

No. 95262-1

No. 49224-5-II

(Thurston County Superior Court Nos. 16-2-01547-34, 16-2-01573-34,
16-2-01826-34, 16-2-01875-34, 16-2-01749-34)

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

WASHINGTON PUBLIC EMPLOYEES ASSOC. et al.,
Appellants/Plaintiffs,

v.

STATE OF WASHINGTON et al.,
Respondents/Defendants,

and

FREEDOM FOUNDATION,
Respondent/Defendant.

APPELLANTS' OPENING BRIEF

Counsel for Appellants/Plaintiffs

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I. INTRODUCTION

Unions representing thousands of Washington State employees seek an order remanding this case for entry of an order enjoining release to the Freedom Foundation of those employees' dates of birth coupled with their names, and a ruling that the trial court erred in not enjoining the release of the work email addresses of those employees. The sensitive birthdate information, coupled with names, as well as work email addresses are exempt from disclosure under the Public Records Act, Ch. RCW 42.56. On this record, the failure to enjoin disclosure of work email addresses to the Foundation was in error, as those emails addresses were also exempt from disclosure.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in failing to permanently enjoin the State Agencies from disclosing the requested names, dates of birth, and work email addresses of state employees represented by the Unions to the Foundation?

2. Did the trial court err in failing to permanently enjoin DSHS from disclosing to the Foundation the month and year of birth of SEIU 1199NW-represented employees employed at certain DSHS facilities?

III. STATEMENT OF THE CASE

A. The Freedom Foundation's Request

The Freedom Foundation (“Foundation”) requested under the Public Records Act, RCW 42.56 (“PRA”) that Washington State Agencies named as Defendants herein (collectively “the Agencies”) provide it with “[t]he first name, last name, middle initial, birthdate and work email address of every current ... employee” represented by Teamsters Local Union No. 117 (“Local 117”), Washington Federation of State Employees (“WFSE”), International Brotherhood of Electrical Workers Local 76 (“Local 76”), United Association Local 32 (“Local 32”), Washington Public Employees Association Local 365 (“WPEA”), Professional & Technical Employees Local 17 (“PTE Local 17”), and Service Employees International Union Healthcare 1199NW (“SEIU 1199NW”) (collectively “the Unions”).

B. The Employees' Alarm at Potential Disclosure

In April of 2016, public employees represented by the Unions received notice that their public employer would release their date of birth connected with their exact name, along with their work email addresses, to the Foundation unless a court order prevented that from occurring. Stanford Dec. ¶¶2, 3, Ex. A, CP 1579-1580, 1582-1642; McGee Dec. ¶¶2, 3, CP 1304; Kite Dec. Ex. A, CP 1557-1558, 1561-1562; Myers Dec. Ex.

A, CP 1693-1694, 1696-1698; Magee Dec. Ex. A. CP 1700, 1703-1716; Sims Dec. Ex. A, CP 1687-1688, 1690-1692; Burnham Dec. ¶3, CP 2808-2809, 2812-2817; Woodrow Dec., ¶5, CP 115-116; Hopkins Dec. ¶4, Ex. A, CP 3655-3656, 3660-3662. “With this information, the Freedom Foundation can use the services of commercial vendors who can use data mining techniques to provide residential contact information.” Devereux Dec. ¶8, CP 1885.¹

Upon learning of the Foundation’s request, the employees were alarmed about their personal privacy and about the potential for identity theft and resulting financial problems. Stanford Dec. ¶5, CP 1580-1581; McGee Dec. ¶5, CP 1305; Kite Dec. ¶5, CP 1558-1559 (“this information could be used to wreck my credit, work record, and good name.”); Voss Dec ¶¶3, 4, CP 556-557 (“this information could be used to access my retirement account and my health care information”); Walters Dec. ¶¶3, 5, CP 1565-1566 (“The release of my exact name and date of birth contributes to the likelihood that my identity will be stolen again and used for fraudulent purposes. Fraudulent actors could use this information to submit for tax refunds, and credit cards. The release of my name linked to my date of birth could facilitate this identity theft. ... I don’t trust the

¹ When citing to the Clerk’s Papers, the Unions will cite to the earliest numbered occurrence of a particular document. The same documents were filed in all five trial court cases, which were consolidated in the above-captioned matter.

Freedom Foundation or any other organization, and I don't know what they would do with my personal information."); Thome Dec. ¶5, CP 1718 ("that information could be used to access much of my personal information, including: credit card numbers, credit reports, bank accounts, and insurance records, and other financial and personal records, all of which would otherwise not be accessible."); Magee Dec. ¶6, CP 1701 ("The release of my personal information, increases the likelihood that my identity will be stolen by a member of the public. I don't want this personal information to be circulating in a stranger's hands."); *id.* at ¶7 ("I am also concerned about the privacy of my members. I am concerned that members' identities will also be stolen, or that someone can use this information to ruin their reputation. The release of all of their personal information to a third party also places them at risk for identity theft and fraud."); Myers Dec. ¶6, CP 1694 ("I want to preserve the confidentiality of my private information, because I believe that the release of this information puts me at risk of identity theft and fraud."); Simms Dec. ¶5, CP 1688 ("I was upset that my personal information would be released, because this disclosure will increase the risk of my identity being compromised. My identity has been compromised in the past, when someone tried to use my credit card. Since this incident, I have become very protective of my private information. I purchase credit monitoring, I

frequently check my credit card statements, and I don't give out my personal information to anybody. I am very selective about who gets to see my information.); Henricksen Dec. ¶¶5, 6, CP 1882, ("used to destroy my credit, and steal my identity. This information could be used to commit fraud. My name and birthdate could be used to ask for tax refunds, credit cards, accessing my bank accounts, getting my credit reports, and medical records."); Gagnon Dec. ¶3, 4, CP 3725-3726 ("I could be harassed, threatened, or even harmed" if this information is disclosed); Hopkins Dec. ¶15, CP 3658-3659 (employees concerned about identity theft and personal safety); McBride Dec. ¶¶4, 5, CP 3714-3715 (concerns about "personal safety" and access to financial information); Wood Dec. ¶¶6, 7, CP 3720 ("absolutely stunned ... and frightened" for personal safety and identity that this information might be disclosed); *id.* at ¶7 ("I am really afraid of identity theft."); Shelman Dec. ¶6, CP 4175 ("I do not want my name with my date of birth released."); Statler Dec. ¶11, CP 4172 ("It is concerning to me that my name and date of birth could be released, because it could be used to find out my home address and contact information.").

Among the Unions' bargaining unit members who are subject to the record request, high percentages are also union members in addition to being bargaining unit members. *See, e.g.*, Stanford Dec. ¶4, CP 1580;

McGee Dec. ¶4, CP 1305; Magdalena Dec. ¶3, CP 4111. Many Union members are concerned that the release of their dates of birth linked to their names will allow the Foundation to target them with harassment because of their voluntary association as members of a public sector union. Stanford Dec. ¶5, CP 1580-81; McGee Dec. ¶5, CP 1305; Kite Dec. ¶7, CP 1559 (“I know little to nothing about the Freedom Foundation, except they hate workers like me who choose union representation. I am afraid that once the Freedom Foundation has obtained my name and birthdate they will be able to target me with their hate mail. And I don’t trust that that is all they will do with the information about me that they receive from my employer.”); Thome Dec. ¶6, CP 1719 (“I value my membership in WPEA because together we are able to continue the great work of unions in creating a fair deal for workers and our public employer. I am afraid that once the Freedom Foundation has obtained my name and birthdate they will bombard me with harassing mail, phone calls and may come to my home to belittle my choice to be a union member.”); Myers Dec. ¶7, CP 1694 (“I also don’t want my personal information to be released, because I don’t want to be solicited by the Freedom Foundation. I am not interested in anything that they have to say. I don’t want anybody intervening in the relationship between me and my union. I want the Union to be able to do its job, and to be free of obstacles in performing

its job – representing me. The release of my personal information would allow the Freedom Foundation to target me with its anti-union message, and would compromise my ability to associate with the Union that represents me.”); Simms Dec. ¶7, CP 1688 (“If Freedom Foundation were to receive my private information, they could use this information to find my personal home address and attempt to visit and solicit me at my home. I don’t want the Freedom Foundation to communicate with me under any circumstances. If I want to talk with them, I know where to find them. I don’t want them coming to my house to harass me.”).

The Foundation is well known for its hostility to public sector workers associating in unions and for harassing individual union members. Stanford Dec. ¶5, CP 1581; McGee Dec. ¶5, CP 1305. Once it obtains information about individual union members it contacts them directly in multiple ways to inveigh against union membership. 2nd Barnard Dec. Ex. A, p. 2, CP 1660. Just recently, the Foundation’s CEO outlined in a solicitation to donors how, once it obtains enough information to locate them, the Foundation approaches public sector union members, including through door-to-door home visits, email, phone calls, and letters, to express that hostility. Stanford Dec., Ex. B., pp. 3, 5, CP 1646, 1648.

The Foundation has also established a state-wide operation in which its representatives approach union members in their homes to

denigrate their choice to associate in their unions. Stanford Dec. Ex. B, p. 3, CP 1646. The Foundation uses this widespread effort to dissuade members and potential members from associating together in unions as a tool to solicit funds for its operations. 2nd Barnard Dec. Ex. A, pp. 3-4, CP 1661-62, Ex. B, CP 1664; Stanford Dec. Ex. B, p. 3, CP 1646. The Foundation intends to expand its efforts to approach union members in their homes as well as by phone, email and letters, an effort greatly aided by obtaining information through requests such as the one at issue here. *Id.*; 2nd Barnard Dec. Ex. B, CP 1664. The Foundation has already targeted over 12,000 of one union's members in their own homes and is beginning the same campaign at the homes of 1,000 members of another union. *Id.* It is in the process of contacting 80,000 teachers represented by Washington Education Association to belittle their choice to associate as a union. Stanford Dec. Ex. B, p. 5, CP 1648.

Given the declared intentions and past actions of the Foundation, the fear of WPEA and PTE members that they will be the next group subjected to this hostile targeting is demonstrably reasonable. Simms Dec. ¶6, CP 1688 (“I don’t want to give my personal information to the Freedom Foundation, because I don’t want to be harassed by them.”); Kite Dec. ¶7, CP 1559 (“I know little to nothing about the Freedom Foundation, except they hate workers like me who choose union

representation. I am afraid that once the Freedom Foundation has obtained my name and birthdate they will be able to target me with their hate mail.”); Thome Dec. ¶6, CP 1719 (“I am afraid that once the Freedom Foundation has obtained my name and birthdate they will bombard me with harassing mail, phone calls and may come to my home to belittle my choice to be a union member.”); Magee Dec. ¶11, CP 1702 (“I don’t want any of my personal information to be released to the Freedom Foundation, because I don’t want to be solicited by them. I know that the Freedom Foundation has used similar requests for information to target SEIU members, and state teachers. I don’t want to be targeted and harassed at my home, or through my home phone number.”); Myers Dec. ¶5, CP 1694 (“I was angry when I received this email, because I am familiar with the Freedom Foundation. I know that they are right wing organization that hides behind the moniker of ‘freedom.’ They are anti-union, and are trying to bankrupt public sector unions. I am barely politically involved, but I read a lot about what the Freedom Foundation is doing to push its agenda across the state, and harass union members.”).

C. The Commercial Purpose for the Foundation’s Request.

The Unions are labor organizations representing state employees across Washington State. The relationship between the Unions and the State is governed by the terms of their respective collective bargaining

agreements as well as applicable statutes, including RCW 41.06 and RCW 41.80. *See, e.g.*, Woodrow Dec. at ¶4, CP 116; Hopkins Dec. ¶3, CP 3656.

The Foundation is a Washington State organization opposed to the goals of the Unions. The Foundation regularly publicizes its goal to “weaken,” “defund” and “bankrupt” public sector unions and the efforts it takes to attempt to accomplish that goal. Iglitzin Dec., ¶2, Ex. A, CP 31, 36-39.

The Foundation fundraises by advertising its mission to economically cripple unions and by announcing the details of steps it has taken or will take to “defund” and “bankrupt” public sector unions. Iglitzin Dec., ¶¶3-4, Exs. B, C, CP 32, 40-47. The Foundation even used state employees’ negative reaction to its request for birthdates to attempt to generate donations on its website. Devereux Dec., ¶10, CP 1886, Att. 2, CP 1892.

The Foundation’s efforts to diminish the membership and financial resources of public-sector unions are not restricted to mailings or websites—it also boasts about its door-to-door outreach to union members to attempt to negatively influence their perspectives about their collective bargaining representatives, and believes that these door-to-door efforts are crucial in achieving their goals. Iglitzin Dec., ¶¶7-9, Exs. F-H, CP 32-33, 61-73 The Foundation has a demonstrated pattern of obtaining personal

information regarding public employees represented by unions through the PRA, using that information to contact employees for the purpose of subjecting them to anti-union propaganda, which employees find offensive but are powerless to stop. Devereaux Dec., ¶¶8-9, CP 1885-86. In other words, the Foundation’s mission explicitly relies on contacting members (or potential members) of the Unions wherever they may be, in order to discredit, disparage, and undermine the Unions.

