc.wa.gov/databases/rep_uc/08241.htm (last visited on Oct. 8, 2015).

“utilizing a third party to threaten its employees with reprisals or physical harm if the employees continued to engage in activities on behalf of the union.” *Id.* at 1136.

Here, SEIU attempts to analogize to *Maidsville* by alleging that the Foundation operates as the State’s “proxy.” Pet’rs Br. at 23-24. Nothing could be further from the truth. A “proxy” is “a person who is given the power or authority to do something...for someone else.”¹⁰ SEIU cites absolutely no evidence, let alone a preponderance of evidence, to show that the State has given the Foundation the power or authority to act on its behalf. The lower court correctly held that SEIU’s “proxy” argument was completely meritless. RP 40.

f. The Foundation does not commit a ULP because it does not possess sufficient control over IPs.

The Foundation also does not violate PECBA because it does not possess sufficient control over its IPs, but even if it did, informing IPs about their constitutional rights does not constitute interference. A third party must possess “sufficient control” over an employer’s employees for its actions to constitute a ULP violation. *See Fabric Services, Inc.*, 190 NLRB 540, 542 (1971); *St. Francis Hospital*, 263 NLRB 834 (1982) (“The Board has held that an independent Respondent can be held liable for acts

¹⁰ Merriam-Webster Dictionary, *available at* <http://www.merriam-webster.com/dictionary/proxy> (last accessed Aug. 24, 2016).

committed with respect to employees other than his own only if that respondent possessed ‘sufficient control over the Section 7 rights alleged to have been restrained or coerced.’”); *Ashford TRS Nickel, LLC d/b/a The Sheraton Anchorage Hotel & Spa*, Case No. 19-CA-032761, 2013 WL 6072713 (2013) (where the Board affirmed *Fabric Services*’ ‘sufficient control’ rule and discussing several facts demonstrating a third party’s sufficient control over covered employees).¹¹ A third party may have “sufficient control” if it has enough authority over an employee to carry out a lawful threat, such as eviction from the premises or denial of a credit union loan, *see Fabric Services; A. M. Steigerwald Co.; Scott Hudgens*; or the employer must consult with or report to the third party in some way, *see Ashford TRS Nickel*.

Fabric Services is instructive. In *Fabric Services*, Fabric Services owned the plant facility where Southern Bell Telephone Company conducted its operations. *Id.* at 541. A Fabric Services manager ordered a Southern Bell employee to remove union-supporting insignia on his pocket protector. *Id.* The Southern Bell employee brought an unfair labor practice

¹¹ “A party may cite as an authority an opinion designated “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.” GR 14(b)(1). The NLRB does not prohibit citation to unpublished opinions.

charge against both his employer and Fabric Services. *Id.* Fabric Services argued that it could not have violated Section 8(a)(1) because it was not the employee's employer. *Id.* The Board held that Fabric Services was liable by virtue of its ownership of the plant facility and its power to evict the employee from its premises, and thus Fabric Services was in a position of "sufficient control" to force the employee to remove his union supporting pocket protector or otherwise directly interfere with his ability to show such support while performing his work. *Id.* at 542.

Since *Fabric Services*, the "sufficient control" rule has become well-established:

In *A. M. Steigerwald Co., supra*, the Board followed *Fabric Services* by applying the same "control" test to determine whether a credit union could coerce or restrain Section 7 rights of employees other than his own. The credit union had sent a letter to the employees of an employer whose work force a union was attempting to organize stating that, if the union won the election, the employees would not be able to obtain future loans, and that individuals who were not presently members of the credit union would be ineligible to join. As in *Fabric Services*, by virtue of its power to deny future loans and membership, the credit union's threat to invoke that power violated Section 8(a)(1). In *Scott Hudgens*, 192 NLRB 671 (1971), the owner of a shopping center was held in violation of Section 8(a)(1) by threatening to have employees of another employer located within the shopping center arrested because they were trespassing on private property; by virtue of its ownership, the owner had the power to carry out the threat.

