

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)

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION II

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

v.

STATE OF WASHINGTON et al.,  
Respondents/Defendants,

and

FREEDOM FOUNDATION,  
Respondent/Defendant.

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**APPELLANTS' REPLY BRIEF**

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## TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
A. The Correct Standard Of Review Is <i>De Novo</i> .	2
B. Disclosure Of The Requested Documents Would Violate The PRA's Prohibition On Disclosure Of Public Records For Commercial Purposes.	3
C. RCW 42.56.230(3) Exempts Disclosure Of The Individual Dates Of Birth Sought By The Foundation Because, When Tied to Individual Employees' Names, Disclosure Would Be Highly Offensive And Has No Legitimate Concern For The Public.	5
D. 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).	10
E. RCW 42.56.230(7)(a), Which Exempts Records Of An Individual's Age, Exempts An Individual's Date Of Birth From Disclosure.	16
F. Providing Names, Birthdates, and Work Email Addresses To The Foundation Constitutes A Misuse Of State Resources.	18
G. RCW 41.80.110(1)(a) Prohibits Disclosure Here, As Such Disclosure Would Constitute An Unfair Labor Practice.	20
H. Disclosure Would Violate The Unions' Members' Constitutional Right Of Free Association.	22
CONCLUSION	23

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Fabric Services, Inc.</i> , 190 NLRB 540 (1971).....	20
<i>Trueblood v. Washington DSHS</i> , 822 F.3d (9th Cir. 2016).....	13
<b>State Cases</b>	
<i>Bainbridge Island Police Guild v. City of Puyallup</i> , 172 Wn.2d 398 (2011).....	2
<i>Bellevue John Does 1-11 v. Bellevue School Dist. No. 405</i> , 164 Wn.2d 199, 189 P.3d 139 (2008).....	4, 6, 17, 19
<i>Cowles Pub. Co. v. State Patrol</i> , 44 Wn. App. 882, 724 P.2d 379 (1988).....	1
<i>Eugster v. City of Spokane</i> , 121 Wn. App. 799, 91 P.3d 117 (2004).....	22
<i>Foss v. Dep't of Corr.</i> , 82 Wn. App. 355, 918 P.2d 521 (1996).....	22
<i>Hearst v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 123 (1978).....	6
<i>John Doe A v. Wash. State Patrol</i> , 185 Wn.2d 363 (2016).....	20
<i>John Doe G v. Dep't of Corr.</i> , No. 74354-6-I, 2017 Wash. App. LEXIS 110 (Div. I, Jan. 23, 2017).....	2
<i>Kucera v. State, Dept. of Transp.</i> , 140 Wn.2d 200, 995 P.2d 63 (2000).....	3

<i>Right-Price Recreation, L.L.C v. Connells Prairie Cmty. Council,</i> 105 Wn. App. 813, 21 P.3d 1157 (2001).....	22
<i>SEIU 925 v. State of Washington,</i> 2016 WL 7374228, --- P.3d --- (2016).....	4
<i>SEIU Healthcare 775NW v. State of Washington,</i> 193 Wn. App. 377, 377 P.3d 214 (2016).....	1, 3, 4, 9, 10
<i>Snedigar v. Hoddersen,</i> 114 Wn.2d 153, 786 P.2d 781 (1990).....	22
<i>Tiberino v. Spokane County,</i> 103 Wn. App. 680, 13 P.3d 1104 (2000).....	1, 8
<i>Wright v. State,</i> 670 P.2d 1090 (Wyo. 1983).....	13
<i>In re Young,</i> 122 Wn.2d 1, 857 P.2d 989 (1993).....	12
<b>State Statutes</b>	
Public Records Act , RCW 42.56.....	1, 3, 5, 15, 19
RCW 10.77.110.....	14
RCW 10.97.030.....	10, 11, 12
RCW 41.80.....	20, 21
RCW 42.52.180.....	19, 20
RCW 71.05.....	15
<b>Regulations</b>	
WAC 292-110-010.....	19, 20
<b>Constitutional Provisions</b>	
First Amendment to the United States Constitution.....	22
Article I, § 5 of the Washington Constitution.....	22

**Other Authorities**

Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 *Hastings L.J.* 1227, 1254 (2003).....7

Michelle N. M. Latta, *Governor’s Office of Administration v. Purcell: Clarifying the Personal Security Exception*, 22 *Widener L.J.* 403, 419 (2013).....7

Restatement (Second) of Torts § 652D,  
American Law Institute (1977).....6, 8

## INTRODUCTION

RCW 42.56.030 explains the intent of the PRA. It reads, in relevant part:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. ***The people insist on remaining informed so that they may maintain control over the instruments that they have created.*** This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. ...