Ultimately, the Foundation’s representatives have made it clear that any results obtained from its attack on public sector unions is a key piece of “leverage,” especially with respect to obtaining contact information for union-represented employees for its outreach activities—leverage to be used to get “more donations” to fund the Foundation. Iglitzin Dec., ¶9, Ex. I, CP 33, 74-76.

D. Prior Proceedings

In the lower court the Unions sought, but failed to obtain, a permanent injunction prohibiting the Agencies from providing the information to the Foundation. CP 2777-2781. The lower court did not enjoin release of the work emails, and they were disclosed. A commissioner of this Court, noting that we are in an “era of cybercrime and the use of dates of birth as identity verification,” enjoined release of employees’ birth dates pending appeal.

IV. ARGUMENT

A. The Standard Of Review Is *De Novo*.

This Court reviews lower court PRA orders *de novo*. RCW 42.56.550(3); *West v. Thurston County*, 169 Wn. App. 862, 865, 282 P.3d 1150 (2012). This Court reviews “the application of a claimed statutory exemption without regard to any exercise of discretion by the agency.” *Newman v. King County*, 133 Wn.2d 565, 571, 947 P.2d 712 (1997).

B. This Court Should Remand For Entry Of An Order Granting A Permanent Injunction Because The Unions Have Shown Clear Legal Or Equitable Rights, A Well-Founded Fear Of Immediate Invasion Of Those Rights, And That Disclosure Of The Requested Information Will Result In Actual And Substantial Injury.

In order to obtain an injunction, a plaintiff must show that: (1) she has a clear legal or equitable right; (2) that she has a well-founded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to her. *Kucera v. State, Dept. of Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). These criteria are evaluated by balancing the relative interests of the parties and, if appropriate, the interests of the public. *Id.* A third party is entitled to a permanent injunction pursuant to RCW 42.56.540 to prevent an agency from disclosing records where, as here, it establishes: “(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.” *Ameritrust Mortgage Co. v. Office of Attorney Gen. of Wash.*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013).

Here, the requested documents specifically pertain to the Unions. Additionally, several exemptions to disclosure apply to the information requested, and the disclosure would constitute two separate violations of Washington State laws under this set of circumstances, as explained *infra*. Finally, the disclosure would not be in the public interest, as it would substantially and irreparably harm the Unions’ members.

C. RCW 42.56.230(3) Exempts The Dates Of Birth Sought By The Foundation Because That Is Personal Information Related To Individual Public Employees, The Disclosure Of Which Would Be Highly Offensive To A Reasonable Person, And There Is No Legitimate Concern Of The Public In Employees’ Dates Of Birth.

RCW 42.56.230(3) exempts from disclosure “[p]ersonal information in files maintained for employees ... of any public agency to the extent that disclosure would violate their right to privacy.” A public agency employee’s right of privacy is “violated only if disclosure of [personal] information about the person: (1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.56.050. *See also Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 904-05, 346 P.3d 737 (2015).

Names and dates of birth are personal information. *Predisik*, 182 Wn.2d at 903-04 (names are personal information); *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 411-12, 413 n. 10 (2011) (personal information is “information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general”; and employee’s name connected to an unsubstantiated allegation of misconduct “does not bear on the [employee’s] performance or activities as a public servant.”) (*quoting Bellevue v. John Does*, 164 Wn.2d 199, 215, 189 P.3d 139 (2008)).

Disclosure of a person’s date of birth in conjunction with the person’s name would be highly offensive to a reasonable person. *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357, *remanded on other grounds*, 136 Wn.2d 1030, 972 P.2d 101 (1998), *and amended*, 972 P.2d 932 (1999) (analyzing predecessor to RCW 42.56.230(3)) (release of employee identification numbers coupled with their names would be highly offensive and an invasion of privacy because it would lead to scrutiny of the employees unrelated to the employees’ conduct of public business). *See also* the Arizona Supreme Court in *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 302, 955 P.2d 534 (1998) (Upholding several school districts’ refusal to disclose teachers’ birth dates under the state public records law when they were requested by a news agency for purposes of conducting

criminal background checks, and recognizing the teachers' privacy interest in their birth dates, in part because that information, when combined with other individualized information, can lead to discovery of a whole host of highly personal information.); *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 365 (5th Cir. 2001) ("The privacy concern at issue ... is that the simultaneous disclosure of an individual's name and confidential [Social Security Number] exposes that individual to a heightened risk of identity theft and other forms of fraud.").

Here, the employees reasonably would be, and many are, offended by the prospect of release of their dates of birth linked to their names because in the current state of the world a birthdate is sensitive information that every reasonable person keeps away from strangers. The declarations in the record highlight the Union bargaining members' rational concerns over identity theft, fraud, and other scenarios resulting from the disclosure of names along with dates of birth. As established by the record, once the information is "public" there is no assurance that it will not be used for other improper purposes. Advances in technology have made a person's privacy interest in their birthdate even more significant and necessary.

The application of the exemption also turns on whether the concern of the public is legitimate, that is, whether it is "reasonable." *Dawson v. Daly*, 120 Wn.2d 782, 798, 845 P.2d 995 (1993). Public employees' dates of birth

have no reasonable bearing on the conduct of the public's business, and the public has no legitimate interest in the birthdate of any particular person; therefore, there is no legitimate public concern that prevents application of the exemption. *Cf., Planned Parenthood of Great NW. v. Bloedow*, 187 Wn. App. 606, 628, 350 P.3d 660 (2015) (public has no legitimate interest in the health care or pregnancy history of any individual woman).

Thus, under RCW 42.56.540, this Court should remand for entry of an injunction prohibiting release of employee dates of birth in connection with employee names because production "would clearly not be in the public interest and would substantially and irreparably damage" the Unions' bargaining unit members. *Bainbridge Island Police Guild*, 172 Wn.2d at 420.

D. Article I, Section 7, Of The Washington Constitution Prohibits Disclosure Of Employees' Dates Of Birth.

While the Court should rule that the requested information is exempt as a statutory matter, exemption is also required by Article 1, Section 7, of the Washington State Constitution. The lower court erroneously held that the Washington Supreme Court's decision in *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 884, 357 P.3d 45 (2015), foreclosed the possibility of any constitutional right of privacy in information contained in a public record. July 29, 2016, VRP, Tr. 21:4-21. However; the *Nissen* Court did not so hold, as that interpretation would render RCW 42.56.050 unconstitutional, as recognized

by the *Nissen* Court itself. 183 Wn.2d 863 at 884, 357 P.3d 45 (“Of course, the public’s statutory right to public records does not extinguish an individual’s constitutional rights in private information.”). *Nissen* held only that there is no privacy interest under the Fourth Amendment to the U.S. Constitution or under Article 1, Section 7, of the Washington Constitution protecting public employees from a search of their personal devices to obtain records “*unrelated to any acts done by them in their public capacity.*” *Nissen*, 183 Wn. 2d at 884, n.10, 357 P.3d at 56 (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (emphasis is the Washington Supreme Court’s)).²

Obviously, privacy interests in information contained in public records have been recognized by the Legislature, whether the information is specifically listed in RCW 42.56.230(3) or encompassed in the “other statute” exemption of RCW § 42.56.070(1).³ Constitutional restrictions on the right to

² *Nissen* concerned the constitutionality of a search for complete documents that may be public records among other documents that may not be public records, not whether there may be constitutional privacy rights in some information contained in the public record. The court specifically stated that once the public records were segregated from the nonpublic record documents, the county should then review the records for redaction of exempt material. *Nissen*, 183 Wn.2d at, 888, 357 P.3d 45, 58 (2015) (“The County must then review those messages—just as it would any other public record—and apply any applicable exemptions, redact information if necessary ...”).

³³ RCW § 42.56.070(1) provides:

Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or **other statute** which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected

public records fall under this "other statute" exemption. *See, e.g., Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013) (The separation of powers in the Washington Constitution creates a qualified gubernatorial communications privilege that functions as an exemption to the Public Records Act); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 595, 243 P.3d 919 (2010) (the "protection of an individual's constitutional fair trial rights" creates an exemption); *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768, 808 (2011) (The Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution are incorporated as exemptions under the "other statute" exemption); *Roe v. Anderson*, No. 3:14-CV-05810 RBL, 2015 WL 4724739, at *2 (W.D. Wash. Aug. 10, 2015). ("[T]he [PRA] itself recognizes and respects other laws (including constitutional provisions) that mandate privacy or confidentiality.") (quoting the State of Washington's brief and stating that "[t]he State is correct").

Thus the PRA must be interpreted in a manner consistent with the court's obligation to protect public employees' constitutional right of privacy in their birth date information. Article I, Section 7, of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs,

by this chapter, an agency shall delete identifying details in a manner consistent with this chapter[.]

(emphasis added)

or his home invaded, without authority of law.” “This provision of our state constitution is explicitly broader than the Fourth Amendment to the United States Constitution... .” *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). Interference with this broad right to privacy is permissible only insofar as is *reasonably necessary* to further substantial governmental interests that justify the intrusion. *Id.* (emphasis added). Under Article 1, Section 7, courts must look to the nature and extent of the information that may be obtained as a result of the government conduct and at the historical treatment of the interest asserted. *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014). A central consideration is the nature of the information sought, and whether the information reveals intimate or discrete details of a person’s life. *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997 (2012), *rev. denied*, 174 Wn.2d 1004 (2012).

A birth date is a discrete detail of a person’s life that is understood to be shared selectively by that person so that the harms detailed in the Unions’ members’ declarations do not come to pass. *See* 3rd Barnard Dec. Ex. D, CP 1779-90 at 1781 (Michelle N.M. Latta, *Governor’s Office of Administration v. Purcell: Clarifying the Personal Security Exception*, 22 Widener L.J. 403, 419-411 (2013)) (“full **names**, combined with addresses and **dates of birth**, were the tools criminals could use to obtain financial information”); Ex. E, CP 1792-1828 at 1805 (Daniel J. Solove, *Identity Theft, Privacy, and the*

Architecture of Vulnerability, 54 Hastings L.J. 1227, 1254 (2003) (“Public record systems can reveal a panoply of personal information, which can be aggregated and combined with other data to construct what amounts to a ‘digital biography’ about a person.”).

E. Agency Disclosure Of The Requested Documents Would Violate The PRA’s Prohibition On Disclosure Of Public Records For Commercial Purposes.

The requested documentation, if disclosed, would violate the PRA because the request is for a commercial purpose, which is prohibited under RCW 42.56.070(9). RCW 42.56 “*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.” *Id.* (emphasis added). Commercial purposes include “a business activity by any form of business enterprise intended to generate revenue or financial benefit.” *SEIU Healthcare 775NW v. State of Washington*, 193 Wn. App. 377, 377 P.3d 214 (2016).

In contrast to the various exemptions set forth in RCW 42.56.210-.480 and RCW 42.56.600- .610 of the PRA from the otherwise broad mandate that the government release public records, RCW 42.56.070(9) establishes a *categorical prohibition* against disclosing lists of individuals (“agencies...**shall not do so...**”) where such list is “requested for

commercial purposes.” RCW 42.56.070(9) (emphasis added).

Because RCW 42.56.070(9) absolutely prohibits disclosure—and does not merely *exempt* certain documents from an affirmative obligation to disclose—the statute cannot be read within the usual narrow construction framework that applies to PRA exemptions generally. RCW 42.56.030 (“exemptions” are to be “narrowly construed”). The PRA elsewhere distinguishes between “exemptions” and “prohibitions,” indicating the terms have different meanings. *E.g.*, RCW 42.56.070(1) (“Each agency...shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions...of this section, this chapter, or other statute which *exempts or prohibits* disclosure of specific information or records.”) (emphasis added). The use of different terms within the same statute implicates the “basic rule of statutory construction that the legislature intends different terms used within an individual statute to have different meanings.” *State v. Tracer*, 173 Wn.2d 708, 718, 272 P.3d 199 (2012).⁴

⁴ To interpret this provision differently does a serious injustice to the will of the people in enacting Initiative Measure 276, which was “approved and enacted into law by a substantial majority of the electorate at the general election in November 1972.” *Fritz v. Gorton*, 83 Wn.2d 275, 277, 517 P.2d 911 (1974). That is because although this law has been repeatedly amended by the Legislature, the provision of the law that is at issue here, the commercial purposes prohibition, existed at its inception. *See* Laws of 1973, c. 1, § 26, subsection 5, which provided simply, “[t]his act shall not be construed as giving any 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.” The importance of this provision, and the need to properly construe and apply it, must be given its

In *SEIU Healthcare 775NW*, the Court of Appeals held that the Foundation’s request for a list of SEIU 775-represented employees was *not* exempt under RCW 42.56’s commercial purposes exemption, “expressly based on the Foundation’s repeated representations” that it was not making use of the list to attempt to solicit money or financial support from the individual providers, *and* that the connection between the request and the Foundation’s fundraising was “too attenuated” in the record before it. However, the record before the court in that case did *not* contain statements made by the Foundation about directly “leverag[ing]” results obtained from its PRA requests to get “more donations” in making its determination, unlike the record before the trial court here. CP 33, 74-76. The record before the trial court here sets this case apart from that presented to the *SEIU 775* court.

