

No. 95262-1

No. 49224-5-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION II

TEAMSTERS LOCAL 117, et al.,
Appellants/Plaintiffs,

v.

STATE OF WASHINGTON, et al.,
Respondents/Defendants,

and

FREEDOM FOUNDATION,
Respondent/Defendant.

BRIEF OF RESPONDENT FREEDOM FOUNDATION

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I. INTRODUCTION

In this case, Appellants, which are seven labor unions (“Unions”), attempt once again to prevent Respondent Freedom Foundation (“Foundation”) from obtaining nonexempt lists of public employees. The Foundation requested these lists to facilitate its educational outreach program, by which it communicates with public employees about their legal rights regarding union membership and dues payment. The Superior Court rightly rejected the Unions’ arguments and declined to enjoin disclosure of the public records. This Court and the Superior Court previously rejected many of the arguments raised in this case. Many of the Union attorneys in this case were the losing attorneys in those prior cases. Case after case after case continues to trickle up through the courts, the Unions continue to lose, and yet they continue to bring more lawsuits. And in their haste to seek relief to which they are not entitled, the Unions routinely attempt to stretch the Public Records Act to its breaking point. The Foundation is a charity that relies upon voluntary donations from the general public, but to carry out its mission to simply communicate with workers about their fundamental rights, it has had to mount and sustain a considerable legal defense. The Public Records Act should not be used as a weapon to harm and prejudice those who seek nonexempt public records.

Public employee names and birthdates are and always have been disclosable public records. The same is true for state-issued email addresses. The Superior Court correctly refused to issue an injunction. This Court should affirm.

II. STATEMENT OF THE CASE

In April 2016, Respondent Freedom Foundation submitted Public Records Act (“PRA”) requests to many state agencies for the names, birthdates, and state-issued work email address of state civil service employees in unionized bargaining units. CP at 3392 (attached as Freedom Foundation Appendix (“FF App.”) at 3). While these workers are located within bargaining units represented by unions, they are not necessarily card-signing union members. *Id.* (FF App. at 3-4). For over two years, “[o]ne of the Foundation's central purposes [has been] to educate public employees... about their constitutional rights to drop their membership in and payment of fees to public sector unions.” *SEIU Healthcare 775NW v. DSHS, et al.*, 193 Wn. App. 377, 385–86, *review denied*, 186 Wn.2d 1016 (2016). These First Amendment rights for public civil service employees are set forth in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and its progeny.

For over two years, the Foundation has conducted this outreach, primarily (though not exclusively) to Individual Providers and Family

Childcare providers, whose First Amendment rights were recently articulated in *Harris v. Quinn*, 134 S.Ct. 2618 (2014). The Foundation's educational outreach includes written, e-mail, phone, social media, and door-to-door communications, in various combinations. When public employees ask the Foundation to stop communicating with them, the Foundation does so as soon as feasibly possible. CP at 3394 (FF App. at 5). The Foundation has never and will never sell or give the public employee information it obtains through the PRA to any third party, and it will never use that information for any purpose other than its educational outreach program. CP 3393 (FF App. at 4). After two-plus years and tens of thousands of outreach communications, no single instance of harassment, targeting, or any other misconduct has ever occurred. *Id.*

In this case, the Unions representing various public employee bargaining units brought five virtually identical lawsuits under RCW 42.56.540 in Thurston County Superior Court. The Unions sued the State and the Foundation to attempt to enjoin disclosure to the Foundation of the lists of public employees' names, birthdates, and work email addresses. The state agencies determined that they possessed public records responsive to the Foundation's request, found no basis to exempt any of the requested information, and intended to disclose the records absent some court order to the contrary.

The cases were assigned to Superior Court Judge Mary Sue Wilson, and a flurry of motions practice ensued. On July 29, 2016, Judge Wilson denied the Unions' Joint Motion for Permanent Injunction. CP 1443. This appeal followed.

III. ARGUMENT

The requested public employee names, birthdates, and work email addresses are fully disclosable and nonexempt public records, and no statutory or constitutional provision exempts them from disclosure.¹

A. Standards of Review and Presumptions

Appellate courts “review a trial court's decision to grant or deny a permanent injunction in relation to the PRA de novo.” *Robbins Geller Rudman & Dowd LLP v. Office of Att’y Gen.*, 179 Wn. App. 711, 719-20, 328 P.3d 905 (2014); *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 389, 374 P.3d 63 (2016); *SEIU Local 925 v. Freedom Foundation*, ___ Wn. App. ___, No. 48522-2-II, 2016 WL 7374228, at *2 (Dec. 20, 2016). “The party seeking to prevent disclosure bears the burden of establishing that an exemption applies.” *SEIU Local 925*, 2016 WL 7374228, at *3. *Ameriquest Mortg. Co. v. Office of Att’y Gen.*, 177 Wn.2d

¹ The Foundation understands and does not contest that the birth months and birth years of employees of the Juvenile Rehabilitation Agency are exempt from disclosure pursuant to RCW 42.56.250(8).

467, 486-87, 300 P.3d 799 (2013). “[T]he moving party must prove that (1) the record in question specifically pertains to that party, (2) an exemption applies, and (3) the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function.” *SEIU Local 925*, 2016 WL 7374228, at *3 (discussing the application of RCW 42.56.540).²

The PRA must be “liberally construed and its exemptions narrowly construed ... to assure that the public interest will be fully protected.” RCW 42.56.030. Courts “must liberally construe the PRA in favor of disclosure.” *West v. Port of Olympia*, 183 Wn. App. 306, 311, 333 P.3d 488 (2014). When evaluating a PRA claim, courts must also “take into account the policy ... that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3). *See also SEIU Local 925*, 2016 WL 7374228, at *3.