*Id.* (emphasis added).

The basic purpose of the Public Records Act (“PRA”) was to allow scrutiny of *the government* by the people of Washington, rather than to promote scrutiny of particular individuals outside of the functions of government. *Cowles Pub. Co. v. State Patrol*, 44 Wn. App. 882, 897–98, 724 P.2d 379, *rev’d on other grounds*, 109 Wn.2d 712 (1988); *Tiberino v. Spokane County*, 103 Wn. App. 680, 689, 13 P.3d 1104 (2000) (disclosure of purely personal emails would be “highly offensive,” and public had no legitimate concern to know content of requested emails; the only reason the *number* of emails sent might even be relevant would be to show an employee not working during work hours and therefore misusing taxpayer dollars that pay her salary). Furthermore, the PRA was never intended to further any entity’s commercial aspirations or purposes, which include “a business activity ***by any form*** ... intended to generate revenue or financial benefit.” *SEIU Healthcare*

*775NW v. State of Washington*, 193 Wn. App. 377, 377 P.3d 214 (2016) (emphasis added).

Here, disclosure of the requested information will violate several exemptions from disclosure and will not serve to allow scrutiny of the government by the requester, as intended by the PRA. Disclosure would ultimately serve to harm public servants by unnecessarily intruding upon their privacy in a way that has no bearing on the conduct of government, as contemplated by the PRA. Disclosure would also serve the commercial purposes of the requester, in violation of the PRA.

## ARGUMENT

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

Both the Unions and the Freedom Foundation (“Foundation”) assert the correct standard of review of a trial court’s decision on a PRA injunction is “de novo.” Appellants’ Opening Brief, 12; Foundation Brief, 3. Nonetheless, the State avers that the standard of review for injunctive relief is “abuse of discretion.” State Opening Brief, 5. The cases cited in the Unions’ and the Foundation’s briefs, and a recent Court of Appeals Division I decision, support the *de novo* standard of review. *John Doe G v. Dep’t of Corr.*, No. 74354-6-I, 2017 Wash. App. LEXIS 110 (Div. I, Jan. 23, 2017) (“This court reviews de novo a trial court’s PRA decisions about exemptions and injunctions.”); *see also Bainbridge Island Police Guild v.*

*City of Puyallup*, 172 Wn.2d 398, 407 (2011) (“Judicial review under the PRA and [RCW 42.56.540] is *de novo*.”) In fact, the case cited by the State for the “abuse of discretion” standard is not a PRA case, but considers whether an injunction was proper “pending compliance” with an environmental law. *Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 209-10, 995 P.2d 63 (2000). Thus, the appropriate standard of review is *de novo*.

**B. 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 “*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*, 193 Wn. App. 377.

The circumstances here differ from those in two other Division Two cases addressing commercial purposes: *SEIU Healthcare 775NW*,

193 Wn. App. 377, and *SEIU 925 v. State of Washington*, 2016 WL 7374228, --- P.3d ---- (2016). In both of those cases, the Court ruled on the record before it, pointing out that the Unions in those cases provided “no specific support for the assertion that the Foundation intends to use” the requested information “to solicit money or membership” from the individuals whose information is being sought. *SEIU 925* at \*5. However, in both cases, this Court explicitly stated that if “future actions of the Foundation show a more direct relationship between provider lists and the Foundation’s fundraising or membership endeavors, that information would be relevant to future requests” and that those holdings “rest on the record” presented at the time. *Id.*

Here, contrary to the Foundation’s assertion at page 21 of its Brief, the record *does* contain additional information *not* reviewed by the Court in either *SEIU Healthcare 775NW* or *SEIU 925*. Specifically, the Foundation has publicly admitted that it will “leverage” these lists into “more donations.” CP 33, 74-76. That statement—an admission by the Foundation of a direct relationship between provider lists and fundraising/membership endeavors—was *not* before the Court in either *SEIU Healthcare 775NW* or *SEIU 925*. This statement is a significant admission of the direct relationship between obtaining these requested lists and the Foundation’s fundraising and membership endeavors and must be

taken into account when determining the propriety of the commercial purposes exemption in this case.