Here, the Foundation’s anticipated benefits from obtaining this information cannot be considered “remote and ephemeral” or “indirect.”⁵

duc. Even the “Statement for” Initiative 276 which appeared in the State of Washington’s voter’s guide prior to the election reassured voters that “[c]ertain records are exempted *to protect individual privacy* and to safeguard essential governmental functions.” See, https://archive.org/stream/810223-1972-initiative-no-276/810223-1972-initiative-no-276_djvu.txt (second page).

⁵ The Foundation repeatedly asserted before the trial court that the entirety of the Court’s quote changes this argument. It reads, in its entirety: “Where the requester’s potential commercial benefit is *remote and ephemeral* and there is a clear purpose other than commercial benefit, the statute does not prohibit supplying the information in list form.” The second clause of the sentence (which, given the use of “and,” *only* applies where the benefit is remote and ephemeral) does not apply here where the benefit to the Foundation is direct.

The Foundation will link state employees to the Foundation’s website, which requests donations. Iglitzin Dec., ¶4, Ex. C, CP 32, 45-47 and Devereux Dec. ¶10, CP 1886, and Att. 2, CP 1892. Furthermore, its representatives have *publicly* stated that it will “leverage” the results of getting lists of public sector union members’ names *directly* into getting “more donations” to fund the Foundation’s anti-union crusade. *Id.* at ¶10, Ex. I, CP 33, 74-76. Disclosure cannot be permitted here to enable the Foundation to fulfill its commercial purpose.

F. RCW 42.56.230(7)(A), Which Exempts Records Of An Individual’s Age, Exempts An Individual’s Date Of Birth From Disclosure.

The Legislature has crafted exemptions to disclosure that are “narrowly tailored to specific situations in which privacy rights or vital governmental interests require protection.” *City of Lakewood v. Koenig*, 182 Wn.2d 87, 93-94, 343 P.3d 335 (2014) (*quoting Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 434, 327 P.3d 600 (2013)).⁶ Included in the list of private personal information exempt from disclosure is: “[a]ny record used to prove identity, *age*, residential address, social security number, or other personal information required to apply for a driver’s license or identicard.”

given that the Foundation’s own spokespeople boast about how it can leverage its requests for additional donations.

⁶ The city redacted witness and victim dates of birth because it said that “the date of birth together with a name has the potential to link a particular individual with a particular identity thus creating the potential to endanger an individual's life, physical safety or property.” This is also a legitimate concern of employees as reflected in the declarations on file.

RCW 42.56.230(7)(a) (emphasis added). A record of a person's date of birth is, therefore, a record of their age, exempt from disclosure by this statutory provision.⁷

While RCW 42.56.230(7)(a) has not been interpreted by the courts, the exemption of records of an individual's age (including birth date) is consistent with other provisions in the PRA specifically making a person's birthdate exempt as a matter of personal, private information. RCW 42.56.250(3) exempts the birthday of a public employee's dependent. RCW 42.56.250(8) exempts the "month and year of birth in personnel files of employees and workers of criminal justice agencies." These statutes reflect that birthdates (age) are viewed by the Legislature as private personal information of no interest to the public and are therefore appropriate to exempt from public disclosure pursuant to RCW 42.56.230(7)(a).

The Foundation turns this argument on its head by arguing that although RCW 42.56.250(3) specifically exempts the date of birth of public employees' dependents, it fails to do so for employees themselves and had the Legislature intended to exempt the employee's birthdate, it would have said so. The simple

⁷ The Foundation has argued that a birthdate is not a record and therefore is not a record of age exempt from disclosure by RCW 42.56.230(7)(a). *FF Resp. in Opp.*, May 11, 2016 (*WFSE v FF*, No. 16-2-01749-34). Setting aside the fact that this request for information and not records is improper under the PRA, the State is ultimately obtaining the employees' date of birth from its records, likely from an employee's application for employment, itself an exempt record. "The following employment and licensing information is exempt from public inspection and copying under this chapter: (2) All applications for public employment..." RCW 42.56.250(2). By providing the list of employees and their birthdates, the State is creating a record of employees birthdates (ages) for the Foundation.

answer is that it did. Because RCW 42.56.230(7)(a) already makes a record of age exempt, there was no need for the Legislature to exempt employees' birthdates in RCW 42.56.250(3). Considering the statute in context with these other provisions, the Foundation does not suggest why the same information (birthdate) should not be exempt private information for the employees themselves or what public interest there is in the employees' birthdates.

Well-recognized canons of statutory construction clarify that the exemption in RCW 42.56.230(7)(a) for records of age was intended to exempt an individual's birthdate from disclosure as part of a release of public records.

Whenever we are tasked with interpreting the meaning and scope of a statute, "our fundamental objective is to determine and give effect to the intent of the legislature." *State v. Sweany*, 174 Wash.2d 909, 914, 281 P.3d 305 (2012) (citing *State v. Budik*, 173 Wash.2d 727, 733, 272 P.3d 816 (2012)). We look first to the plain language of the statute as "[t]he surest indication of legislative intent." *State v. Ervin*, 169 Wash.2d 815, 820, 239 P.3d 354 (2010). " '[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.' " *State v. Hirschfelder*, 170 Wash.2d 536, 543, 242 P.3d 876 (2010) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9–10, 43 P.3d 4 (2002)). We may determine a statute's plain language by looking to "the text of the statutory provision in question, as well as 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.' " *Ervin*, 169 Wash.2d at 820, 239 P.3d 354 (quoting *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005)).

State v. Larson, 184 Wn.2d 843, 848, 365 P.3d 740, 742 (2015).

The Foundation’s argument that the exemption is limited only to records used to obtain a driver’s license or identicard misreads the plain language of the statute.

The purpose of statutory interpretation is “to determine and give effect to the intent of the legislature.” *State v. Sweany*, 174 Wash. 2d 909, 914, 281 P.3d 305 (2012); *State v. J.P.*, 149 Wash. 2d 444, 450, 69 P.3d 318 (2003); *In re Pers. Restraint of Williams*, 121 Wash. 2d 655, 663, 853 P.2d 444 (1993). . . . ***We employ traditional rules of grammar to discern plain meaning.*** *State v. Jim*, 173 Wash. 2d 672, 689, 273 P.3d 434 (2012) (citing *State v. Bunker*, 169 Wash. 2d 571, 578, 238 P.3d 487 (2010)). [Emphasis added.]

Gray v. Suttell & Associates, 181 Wn.2d 329, 339, 334 P.3d 14 (2014). *Gray* considered a statute’s punctuation and structure in interpreting its meaning:

Here, the use of a comma and the disjunctive “or” to separate “soliciting claims for collection” and “collecting or attempting to collect claims owed or due or asserted to be owed or due another person” strongly suggests that there are two types of collection agencies. See *HJS Dev., Inc. v. Pierce County ex rel. Dep’t of Planning & Land Servs.*, 148 Wash. 2d 451, 473 n. 94, 61 P.3d 1141 (2003); *accord Riofta v. State*, 134 Wn. App. 669, 682, 142 P.3d 193 (2006) (“or” is disjunctive unless there is clear legislative intent to the contrary).

Id. at 339. “When a conjunction joins the last two elements in a series of three or more, a comma—known as the serial or series comma or the Oxford comma—should appear before the conjunction.” *The Chicago Manual of Style*, Sixteenth Edition, University of Chicago Press 2010 at Ch. 6.18.

The proper reading of RCW 42.56.230(7)(a), therefore, is a list of exempt records that prove various personal information. Proof of a person’s age

is but one of the listed exemptions. A person's birthdate, one of the most obvious means of establishing a person's age, is thus specifically made exempt from disclosure. The Court should not do as the Foundation suggests and rewrite the statute by removing records of age from the list of records specifically made exempt by RCW 42.56.230(7)(a).

G. The Month And Year Of Birth Of SEIU 1199NW-Represented Employees Who Work At State Psychiatric And Sex Offender Facilities Are Exempt From Disclosure Under RCW 42.56.250(8), Because Those Facilities Are Criminal Justice Agencies.

RCW 42.56.250(8) exempts from PRA disclosure “month and year of birth in the personnel files of employees and workers of criminal justice agencies as defined in RCW 10.97.030.” “Criminal justice agency” includes “a government agency which [1] performs the administration of criminal justice pursuant to a statute or executive order and [2] which allocates a substantial part of its annual budget to the administration of criminal justice.” RCW 10.97.030(5). “Subdivisions” of DSHS may be “criminal justice agencies.”⁸ Western State Hospital (“WSH”), Eastern State Hospital (“ESH”), the Child Study and Treatment Center (“CSTC”), and the Special Commitment Center (“SCC”) – where SEIU 1199NW-represented employees work – are criminal justice agencies under RCW 10.97.030(5). WSH and ESH

⁸ State Defendants have accepted that subdivisions of DSHS—including the Juvenile Rehabilitation Administration—can be criminal justice agencies. State Answer to SEIU 1199NW Complaint ¶4.21, CP 3731; State Response to SEIU 1199NW Motion for Preliminary Injunction, 3, CP 3745.

are State psychiatric hospitals that detain and treat individuals found not guilty by reason of insanity (“NGRI”), individuals undergoing competency evaluations after being charged with a crime, and civilly committed individuals. Hopkins Dec. ¶7, Exs. C, D, E, CP 3657, 3665-3675. CSTC preforms similar functions for children. Hopkins Dec. ¶8, Ex. E, CP 3657, 3671-3675. SCC provides mental health treatment for sexually violent predators. Hopkins Dec. ¶9, Ex. F, CP 3657, 3676-3678.

“‘The administration of criminal justice’ means performance of any of the following activities: Detection, apprehension, *detention*, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or *rehabilitation* of accused persons or criminal offenders.” RCW 10.97.030(1) (emphasis added). Further, WAC 446-20-050 provides that “[s]tate, county, or municipal agencies that have responsibility for the *detention*, pretrial release, post trial release, correctional supervision, or *rehabilitation* of accused persons or criminal offenders” are criminal justice agencies under RCW 10.97 *et seq.* (emphasis added). While RCW 10.97 *et seq.* has existed for years, RCW 42.56.250(8) was enacted in 2010. ESB 1317, 61st Leg., Regular Session (Wa. 2010). Its purpose was to prevent from disclosure personal information that could be used to locate employees of criminal justice agencies. *See, e.g.*, State of Wa. House of Representatives Bill Analysis, HB 1317, Regular Session (2010); State of Wa. House Bill Report, E2SHB 1317,

Regular Session, (2010) (summarizing public testimony that members of the public can and have used public records requests to locate employees of criminal justice agencies and their families).

The terms “detention” and “rehabilitation” are not defined in RCW 10.97.030. However, RCW 10.77.010(7) defines “detention” as “the lawful confinement of a person, under the provisions of this chapter, pending evaluation.” RCW 10.77 *et seq.* is part of the “Criminal Procedure” RCW title and provides procedures for “criminally insane” persons, including those who are not competent to stand trial in a criminal matter (*see, e.g.*, RCW 10.77.068, .073, .075, .078, .079) or who plead NGRI in a criminal case (*see* RCW 10.77.110). The NGRI provision specifically references NGRI individuals’ detention. *Id.* RCW 71.05.020(12), which in part addresses civil commitment, defines “[d]etention” or “detain” to mean “the lawful confinement of a person, under the provisions of this chapter.” For the terms not statutorily defined, dictionary definitions guide their meaning. *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 905, 949 P.2d 1291 (1997). “Rehabilitate” is defined as “to bring (someone or something) back to a normal, healthy condition after an illness, injury, drug problem, etc.” (<http://www.merriam-webster.com/dictionary/rehabilitate>, viewed 12/9/16). A definition of “substantial” is “large in amount, size, or number” (<http://www.merriam-webster.com/dictionary/substantial>, viewed 12/9/16).

WSH, ESH, CSTC, and SCC—where 1199NW-represented employees work—perform the administration of criminal justice pursuant to a statute or executive order. Statutes governing their “criminal justice administration” activities include: RCW 10.77 (WSH and ESH); RCW 71.05 (WSH and ESH); and RCW 71.09 (SCC). WSH and ESH detain and rehabilitate criminal offenders and accused persons and therefore perform the administration of criminal justice under RCW 10.97.030(1). Specifically, a court may order the detention at WSH and ESH of “criminal offenders”: people who are acquitted of a crime because they are NGRI. RCW 10.77.110(1). NGRI patients are also being rehabilitated. Magdalena Dec., ¶10, Ex. G, CP 4112, 4130 (WSH manual describing “biopsychosocial rehabilitation” of NGRI individuals). Likewise, individuals who are charged with crimes (“accused persons”) but whose competency is being evaluated and/or restored are both detained and rehabilitated at WSH and ESH. RCW 10.77.010(7) (“detention” is “lawful confinement...pending evaluation”). Attempts to restore an individual’s legal competency are clearly rehabilitation—bringing them back to a healthy condition. Finally, individuals who are civilly committed at WSH and ESH include those found legally incompetent to stand trial. Magdalena Dec., Ex. F, CP 4111, 4128; Statler Dec. ¶7, CP 4171. Those individuals are both detained (see RCW 71.05.020(12)) and being rehabilitated. WSH and ESH provide specific

descriptions of their rehabilitation and treatment services. Magdalena Dec. ¶¶4, 5, 10, 13, 14, Exs. A, B, G, J, K, CP 4111-12, 4114, 4116, 4130-31, 4141-51, 4153-60; Hopkins Dec. ¶7, Exs. C and D, CP 3657, 3665-3670. Detention activities are further evinced by the locked doors to gain access to WSH and ESH (Statler Dec. ¶9, CP 4171-72; Staples Dec. ¶4, CP 4177), and policies on ward lock-down, custody release, escape, and risk assessment. Magdalena Dec. ¶¶7, 8, 11, 12, Exs. D, E, H, I, CP 4122-23, 4125-26, 4133-36, 4138. Employees perform this criminal justice administration work on a daily basis. Staples Dec. ¶¶2-5, CP 4177; Shelman Dec. ¶¶2-5, CP 4174-75; Statler Dec. ¶¶2-9, CP 4170-72.