The Unions cannot prove any of the elements necessary to obtain

² Generally, a party seeking permanent injunctive relief must prove three elements: (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the act complained of will result in actual and substantial injury. *See SEIU Healthcare 775NW v. DSHS*, 193 Wn. App. 377, 393, 377 P.3d 214, *review denied*, 186 Wn.2d 1016, 380 P.3d 502 (2016). No case has reviewed how this standard interplays with the PRA injunction standard, but “the first two requirements for a permanent injunction relate to the existence of an exemption and the third requirement is consistent with a similar requirement in RCW 42.56.540.” *Id.*

permanent injunctive relief. The Superior Court should be affirmed.

B. RCW 42.56.230(3) does not exempt public employees' birthdates.

Disclosure of the instant public records is not exempted by RCW 42.56.230(3). This provision exempts personal information maintained for employees to the extent that disclosure would violate their right to privacy. A public employee's right to 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); *King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002) ("[u]nder Washington's [PRA], both a privacy interest and a lack of legitimate public interest must be present to establish this exemption.") (emphasis in original).

The Unions argue that disclosure of public employees' names and birthdates violates those employees' right to privacy. Appellants' Brief at 13. The Unions' argument fails for at least two reasons. First, other PRA provisions and case law clearly state that public employee names and birthdates are nonexempt and fully disclosable public records. Second, the Unions' argument relies upon "linkage" analysis, which this Court and the Washington Supreme Court have repeatedly and specifically rejected. The

records are not exempt under RCW 42.56.230(3).

1. RCW 42.56.230(3)'s right to privacy does not protect public employee names and birthdates.

RCW 42.56.230(3) cannot apply simply because disclosure of state employees' names and birthdates would reveal unique facts about identifiable individuals (their age). *See, e.g., Tiberino v. Spokane County*, 103 Wn. App. 680, 689, 13 P.3d 1104 (2000). On the contrary, this exemption is intended to prevent only the disclosure of "sensitive, personal information." *DeLong v. Parmelee*, 157 Wn. App. 119, 157, 236 P.3d 936 (2010), *review granted, cause remanded*, 171 Wn. 2d 1004 (2011). *See also Dawson v. Daly*, 120 Wn.2d 782, 796, 845 P.2d 995 (1993) ("the right of privacy applies only to the intimate details of one's personal and private life"). And every time Washington courts have provided examples of the "intimate," "sensitive, personal information" this exemption covers, public employees' names and birthdates are notably absent. The Supreme Court in *Hearst v. Hoppe*, 90 Wn.2d 123, 580 P.2d 123 (1978) defined the "right to privacy," in the PRA by adopting the Restatement (Second) of Torts. According to *Hearst*, "the comment to the Restatement illustrates what nature of facts are protected by this right to privacy." *Id.* at 136. The Court elaborated:

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. **Sexual relations**, for example, are normally entirely private matters, as are **family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget**. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest... **We therefore adopt the Restatement standard as the controlling [definition].**

Id. at 135-36 (emphasis added).

The Supreme Court adopted the *Hearst* standard as it relates to public employees' right to privacy under the PRA. *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, 164 Wn.2d 199, 216, 189 P.3d 139 (2008) (“disclosure of the identity of a teacher accused of sexual misconduct is highly offensive to a reasonable person.”). In *Cowles Pub. Co. v. State Patrol*, the Court of Appeals remarked that RCW 42.56.230(3) “was intended to shield only that **highly personal information** often contained in employment and other personnel files.” 44 Wn. App. 882, 891, 724 P.2d 379 (1986), *rev'd on other grounds*, 109 Wn.2d 712, 748 P.2d 597 (1988) (emphasis added).³ In *Human Rights Comm'n v. Seattle*, the Court of

³ “Such information might include, but is not limited to, the *particular employee's union dues, charitable contributions, deferred compensation, medical records, disabilities, employment performance evaluations, and reasons for leaving employment...* Likewise, the phrase may include those *sensitive records relating to health, or marital and family*

Appeals applied the *Hearst* standard and found that RCW 42.56.230(3) exempted applicants' answers to certain employment application questions which "elicit[ed] the most private and confidential matters pertaining to the life of the applicant, information replete with substantial and comprehensive private matters pertaining to the applicant and his past activities." 25 Wn. App. 364, 369-70, 607 P.2d 332 (1980).

The *Hearst v. Hoppe* standard (which incorporates the Restatement):

[I]llustrates what nature of facts are protected by this right to privacy, and taken in context makes clear that the PRA will not protect everything that an individual would prefer to keep private. The PRA's 'right to privacy' is narrower. **Individuals have a privacy right under the PRA only in the types of 'private' facts fairly comparable to those shown in the Restatement.**

Predisik, 182 Wn.2d at 905 (citations omitted).

Public employee names and birthdates are not "fairly comparable" to the private facts described in the Restatement. In fact, this information is nothing like highly personal, sensitive information that RCW 42.56.230(3) shields from disclosure. Most individuals routinely publicize their names and birthdates, such as on social media websites like Facebook and when they purchase alcohol. In other instances, the government unilaterally makes their names and birthdates public. For instance, the State of

information necessary for calculating health plans, job benefits, and taxes." Cowles, 44 Wn. App. at 891 (emphasis added).