St. Francis Hospital, 263 NLRB No. 834, 849-50 (1987).

Ashford TRS Nickel also affirmed the “sufficient control” rule. In *Ashford TRS Nickel*, a union alleged that a third party violated Section 8(a)(1) when it filed and maintained a lawsuit in federal court and claimed that the union engaged in defamatory statements and tortious interference related to the union’s boycott of the third party’s hotel. *Id.* The third party owned a hotel that the employer operated pursuant to a managing agreement between the two parties. *Id.* The third party was also the operating lessee of the hotel. *Id.* The managing agreement required that the employer was required to consult with the third party in matters of policy concerning management, sales, room rates, wage scales, personnel, general overall operating procedures, economics and operations. *Id.* The Board found that “Here, as in *Fabric Services*, ... sufficient control is met because Respondent owns the Hotel that [the employer] is operating per their Management Agreement.” *Id.* Indeed, the Board entitled the discussion in the case addressing the third party’s interference violation “Respondent can be held liable under Section 8(a)(1) because of its control over the employees [sic] of Sheraton Anchorage Hotel.” *Id.* (emphasis in original).¹²

Here, the Foundation does not possess sufficient control over IPs that would trigger liability under PECBA. Indeed, the Foundation lacks *any*

¹² Notably, SEIU’s law firm in this PRA case represented the union in that unfair labor practice case.

control over IPs whatsoever. It does not own or maintain the premises where IPs gather for contracting, safety and orientation classes, or any other place of IP work. *See Fabric Services*. The Foundation does not have the power to remove IPs from contracting, safety or orientation classes, or any other location pertaining to IP work. *See Fabric Services, Scott Hudgens*. DSHS does not, in any way, report to or consult with the Foundation. *See Ashford TRS Nickel*. SEIU has failed to cite any evidence whatsoever pointing to any control that the Foundation exercises over IPs. Without *any* control, let alone sufficient control, the Foundation cannot be liable for violating PECBA, nor can DSHS by proxy.

3. SEIU fails to meet its burden in proving that disclosure would clearly not be in the public interest.

Even if SEIU shows that an exemption applies, it still did not meet its burden in showing that disclosure would not be in the public interest. It fails its burden for several reasons.

First, it failed to provide any reference to this prong at all in the entirety of its brief. It thus facially fails to meet its burden in obtaining and injunction under the PRA.

Second, it is undisputed that disclosure of the records at issue will result in the Foundation informing IPs of their constitutional rights to choose whether or not to leave the union. Simply put, disclosure will result in more

people learning about their constitutional rights. It is no wonder SEIU failed to proffer any arguments under this prong because any such arguments would be absurd. Informing people about their constitutional rights cannot, in any way, be construed as antithetical to the public interest, especially when SEIU has established a record of misinforming providers about their constitutional rights. *See* CP 233-45; 249-51. Instead, it lies squarely within the public interest.

Third, contracting, safety, and orientation schedules run by the state for publicly funded IPs involves the expenditure of public funds because these trainings are paid for by the State. The expenditure of public funds also lies squarely within the public interest. *See Belo Management Services, Inc. v. ClickA Network*, 184 Wn. App. 649, 343 P.3d 370 (2014). *Belo Management Services* is instructive:

Tacoma News asserts that the broadcasters failed to demonstrate that disclosure would clearly not be in the public's interest. We agree. Tacoma News persuasively argues that the public has a right to know how Click!, a city-owned enterprise, is spending public funds. The PRA broadly mandates in favor of disclosure: The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. RCW

42.56.030. The broadcasters' contrary arguments confuse the public with Click! and its customers. The affidavit from Click!'s general manager alleges public harm in the form of increased cable rates to its subscribers, but not all people who subscribe to cable. Disclosure in this instance is in the public's interest because the information involves expenditure of public funds.