The CSTC for youth is a locked campus, includes a center for evaluating competence at the time of an offense, and provides psychiatric treatment (rehabilitation). Hopkins Dec. ¶8, Ex. E, CP 3657, 3671-3675. SCC detains and treats sexually violent predators, who are by definition criminal offenders, and maintains a “Sex Offender Treatment Program” (with a right to an annual review hearing to determine treatment progress), making rehabilitation a significant part of its work. Hopkins Dec. ¶9, Ex. F, CP 3657, 3676-3678.

Under WAC 446-20-050, responsibility for detention and rehabilitation activities alone makes WSH, ESH, CSTC, and SCC criminal justice agencies. Additionally, these subdivisions of DSHS allocate a

substantial portion of their annual budget to the administration of criminal justice, i.e., the detention and rehabilitation of criminal offenders and accused persons. WSH and ESH have a substantial number of Forensics beds (about 33 percent of beds at both WSH and ESH).⁹ Magdalena Dec. ¶¶4, 5, Exs. A, B, CP 4111, 4114, 4116. These beds are solely for patients from the criminal justice system, including those serving NGRI sentences and those whose legal competency to stand criminal trial is being evaluated and restored. Hopkins Dec. ¶7, Ex. D, CP 3657, 3668-3670; Magdalena Dec., Ex G, CP 4122, 4130-31. Additionally, accused persons are placed outside Forensics when they are civilly committed after being found legally incompetent to stand trial on criminal charges, meaning the population of criminal offenders and accused persons at WSH and ESH is larger than just Forensics. Statler Dec. ¶7, CP 4171. RNs in the civil wards perform work in Forensics. Statler Dec. ¶10, CP 4172. Thus, a “substantial”—i.e., large in size and number—portion of the WSH and ESH budgets must focus on detention and rehabilitation of criminal offenders. CSTC also provides forensic services. Hopkins Dec. ¶7, Ex. E, CP 3657, 3671-3675. Similarly, 100 percent or nearly 100 percent of the budget of SCC must be focused on detention and rehabilitation of sexual predators,

⁹ At WSH, 270 of the 827 beds are for Forensic patients. Magdalena Dec. ¶4, Ex. A, CP 4111, 4114. At ESH, 95 of the 287 beds are for forensic patients. Magdalena Dec. ¶5, Exs. B, CP 4111, 4116.

given that the SCC focuses on “rigorous treatment” leading to a possible annual review hearing. Hopkins Dec., Ex. F, CP 3657, 3676-3678.

Employees at WSH and ESH fear for their safety if their dates of birth, linked to names and work emails, were released, because they have credible worries about retribution from accused people and criminal offenders they have encountered in their work. Statler Dec. ¶11, CP 4172; Shelman Dec. ¶6, CP 4175; Staples Dec. ¶6, CP 4177; Third Kussmann Dec. ¶2 Ex. A, CP 4162, 4164-68 (article describing escape of dangerous individuals from WSH). This is the precise reason the Legislature enacted this exemption: to prevent members of the public from harassing criminal justice agency employees. Thus, the month and year of birth of SEIU 1199NW-represented employees at WSH, ESH, CSTC, and SCC are exempt from disclosure under RCW 42.56.250(8).

H. Disclosure Here Would Directly Violate Other Washington State Laws.

Disclosure, while favored, is *not* so favored as to exclude compliance with other laws, especially where those other laws prohibit the result that the requested disclosure in this case will achieve. Instead, RCW 42.56.070(1) “incorporates into the Act other statutes which exempt or prohibit disclosure of specific information or records,” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994) (“*PAWS*”), because

the PRA seeks to look to the interests protected by other statutes when evaluating disclosure.¹⁰ In so doing, courts look to the other statutes to determine whether the statute *operates* as a prohibition against such disclosure. *Id.* at 262; *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (holding the attorney-client privilege at RCW 5.60.060(2)(a) is an “other statute” prohibiting disclosure); *Ameriquest Mortg. Co. v. Office of Att’y Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (federal privacy laws operated to prohibit disclosure).¹¹

1. The State’s Disclosure of The Documents Here Will Be An Unlawful Misuse of State Resources.

The State’s disclosure of the Unions’ members’ full names, dates of birth, and work email addresses to the Foundation would constitute a misuse of State resources in violation of Washington law. RCW 42.56.070(1) provides, in pertinent part:

¹⁰ The Washington Supreme Court decision *John Doe A. v. Wash. State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016) does not require a different conclusion. There, the court stated that an “other statute” must “expressly prohibit or exempt the release of records”; it indicates that such exemptions exist where “courts have identified a legislative intent to protect a particular interest or value.” Here, as described *infra*, such interests or values—protecting the bargaining relationship as well as protecting state resources from misuse—clearly exist and favor nondisclosure.

¹¹ *White v. Clark*, 188 Wn. App. 622, 630-31, 354 P.3d 38 (2015), supports this interpretation of the “other statute” provision. After stating that “[the] other statute” exemption applies only if that statute explicitly identifies an exemption,” *id.* at 630-31, the court proceeded to find the “other statute” provision met by combining Article VI, Section 6, of the Washington Constitution, multiple sections of Title 29A RCW, and secretary of state regulations authorized by statute, which the court held together operated to ensure ballot security and secrecy and therefore operated to prohibit disclosure of digital copies of election ballots.

Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, *unless* the record falls within the specific exemptions of subsection (6) of this section, this chapter, *or other statute which exempts or prohibits disclosure of specific information or records.*

(emphasis added). The PRA expressly provides that “other statutes” may operate to prevent disclosure. When evaluating the applicability of “other statutes,” the courts analyze whether the statute operates as an *exemption* or *prohibition* against disclosure. *PAWS*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (holding that the Uniform Trade Secrets Act and the anti-harassment statute both operate as exemptions against disclosure pursuant to RCW 42.56.070(1)); *Hangartner*, 151 Wn.2d at 453 (holding that RCW 5.60.060(2)(a)’s guarantee of attorney-client privilege is an “other statute” prohibiting disclosure under RCW 42.56.070(1)); *Ameriquest Mortg. Co.*, 170 Wn. 2d at 440 (federal privacy laws operate to prohibit disclosure under RCW 42.56.070(1)). The “other statute” must “prohibit or exempt the release of records” and such exemptions exist where “courts have identified a legislative intent to protect a particular interest or value.” *Wash. State Patrol*, 185 Wn.2d at 377-78. Under RCW 42.52.160(1) and RCW 42.52.180(1), work email addresses issued by the State of Washington, along with State information such as employee lists, are considered to be State resources. *See, e.g., Knudsen v. Washington State Executive Ethics Bd.*, 156 Wn. App. 852, 862,

235 P.3d 835 (2010) (“State e-mail systems, including the system involved here, exist to facilitate communications for purposes of state business”). Therefore, Union members’ full names, dates of birth, and email addresses are State resources.

Here, RCW 42.52.180 and WAC 292-110-010 exempt or prohibit disclosure because protecting state resources from misuse is of “particular interest or value.” Under RCW 42.52.180, the Legislature prescribed that State resources should not be used, “directly or indirectly,” for the purpose of supporting or opposing a ballot proposition or a campaign for election of a person to an office. Moreover, under WAC 292-110-010, State resources are not to be used “for the purpose of conducting outside business, in furtherance of private employment, or to realize a private financial gain,” and “the use is not for supporting, promoting the interests of, or soliciting for an outside organization or group.” Hence, there is an explicit legislative intent to protect State resources from being used to support political agendas and to garner donations for an outside organization.

The Foundation is asking the State, through its PRA request, to misuse its resources in support of the Foundation, an outside organization. The Foundation plans to use the requested information to contact union members. Nelson Dec. ¶¶4, 9, CP 3767. The Foundation’s correspondence inevitably contains the link to the Foundation’s website, where both its political agenda

and requests for donations are prominent. *See, e.g.*, Iglitzin Dec. Exs. B, C, CP 40-47; Eagle Dec. Att. A, CP 2244-2253. The Foundation publicly advocates against political candidates who are supported by union political action committees (“PACs”). *See, e.g.*, Iglitzin Dec. ¶11, Ex. K, CP 33, 80-84; Second Kussmann Dec., Ex. F, CP 3799-3801. It also promotes “right to work” ballot propositions throughout Washington. Iglitzin Dec. ¶¶11-12, Exs. A, J, L, CP 33, 36-39, 77-79, 85-91; Second Kussmann Dec., Ex. F, CP 3799-3801. Additionally, the Foundation sends out brochures that contain political rhetoric and ask for contributions to help “bring the Pacific Northwest back from its hardcore radical politics.” Eagle Dec., Ex. A, p. 9, CP 2253. The State is prohibited from allowing a misuse of its resources to support the Foundation’s political agenda and help it garner donations.

Allowing the State to produce email addresses so the Foundation can directly share its website link would constitute a misuse of State resources. For example, in Executive Ethics Board Advisory Opinion 04-01, State agencies are cautioned against posting links on their own websites to websites run by private entities that advocate for or against state ballot initiatives or political candidates, unless required to do so by contractual obligation. Iglitzin Dec. ¶13; Ex. M, CP 33, 92-97. The Opinion goes on to advise that using State facilities to electronically distribute articles and opinions that discuss public office candidates or ballot measures could result in an indirect use of

facilities to support political activity and, therefore, the agency should avoid distributing such material. *Id.* The same applies to electronic links, as “providing a direct electronic link to a private web page which contains materials and advertisements that support, or oppose, passage of a ballot initiative would also violate RCW 42.52.180.” *Id.* Therefore, supplying the Foundation with access to State email addresses so it can link recipients to its private, politically-charged website is a misuse of State resources.

Ultimately, the State is prohibited from disclosing the Unions’ members’ full names, dates of birth, and work email addresses to the Foundation because RCW 42.52.180 and WAC 292-110-010 constitute “other statutes” that create an exemption to disclosure under the PRA. Responding to the Foundation’s request requires State resources to be misused to send employees correspondence that contains links to the Foundation’s website that supports (or opposes) candidates, supports ballot propositions favored by the Foundation, and asks for donations.

2. The State’s Disclosure Of The Documents Here Will Be An Unlawful Unfair Labor Practice.

RCW 41.80.110(1)(a) establishes that it is an unfair labor practice (“ULP”) for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by RCW 41.80, as listed in RCW 41.80.050:

Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form,

join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining *free from interference*, restraint, or coercion.

An interference violation exists when an employee could reasonably perceive the employer's statements or actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A, 1996 WL 768490 (PECB, 1996). The union is not required to show that an employer intended or was motivated to interfere with collective bargaining rights. *City of Tacoma*, Decision 6793-A, 2000 WL 194131 (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced or that the employer had union animus. *Id.*¹²

A finding that interference has occurred is not based on the actual feelings of a particular employee, but on whether a typical employee in those circumstances could reasonably see the employer's actions as discouraging union activity. *Snohomish County*, Decision 9291-A, 2007 WL 768751 (PECB, 2007). "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

¹² The Public Employment Relations Commission and the state courts have concurrent jurisdiction over unfair labor practice complaints. *Yakima v. Fire Fighters*, 117 Wn.2d 655, 674-75, 818 P.2d 1076 (1991); *State ex rel. Graham v. Northshore Sch. Dist.* 417, 99 Wn.2d 232, 240, 662 P.2d 38 (1983).

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).¹³

Where a typical employee in the same circumstances could reasonably see the employer’s actions as discouraging his or her union activities, communications constitute unlawful interference in violation of RCW 41.80. “Even if non-coercive in tone, a communication may be unlawful if it has the effect of undermining a union.” *Grant County Public Hospital District 1*, Decision 8378-A, 2004 WL 2507347 (PECB, 2004).

Any balancing of the employer’s rights of free speech and the rights of employees to be free from coercion, restraint, and interference “must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might more readily be dismissed by a more disinterested ear.”