Washington will, upon request, produce to requestors a list of all registered voters, including their names and birthdates (and their residential addresses).⁴ While some individuals *may* prefer to keep their names and birthdates private, personal preferences do not trigger the PRA's right to privacy. *See Predisik*, 181 Wn.2d at 905 (“the PRA will not protect everything that an individual would prefer to keep private”). The Unions failed entirely to address this mandatory step in the analysis. App. Brf. at 14.

Furthermore, the PRA contains provisions identifying what specific public employee information is exempted from disclosure. RCW 42.56.250(3) exempts:

Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information.

Id. The Legislature specifically omitted public employees' names and birthdates from this exemption. Indeed, it exempted other persons' names and birthdates **but not those of public employees**. *See id.* (“the names, dates of birth... of *dependents* of employees or *volunteers* of a public

⁴ *See* general information about the Washington State Voter Registration Database, available at <https://www.sos.wa.gov/elections/vrdb/> (last visited Jan. 20, 2016); *see also* the specific data fields disclosed on the VRDB, available at <https://www.sos.wa.gov/assets/elections/VRDBDatabaseFields.pdf> (last visited Jan. 20, 2016).

agency.”) (emphasis added). RCW 42.56.250(8) operates the same way. It exempts from disclosure the “month and year of birth in the personnel files of employees and workers of criminal justice agencies.” RCW 42.56.250(8). This suggests that, as a default, birthdates of employees of all agencies other than criminal justice agencies are fully disclosable under the PRA.

At any point, the Legislature could have designated all public employee birthdates exempt, but it did not. So, the Court must draw the conclusion that the Legislature intended this omission. *See Wa. State Republican Party v. Wa. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 280, 4 P.3d 808 (2000) (“Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies.”). In a PRA case, this presumption is amplified by the broad pro-disclosure mandate expressed in the statute and its case law.

Thus, public employees’ names and birthdates are not the type of sensitive, intimate, highly-personal information protected from disclosure by RCW 42.56.230(3).

2. The Unions employ a linkage argument that has been explicitly rejected by Washington courts.

“A reviewing court should not look beyond the four corners of the

records at issue to determine if they were properly withheld under a PRA exemption.” *SEIU Local 925*, 2016 WL 7374228, at *6; *SEIU Healthcare 775NW*, 193 Wn. App. at 411 (explaining that courts may neither ignore a PRA exemption’s plain language nor expand it to encompass situations not reflected in its plain language); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 183, 142 P.3d 162 (2006) (“[N]o statutory language or case law [] support[s] the notion [that] we may look beyond the four corners of the records at issue to determine whether they were properly withheld.”); *Sheehan*, 114 Wn. App. at 345–46 (rejecting what the court characterized as a “linkage” argument—“that any information, no matter how public it may be, is nondisclosable if it could somehow lead to other, private information being tracked down from other sources.”). The Unions’ argument can only prevail if this Court departs from each of these well-settled principles (several of which it, itself, has set forth in the last 12 months) and adopts a “linkage” analysis.

The Unions argue that the disclosure of public employees’ names and birthdates violates RCW 42.56.230(3) because the combined disclosure of those two data points *could* allow requestors to obtain other information about public employees that *may* be exempt from disclosure under the PRA. App. Brf. at 13-15. In other words, their argument only stands if this Court looks beyond the four corners of the requested records to determine whether

the requested records can be disclosed. This is “linkage,” but **as this Court held one month ago,**

[L]inkage arguments cannot be used to extend the plain language of a PRA exemption... And we are bound to liberally construe the PRA in favor of disclosure while narrowly construing exemptions. RCW 42.56.030. Thus, we cannot look to what information could be discovered beyond the four corners of the records requested to determine if an exemption applies.

SEIU Local 925, 2016 WL 7374228, at *6. The correct question, then, is whether disclosure of public employees’ names and birthdates, themselves, would violate those employees’ right to privacy. The answer is a resounding “no.”

The Unions rely chiefly on *Tacoma Public Library v. Woessner* to support their position. 90 Wn. App. 205, 218, 951 P.2d 357 (“*Woessner*”) (1998).⁵ At first glance, *Woessner* admittedly appears to support their position. However, the “four corners” and “anti-linkage” doctrines established later in *Sheehan*, *Koenig*, *SEIU Healthcare 775NW*, and *SEIU Local 925* appear to clearly overturn *Woessner*, a case that predates *Sheehan* and its progeny. (*Woessner* was decided in 1998 and *Sheehan* was decided in 2002.)

In addition, *Woessner* is distinguishable. In *Woessner*, the Court ruled

⁵ Notably, even *Woessner* explicitly omits birthdates from the “intimate details of one’s personal and private life” protected by the right to privacy exemption in RCW 42.56.230(3). 90 Wn. App. at 218-19.

that disclosure of public library employees' identification numbers (but not their names and other wage information) would violate those employees' right to privacy because anyone with that data could discover the employees' "non-public job evaluations, charitable contributions, private addresses and phone numbers" by "simply logging onto a City of Tacoma computer" *Woessner*, 90 Wn. App. at 218. To prevent the discovery of non-requested information, the *Woessner* Court looked beyond the four corners of the requested records to determine that a portion of the requested information was nondisclosable. *Id.* *Woessner*'s reasoning squarely conflicts with the four more recent cases cited above. *Sheehan* evaluated the same statutory exemption as *Woessner*⁶ yet declined to engage in the same linkage analysis employed by *Woessner*. *Sheehan*, 114 Wn. App. at 345–46. *Koenig* adopted and applied *Sheehan*'s reasoning. *Koenig*, 158 Wn.2d at 183. And this Court in *SEIU Healthcare 775NW* and *SEIU Local 925* affirmed the "anti-linkage" principle. *SEIU Healthcare 775NW*, 193 Wn. App. at 411; *SEIU Local 925*, 2016 WL 7374228, at *6. Clearly, *Woessner*'s linkage analysis is no longer precedential authority.

