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No. 95262-1

SUPREME COURT OF THE STATE OF WASHINGTON

No. 49224-5-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION,
UFCW LOCAL 365, et al.,
Respondents/Plaintiffs,

v.

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

and

FREEDOM FOUNDATION,
Petitioner/Respondent/Defendant.

PETITIONER FREEDOM FOUNDATION ANSWER TO BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

Petitioner Freedom Foundation ("Foundation") is the Respondent below. The Foundation is a nonprofit entity which informs public employees about their legal rights regarding union membership and dues payment obligations. At issue here are numerous public records requests the Foundation submitted to Washington agencies for the names, birthdates, and work email addresses of unionized public employees. The Foundation requested these records for one, exclusive purpose: to speak to public employees about their rights. The Foundation asks this Court to reverse the Court of Appeals' published decision.

II. ISSUES ADDRESSED

1. Whether this Court should address the Constitutional error that was the sole basis Division II's decision.

2. Whether the records at issue here are so private and so irrelevant to the public, to be exempt under RCW 42.56.050.

III. 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 addresses of state civil service employees in unionized bargaining units. CP at 3392. While these workers are included in bargaining units represented by unions, they are not

necessarily card-signing union members. *Id*. 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.

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 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. The Unions appealed to the Court of Appeals, Division II ("Division II"). On October 31, 2017, Division II reversed the Superior Court, holding that Article I § 7 of the Constitution exempts public employees' names and birthdates from disclosure. *Washington Public Employees Association, et al. v. Washington State Center for Childhood Deafness and Hearing Loss, et al.* ("*WPEA*"), No. 49224-5-II (October 31, 2017) (Appendix at A:1-13). Amicus American Civil Liberties Union of Washington ("ACLU") filed a brief asking this Court to change its views on what kinds of information Article 1, §7 of the Washington State Constitution ("Article 1, §7") protects, as well as made procedural and statutory arguments. Petitioner has already fully addressed the constitutional issue, but filed this answer to address the procedural and statutory points.

IV. ARGUMENT

A. This Court Should Overturn the Lower Court's Constitutional Decision, Rather Than Avoid the Issue

This Court should not accept the ACLU's invitation to avoid the constitutional issue that is the heart of this case. Brief of Amicus Curiae American Civil Liberties Union of Washington ("ACLU Brief") at 10.

Division II based its decision entirely upon Article 1, § 7 and declined to address the unions' several statutory exemption arguments. *WPEA*, App. A:3-4, n. 2. There are two possible explanations for this: Either Division II ignored the doctrine of constitutional avoidance or it found that the Superior Court was correct in dismissing each of the statutory arguments raised by the unions and therefore only addressed the constitutional issue. *See Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000); *Sinear v. Daily Journal-American*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982); *see also Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 156 Wn.2 253, 277 n. 19 (2006). Whatever the logic that guided the lower court, this Court is faced with the decision Division II made, rather than the one it should or could have made.

There are several practical and legal reasons to address Division II's decision as it is written. First, as Amici Curiae, Allied Daily Newspapers of Washington, Seattle Times Company, Washington Coalition for Open Government, Washington Newspaper Publishers Association, and Washington State Association of Broadcasters ("Transparency Amici") point out in their brief, there have been dozens of attempts to create constitutional exceptions to the PRA, all of which have failed, except this

one.[1] The decision below, if allowed to stand, would be an outlier and, thereby, create monumental confusion in Public Records law. How are courts to address the conflict between this Court's decision in *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 883, 357 P.3d 45 (2015) and Division II's decision here if this Court does not address the constitutional issue? What about Division II's conflicting prior decision in *SEIU Local 925 v. Freedom Foundation*, 197 Wn. App 203, 389 P.3d 641 (2016)? This potential confusion is a powerful reason to address the constitutional issue the Court of Appeals placed at the center of its opinion.