Grant County Public Hospital District 1, Decision 8378-A (quoting *Town of Granite Falls*, Decision 2692, 1987 WL 383191 (PECB, 1987)) (holding supervisor’s statements during a staff meeting to bargaining unit members

¹³ RCW 41.56 and 41.80 are substantially similar to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (“NLRA” or “Act”). *See, e.g., Lewis County PUD*, Decision 7277-A, 2002 WL 65627 (PECB, 2002). The “interference” prohibition closely parallels the “interference” prohibition found in Section 8(a)(1) of the NLRA. With the approval of the Supreme Court of the State of Washington, PERC considers the precedents developed by the National Labor Relations Board (“Board”) and the federal courts under the Act in construing this state’s collective bargaining statutes in cases where local precedent is limited or lacking, and the statutes are similar. *City of Bellevue*, Decision 5391-C, 1997 WL 810871 (PECB, 1997).

constituted unlawful interference). In *Pasco Housing Authority*, an employer’s memo to its bargaining unit undermining the union and promoting decertification was found to be coercive in tone. It “discredits and undermines the union” without giving the employees a full explanation of their statutory rights. *Id.* In an environment where no decertification petition had been filed, these statements were coercive, and employees could reasonably have perceived them as an attempt to undermine the union. *Id.*

Here, the same effect would occur when a reasonable employee learns that her employer provided her email address to an organization that is now emailing her and purportedly providing her with information that the Union allegedly did not provide—information undermining the Union and its role in representing the employees, and continuing such disparagement by comparing its operating practices to the mafia, Iglitzin Dec. ¶6, Ex. E, CP 32, 58-60—all under the apparent blessing of her employer.

Additionally, an employer may not simply allow a third party to interfere with employee organizing and representational rights and escape a violation of RCW 41.80 or the Act. For example, in *Maidsville Coal Co.*, the employer was found to have violated the NLRA when it used a third party to threaten employees with reprisal if they continued to engage in activities on behalf of the union. *Maidsville Coal Co.*, 257 NLRB 1106, 1136 (1981), *enf. denied on other grounds by NLRB v. Maidsville Coal Co.*, 693 F.2d 1119 (4th

Cir. 1983). Further, the unlawful conduct need not have been committed by the employee's employer for it to constitute an "interference" ULP. In *Fabric Services, Inc.*, 190 NLRB 540, 542 (1971), the employer owned the plant facility on which Southern Bell Telephone and Telegraph Company conducted its operations. *Id.* at 541. A Fabric Services personnel manager ordered a Southern Bell employee at this plant to remove Union supporting insignia on his pocket protector. *Id.* Fabric Services defended itself against the alleged ULP charge by relying entirely and solely on the grounds that it cannot be found to have violated Section 8(a)(1) because it was not the affected employee's employer. *Id.* The Board held that Fabric Services was liable because it was in a position to interfere with the employee's ability to show such support while performing his work. *Id.* at 542. Thus, behavior that is indisputably prohibited if undertaken by an employer (the State), is likewise unlawful when performed by the Foundation, whether as an independent entity or as an employer's proxy.

Here, the Foundation seeks to interfere with the protected relationship between represented bargaining unit members and their collective bargaining representatives in a manner that is prohibited by RCW 41.80. Namely, the Foundation seeks to disparage, discredit, ridicule, and/or undermine the Unions and attempt to coerce employees to refrain from becoming or remaining members. Such behavior would indisputably be prohibited by RCW

41.80 if undertaken by an employer; it is likewise unlawful when performed by the Foundation. Even if the State does not mean to interfere in the employees' relationship with the Unions or to discourage union activity, such intent is irrelevant as the effect is the same to the workers they represent. In short, the State would participate in and commit an interference ULP by facilitating a third party to accomplish what would be unlawful if done by the State itself, and the Foundation's use of the requested documents to disparage, discredit, ridicule, or undermine the Unions is prohibited insofar as it violates the statutory mandate which protects employee rights to engage in collective bargaining free from interference.

I. Disclosure Would Violate The Unions' Members' Constitutional Right Of Free Association.

In Washington, “[f]ull freedom of association of workers is protected by statute, case law, and our state and federal constitutions.” *Foss v. Dep’t of Corr.*, 82 Wn. App. 355, 365, 918 P.2d 521, 526 (1996) (citing RCW 49.32.020; Article I, § 5 of the Washington Constitution and the First Amendment to the United States Constitution). *Accord*, *State Emp. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 132 (2d Cir. 2013) (“Included in this right to free association is the right of employees to associate in unions.”) (citing *Thomas v. Collins*, 323 U.S. 516, 534, 65 S. Ct. 315, 89 L. Ed. 430 (1945)).

Especially in bargaining units with high union membership, disclosure of birth dates linked with names is tantamount to a disclosure of the Unions' membership lists coupled with the information that will allow the Foundation to target those members. The dates of birth of union members linked to their exact names inevitably leads to targeting of those union members with hostile home visits, phone calls and written broadsides—all designed to wear down their decision to associate together in their unions. Second Iglitzin Dec., Ex. A (Green Declaration), CP 176-180. Such disclosure to the Foundation violates those members' freedom of association. *See, e.g., Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 466, 78 S. Ct. 1163, 1174 (1958) (Affording constitutional protection for free association and speech from disclosure of membership lists of an association to entity hostile to the association), *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140-41 (9th Cir. 2009 (same)), *Dole v. Service Employees Union Local 280*, 950 F.2d 1456, 1460-63 (9th Cir. 1991 (same)); *Eugster v. City of Spokane*, 121 Wn. App. 799, 807, 91 P.3d 117 (2004) (same); *Snedigar v. Hoddensen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990) (same); *Right-Price Recreation, L.L.C v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 824-25, 21 P.3d 1157 (2001) (same).

Here, the avowed purpose of the Foundation is to destroy the free association of members in their unions. The purpose of the Foundation in

seeking the members' dates of birth is solely to communicate a message antithetical to the choice of Union members to freely associate as union members. The records sought will provide the Foundation with the birth dates and email addresses of all members solely for that purpose. The State Agencies would violate the U.S. and Washington State constitutional protections for free association and free speech by providing the Foundation with the requested information, as would the use of this Court's process to obtain that information. *See, Jane Does 1-10 v. University of Washington*, No. 16-cv-1212-JLR (Nov. 15, 2016) (Release of personal information such as name and personal phone number of individuals engaged in fetal tissue research and reproductive rights advocacy would violate the state and federal constitutional rights of free association and expression and was therefore exempt under RCW 42.56.070(1) from disclosure in response to a PRA request.)¹⁴; *Roe v. Anderson*, No. 3:14-CV-05810 RBL, 2015 WL 4724739, at *2 (W.D. Wash. Aug. 10, 2015) (Release of exotic dancers' names with dates of birth exempt because release would chill dancers' free expression).

¹⁴ A copy of this recent decision is contained in the Appendix to this brief.

J. Unions Have A Well-Founded Fear Of Immediate Invasion Of Their Rights And Disclosure Will Result In Actual And Substantial Injury that Tips The Balance Of Any Hardship In The Union's Favor.

The Unions have a well-founded fear of an immediate invasion of their rights. The State Agencies have informed the Unions that they intend to disclose the information requested in its entirety. Once the information has been disclosed, there is no way of retrieving it or otherwise undoing the disclosure. *NW. Gas Ass'n v. Utils. & Transp. Comm'n*, 141 Wn. App. at 121-122. Release of the information would result in actual and substantial injury to the Unions generally and to their relationship with their members.

V. CONCLUSION

For the reasons set forth above, the Court should reverse the trial court's denial of permanent injunctive relief and remand for entry of an order permanently enjoining the Agencies from disclosing the requested information to the Foundation. The Court should also issue an order requiring the Foundation to return the improperly-disclosed email addresses.

RESPECTFULLY SUBMITTED this 9th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2016, I caused the foregoing Appellants' Opening Brief to be e-filed with the Court of Appeals, Division II, and copies emailed to and deposited in the U.S.

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APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JANE DOES 1-10, et al.,

Plaintiffs,

v.

UNIVERSITY OF WASHINGTON, et
al.,

Defendants.

CASE NO. C16-1212JLR

ORDER GRANTING MOTION
FOR A PRELIMINARY
INJUNCTION AND DENYING
MOTION TO FILE A
SUPPLEMENTAL PLEADING

I. INTRODUCTION

Before the court are: (1) Plaintiffs’ motion for a preliminary injunction (TRO/PI Mot. (Dkt. # 2)) and (2) Defendant University of Washington’s (“UW”) motion for leave to file a one-page supplemental pleading in response to Plaintiffs’ motion for a preliminary injunction (MFL (Dkt. # 58)). The court has considered the motions, all of the parties’ submissions related to the motions, other relevant portions of the record, and

1 the applicable law. Being fully advised,¹ the court GRANTS Plaintiffs' motion for a
2 preliminary injunction but narrows the scope of the preliminary injunction as compared
3 to the temporary restraining order (TRO (Dkt. # 27)) and DENIES as moot UW's motion
4 for leave to file a one-page supplemental pleading in response to Plaintiffs' motion for a
5 preliminary injunction.

6 II. BACKGROUND

7 On February 9, 2016, Defendant David Daleiden issued a request to UW under
8 Washington State's Public Records Act ("PRA"), RCW ch. 42.56, seeking to "inspect or
9 obtain copies of all documents that relate to the **purchase, transfer, or procurement of**
10 **human fetal tissues**, human fetal organs, and/or human fetal cell products at the [UW]
11 Birth Defects Research Laboratory from **2010 to present.**" (Power Decl. (Dkt. # 5) ¶ 4,
12 Ex. C (bolding in original).) On February 10, 2016, Defendant Zachary Freeman issued a
13 similar PRA request to UW. (*Id.* ¶ 6, Ex. E.) Among other documents, these PRA
14 requests sought communications between UW or its Birth Defects Research Laboratory,

15
16 _____
17 ¹No party requested oral argument on either motion in a manner that comports to the
18 court's Local Rules. Under Local Civil Rule 7(b)(4), "[a] party desiring oral argument shall so
19 indicate by including the words 'ORAL ARGUMENT REQUESTED' in the caption of its
20 motion or responsive memorandum." Local Rules W.D. Wash. LCR 7(b)(4). In contravention
21 of this Rule, Defendant David Daleiden filed a separate pleading requesting oral argument on
22 Plaintiffs' motion for a preliminary injunction (Req. for Arg. (Dkt. # 56)) three days after he
filed his responsive memorandum (Daleiden Resp. (Dkt. # 50)). Thus, Mr. Daleiden's request is
untimely and does not otherwise adhere to the court's Local Rules. In any event, the parties have
thoroughly briefed the issues (*see* PI Mot., Daleiden Resp., Freeman Resp. (Dkt. # 47); UW
Resp. (Dkt. # 45); Pltf. Reply (Dkt. # 61)), and the court concludes that oral argument would not
be helpful to its disposition of Plaintiffs' motion for a preliminary injunction, *see* Local Rules
W.D. Wash. LCR 7(b)(4) ("Unless otherwise ordered by the court, all motions will be decided
by the court without oral argument."). For these reasons, the court DENIES Mr. Daleiden's
request for oral argument.

1 on the one hand, and Cedar River Clinics, Planned Parenthood of Greater Washington
2 and North Idaho, or certain individuals or employees of Cedar River and Planned
3 Parenthood, on the other hand. (*Id.* at 1; *see also id.* ¶ 4, Ex. C at 1-2.) Mr. Daleiden’s
4 PRA request specifically lists the names of eight such individuals. (*Id.* ¶ 4, Ex. C at 1-2.)

5 On July 21, 2016, UW notified Plaintiffs that absent a court order issued by
6 August 4, 2016, it would provide documents responsive to Mr. Daleiden’s PRA request
7 without redaction at 12:00 p.m. on August 5, 2016. (Does 1, 3-4, 7-8 Decls. (Dkt. ## 6,
8 8-9, 12-13) ¶ 3, Ex. A; Doe 5 Decl. (Dkt. # 10) ¶ 3; Does 6 Decl. (Dkt. # 11) ¶ 5, Ex. A.)

9 On July 26, 2016, UW issued a similar notice to Plaintiffs regarding Mr. Freeman’s
10 request and indicated that, absent a court order, UW would provide responsive documents
11 without redaction on August 10, 2016.² (Does 1, 3-4, 7 Decls. ¶ 4, Ex. B.)³

12 On August 3, 2016, Plaintiffs filed a complaint on behalf of a putative class
13 seeking to enjoin UW from issuing unredacted documents in response to the PRA
14 requests. (Compl. (Dkt. # 1).)⁴ Plaintiffs object to disclosure of the requested documents

16 ² Under RCW 42.56.540, “[a]n agency has the option of notifying persons named in the
17 record or to whom a record specifically pertains.”

18 ³ Jane Doe 2 omitted exhibits from her declaration, but the other Doe declarations
19 sufficiently demonstrate that UW issued similar letters to the individuals implicated in the
20 relevant PRA request.

21 ⁴ Plaintiffs also filed an amended complaint and a second amended complaint on August
22 3, 2016. (See FAC (Dkt. # 22); SAC.) Plaintiffs’ amended complaint amends allegations
concerning jurisdiction and venue. (*Compare* Compl. ¶¶ 17-18 (alleging jurisdiction under
RCW 2.08.010 and RCW 4.28.020 and venue under RCW 42.56.540), *with* FAC ¶¶ 17-18
(alleging jurisdiction under 28 U.S.C. § 1331 and venue under 28 U.S.C. § 1391(b)(2)).)
Plaintiffs’ second amended complaint corrects what appear to be typographical errors in
paragraph 18 of the amended complaint relating to venue. (*Compare* FAC ¶ 18, *with* SAC ¶ 18.)