The Unions speculate about the potential "dangers" that will result if the

⁶ At the time of *Woessner* and *Sheehan*, RCW 42.56.230(3) was codified as RCW 42.17.310(1)(b).

Foundation obtains the list of public employees.⁷ However, nothing in the record justifies any of this speculation. Remember, the Foundation has been conducting its outreach to public employees for over two years, and the Unions have never been able to produce a single shred of evidence that any of the threatened “dangers” have ever occurred—because they have not. Unions speculated about similar harms in *SEIU Healthcare 775NW* and *SEIU Local 925*, and this Court rightly dismissed them. Looking to those cases and the Unions’ allegations in this case, a discernible pattern emerges: these Unions can only allege speculative fears; they can never identify any real evidence that those fears have been or are likely to be realized if the Foundation receives lists of public employees. This pattern could lead one to conclude that the Unions are being somewhat disingenuous with the Court about the speculative harms they purport to fear. This is putting it mildly.

The Foundation has been abundantly clear about what it will and will not do with the lists it is requesting. The Foundation intends to use the requested public employees’ names and birthdates to acquire additional contact information that is publicly available from the Secretary of State’s office on the Voter Registration Database. FF App. at 4. Thus, **the**

⁷ Appellant’s Brief at 15 (“As established by the record, once information is ‘public’ there is no assurance that it will not be used for other improper purposes.”). The Unions cite to no support in the record for this statement—because there is none.

Foundation will only obtain additional contact information for public employees that is already publicly available to anyone who requests it.⁸

It has also declared multiple times under oath that it will only use the records it has requested to inform public employees about their legal rights regarding union membership and dues payment. CP at 3393 (FF App. at 4 (“The Freedom Foundation’s sole purpose for the requested lists is to inform state workers of their constitutional rights. The lists will never be used for other purposes.”)).

There can be no legitimate, justifiable fear about the Foundation’s procurement of these records. On the contrary, when the Foundation receives these records, thousands of Washington public employees will be empowered with critical information about their fundamental rights. Some of the employees might choose to exercise those rights, and *that* is the only “harm” the Unions are attempting to prevent. CP 230 (FF App. at 17 (“**Why are they asking for our info? They want to contact you about your union membership.** They are trying to get public employees to drop their union membership.”)).

Public employees’ names and birthdates are not the type of sensitive personal information protected by the PRA’s right to privacy. Moreover,

⁸ See *supra* n. 4.

the Unions' right to privacy argument relies upon the linkage analysis roundly rejected by Washington courts. For both reasons, the Superior Court did not err by rejecting RCW 42.56.230(3) as a basis to enjoin disclosure of the requested information.

C. Article I, § 7 of the Washington Constitution does not prohibit disclosure of public employees' birthdates.

Article I, § 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” A valid statute qualifies as an “authority of law.” *State v. Gunwall*, 106 Wn.2d 54, 68-69 (1986). The PRA is obviously a valid statute so the PRA is the “authority of law.” “One type of interest protected by the right to privacy is the right to nondisclosure of intimate personal information or confidentiality.” *SEIU Local 925*, 2016 WL 7374228, at *7.

At the outset, the Superior Court correctly disposed of this argument by applying the clear principle set forth in *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 883, 357 P.3d 45 (2015). There, the Washington Supreme Court held that “**an individual has no constitutional privacy interest in a public record[.]**” (Emphasis added). Below, the Superior Court correctly explained that Article I, § 7 definitionally cannot apply to public records.

I read the 2015 State Supreme Court *Nissen* case as clearly rejecting the argument that is made here. Public records that are records within government's possession are public records, and the court has said there is not a Constitutional right [to privacy]

into that. So to the extent that the Plaintiffs urge the court to apply a constitutional test to analyze that release should only happen if release is necessary to further governmental interest that justifies the intrusion, I find that that test does not have application here in public records law, and that this is not a seeking of information that is with the private person, which is what the constitution addresses, but it is seeking information and records that are in the government's possession and are therefore public records.

RP at 021 (FF App. at 047)). The Superior Court was correct. The requested lists, including public employees' birthdates, are public records.⁹ No party has argued otherwise. Thus, there is no constitutional privacy interest in this information, because it is a public record. *Nissen*, 183 Wn.2d at 883. This information is not private; the government already possesses it. *Id.*¹⁰ This Court affirmed *Nissen*'s holding two months ago in *West v. Vermillion*, _____

⁹ RCW 42.56.010 defines a "public record" thusly:

(3) "Public record" includes 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...

(4) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

¹⁰ Contrary the Unions' assertion, the Superior Court did not hold that there is no "constitutional right of privacy in information contained in a public record." App. Brf. at 16. The Superior Court held exactly what *Nissen* held: that there is no constitutional right to privacy in a *public* record. RP at 021 (FF App. at 047). And because the requested lists were indisputably public records, the Court's ruling was perfectly in accord with *Nissen*.

RCW 42.56.050 is not an independent exemption; rather it sets the standard for other PRA exemptions that protect rights of privacy. The PRA contains statutory privacy interests for individuals in certain public records that the Constitution does not. It is that simple.