Secondly, this Court has previously relied on the scope of the parties' briefs to determine that a constitutional question was necessary to the case. *State v. Houston-Sconiers*, 188 Wn.2d 1, 18 n.3, 391 P.3d 409, 418 n.3 (2017). The lower court's silence on the statutory arguments forced the parties to limit the scope of their briefing on this appeal. The parties and amici have each focused the bulk of their arguments on the constitutional issue. As this Court pointed out in *Houston-Sconiers*, 188 Wn.2d at 18 n.3, the focus of the parties' briefs and argument is relevant to the Court's decision to review constitutional questions rather than avoid them. This

[1] Brief of Amici Curiae Allied Daily Newspapers of Washington, Seattle Times Company, Washington Coalition for Open Government, Washington Newspaper Publishers Association, and Washington State Association of Broadcasters in Support of Petitioner ("Transparency Amici Brief") at 6-7.

Court should review and overturn the constitutional decision Division II made.

B. The Statutory Right to Privacy in the PRA Does Not Exempt Birthdates.

Because the PRA only exempts highly personal information from production, it cannot exempt merely descriptive information such as birthdates. *See, e.g.; State v. McKinney,* 148 Wn. 2d 20, 30 60 P.3d 46, (2002) (Holding that the information at issue, including birthdates, was simply descriptive and, therefore, not private). When the legislature overtly rejected the idea that a constitutional right to privacy exists in 1987, it created an alternative privacy protection through statute. Laws of 1987, ch. 403. This Court accepted this policy statement as binding in *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 259, 884 P.2d 592 (1994).[2] Codified in RCW 42.56. 050, the PRA's statutory right to privacy only protects information from disclosure where disclosure: (1) Would be highly offensive to a reasonable person, and (2) is of no legitimate concern to the public. RCW 42.56.050. Neither prong is met here.

Birthdates are not so private that disclosure would be highly offensive to a reasonable person. The legislature made clear its intent to

[2] Transparency Amici gives an excellent history of the constitutional issues at play here and succinctly describes the legislative action referenced. See Transparency Amici Brief at 2-7.

limit the scope of the privacy exemption in the policy statement that accompanied the passage of the statutory right to privacy. "To avoid unnecessary confusion, "privacy" as used in [RCW 42.56.050] is intended to have the same meaning as the definition given that word by the Supreme Court in "*Hearst v. Hoppe*," 90 Wn.2d 123, 135 (1978)." Laws of 1987, ch. 403. *Hearst* defined privacy by turning to the Restatement (Second) of Torts ("Restatement"), which uses the same two-pronged definition codified in RCW 42.56.050. In *Hearst*, the definition is accompanied by a list of examples:

> 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.

Hearst v. Hoppe, 90 Wn.2d 123, 135, 580 P.2d 246, 253 (1978) *quoting* Restatement (Second) of Torts 652D at 386. To argue that birthdates are in the same strata of offensiveness as sexual relations or humiliating illnesses is to blink reality. It is ludicrous. Does one only invite people to a birthday party if one would also trust them with their darkest secrets?

Additionally, Transparency Amici's briefs make clear that the public has a legitimate interest in the birthdates of public employees. The very fact that amici bothered to write not one, but two briefs to overturn the lower court's decision is testament this. *See* Transparency Amici Brief. As petitioner and Transparency Amici have repeatedly explained, birthdates are essential to disambiguate state actors, ensuring both access and accountability. To say that birthdates are too private to be produced under RCW 42.56.050 is to say that the public has no legitimate interest in knowing exactly which public employee they are dealing with.

The ACLU's arguments to the contrary are unpersuasive and inapposite. The ACLU urges this Court to allow linkage-based analyses to prevent disclosure of public records. ACLU Brief at 14-15. This Court's decision in *Koenig v. City of Des Moines*, 158 Wn.2d 173, 183 142 P.3d 162, 166 (2006), was clear that only the contents of the record at issue could be used to determine whether or not disclosure was proper. Additionally, the ACLU's analogy to the context of a sexual relationship to show that linkage to other information effects the propriety of disclosure is preposterous. ACLU Brief at 14-15. As the Restatement makes clear, sexual relationships are inherently private in and of themselves, so the first prong of the statutory privacy test would be met regardless of context.