1 in unredacted form because the documents include personally identifying information
2 such as direct work phone numbers, work emails, personal cell phone numbers, and other
3 information. (See SAC at 1 (“Doe Plaintiffs . . . seek to have their personal identifying
4 information withheld to protect their safety and privacy.”); see also, e.g., Doe 5 Decl. ¶¶
5 4-5 (“Any email contacts I had with the [Birth Defects Research Laboratory] would have
6 highly personal information such as my name, email address, and phone number. . . . My
7 name, email address, and phone number are information that I try to keep private when
8 related to where I work.”).)

9 On the same day that they filed suit, Plaintiffs filed a motion seeking both a
10 temporary restraining order (“TRO”) and a preliminary injunction against disclosure of
11 the requested documents.⁵ (See TRO/PI Mot.) In addition, Plaintiffs filed a motion for
12 class certification. (See MFCC (Dkt. # 16).) Plaintiffs ask the court to certify a class
13 consisting of “[a]ll individuals whose names and/or personal identifying information
14 (work addresses, work or cell phone numbers, email addresses) are contained in
15 documents prepared, owned, used, or retained by UW that are related to fetal tissue
16 research or donations.” (*Id.* at 2.)

17 On August 3, 2016, the court granted Plaintiffs’ motion for a TRO but set the TRO
18 to expire on August 17, 2016, at 11:59 p.m. (TRO (Dkt. # 27) at 7.) The court restrained
19 UW “from releasing, altering, or disposing of the requested documents or disclosing the
20

21 ⁵ On the same day, Plaintiffs also filed a motion to proceed in pseudonym. (MTPP (Dkt.
22 # 15).) Defendants did not oppose the motion (see generally Dkt.), and the court granted it on
August 29, 2016 (8/29/16 Ord. (Dkt. # 68)).

1 | personal identifying information of Plaintiffs pending further order from this court.” (*Id.*
2 | at 7.) On August 17, 2016, the court extended the TRO “until such time as the court
3 | resolves Plaintiffs’ pending motion for a preliminary injunction.” (8/17/16 Ord. (Dkt.
4 | # 54) at 2.) Plaintiffs’ motion for a preliminary injunction is now pending before the
5 | court.

6 | Before the court could resolve Plaintiffs’ motion for a preliminary injunction,
7 | however, Mr. Daleiden filed a motion to dismiss for failure to state a claim and for lack
8 | of subject matter jurisdiction. (*See* MTD (Dkt. # 49).) On October 4, 2016, the court
9 | granted Mr. Daleiden’s motion and dismissed Plaintiffs’ second amended complaint
10 | without prejudice for lack of subject matter jurisdiction. (10/4/16 Order (Dkt. # 76) at
11 | 12-14.) The court also granted Plaintiffs leave to file a third amended complaint that
12 | remedied the jurisdictional deficiencies identified in the court’s order. (*Id.* at 14-18.)
13 | Plaintiffs timely filed their third amended complaint on October 18, 2016 (TAC (Dkt.
14 | # 77)), and the court concludes that Plaintiffs’ third amended complaint satisfies the
15 | directives of its October 4, 2016, order with respect to subject matter jurisdiction.
16 | Accordingly, the court now considers Plaintiffs’ motion for a preliminary injunction and
17 | UW’s motion for leave to file a supplemental response to Plaintiffs’ motion for a
18 | preliminary injunction.

19 | //

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III. ANALYSIS

A. UW's Motion for Leave to File a Supplemental Response to Plaintiffs' Motion for Preliminary Injunction

Mr. Daleiden and UW both filed responses to Plaintiffs' motion for a preliminary injunction on August 15, 2016. (*See* Daleiden Resp.; UW Resp.) Mr. Daleiden devoted a section of his response to his argument that the court lacked subject matter jurisdiction and his assertion that UW was immune from suit under the Eleventh Amendment to the United States Constitution. (Daleiden Resp. at 1, 4.) Mr. Daleiden filed his response to Plaintiffs' motion for a preliminary injunction the same day as he filed his motion to dismiss for lack of subject matter jurisdiction. (*See* MTD.) The motion to dismiss addressed the same Eleventh Amendment issue that Mr. Daleiden raised in his response to Plaintiffs' motion for a preliminary injunction. (*See id.* at 2-3.)

On August 18, 2016, UW filed a motion seeking leave to file a supplemental response to Plaintiffs' motion for a preliminary injunction to address the jurisdictional and Eleventh Amendment issues raised in Mr. Daleiden's response to Plaintiffs' motion for a preliminary injunction. (*See* MFL.) UW simultaneously filed its proposed supplemental response. (UW Supp. Resp. (Dkt. # 59).) Mr. Daleiden opposed UW's motion for leave. (Daleiden Resp. to MFL (Dkt. # 62).)

UW's proposed supplemental response consists of one sentence:

With regard to the jurisdictional issue raised by [Mr.] Daleiden . . . , [UW] does not object to this [c]ourt considering the issues of declaratory judgment and/or injunctive relief as raised by . . . Plaintiffs in their complaint and motions for a temporary restraining order and preliminary injunctive relief.

1 (*Id.* at 1-2.) UW’s single-sentence statement is substantively identical to statements in
2 UW’s response to Mr. Daleiden’s motion to dismiss. (*See, e.g.*, UW Resp. to MTD (Dkt.
3 # 71) at 3 (“[UW] believe[s] that this [c]ourt is an appropriate forum for this action,
4 insofar as . . . Plaintiffs are arguing federal constitutional claims . . . and . . . [UW]
5 consents to jurisdiction of the federal court for purposes of considering the issues of
6 declaratory judgment and/or injunctive relief as raised by . . . Plaintiffs.”), 4 (“[UW] . . .
7 consents to jurisdiction of the federal court for purposes of considering the issues of
8 declaratory judgment and/or injunctive relief as raised by . . . Plaintiffs.”).)

9 In the factual background section of the court’s order addressing subject matter
10 jurisdiction, the court acknowledged UW’s supplemental response to Plaintiffs’ motion
11 for a preliminary injunction. (*See* 10/4/16 Order at 6.) However, in its analysis of the
12 Eleventh Amendment issue, the court relied solely on UW’s response to Mr. Daleiden’s
13 motion to dismiss. (*See id.* at 9, 12.) The court has ruled on Mr. Daleiden’s motion to
14 dismiss for lack of subject matter jurisdiction and dismissed Plaintiffs’ second amended
15 complaint without prejudice and with leave to amend. (*Id.* at 12-18.) Plaintiffs timely
16 filed a third amended complaint that remedied the jurisdictional deficiencies identified in
17 the court’s order. (*See* TAC.) Accordingly, UW’s motion for leave to file a
18 supplemental response directed at that issue is now moot, and the court denies the motion
19 on that basis.

20 **B. Plaintiffs’ Motion for a Preliminary Injunction**

21 Now that the jurisdictional issues resolved (*see* 10/4/16 Order; TAC), the court
22 turns to Plaintiffs’ motion for a preliminary injunction.

1 **1. Standards for a Issuing a Preliminary Injunction**

2 Under the Federal Rules of Civil Procedure, a party seeking a preliminary
3 injunction must show: (1) a likelihood of success on the merits; (2) that irreparable harm
4 is likely, not just possible, if the injunction is not granted; (3) that the balance of equities
5 tips in its favor; and (4) that an injunction is in the public interest. *See* Fed. R. Civ. P. 65;
6 *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011); *Doe v.*
7 *Reed*, 586 F.3d 671, 676 (9th Cir. 2009) (applying the Federal Rule of Civil Procedure 65
8 standard to the review of a preliminary injunction issued to prevent disclosure pursuant to
9 the PRA), *judgment affirmed by John Doe No. 1 v. Reed*, 561 U.S. 186 (2010). When
10 there are “serious questions going to the merits and a balance of hardships that tips
11 sharply towards the plaintiff,” the court may issue a preliminary injunction “so long as
12 the plaintiff also shows that there is a likelihood of irreparable injury and that the
13 injunction is in the public interest.” *Cottrell*, 632 F.3d at 1136.⁶

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19 ⁶ The standard for issuing a preliminary injunction under federal law is largely consistent
20 with the standard for issuing an injunction under the PRA. Under the PRA, the court may issue
21 an injunction prohibiting disclosure if the court “finds that such examination would clearly not
22 be in the public interest and would substantially and irreparably damage any person, or would
substantially and irreparably damage vital governmental functions.” RCW 42.56.540. The court
concludes that the outcome of this motion would be no different if the court were to consider it
under the standard stated in RCW 42.56.540.

2. Likelihood of Success on the Merits

Under the PRA, UW, as a state agency,⁷ is under a general mandate to permit public inspection and copying of public records. *Resident Action Council v. Seattle Hous. Auth.*, 327 P.3d 600, 605 (Wash. 2013) (citing *Hearst Corp. v. Hoppe*, 580 P.2d 246, 249 (Wash. 1978)); RCW 42.56.030. The PRA defines a “public record” as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(3). There is no dispute that the records at issue fall within the definition of “public records” under the PRA. (*See* UW Resp. at 4.) The question, then, is whether an exemption applies that would allow redaction of Plaintiffs’ names and personally identifying information.

The PRA enumerates a variety of “specific exemptions” and contains a catch-all savings clause that exempts information if any “other statute . . . exempts or prohibits disclosure of specific information or records.” *See* RCW 42.56.070(1); *see also* *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 884 P.2d 592, 602 (Wash. 1994). Plaintiffs rely on the PRA’s catch-all savings clause to assert that the personally identifying information of Plaintiffs is exempt from disclosure based on Plaintiffs’ rights

⁷ There is no dispute that the UW qualifies as a “public agency” under the PRA. (*See* PI Mot. at 13 (“There can be no dispute that . . . UW qualifies as a public agency.”); MTD at 7 (“[T]he university is a state entity”))

1 to privacy and association under the Washington state and federal constitutions.⁸ (*See* PI
2 Mot. at 8 (“[T]he identities and/or personal identifying information of the . . . Plaintiffs
3 are exempt from disclosure based on Plaintiffs’ rights to privacy and association”))

4 The Washington Supreme Court has held that the PRA must be interpreted as
5 incorporating constitutional protections against disclosure. In *Seattle Times Co. v. Serko*,
6 243 P.3d 919 (Wash. 2010), the Court recognized that there are constitutional limits on
7 public disclosure under the PRA, even though the PRA does not include an explicit
8 exemption for the protection of constitutional rights. Referencing both the federal and
9 state constitutions, the Court stated: “There is no specific exemption under the PRA that
10 mentions the protection of an individual’s constitutional fair trial rights, but courts have
11 an independent obligation to secure such rights.” *Id.* at 927 (citing *Gammett Co. v.*
12 *DePasquale*, 443 U.S. 368, 378 (1979)). The *Serko* court did not find that disclosure of
13 the records would violate the defendant’s rights in that instance, but signaled its readiness
14 to order the records withheld if a constitutional violation would have resulted. *Id.* at
15 927-28.

16 More recently, in *Freedom Foundation v. Gregoire*, 310 P.3d 1252 (Wash. 2013),
17 the Washington Supreme Court “recognized that the PRA must give way to constitutional

18 _____
19 ⁸ The only enumerated exemption potentially applicable here pertains to “[p]ersonal
20 information in files maintained for employees, appointees, or elected officials of any public
21 agency to the extent that disclosure would violate their right to privacy.” RCW 42.56.230(3).
22 This exemption, to the extent it is applicable, would only apply to UW employees. *See id.* By
its terms, the exemption does not apply to those Plaintiffs who are referenced in the public
records but not employed by UW. *See id.* Because the court ultimately concludes that Plaintiffs
are likely to succeed on the merits of their constitutional claim, *see infra* § III.B.2, the court need
not consider the application of this more limited exemption at this time.

1 mandates.” *Id.* at 1258 (citing *Serko*, 243 P.3d at 927-28 (2010); *Yakima Cty. v. Yakima*
2 *Herald–Republic*, 246 P.3d 768, 783 (Wash. 2011) (noting in dictum that the argument
3 that constitutional provisions can serve as PRA exemptions “has force”). Building on
4 that recognition, the Court held that the separation of powers in the Washington
5 Constitution creates a qualified gubernatorial communications privilege that functions as
6 an exemption to the PRA, even though there is no specific statutory exemption for that
7 privilege. *Freedom Foundation*, 310 P.3d at 1258-59.

8 Finally, this court recently recognized that “the PRA’s deference to ‘other
9 statute[s]’ is a ‘catch all’ saving clause, which does not require a disclosure that would
10 violate the Constitution.” *Roe v. Anderson*, No. 3:14-CV-05810 RBL, 2015 WL
11 4724739, at *2 (W.D. Wash. Aug. 10, 2015). “In other words, it is not necessary to read
12 the PRA in conflict with the Constitution when the [PRA] itself recognizes and respects
13 other laws (including constitutional provisions) that mandate privacy or confidentiality.”
14 *Id.* (quoting the State of Washington’s brief and stating that “[t]he State is correct”). The
15 court concluded that the PRA, “by design, cannot violate the Constitution, and
16 constitutional protections (such as freedom of expression) are necessarily incorporated as
17 exemptions, just like any other express exemption enumerated in the PRA.” *Id.* at *3.