Wn. App. ___, 384 P.3d 634, 638 (2016) (“In *Nissen*, the court held that ‘an individual has no constitutional privacy interest in a public record.’”).¹¹ The Superior Court got it right. This case involves public records, so Article I, § 7 has no proper application here.

Despite this, the Unions now for the first time appear to argue that a “birthdate is a discrete, intimate detail of a person’s life” and should enjoy constitutional protection. App. Brf. at 19-20. The Unions cannot explain how this one data point, a birthdate, is categorically **not** a public record while the other listed data points categorically **are** public records.¹² Assuming, arguendo, that this contention holds any water, it is clear that birthdates are not the type of “[p]rivate affairs... that reveal intimate or discrete details of a person's life.” *SEIU Local 925*, 2016 WL 7374228, at *8. The Unions have not and cannot show that historically a person’s birthdate has been a private matter. *See State v. Puapuaga*, 164 Wn.2d 515, 522-24, 192 P.3d 360 (2008) (courts look at the history of how an alleged

¹¹ Curiously, this Court did not apply *Nissen*’s simple reasoning in *SEIU Local 925*, 2016 WL 7374228, at *7-10. Likely, this was because none of the parties in that case raised *Nissen* in their briefing on Article I, § 7. At any rate, this Court in *SEIU Local 925* nonetheless held that disclosure of public employees’ names and contact information did not violate the constitutional protection of private affairs. *Id.* at *10.

¹² This theory is highly unlikely, since the PRA’s plain provisions indicate that public employees’ and others’ birthdates **are** public records. For instance, RCW 42.56.250(3) exempts birthdates of public employees’ dependents, but not public employees. RCW 42.56.250(8) exempts the birth months and birth years of criminal justice agency employees, but not those employees’ birth days. The very existence of these exemptions demonstrate, rather obviously, that public employee birthdates are not exempt from disclosure.

privacy interested has been treated). Thus, the question is whether, in Washington, a public employee is entitled to hold a reasonable expectation of privacy in the knowledge of his or her birthdate. *Id.* at 524. Courts have held constitutionally protected “private affairs” can include information contained in a motel registry including one's whereabouts or co-guests at the motel, patient names and diagnoses in state-subsidized mental health facilities, trade secrets and related commercial information, personal financial data, and information regarding personal sexual matters.” *SEIU Local 925*, 2016 WL 7374228, at *10. In *SEIU Local 925*, this Court concluded that public employees’ names and contact information “do not appear to implicate the kind of personal information previously held to constitute private affairs.” *Id.* Likewise, birthdates are not the type of highly discrete information protected by the constitutional right to privacy.¹³ This conclusion is supported by the fact that the PRA’s right to privacy protects discrete information akin to that which Article I, § 7 protects. *See Hearst*, 90 Wn.2d at 136 (identifying several examples of private affairs, including, sexual relations, family quarrels, unpleasant or disgraceful or humiliating illnesses, intimate personal letters, “most details of a man's life in his home, and some of his past history that he would rather forget”). The PRA’s right

¹³ The Unions merely point to their own declarations and two law review articles to support their contention that birthdates are constitutionally-protected “private affairs.” This is not exactly legal authority.

to privacy also identifies birthdates as specifically non-private affairs. *See Sheehan*, 114 Wn. App. at 343 (“[T]here is no liability for giving publicity to facts about the plaintiff’s life that are matters of public record, **such as the date of his birth.**”) (emphasis added).

The Superior Court correctly held that Article I, § 7 does not apply to the records in dispute.

D. RCW 42.56.070(9) does not prohibit disclosure of the requested public records.

The Unions raise a twice-rejected argument that disclosure is prohibited because the Foundation requested the public employee lists for commercial purposes. This issue is entirely controlled by this Court’s decisions in *SEIU Healthcare 775NW*, 193 Wn. App. at 400-09, and *SEIU Local 925*, 2016 WL 7374228, at *3-5. The Foundation’s purpose in this case is identical to its purpose in those two cases: to inform workers of their legal rights regarding union membership and dues payment. CP at 3395 (FF App. at 6). Just like the unions in those cases, the Unions here fail to identify *any* evidence supporting the notion that the Foundation intends “to generate revenue from the *direct use* of requested information.” *SEIU Local 925*, 2016 WL 7374228, at *5 (emphasis in original) (citing *SEIU Healthcare 775NW*, 193 Wn. App. at 406). In fact, in *SEIU Local 925*, this Court permitted the inclusion of additional evidence on review—the same

evidence the Unions rely upon here to support their argument. (FF App. at 025-026). Much of the Unions' arguments in this case parallel SEIU 925's arguments in *SEIU Local 925*.¹⁴ But this Court addressed and squarely rejected that argument:

[T]he mere mention of the provider information in fundraising materials is not a direct use of the information to generate revenue. The financial benefit garnered from mentioning the provider information in order to publicize the Foundation's work is too attenuated to constitute a direct use amounting to a commercial purpose.

SEIU Local 925, 2016 WL 7374228, at *5.

This Court has spoken (twice), and the issue is settled. The Foundation's purpose in requesting the public employee lists is not commercial. The Superior Court correctly held that RCW 42.56.070(9) does not bar disclosure of the requested records.