In this case, the Foundation's anticipated benefits from obtaining this information is not considered "remote and ephemeral" or "indirect," as 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. CP 33, 74-76. Disclosure cannot be permitted here, as it would enable the Foundation to fulfill its commercial purpose.

**C. RCW 42.56.230(3) Exempts Disclosure Of The Individual Dates Of Birth Sought By The Foundation Because, When Tied to Individual Employees' Names, Disclosure Would Be Highly Offensive And Has No Legitimate Concern For The Public.**

The Foundation makes two arguments that, upon examination, do not demonstrate that the privacy rights of the individual employees will not be violated by the disclosure it seeks. It argues (1) that an individual does not have a privacy interest in her or his date of birth, even when tied to that individual's full name; and (2) that an argument that exempt information will be learned from obtaining birthdates with names (because that information will lead to other information) is an argument that has been rejected by this Court. Both arguments fail.

Individual employees do retain a privacy interest in their dates of birth when tied directly to their names. Although the Foundation argues that the Legislature enacted protections for birthdates of non-employees and a set of employees in RCW 42.56.250(3) and RCW 42.56.250(8) respectively, that does not lead to the conclusion that birthdates of employees, when linked to their specific names, are not protected by the privacy right enacted in RCW 42.56.230(3).

Appellants do not contest that the Washington Supreme Court in *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, 164 Wn.2d 199, 216, 189 P.3d 139 (2008) adopted the approach of *Hearst v. Hoppe*, 90 Wn.2d 123, 580 P.2d 123, 136 (1978), to delineate the right to privacy in the PRA, which, in turn, relies on Section 652D of the Restatement (Second) of Torts § 652D, published by the American Law Institute in 1977. However, the Washington Courts have not ceded their responsibility to interpret statutes to the American Law Institute's description of specific examples of privacy rights written some 40 years ago.

Rather, in applying the Restatement approach to privacy rights now, “[t]he protection afforded to the plaintiff’s interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens.” Restatement (Second) of Torts § 652D (1977). In this time and place, the

Internet has transformed the way in which personal information is acquired, held and used. It has turned previously innocuous information into information to be carefully guarded. A person's birthdate, which may have previously been considered innocuous information, is no longer innocuous because of the mischief that is made possible by the fact that so much information about any individual is available to those with a name and corresponding birthdate. Michelle N.M. Latta, *Governor's Office of Administration v. Purcell: Clarifying the Personal Security Exception*, 22 Widener L.J. 403, 419 (2013)) ("full **names**, combined with addresses and **dates of birth**, were the tools criminals could use to obtain financial information") (emphasis added); 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."). In this decade, nearly all of a person's financial, medical and other personal information is available online to anyone with the key information of name and birthdate, and the right skills to use that information.

Nor can the privacy right of public employees be limited to matters that are sexual or concern family relations. The harm that would result

from disclosure of personal information must be taken into account when considering whether a person's privacy interest is being violated. In determining what is within the right of privacy "due regard [must be given] to the feelings of the individual and the harm that will be done to him by the exposure." Restatement (Second) of Torts § 652D (1977), Comment h. Here, due regard to the reasonable feelings of the public employees whose dates of birth linked to their names would be disclosed demonstrates that their privacy would be violated by disclosure.<sup>1</sup>

The fact that the harm that will be done by the increased risk of identity theft goes to the legitimate privacy interest in a date of birth linked with a name, not to the fact that some other exempt information may be discovered, as the Foundation contends by characterizing the Appellant's argument as a prohibited "linkage" argument. As this Court