18 The plaintiffs in *Anderson* were dancers and managers at an erotic dance studio.
19 *Id.* at *1. Pierce County required the plaintiffs to be licensed for their professions, and a
20 private citizen filed a PRA request with the Pierce County Auditor seeking the plaintiffs’
21 personal information, including true names, birthdates, and photographs. *Id.* Similar
22 UW’s actions in this case, the Auditor informed the plaintiffs that she intended to

1 disclose the information unless the plaintiffs obtained an injunction. *Id.* The *Anderson*
2 court found that the operative legal issue was “whether the Constitution protects [the
3 p]laintiffs’ information, exempting it from disclosure under the PRA.” *Id.* at *3. The
4 plaintiffs argued that as workers in an erotic dance studio, they engaged in a form of
5 protected First Amendment expression, and that disclosure of their information would
6 have an unconstitutional chilling effect on that expression. *Id.* They argued that
7 disclosure of their personally identifying information and the personally identifying
8 information of those similarly situated would render them “uniquely vulnerable to
9 harassment, shaming, stalking, or worse.” *Id.* Relying on prior Ninth Circuit authority,
10 the court held that disclosure of the plaintiffs’ personal information would have an
11 unconstitutional chilling effect and was therefore protected by the First Amendment from
12 disclosure under the PRA. *Id.* (citing *Dream Palace v. City of Maricopa*, 384 F.3d 990,
13 1012 (9th Cir. 2004)).

14 Similar to Plaintiffs here, the plaintiff in *Planned Parenthood Association of Utah*
15 *v. Herbert*, 828 F.3d 1245 (10th Cir. 2016), asserted that its “association with other
16 Planned Parenthood providers who participate in lawful programs that allow abortion
17 patients to donate fetal tissue for scientific research . . . is protected by the First
18 Amendment.” *Id.* at 1258. The Tenth Circuit “ha[d] little trouble in concluding” that the
19 plaintiff’s assertion of First Amendment rights was “valid.” *Id.* at 1259. Thus, the court
20 rejects Mr. Daleiden’s assertion that “freedom of association rights do not even apply
21 here, as [Plaintiffs] are not here on behalf of a group engaged in first amendment [sic]
22 expression but as participants in a particular type of research activity.” (Daleiden Resp.

1 | at 11.) The court also concludes that “research activity” is a form of expression protected
2 | within the ambit of the First Amendment. *See Dow Chem. Co. v. Allen*, 672 F.2d 1262,
3 | 1275 (7th Cir. 1982) (“[W]hatever constitutional protection is afforded by the First
4 | Amendment extends as readily to the scholar in the laboratory as to the teacher in the
5 | classroom.”).

6 | Even if the research in which Plaintiffs participate or to which they contribute
7 | does not fall within the ambit of First Amendment protection, the groups with which
8 | Plaintiffs have participated or associated do engage in advocacy for the health and
9 | reproductive rights of women. (*See, e.g., Power Decl. Ex. 1* (“The mission of Planned
10 | Parenthood of Greater Washington and North Idaho is to provide exceptional
11 | reproductive and complementary health care services, honest education, and fearless
12 | advocacy for all.”); *Cantrell Decl. (Dkt. # 4) ¶ 2* (“As a reproductive health provider since
13 | 1979, Cedar River Clinics and its employees have fought for reproductive freedom.”).)
14 | The case law upon which Mr. Daleiden relies specifically recognizes advocacy as a
15 | category of expression that qualifies for First Amendment protection. (*Daleiden Resp. at*
16 | 11 (citing *Boys Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000))); *see Dale*, 530 U.S. at
17 | 648 (“The First Amendment’s protection of expressive association is not reserved for
18 | advocacy groups. But to come within its ambit a group must be engaged in some form of
19 | expression, whether it is public or private.”). Based on the foregoing authorities, the
20 | court concludes that Plaintiffs have asserted valid constitutional interests. Thus, similar
21 | to the court in *Anderson*, this court must assess whether those free speech and association
22 |

1 rights protect Plaintiffs’ personally identifying information from disclosure under the
2 PRA. *See Anderson*, 2015 WL 4724739, at *3.

3 The Supreme Court has stated that those resisting government- required disclosure
4 “can prevail under the First Amendment if they can show ‘a reasonable probability that
5 the compelled disclosure [of personal information] will subject them to threats,
6 harassment, or reprisals from either Government officials or private parties.’” *John Doe*
7 *No. 1 v. Reed*, 561 U.S. 186, 200 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74
8 (1976)) (alterations in original). The Court has also detailed the type of evidence upon
9 which Plaintiffs may rely:

10 The proof may include . . . specific evidence of past or present harassment
11 of members due to their associational ties, or of harassment directed against
12 the organization itself. A pattern of threats or specific manifestations of
13 public hostility may be sufficient.

14 *Buckley*, 424 U.S. at 74.

15 Here, Plaintiffs have submitted multiple declarations detailing past and present
16 harassment due to Plaintiffs’ associational ties with the various organizations at issue, as
17 well as threats and harassment directed against the organizations themselves. For
18 example, Ellen Gertzog, National Director for Affiliate Security at Planned Parenthood
19 Federation of America (“PPFA”), detailed the history of violence against abortion
20 providers and abortion-providing facilities and the escalating nature of the threats and
21 acts of violence since 2015. (*See generally* Gertzog Decl. (Dkt. # 3).) She attests that
22 since 1977 there have been 11 murders, 26 attempted murders, 42 bombings, 185 arsons,
and thousands of incidents of criminal activities directed at abortion providers. (*Id.* ¶ 3.)

1 In addition, the number of reported incidents of vandalism of Planned Parenthood health
2 centers doubled from nine in 2014 to 18 in 2015. (*Id.* ¶ 13.) Ms. Gertzog also testifies
3 that Planned Parenthood employees have been harassed at their homes, in their
4 workplaces, over the phone, and through their online presence in social media—“all due
5 to the nature of their employment and their association with abortion.” (*Id.* ¶ 5; *see also*
6 *id.* ¶ 7.) She concludes that, “[b]ased on [her] expertise with security risks, . . . if
7 personally identifying information for people associated with fetal tissue donation and
8 research and the Birth Defects [Research Laboratory] at [UW] is publicly released, those
9 persons will be at particular risk due to the nature of their work and the publicity
10 surrounding the fetal tissue donation.” (*Id.* ¶ 14.)

11 Likewise, Connie Cantrell, the Executive Director of Cedar Rivers Clinics,
12 testifies that as a result of its employees’ reproductive freedom advocacy, Cedar River
13 Clinics “have been firebombed, vandalized, blocked, and terrorized.” (Cantrell Decl.
14 ¶ 2.) The Cedar Rivers Renton Clinic received a bomb threat. (*Id.* ¶ 4.) The Clinics’
15 employees and their children “have been harassed, stalked, received death threats, and
16 persecuted at the clinics they work at, and even sometimes at their homes.” (*Id.* ¶ 2.)
17 Cedar River Clinics coordinate with the UW Birth Defects Research Laboratory to collect
18 tissue donated by those people whom Cedar River Clinics serves. (*Id.* ¶ 5.) The tissue is
19 collected from individuals already undergoing clinical care at a Cedar River Clinic. (*Id.*)
20 Those donors provide the tissue pursuant to a Certificate of Confidentiality from the
21 National Institute of Health and Child Human Development, which prevents the
22 disclosure of identifying information. (*Id.*) However, employees of Cedar River Clinics

1 | must interact with the UW Birth Defects Research Laboratory on their patients' behalves
2 | in order to effectuate the transfer of information that is otherwise protected from
3 | disclosure. (*Id.*) Ms. Cantrell attests that forcing the disclosure of the Clinics'
4 | employees' private information will subject those employees to increased threats and
5 | greater risk of violence from those who oppose fetal tissue research and abortion "simply
6 | because [the employees] interact with a public agency." (*Id.* ¶ 7.)

7 | Plaintiffs also submit numerous declarations from various Plaintiffs who work
8 | with Planned Parenthood, Seattle Children's Hospital, Cedar River Clinics, Evergreen
9 | Hospital Medical Center, and the University of Washington. (*See generally* Does 1-8
10 | Decl.) All of these Plaintiffs are aware of threats or acts of violence against individuals
11 | or institutions that are involved in providing clinical abortions or conducting fetal tissue
12 | research. (*See generally id.*) All of these Plaintiffs fear that they, their families, and their
13 | colleagues will be subjected to such threats or acts of violence due to their involvement
14 | with the research conducted by UW Birth Defects Research Lab if their personally
15 | identifying information is released. (*See generally id.*)

16 | Mr. Daleiden attests that he and the organization with which he works "do not
17 | support, have never supported, and will never support vigilante violence against abortion
18 | providers." (Daleiden Decl. (Dkt. # 50-1) ¶ 47.) He also specifically denies that his or
19 | his organization's activities "sparked" the recent tragic shooting and killings at a Planned
20 | Parenthood facility in Colorado Springs. (*Id.* ¶¶ 48-59.) These statements, however, do
21 | not counter the specific evidence Plaintiffs have presented of past or present harassment
22 | by others due to Plaintiffs' associational ties, or of harassment, threats, or violence

1 directed against their organizations; nor does it counter the chilling effect that the threat
 2 of such harassment or violence from others would have upon Plaintiffs' exercise of their
 3 constitutional rights.⁹

4 Instead, Mr. Daleiden argues that if Plaintiffs wished to keep their identities secret,
 5 "they should have dealt with a private laboratory rather than a state university that is
 6 subject to the [PRA]." (Resp. at 8.) He asserts that "the solution to [Plaintiffs'] problems
 7 is . . . to shift one's business from a state laboratory to a private entity that isn't subject
 8 to these types of disclosure requirements." (*Id.*) This argument simply begs the question.
 9 If disclosure of Plaintiffs' personally identifying information violates their constitutional
 10 rights, then the PRA does not require or permit such disclosure. *See Anderson*, 2015 WL
 11 4724739, at *3 ("The PRA, by design, cannot violate the Constitution, and constitutional
 12 protections . . . are necessarily incorporated as exemptions, just like any other express

13
 14 ⁹ The other Defendants also do not present evidence that undermines Plaintiffs' position.
 15 Mr. Freeman states that he "disputes many of the facts set forth in the *Motion* at 2-7 and in the
 16 declarations filed by plaintiffs." (Freeman Resp. at 2 (*italics in original*.) However, he fails to
 17 specify which facts he disputes or offer any evidence that rebuts Plaintiffs' evidence of threats
 18 and harassment. (*See id.*) Mr. Freeman filed a declaration with his responsive memorandum.
 19 (Freeman Decl. (Dkt. # 48).) His declaration does not discuss or dispute the facts in Plaintiffs'
 20 declarations. (*See generally* Freeman Decl.) Mr. Freeman's declaration merely states that he
 21 "made the public records request at issue in the case in [his] capacity as an agent for the [Family
 22 Policy Institute of Washington]" (*id.* ¶ 2), and attaches email correspondence between himself
 and a Washington State Assistant Attorney General concerning the request (*id.* ¶ 3., Ex. A).

UW admits that "Plaintiffs have shown a substantial likelihood that their protected First
 and/or Fourteenth Amendment rights under the United States [sic] (and their privacy rights under
 the Washington State Constitution) would be negatively impacted by the release of their names
 and other personally identifiable information." (UW Resp. at 7.) "As such, [UW] supports a
 preliminary injunction barring the disclosure, at least at this stage in the proceedings, of the
 names as well as other personally identifiable information of individuals involved in fetal
 research contained in [UW] records, including the names of UW and lab employees, employees
 of tissue donation partners, and other researchers who use donated tissue in their research." (*Id.*)

1 exemption enumerated in the PRA.”). The court agrees that the public has an interest in
2 understanding and obtaining information about the types of research and other work in
3 which UW engages with public funds, but releasing Plaintiffs’ personally identifying
4 information would do little, if anything, to advance that interest. The First Amendment
5 does not allow state law to force individual Plaintiffs to choose between (1) facing
6 threats, harassment, and violence for engaging in or associating with research at a public
7 institution, and (2) foregoing engagement with that public institution to avoid disclosure
8 of personally identifying information and the related harassment and threats that such
9 disclosure is likely to bring. This is exactly the kind of “chilling effect” that the
10 Constitution forbids. *See id.* at *3 (citing *Dream Palace*, 384 F.3d at 1012).¹⁰ The court,
11 therefore, concludes that Plaintiffs are likely to succeed on the merits of their claim that
12 disclosure of their personally identifying information would render them and those

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14
15 ¹⁰ The court is not persuaded by the case authority that Mr. Daleiden cites. The majority
16 of the cases he cites do not address the issue of privacy rights in public records cases and
17 therefore have little, if any, bearing here. *See, e.g., City of Ontario, Cal. v. Quon*, 560 U.S. 746
18 (2010) (rejecting a police officer’s unreasonable search and seizure challenge to a city’s review
19 of sexually explicit messages sent on a pager issued to the officer by the city); *In re Grand Jury
20 Subpoena, JK-15-029*, No. 15-35434, 2016 WL 3745541, at *3 (9th Cir. July 13, 2016) (finding
21 a grand jury subpoena “unreasonably overbroad” and “an unreasonable search under the Fourth
22 Amendment” where it would include emails from personal accounts that the petitioner would
reasonably expect to remain private). The cases that Mr. Daleiden cites that do concern privacy
rights in PRA requests fail to support his position. *See Koenig v. City of Des Moines*, 142 P.3d
162, 168 (Wash. 2006) (refusing to uphold the exemption of entire records simply because they
were responsive to a request that sought records related to a specific person, but upholding the
redaction of identifying information of a sexual assault victim in the records before they were
released); *Bainbridge Island Police Guild v. City of Puyallup*, 259 P.3d 190, 196-97 (Wash.
2011) (redacting the name of a police officer, even though it had already been publicly disclosed
in other records, because the context of the documents—an investigation of an unsubstantiated
sexual misconduct investigation—would be highly offensive to a reasonable person).