E. RCW 42.56.230(7)(a) does not exempt public employees' birthdates from disclosure.

RCW 42.56.230(7)(a) exempts "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." ("driver's license exemption"). The driver's license exemption obviously does not apply to

¹⁴ This makes perfect sense, because the lawyers who created and advanced the commercial purpose argument in *SEIU Healthcare 775NW* and *SEIU Local 925* are partners in the same law firm: Dmitri Iglitzin, Robert Lavitt, and Kathy Barnard are all partners at Schwerin Campbell Barnard Iglitzin & Lavitt LLP. Indeed, Dmitri Iglitzin was lead counsel in for the Union in *SEIU Healthcare 775NW* and is lead counsel for Teamsters Local 117 in this case. See <http://www.workerlaw.com/People.aspx>.

lists of public employee names and birthdates, yet the Unions devotes several pages of argument to this argument. App. Brf at 23-27. First, lists of public employees' names and birthdates are not records "used to prove... information required to apply for a driver's license or identicard." RCW 42.56.230(7)(a).¹⁵ Clearly, this exemption prevents the government from disclosing copies of personal documents necessary to obtain a driver's license like birth certificates, social security cards, adoption papers, school transcripts, and passportss. An individual could not waltz into a Department of Licensing office, present a DOL agent with a list of public employee names and birthdates, and obtain a driver's license or identicard. That is the plain reading of the statute, giving effect to every word of the provision. *See Northwest Steel Rolling Mills, Inc. v. Dept. of Revenue*, 40 Wn. App. 237, 240, 698 P.2d 100 (1985) ("A court must give effect to every phase or word in a statute wherever possible.").

Second, if the Unions are correct that RCW 42.56.230(7)(a) exempts the birthdates from lists of public employee names and birthdates, then RCW 42.56.250(8)'s exemption for birth months and years "of employees and workers of criminal justice agencies," which became law two years after RCW 42.56.230(7)(a), would be rendered entirely superfluous. Courts

¹⁵ The Foundation does not, and never has, claimed that public employees' birthdates are not public records within the meaning of Ch. 42.56 RCW. *Contra* App. Brf at 24 n. 7.

“interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.” *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). Courts must also “presume that the legislature enacts laws with full knowledge of existing laws.” *Maziar v. Washington State Dept. of Corrections*, 183 Wn.2d 84, 88, 349 P.3d 826 (2015). Unless RCW 42.56.250(8) (created in 2010) was passed by the Legislature without any intent to change the law, the Legislature must have clearly believed that there is no blanket exemption for public employees’ birthdates.

A case cited by the Unions, *Gray v. Suttell & Associates*, 181 Wn.2d 329, 334 P.3d 14 (2014), actually supports the Foundation’s position that RCW 42.56.230(7)(a) does not exempt the instant lists. The court in *Gray* stated:

When possible, the court derives legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.

Id. at 339. Other provisions of the PRA prohibit only birth years and months of criminal justice agency employees. *See* RCW 42.56.250(8). This leads to the conclusion that other public employees’ birthdates are not exempt. *See In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (“Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of

the other. Omissions are deemed to be exclusions.” (internal citations omitted)).

Even if the Unions’ interpretation of RCW 42.56.230(7)(a) were logically tenable, which it is not, the Foundation’s and State’s interpretation is narrower, and is thus the favored reading under the PRA’s interpretive mandate. RCW 42.56.030; *Washington State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). RCW 42.56.230(7)(a) does not exempt public employees’ birthdates on the lists at issue in this case. The Superior Court did not err.

F. RCW 42.56.250(8) does not apply to the SEIU 1199-represented employees.

The Unions argue that public employees of Western State Hospital (“WSH”), Eastern State Hospital (“ESH”), the Child Study and Treatment Center (“CSTC”), and the Special Commitment Center (“SCC”) are employees of “criminal justice agencies” whose birth months and birth years are exempt from disclosure under RCW 42.56.250(8). App. Brf. at 27-33. *See* RCW 42.56.250(8) (exempting “Photographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies as defined in RCW 10.97.030.”). RCW 10.97.030 defines a “criminal justice agency” as a “government agency which performs the administration of criminal justice pursuant to a statute or executive order

and which allocates a substantial part of its annual budget to the administration of criminal justice.”

These four sub-agencies are organized under the Department of Social and Health Services (“DSHS”). DSHS has determined that its sub-agency, the Juvenile Rehabilitation Administration, is a “criminal justice agency” and so DSHS will be redacting the birth months and years of those employees pursuant to RCW 42.56.250(8). However, DSHS does not believe that the WSH, ESH, CSTC, and SCC are “criminal justice agencies,” based on the nature of those sub-agencies’ work. CP 4437-4446.

The Foundation agrees with the Superior Court that DSHS’s position is reasonable. FF App. at 51. The PRA’s interpretive mandate that exemptions should be read narrowly support this conclusion. *See* RCW 42.56.030. The Superior Court did not err by concluding that WSH, ESH, CSTC, and SCC employees fall within the criminal justice exemption in RCW 42.56.250(8).

G. No “other statutes” prohibit disclosure of the instant public records.

No “other statutes” prohibit the disclosure of these records to the Foundation. The PRA compels agencies to affirmatively produce a public record “unless the record falls within the specific exemptions of... this chapter, or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). “An ‘other statute’ that

exempts disclosure does not need to expressly address the PRA, **but it must expressly prohibit or exempt the release of records.**” *Washington State Patrol*, 185 Wn.2d at 372 (emphasis added).