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<sup>1</sup> The fact that some individuals may list their dates of birth on Facebook pages, which have privacy controls to limit the group to whom that is revealed, does not mean that dates of birth are not highly personal information, as the Freedom Foundation claims. Furthermore, providing one's date of birth to purchase alcohol—which is also a choice—is different from releasing a public employee's date of birth. *See* Restatement (Second) of Torts § 652D (1977), Comment b (private matters are "facts about [oneself] that [one] does not expose to the public eye, but keeps entirely to himself [or herself] or at most reveals only to his family or to close friends." *Tiberino v. Spokane Cty. Prosecutor*, 103 Wn. App. 680, 13 P.3d 1104 (2000), is not to the contrary. Dates of birth, linked to names, are highly personal information of the type that is protected under RCW 42.56.230(3). The Freedom Foundation's characterization of *Tiberino* is incorrect. In that case, the Court found that disclosure of personal emails to family and friends is highly offensive to a reasonable person, specifically noting that an individual has a privacy interest when "information which reveals unique facts about those named is linked to an identifiable individual." *Tiberino*, 103 Wn. App. at 689-90 (internal citations omitted).

pointed out in *SEIU Healthcare 775NW*, 193 Wn. App. 377, there is a difference between determining whether disclosure violates RCW 42.56.230(3) and the “linkage” argument. In ruling that a linkage argument (i.e., an argument that exempt information would be discovered if non-exempt information was disclosed) would not prevent disclosure, the Court specifically noted that the linkage argument was different from an argument that the disclosure of specific information violated the right to privacy protected by RCW 42.56.230(3). The Court specifically distinguished the argument Appellants make here, that the information that will be disclosed is exempt because it would violate the right of privacy protected by RCW 42.56.230(3). *SEIU Healthcare 775NW.*, 193 Wn. App. at 411, n. 15.

[In] *Tacoma Pub. Library v. Woessner*, ... this court ruled that release of employee identification numbers would be an invasion of privacy because those numbers would allow the requestor to determine exempt personal information regarding the employees. 90 Wash.App. 205, 221–222, 951 P.2d 357 (1998). There the court was examining whether the disclosure of the requested information would violate an employee's right to privacy, and was required to determine whether such disclosure would be highly offensive. *Id.* at 216–222, 951 P.2d 357. Neither situation is present in this case.

*Id.* Here, the affected employees reasonably would find the disclosure of their birthdates along with their names highly offensive, and a violation of their privacy.

**D. 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).**

While the State found that the criminal justice agency exemption in RCW 42.56.250(8) applies to one sub-agency of DSHS, the Juvenile Rehabilitation Administration (“JRA”), it did not find the exemption applicable to other sub-agencies, including Western State Hospital (“WSH”), Eastern State Hospital (“ESH”), and the Special Commitment Center (“SCC”).<sup>2</sup> State Opening Brief, 12. The Freedom Foundation— with no analysis of its own—agrees that the State’s position is reasonable. Brief of Freedom Foundation, 26. “Criminal justice agency” is defined as “a government agency [1] which 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). “The administration of criminal justice” includes detention and rehabilitation of accused persons or criminal offenders. RCW 10.97.030(1).

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<sup>2</sup> The State does not specifically mention SEIU 1199NW’s arguments that the Child Study and Treatment Center (“CSTC”) is a criminal justice agency pursuant to RCW 10.97.030.

In declining to apply this exemption to WSH, ESH, CSTC and SCC, the State fails to address SEIU 1199NW's arguments that (1) those agencies are criminal justice agencies because they perform the administration of criminal justice in their *detention* of accused persons and criminal offenders (Appellants' Opening Brief, 27-31) and (2) a substantial portion of those agencies' budgets is dedicated to the administration of criminal justice (Appellants' Opening Brief, 31-33). SEIU 1199NW briefed those arguments and will not reiterate them here. Additionally, the State's proffered definition and analysis of "rehabilitation" actually encompasses the work of WSH, ESH, CSTC and SCC. Finally, in asserting that those agencies are not criminal justice agencies because they do not perform rehabilitation activities, the State ignores a significant number of the functions of those agencies.

WSH, ESH, CSTC and SCC engage in rehabilitation of accused persons or criminal offenders, even under the State's definition of rehabilitation: "'to restore (as a convicted criminal defendant) to a useful and constructive place in society through therapy, job training, and other counseling.'" State Opening Brief, 13. The parenthetical "as a convicted criminal defendant" is an example and does not mean that all covered by this definition must have a criminal conviction. This is underscored by RCW 10.97.030, which specifically states "criminal justice

administration” pertains to accused persons or criminal offenders, not only convicted criminal defendants.