1 similarly situated “uniquely vulnerable to harassment, shaming, stalking, or worse,”
2 *Anderson*, 2015 WL 4724739, at *1, and in this context, would violate their constitutional
3 rights of privacy and association. Thus, the court also concludes that Plaintiffs are likely
4 to succeed on the merits of their claim that their personally identifying information is
5 exempt from disclosure under the PRA.

6 **3. The Remaining Factors**

7 The court has found that Plaintiffs are likely to succeed on their claims that the
8 disclosure of their personally identifying information in response to Defendants’ PRA
9 requests will violate their constitutional rights to privacy and association. *See supra*
10 § III.B.2. The denial of First Amendment freedoms “unquestionably constitutes
11 irreparable injury” supporting the issuance of a preliminary injunction. *Doe v. Harris*,
12 772 F.3d 563, 583 (9th Cir. 2014) (citing *Associated Press v. Otter*, 682 F.3d 821, 826
13 (9th Cir. 2012), and *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Klein v. City of San*
14 *Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009). Plaintiffs have, therefore,
15 demonstrated that they will suffer irreparable harm in the absence of a preliminary
16 injunction.

17 Next, the court considers whether a preliminary injunction will serve the public
18 interest. The court has recognized that the public has an interest in obtaining information
19 concerning the scientific research conducted by UW. *See supra* § III.B.2. However,
20 redacting Plaintiffs’ personally identifying information from the documents responsive to
21 Defendants’ PRA requests will do little, if anything, to undermine this interest. On the
22 other hand, the Ninth Circuit has “consistently recognized the significant public interest

1 in upholding First Amendment principles.” *Harris*, 772 F.3d at 583 (quoting
2 *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)). The court
3 concludes that disclosure of Plaintiffs’ personally identifying information would run
4 contrary to the public interest because it would do little to further the PRA’s purposes of
5 ensuring government accountability, while exposing Plaintiffs to the threat of violence or
6 harassment and chilling First Amendment associational rights. The court concludes that
7 the public interest factor weighs in favor of issuing the preliminary injunction.

8 As for the balance of equities, the court recognizes that the public, Mr. Freeman,
9 and Mr. Daleiden have an interest in the production of documents responsive to the PRA
10 requests. Furthermore, as noted above, the public has an interest in obtaining information
11 concerning research conducted by UW. *See supra* § III.B.2. However, as also noted
12 above, obtaining Plaintiffs’ personally identifying information would contribute little, if
13 anything, to the public’s interest in understanding and being informed about the types of
14 research UW conducts. *See id.* Moreover, both Mr. Freeman and Mr. Daleiden have
15 disavowed any interest in obtaining Plaintiffs’ personally identifying information.
16 (Freeman Resp. at 1 (stating that Mr. Freeman “has no objection to the redaction of
17 personally identifying information or contact information”); Daleiden Resp. at 2
18 (“Daleiden and Freeman have agreed to a redaction of the plaintiffs’ personal identifying
19 information.”).)¹¹ Thus, a preliminary injunction that precludes disclosure of Plaintiffs’

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22 ¹¹ Defendants’ disavowal of any interest in Plaintiffs’ personally identifying information
does not include the eight names Mr. Daleiden specifically identified in his PRA request.

1 personally identifying information will cause Defendants little, if any, hardship. On the
2 other hand, Plaintiffs have demonstrated that, absent the preliminary injunction, there is a
3 likelihood that their First Amendment rights will be impinged. Thus, the court concludes
4 that the balance of the equities tips sharply in Plaintiffs' favor.

5 All of the *Winter* factors favor imposing a preliminary injunction that prohibits the
6 disclosure of Plaintiffs' personally identifying information in response to Defendants'
7 PRA requests.

8 **4. The Bond Requirement is Waived**

9 The court may issue a preliminary injunction "only if the movant gives security in
10 an amount the court considers proper to pay costs and damages sustained by any party
11 found to have been wrongfully . . . restrained." Fed. R. Civ. P. 65(c). However, a district
12 court "may dispense with filing of a bond when it concludes there is no realistic
13 likelihood of harm to the defendant from enjoining his or her conduct." *Jorgensen v.*
14 *Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003). The only prejudice to Mr. Daleiden and
15 Mr. Freeman is the minimal burden caused by delay due to the time UW will need to
16 redact Plaintiffs' personally identifying information. Further, no Defendant requested the
17 imposition of a bond or responded to the portion of Plaintiffs' motion asking the court to
18 waive the bond requirement. (*See generally* UW Resp.; Daleiden Resp.; Freeman Resp.)
19 Accordingly, the court finds that any potential costs to Defendants are de minimis and
20 declines to impose a bond.

21
22 (Daleiden Resp. at 5.) The court addresses this issue in the section of this order pertaining to the
scope of the preliminary injunction. *See infra* § III.B.5.

5. Scope of the Preliminary Injunction

The final issue that the court must resolve is the scope of the preliminary injunction. The August 3, 2016, TRO restrained UW “from releasing, altering, or disposing of the requested documents or disclosing the personal identifying information of Plaintiffs pending further order of this court.” (TRO at 7.) Mr. Daleiden argues that the TRO is overbroad because Plaintiffs did not ask the court to enjoin the release of the documents—only the release of their identities and personally identifying information. (Daleiden Resp. at 11-12; *see* PI Mot. at 16 (“An order should be entered enjoining . . . UW from releasing the Documents unless . . . Plaintiffs’ identities and/or other personal identifying information are redacted.”), 9-10 (“Plaintiffs do not ask the Court to order the nondisclosure of any such substantive information with regard to the programs themselves or their implementation.”).) The court agrees. The preliminary injunction shall enjoin UW from releasing the documents responsive to Mr. Daleiden’s and Mr. Freeman’s PRA requests unless Plaintiffs’ identities and other personally identifying information are first redacted from those documents.

The parties, however, differ as to the scope of the phrase “personally identifying information.”¹² Mr. Daleiden, for example, appears to interpret this phrase to encompass

¹² Mr. Daleiden asserts that Plaintiffs’ motion for a preliminary injunction is moot because he has already agreed to allow UW to redact “the personal contact information” for all individuals identified in the requested records and the names of all individuals identified in the record, except for the eight individuals he identifies in his PRA request. (Daleiden Resp. at 4-5.) However, because Plaintiffs the redaction of more than just “personal contact information” and because Plaintiffs do not agree that the eight names identified by Mr. Daleiden should not be redacted, Plaintiffs’ motion is not moot.

1 | only names and contact information. (Daleiden Resp. at 9.) As UW points out, however,
2 | “[p]ersonally identifiable information is logically a broader category than just names and
3 | contact information” and should include “any information from which a person’s identity
4 | could be derived with reasonable certainty.” (UW Resp. at 2 n.2.) Indeed, Plaintiffs
5 | argue that “personally identifying information” should be “understood to include a broad
6 | range of information that (a) identifies or provides the location of specific individuals, (b)
7 | would allow individuals to be identified or located, and (c) would allow individuals to be
8 | contacted.” (Pltf. Reply at 5.) The court agrees. The preliminary injunction will not be
9 | effective in protecting Plaintiffs’ constitutional rights unless it includes these broader
10 | categories of information.

11 | Mr. Daleiden and Mr. Freeman also insist that the eight names that Mr. Freeman
12 | identified in his PRA request to UW should not be redacted from the documents. (*See*
13 | Daleiden Resp. at 5; Daleiden Decl. ¶ 26; Freeman Resp. at 2.) Mr. Daleiden argues that
14 | these names should not be redacted because they “are already widely publicly identified
15 | with the [UW Birth Defects Research Lab], fetal tissue processing, and abortion.”
16 | (Daleiden Decl. ¶ 26.) Plaintiffs assert that disclosure of these eight names would still
17 | violate these individuals’ rights. (Pltf. Reply at 4.)

18 | Plaintiffs reply upon *Bainbridge Island Police Guild v. City of Puyallup*, 259 P.3d
19 | 190 (Wash. 2011). (Pltf. Reply at 4.) In that case, the Court considered whether internal
20 | investigative reports of “unsubstantiated” sexual misconduct should be released under the
21 | PRA and whether the name of the officer involved should be redacted under the former
22 | PRA exemption for personal information. *Bainbridge Island*, 259 P.3d at 192 (citing

1 RCW 42.56.230(2) (2010)). The Court concluded that the reports should be released, but
2 the officer's identity should be redacted despite widespread media coverage that included
3 the officer's name. *Id.* at 192, 196-97.

4 The Court was "not persuaded that a person's right to privacy, as interpreted under
5 the PRA, should be forever lost because of media coverage." *Id.* at 196-97. The Court
6 reasoned as follows:

7 Under the PRA, [the officer] maintains his right to privacy in his identity,
8 regardless of the media coverage of this unsubstantiated allegation. An
9 agency should look to the contents of the document, and not the knowledge
10 of third parties when deciding if the subject of a report has a right to
11 privacy in their identity. Even though a person's identity might be redacted
12 from a public record, the outside knowledge of third parties will always
13 allow some individuals to fill in the blanks. But just because some
14 members of the public may already know the identity of the person in the
15 report, it does not mean that an agency does not violate the person's right to
16 privacy by confirming that knowledge through its production.

17 *Id.* at 197. The Court also relied on the practical effect on the disclosing agency if it held
18 that the officer had no right to privacy in his identity. *Id.* The Court noted that agencies
19 would be required to engage in an analysis of not just the contents of the report but the
20 degree and scope of media coverage regarding the incident or subject. *Id.* Agencies
21 would be faced with making fact-specific inquiries with uncertain guidelines on exactly
22 how much media coverage is required before an individual loses his or her right to
privacy. *Id.*

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1 The court concludes that the *Bainbridge Island* analysis applies here too.¹³ Mr.
2 Daleiden's ability to find certain publicly available information about eight individuals
3 that he believes will be named in the records at issue is irrelevant to the right of those
4 individuals to claim a valid exemption under the PRA based on their constitutional rights.
5 UW may not confirm whatever public knowledge Mr. Daleiden has obtained elsewhere
6 through production under the PRA without redaction of the eight Plaintiffs' names. *See*
7 *id.* In addition, the court declines to impose on UW the burden of performing an
8 intractable fact-specific inquiry concerning the level of media coverage each individual at
9 issue has received. *See id.*

10 Accordingly, the court grants Plaintiffs' motion for a preliminary injunction, but
11 narrows the scope of the preliminary injunction as compared to the TRO. The court
12 preliminarily enjoins UW from releasing the requested documents without first redacting
13 all personally indentifying information or information from which a person's identity
14 could be derived with reasonable certainty for all individuals. Such information includes
15 but not limited to (a) information that identifies or provides the location of an individual,
16 (b) information that would allow an individual to be identified or located, (c) information
17 that would allow an individual to be contacted, (d) names of individuals, (e) phone

18
19
20 ¹³ The court has also examined *Doe No. 1 v. Reed*, 697 F.3d 1235, 1239-40 (9th Cir.
21 2012), in which the court found that the plaintiffs' claim seeking an injunction preventing the
22 State from publicly releasing certain referendum petitions was moot because the petitions were
already widely available on the internet. That case is distinct because here the actual documents
have not been released and are not widely available. The court concludes that this case is more
like *Bainbridge Island*, and for that reason, the court applies the *Bainbridge Island* Court's
analysis.

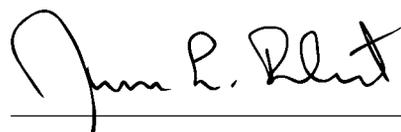
1 numbers, (f) facsimile numbers, (g) email and mailing addresses, (h) social security or tax
2 identification numbers, and (i) job titles.

3 The court is uncertain of the number of documents involved or the time required to
4 appropriately redact the documents. The court, therefore, instructs counsel for the parties
5 to work together to establish reasonable and protocols for redaction and timelines for
6 production. If counsel are unable to come to agreement on these items, counsel may
7 contact the court to schedule a telephonic hearing to resolve any outstanding issues.

8 **IV. CONCLUSION**

9 Based on the foregoing, the court GRANTS Plaintiffs' motion for a preliminary
10 injunction (Dkt. # 2) as more fully described above. The court also DENIES as moot
11 UW's motion for leave to file a one-page supplemental pleading in response to Plaintiffs'
12 motion for a preliminary injunction (Dkt. # 58).

13 Dated this 13th day of November, 2016.

14
15 

16 JAMES L. ROBART
17 United States District Judge

SCHWERIN CAMPBELL BARNARD IGLITZIN LAVITT

December 09, 2016 - 3:17 PM

Transmittal Letter

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