The “other statute” exemption applies only to those exemptions explicitly identified in other statutes; its language does not allow a court to imply exemptions but only allows specific exemptions to stand. ... Therefore, if the exemption is not found within the PRA itself, **we will find an “other statute” exemption only when the legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response to a public records request.**”

Id. at 373 (emphasis added). *See also Progressive Animal Welfare Soc. v. Univ. of Washington (“PAWS II”)*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994).¹⁶

Thus, as a threshold requirement, an “other statute” must specifically address records and exempt them from public disclosure.¹⁷ Both of the Unions’ “other statute” arguments fail because they do not expressly prohibit or exempt the release of specific records and both would force this

¹⁶ “[I]f another statute (1) does not conflict with the [Public Records] Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the redaction requirement. **The rule applies only to those exemptions explicitly identified in other statutes; its language does not allow a court “to imply exemptions but only allows specific exemptions to stand.”** *PAWS II*, 125 Wn.2d at 262 (emphasis added).

¹⁷ The Unions claim the legal standard is that “[t]he 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. App. Brf. at 35 (quoting portions of *Wash. State Patrol*, 185 Wn.2d at 377-78). But this misstates or waters down the legal standard set forth in *Wash. State Patrol*. The Court in that case was observing that “other statutes” have been found not just when there is express language prohibiting or exempting the release of records, but when there is, **additionally**, special and clear legislative intent to protect particular records from disclosure. 185 Wn.2d at 373 (emphasis added).

court to “imply exemptions,” which the PRA does not allow.

1. *RCW 42.52.180 and WAC 292-110-010 do not prohibit disclosure of the instant public records.*

First, the Unions claim RCW 42.52.180 and WAC 292-110-010 constitute an “other statute.” They claim disclosure of the contact information to the Foundation would violate state ethics law prohibiting the misuse of state resources. According to the Unions, that the Foundation’s outreach to public employees will include electioneering communications (it will not), solicitations for donations (it will not), or the promotion of a particular political agenda (it will not). App. Brf. at 36. Of course, these allegations are entirely unsupported by the record. The Foundation has been contacting workers for two-plus years, and the Unions cannot find a single Foundation communication with workers that includes any of those private and campaign-oriented communications. Further, the Foundation has repeatedly declared that it will use the requested records **solely** to communicate with workers about their legal rights regarding union membership and dues payments. CP 3395 (FF App. at 6). The Unions’ theory does not hold up even if RCW 42.52.180 and WAC 292-110-010 were an “other statute.”

However, RCW 42.52.180 and WAC 292-110-010 are not an “other statute,” as the Superior Court correctly concluded. RP at 023 (FF App. at

049). It nowhere **expressly prohibits or exempts the release of records**. See *Wash. State Patrol*, 185 Wn.2d at 372. To hold otherwise would require this Court to imply a PRA exemption, which it may not do. *Id.*

2. RCW 41.80.110(1)(a) does not prohibit disclosure of the instant public records.

Second, the Unions claim that RCW 41.80.110(1)(a) constitutes an “other statute.” They reason that disclosing the records to the Foundation when the State knows the Foundation will communicate with bargaining unit members about their rights regarding union membership constitutes an “unfair labor practice” because the State would be “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the[ir collective bargaining] rights.” RCW 41.80.110(1)(a). App. Brf. 38-43. This argument is, of course, nonsensical.¹⁸

But it ultimately fails because RCW 41.80.110(1)(a) is not an “other statute,” as the Superior Court correctly concluded. RP at 023 (FF App. at

¹⁸ This argument has been explicitly rejected by the Superior Court in at least seven cases: *Puget Sound Advocates for Retirement Action, et al. v. DSHS, et al.*, No. 16-2-04296-34 (Thurston County Superior Court) (December 16, 2016); *SEIU 1199NW v. DSHS, et al.*, No. 16-2-01875 (Thurston County Superior Court) (July 29, 2016); *International Brotherhood of Electrical Workers, Local 76, et al. v. State of Washington, Washington Department of Labor & Industries, et al.*, No. 16-2-01826-34 (Thurston County Superior Court) (July 29, 2016); *Washington Federation of State Employees v. State of Washington, Department of Agriculture, et al.*, No. 16-2-01749-34 (Thurston County Superior Court) (July 29, 2016); *Washington Public Employees Association, UFCW Local 365, et al. v. Washington State Center for Childhood Deafness & Hearing Loss, et al.*, No. 16-2-01573-34 (Thurston County Superior Court) (July 29, 2016); *Teamsters Local Union No. 117 v. State of Washington, et al.*, No. 16-2-01547-34 (Thurston County Superior Court) (July 29, 2016); *SEIU 775 v. DSHS, et al.*, No. 16-2-01007-34 (Thurston County Superior Court) (March 25, 2016).

049). It nowhere **expressly prohibits or exempts the release of records**. See *Wash. State Patrol*, 185 Wn.2d at 372. To hold otherwise would require this Court to imply a PRA exemption, which it may not do. *Id.*

H. Disclosure of the instant public records would not violate union members' constitutional right of free association.

The Unions also allege that disclosure of the instant records would violate union members' constitutional right of free association. App. Brf. at 43-45. Essentially, they argue, if the Foundation receives information that will allow it to communicate with public employees about employees' rights of free speech and free association, those employees' rights of free association will be violated. To put it mildly, this argument is a towering crescendo of absurdity. The Superior Court correctly rejected this argument on the ground that constitutional free association provisions do not expressly prohibit or exempt the release of records. RP at 023-024 (FF App. At 049-050). *Accord Wash. State Patrol*, 185 Wn.2d at 372. But it fails for many other reasons, too. The Unions' argument relies on two demonstrably false assumptions: first, that the Foundation will obtain the equivalent of union membership lists; and two, that the Foundation will use this information to target and harass public employees.