The State admits that SCC “provide[s] treatment to individuals under a civil commitment order based on the State’s Sexually Violent Predator law.” State Opening Brief, 12. The State cites *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), for the proposition that SCC is involved with civil, not criminal, commitments. In fact, the following language in *Young* explicitly supports SEIU 1199NW’s arguments that SCC provides rehabilitation of sex (criminal) offenders: “[a]lthough *the ultimate goal of the statute is to treat, and someday cure those whose mental condition causes them to commit acts of sexual violence*, its immediate purpose is to ensure the commitment of these persons in order to protect the community.” 122 Wn.2d at 10 (emphasis added).<sup>3</sup> Additionally, considering commitments to SCC civil for the purpose of deciding double jeopardy and *ex post facto* constitutional claims (as analyzed in *Young*) does not prevent SCC from being a “criminal justice agency” under RCW 42.56.250(8) and as specifically defined in RCW 10.97.030.

The State’s arguments that WSH and ESH are not responsible for “incarcerating individuals that have been charged with a crime” but “evaluate and restore competency when possible” (State Opening Brief,

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<sup>3</sup> The *Young* court also refers to people committed at SCC as detainees. 122 Wn.2d at 13.

12) do not preclude WSH and ESH from being criminal justice agencies. SEIU 1199NW does not dispute the State's assertion that *Trueblood v. Washington DSHS*, 822 F.3d (9th Cir. 2016) provides WSH and ESH are responsible for evaluating patients and restoring competency. State Opening Brief, 12. Specifically, in *Trueblood*, the Ninth Circuit considered whether criminal defendants (i.e., accused persons) were entitled to a competency evaluation at a state mental institution (to evaluate and possibly restore competency) within seven days of a court order calling for such evaluation. 822 F.3d at 1041-42. Thus, *Trueblood* also supports that WSH and ESH are involved in the rehabilitation of accused persons or criminal offenders.

The State also posits that the focus of rehabilitation is “the reintegration into society of a convicted person to counter habitual offending,” citing *Wright v. State*, 670 P.2d 1090 (Wyo. 1983). State Opening Brief, 13. *Wright* is not precedential authority, and its discussion of rehabilitation is as one of four or more purposes of punishment for a crime, not whether state mental and sex offender facilities are engaged in rehabilitation. 670 P.2d at 1093. Taking aside that specific context, *Wright* also supports that WSH, ESH, CSTC and SCC perform rehabilitation activities for accused persons and criminal offenders, in that they provide

therapeutic services with one goal being reintegration into society. *See* Appellants’ Opening Brief, 27-28, 30-31 (and citations therein).

The State avers that the role of SCC, WSH, and ESH is not “the rehabilitation of the criminally convicted offender, but rather the therapeutic evaluation and treatment of individuals facing criminal charges [to determine if competent to stand trial].” State Opening Brief, 13. While that may be true, WSH and ESH’s work evaluating and restoring criminal defendants’ competency constitutes rehabilitation under even the State’s definition. Furthermore, the State does not address at least three additional ways WSH, ESH, CSTC and SCC are criminal justice agencies based upon their rehabilitation activities. First, individuals at WSH and ESH who have been found by a criminal court to be not guilty by reason of insanity (“NGRI”) are clearly being rehabilitated: they are former criminal defendants being treated (including through therapy) with the purpose of being restored and placed back in society. This is reflected in both the framework of RCW 10.77.110 as well as WSH policies for NGRI individuals.<sup>4</sup> Second, individuals who are civilly committed to WSH and

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<sup>4</sup> Specifically, one policy states that “[a]ll patients receiving *treatment* on [NGRI] wards receive a risk assessment, identifying the factors that place them at increased risk for criminal activity *in less restrictive settings*. In addition to the risk assessment, the courts receive updates on each individual’s progress in treatment and readiness for a less restrictive environment every six months...*Each patient develops an individualized relapse prevention plan that assists them in planning for their success with discharge and*

ESH because they are deemed not competent to stand trial as a criminal defendant are also being rehabilitated under the State's definition. Specifically, they are accused persons who are receiving therapy.<sup>5</sup> Third, as previously explained, SCC's treatment of convicted sex offenders with the possibility of release into the community fits squarely within the State's rehabilitation definition.