Id., 184 Wn. App. at 661-62. Just like in *Belo Management Services*, the records at issue involve the expenditure of public funds. SEIU has not, and cannot, argue that disclosure of publicly funded contracting, orientation, and safety schedules, attended by publicly paid quasi-public employees, is “clearly not in the public interest.” *See Belo*, 184 Wn. App. at 661 (citing *Morgan v. City of Federal Way*, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009)).

4. SEIU fails to meet its burden in proving that disclosure would substantially and irreparably harm SEIU or a vital government function.

Finally, SEIU cannot claim that the Foundation’s efforts to inform people of their constitutional rights would substantially and irreparably harm SEIU. A party seeking to enjoin the disclosure of public records must not only prove an exemption applies, and that disclosure would clearly not be in the public interest, but also that it would “substantially and irreparably damage any person, or...vital government functions.” *Belo*, 184 Wn. App. at 661. A party does not show the requisite irreparable damage by mere assertive speculations. *Id.*

Here, SEIU speculates about two potential harms: i) the disclosure of the records at issue violates RCW 41.56.010, which protects *employees* right to organize (notably, not the union’s interest in having employees organized), and ii) disclosure would result in the loss of SEIU’s members and revenue. SEIU’s allegations of harm are meritless.

First, regarding both allegations of harm, an agency’s conduct in complying with the law is not only categorically precluded from qualifying as a harm (by virtue of the legislature mandating it), it is *required*.

Second, regarding both allegations of harm, informing people of their constitutional rights cannot qualify as a harm. Quite the opposite. Instead, it is a matter of political speech. In another PRA case between the Foundation and SEIU, this Court noted: “Notifying individuals of their constitutional rights does not directly involve the generation of revenue or financial benefit. As the trial court noted, this purpose appears to be political rather than commercial.”. *SEIU Healthcare 775NW v. State, Dept. of Soc. & Health Services*, 193 Wn. App. 377, ___ P.3d ___ (2016). As political speech, it is one of the most highly protected forms of speech. *See Collier v. City of Tacoma*, 121 Wn.2d 737, 746, 854 P.2d 1046 (1993) (“Wherever the extreme perimeters of protected speech may lie, it is clear the First Amendment protects political speech, giving it greater protection over other forms of speech.”) (internal citations omitted).

Third, regarding the first allegation of harm, disclosure of the records in no way violates PECBA or otherwise constitutes unlawful interference. *See supra*. Without any harmful cause, there is no harmful effect.

Fourth, regarding the first allegation of harm, even if disclosure did constitute a harm—which it absolutely does not in this case—the harm would be against the *employee*, not the union. PECBA, and RCW 41.56.040 specifically, only protects employees rights:

41.56.040. Right of *employees* to organize and designate representatives without interference.

No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate *against any public employee or group of public employees* in the free exercise of *their right* to organize and designate representatives of *their own choosing* for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

RCW 41.56.040 (emphasis added). SEIU did not bring this lawsuit under associational standing on behalf of providers. SEIU brought this lawsuit in its own name. That PECBA exists to protect employees rights, and not the unions as SEIU erroneously claims, is bolstered by the fact PECBA specifically includes a provision outlining unfair labor practices committed by *unions*:

41.56.150. Unfair labor practices *for bargaining representative enumerate*. It shall be an unfair labor practice *for a bargaining representative*: (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter; (2) To induce the public

employer to commit an unfair labor practice; (3) To discriminate against a public employee who has filed an unfair labor practice charge; (4) To refuse to engage in collective bargaining.

RCW 41.56.150 (emphasis added). SEIU cannot claim to be harmed when the harm discussed in the statute would only apply to employees.

VI. CONCLUSION

For the foregoing reasons, this Court should uphold the trial court's decision to deny a preliminary and permanent injunction.

RESPECTFULLY SUBMITTED this day 6th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 6, 2016, I filed with the Court by E-filing and I served by e-mail the foregoing document and this certificate of service on:

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Dated this 6th day of September, 2016, at Seattle, Washington.

Kirsten Nelsen

FREEDOM FOUNDATION

September 06, 2016 - 4:54 PM

Transmittal Letter

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