First, the Foundation is not requesting and will not receive union membership lists. The requests at issue are for public employees in

unionized bargaining units. CP at 3392 (FF App. at 3). **Inclusion in a bargaining unit is categorically different than union membership.** The Unions admit this by stating that the affected bargaining units have “high union membership.” App. Brf. at 44. That may be, but *high* union membership within a bargaining unit is not 100% union membership within a bargaining unit. The lists Freedom Foundation requested and will receive do not disclose union membership status, and it will be impossible for the Foundation to know which listed public employees are full union members.

Second, the Foundation never has and never will use these lists to target and harass public employees. Period. CP 3393-3394 (FF App. at 4-5). That is a tactic employed by the Unions. CP at 3392-3393 (FF App. at 3-4). The Unions blanket their argument in completely baseless forecasts about the Foundation’s future communications with public employees. One sentence from the Unions’ brief will illustrate this phony hysteria: disclosing the requested information to the Foundation “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.” This is clearly untrue.

First, the Foundation primarily engages in outreach by mail. Sometimes, it also communicates via e-mails, phone calls, and canvassing efforts. CP at 3393 (FF App. at 4). Every Foundation employee who communicates with

workers is trained to be polite, friendly, and informative but never hostile or pushy. *Id.* Further, when the Foundation learns from specific employees that they do not wish to receive further communications, the Foundation stops communicating with them, immediately. CP at 3394 (FF App. at 5). Indeed, the Foundation would derive no benefit at all from harassing employees when its goal is to inform employees of their constitutional right to leave a union.

Moreover, the two federal cases cited by the Unions in which federal courts enjoined the release of public records on constitutional grounds both involved situations wherein the courts concluded that disclosure could result in *real harm* that produced real chilling effects. App. Brf at 45. In *Roe v. Anderson*, No. 3:14-CV-05810 RBL, 2015 WL 4724739, at *3 (W.D. Wash. Aug. 10, 2015), the court concluded that exotic dancers were “uniquely vulnerable to harassment, shaming, stalking, or worse” if their legal names and other information was disclosed to a PRA requestor. However, this ruling was based explicitly on the danger posed by the requestor, himself, who had previously violated anti-harassment orders. *See Dreamgirls of Tacoma LLC v. Pierce County*, Case No. 3:14-cv-05810 RBL, Dkt. 26 (W.D. Wash. 2014). The same federal court conducted the same analysis in *Jane Does 1-10 v. University of Washington*, No. 16-cv-1212-JLR (Nov. 15, 2016), and granted a preliminary injunction. There, the

court found that disclosure of identifying information about fetal tissue researchers could expose them to severe threats of harassment, relying upon statistics about violence against abortion providers. *Id.* at p. 14 (“[S]ince 1977 there have been 11 murders, 26 attempted murders, 42 bombings, 185 arsons, and thousands of incidents of criminal activities directed at abortion providers.”).

Comparing the Foundation’s outreach activities to the types of real harms in *Roe* and *Jane Doe* insults this Court’s intelligence. Furthermore, the Unions insult public employees by portraying them as frail, weak-minded, and childish. But Washington public employees are not fragile; they are adults who have devoted themselves to public service. They have the intelligence and the right to receive information about their rights and make informed decisions. The truth about their rights is not a threat of harm. It cuts into the Unions’ membership dues, but that is different than, say, murdering abortion providers.

Disclosure will not violate, impinge, or diminish, in any way, the free association rights of public employees. On the contrary, it will enhance those rights. *See Abood*, 431 U.S. at 235 (“[First Amendment] principles prohibit [the union] from requiring any of [its bargaining unit members] to contribute to the support of an ideological cause he may oppose as a condition of holding a job...”).

Finally, under this Court’s decision two months ago in *West*, “associational privacy rights under the First Amendment are constitutional privacy rights, and an individual has no constitutional privacy interest in a public record.” 384 P.3d at 639. As this Court explained, “[t]he language of this holding does not limit it to only certain constitutional privacy interests nor to only those privacy interests enumerated under certain constitutional provisions.” The lists in dispute are public records. Thus, the First Amendment right of free association cannot have application in this case. The Superior Court did not err.

I. The Unions cannot satisfy the remaining requirements necessary to obtain and injunction.

The Unions have failed to establish that any exemption applies to the requested records. Thus, they cannot establish that the “disclosure would not be in the public interest and would substantially and irreparably harm [the Unions] or a vital government function.” *SEIU Local 925*, 2016 WL 7374228, at *3. The Unions fail to satisfy any of the requisite standards to obtain injunctive relief.

J. Respondent Freedom Foundation reserves the right to seek reimbursement by the Unions of its reasonable attorney fees and costs.

The Foundation reserves its right to argue before the Washington Supreme Court its entitlement to reasonable attorney fees and costs, payable

by the Unions, pursuant to *Spokane Police Guild v. Washington State Liquor Control Board*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989), *Seattle Firefighters Union v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987), and *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758-59, 958 P.2d 260 (1998). Currently, Washington Supreme Court precedent in *Confederated Tribes* appears to foreclose this Court's ability to award the Foundation its reasonable attorney fees and costs it incurred to dissolve the preliminary injunctions below and the appellate stay granted in this case. *See Confederated Tribes*, 135 Wn.2d at 758-59. Should this case proceed to discretionary review before the Supreme Court, the Foundation reserves the right to argue this issue before that court.

IV. CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Court affirm the judgment of the Superior Court.

RESPECTFULLY SUBMITTED on January 20, 2017.



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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 20, 2017, I electronically filed with the Court the foregoing document and the accompanying declaration and served the same by email upon the following:

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FREEDOM FOUNDATION

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Transmittal Letter

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