The State notes it does not see its role at WSH, ESH and SCC "as fitting into the definition of criminal justice agency" and thus did not identify that as an exemption. State Opening Brief, 13. The State cites no authority for deference to its conclusion that the SCC, CSTC, WSH and ESC are not "criminal justice agencies." In fact, there is no such deference, as evinced by the *de novo* standard of review and the fact that the PRA provides a mechanism for an entity to whom a record pertains or who is named in the record to seek an injunction preventing the State from releasing such records. RCW 42.56.540. Similarly, the Foundation's statement that the Superior Court "did not err" by concluding that the

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*reintegration into the community.*" Magdalena Dec., Exh. G, CP 4129-31 (emphasis added).

<sup>5</sup> See, e.g., "Evaluation for Civil Commitment Following Dismissal of Felony Charges," which provides a procedure for civil commitment of people whose felony charges have been dismissed. Magdalena Dec., Exh. F, CP 4127-28. The civil commitment statute provides for treatment and the possibility of discharge. See, e.g., RCW 71.05.201; RCW 71.05.365.

agencies do not fall within the criminal justice agency exemption misstates the standard of review of the Superior Court's decision, which is *de novo*. Thus, WSH, ESH, CSTC and SCC are criminal justice agencies under 42.56.250(8), and month and year of birth of SEIU 1199NW-represented employees working there are exempt from release.

**E. RCW 42.56.230(7)(a), Which Exempts Records Of An Individual's Age, Exempts An Individual's Date Of Birth From Disclosure.**

Respondents argue that RCW 42.56.230(7)(a) does not exempt the list of employees' dates of birth requested by the Foundation because the list itself is not a record used to establish age for purposes of obtaining a driver's license or identicard. FF Resp. at 22-25 and State Resp. at 13-14. The State further argues that the list of dates of birth is not exempt because the birthdates were obtained from employment records and not from documents that had been used to obtain a driver's license or identicard.<sup>6</sup>

The gist of both arguments is that the statute only exempts "records" actually used to obtain a driver's license or an identicard (regardless of content) and not the "personal information" that is the reason the State has the record in the first place, i.e., the individual's date of birth to prove his or her age. This argument ignores the stated purpose

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<sup>6</sup> There is no evidence in the record showing from where the State has obtained the employees' dates of birth.

of the exemptions to disclosure in RCW 42.56.230, that it is the *personal information* in the records that is exempt from disclosure:

42.56.230. *Personal information.*

The following *personal information* is exempt from public inspection and copying under this chapter:

...  
(7)(a) Any 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.

(Emphasis added.) In *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 210–12, 189 P.3d 139, 144–45 (2008), the court held that personal information, in that case the individual's identity, is information that relates to a particular person. A date of birth also relates to the particular person and is "personal information." RCW 42.56.230(7)(a) expressly recognizes that the person's age (date of birth) is one of the pieces of personal information in the record that makes the record exempt.

The logical extension of both arguments made by the Respondents is that whether the birthdates requested by the Foundation are exempt depends not upon the personal nature of the information in the record, but upon the source from which the birthdates are derived. They argue that only if the personal information comes from a record establishing the person's date of birth that was used to prove age for the individual to

obtain a license or identicard is that personal information exempt from disclosure. This argument ignores that the personal information that is intended to be protected by the statute is expressly declared to be the person's age (or other personal information), which is necessarily revealed by their date of birth.

The Respondents' position that whether a date of birth (a person's age) is personal and private information depends on its source has no logical basis. The nature of the information itself is what makes it "personal information," not the source of the record. There is nothing "personal" or "private" about a document submitted to obtain a license unless it contains personal information. If a person's age (date of birth) is exempt because it is exempt personal and private information when applying for a license, it is necessarily exempt for disclosure regardless of the source. Differentiation based on source is completely arbitrary.

**F. Providing Names, Birthdates, and Work Email Addresses To The Foundation Constitutes A Misuse Of State Resources.**

Respondents argue that providing union members' names, birthdates, and work email addresses to the Foundation does not constitute a misuse of State resources because the Foundation has not used such information for electioneering communications, solicitations for donations, and for the promotion of the Foundation's political agenda.

The record, however, demonstrates that the Foundation has and will use the requested information to engage in all of the aforementioned activities. By way of example, in an email from the Foundation to SEIU 775-represented healthcare workers, the Foundation directed employees to a website ([www.SEIUIOptOut.com](http://www.SEIUIOptOut.com)) that linked to the Foundation's website. Iglitzin Dec. Ex. C, CP 40-47 The Foundation's website supports ballot measures it authors and/or like-minded political candidates, seeks donations (by means of a large "DONATE" button on the top of the site), and promotes the Foundation's political agenda. *See, e.g.* Iglitzin Dec. Exs. G, J, K, L, CP 63-65, 77-79, 80-84, 85-88. Hence, the record *does* contain evidence that the Foundation has and will use the requested information to link employees to its website, where the Foundation blatantly provides electioneering communications, seeks donations, and promotes its political agenda.

Moreover, RCW 42.52.180 and WAC 292-110-010 are "other statutes" that operate to prohibit disclosure of the union members' names, birthdates, and work email addresses. RCW 42.56.070(1) provides that State agencies should make records available for public inspection unless such records fall within the prescribed exceptions or "*other statute which exempts or prohibits disclosure of specific information or records.*" (Emphasis added). Such exemptions exist where "courts have identified a

legislative intent to protect a particular interest or value.” *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 377-78 (2016).

Here, an exemption exists because the Legislature identified its interest in not having State resources used “directly or indirectly” for the purpose of supporting or opposing ballot propositions, campaigning for election, conducting outside business to realize a private financial gain, and/or for supporting the interests of an outside organization or group. *See* WAC 292-110-010; RCW 42.52.180. The State is therefore prohibited from using its resources to provide the requested documents to the Foundation, as the Foundation will use the requested information to link employees to its website that supports (or opposes) candidates, supports ballot propositions favored by the Foundation, and asks for donations.

**G. RCW 41.80.110(1)(a) Prohibits Disclosure Here, As Such Disclosure Would Constitute An Unfair Labor Practice.**

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 National Labor Relations Act. Further, the unlawful conduct need not have been committed by the employee’s employer for it to constitute an “interference” ULP. *Fabric Services, Inc.*, 190 NLRB 540, 542 (1971) (Employer liable because third party was in a position to interfere with the employee’s ability to show union support while

performing his work). 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. Such behavior would indisputably be prohibited by RCW 41.80 if undertaken by an employer; it is likewise unlawful when performed by the Foundation. 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.<sup>7</sup>

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<sup>7</sup> To say that the Superior Court has rejected the argument on seven occasions is incorrect. The Foundation cites the five cases that were consolidated before the court *separately*, in an attempt to bolster the impact of its "alternate math." Furthermore, that is the purpose of an appeal—to seek this Court's opinion on whether the lower court's approach is indeed correct.

## **H. 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). While the Foundation claims that it aims to “notify workers of their constitutional rights,” its real purpose is to reach bargaining unit members in the privacy of their own homes to campaign for their resignations, which is both harassing and done for a commercial purpose. The communication is not initiated by the union member, and in many cases is unwanted and viewed as harassment.<sup>8</sup> The hostility the Foundation expresses towards a union member’s union is meant to intimidate members and suppress their right to association, in violation of the First Amendment and Article I, § 5 of the Washington Constitution. *Cf.*, *Eugster v. City of Spokane*, 121 Wn. App. 799, 807, 91 P.3d 117, 121 (2004); *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990); *Right-Price Recreation, L.L.C v. Connells Prairie Cmty. Council*, 105 Wn. App.

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<sup>8</sup> The Freedom Foundation proclaims that in its outreach work to employees represented by unions, “no single instance of harassment, targeting, or any other misconduct has ever occurred.” Freedom Foundation Brief, 3. This ignores record evidence—of which Foundation counsel was aware—of harassment of a union-represented individual contacted three times at home by Freedom Foundation representatives, despite the fact that she had previously told them not to return. Second Iglitzin Declaration, Exh. A (Declaration of Danielle Green), CP 176-180. She additionally notes that the representatives stated that they know the name of her child client, and describes further harassment by Freedom Foundation representatives, including about her union attire. *Id.*

813, 824-25, 21 P.3d 1157 (2001). For this reason, the disclosure sought here would violate both the U.S. and State constitutions.

### **CONCLUSION**

Because of the foregoing, this Court should reverse and remand for entry of a permanent injunction.

RESPECTFULLY SUBMITTED this 21st day of February, 2017.

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