ACLU next takes issue with the reliability of the Restatement. The legislature and this Court have adopted the Restatement as the primary tool for evaluating statutory privacy claims and, indeed, ACLU also relies upon it for the undisputed proposition that privacy can be affected by disclosure. ACLU Brief at 3.[3] However, the ACLU also argues that the Restatement is out of date, written in a time before the internet. This is puzzling for several reasons. Firstly, is the Restatement reliable or not? Secondly, is the ACLU arguing that, because of the internet, people have a *greater* expectation of privacy? This seems at odds with the ACLU's next argument that people are regularly using their dates of birth with retailers and others. ACLU Brief at 17-18. ACLU cites an article by US News and World Reports that *assumes* the reader is giving out his or her birthdate regularly![4] And yet, this is being used to argue that birthdates are too sensitive to be released under the PRA.

Finally, the ACLU argues that because the requestor wants to pair one public record, employees' names and birthdates, with another public record, the Voter Registration Database, this somehow creates new privacy

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[3] Of course, this statement is as accurate as it is irrelevant. This is not a case about disclosure or privacy generally, but rather about disclosure of public records and constitutional privacy. See §C below.

[4] Maryalene LaPonsie, *10 Ways You're Opening Yourself Up for Fraud*, U.S. News & World Report, Apr. 5, 2018, <https://money.usnews.com/money/personal-finance/family-finance/articles/2018-04-05/10-ways-youre-opening-yourself- up-for-fraud>

concerns. ACLU at 19-20. The Voter Registration Database, which no party or amicus has challenged as unconstitutional or inappropriate in any way, contains names, birthdates, and mailing addresses.[5] The ACLU argues that, by matching two sets of public records, the requestor is circumventing the legislature's will by retrieving mailing addresses of public employees that are exempt under RCW 42.56.250(4). ACLU Brief at 20. However, if the ACLU does not believe that publicizing mailing addresses is appropriate, then the challenge should be brought in a case about the Voter Registration Database. Additionally, the ACLU misunderstands the legislature's will. The legislature has clearly spoken. RCW 42.56.250(8) 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(3) exempts the birthdates of public employees' dependents. The PRA nowhere exempts public employees' birthdates from disclosure. This omission is purposeful.[6] The legislature's intent was never to keep requestors from contacting state employees.

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[5] *See* RCW 29A.08.710. The statewide voter registration database is available upon request. *See* https://www.sos.wa.gov/elections/vrdb/extract-requests.aspx. Searchable versions are readily found online, enabling anyone to look up the DOB of any state voter. *See, e.g.*, www.soundpolitics.com/voterlookup.html.

[6] *See In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) ("Under expression unius est exclusion 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).

Birthdates are not so private that disclosure would be highly offensive to a reasonable person. They are, however, of public concern. This Court should order the release of employees' names and birthdates.

C. Amicus Constitutional Arguments are Inapposite and Irrelevant.

"[A]n individual has no constitutional privacy interest in a public record[.]" *Nissen v. Pierce Cty*., 183 Wn.2d 863, 883, 357 P.3d 45 (2015). This statement, made by this Court only 3 years ago should be dispositive in this case. This short comment was directly refuting a claim that Article 1, §7 protected public records and was not accompanied by analysis, but rather was the stated as obvious. This was appropriate because it is obvious. Definitionally, no one has disputed that the requested information at issue is a "public record." A public record is presumptively subject to disclosure, with the burden on the party resisting disclosure to show that the records are subject to some exemption. *See, e.g., Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wash. 2d 702, 715, 261 P.3d 119, 125 (2011); *Progressive Animal Welfare Soc'y v. Univ. of Wash*., 125 Wash.2d 243, 251, 884 P.2d 592, 607 (1994). In contrast, "private affairs" are pieces of information in which a person has a reasonable expectation of privacy. *Ino Ino v. City of Bellevue*, 132 Wn. 2d 103, 937 P.2d 154, amended, 943 P.2d 1358 (1997). To claim that a person reasonably expected information that

is presumptively disclosable to the public to be private is absurd. It is categorically impossible to have an expectation of privacy in a public record.

To overcome this hurdle, the ACLU established a strawman argument, stating that "It is well-established that disclosure of information can violate privacy" as if a finding for petitioner would somehow conflict with that assertion. ACLU Brief at 3. Disclosure of *private* information can indeed violate *certain types of privacy rights*. However, this case is not about private information, but rather information in the state's possession. The constitutionally relevant disclosure, disclosure to the state, is not being challenged here. The vague and unsubstantiated parade of horribles that the ACLU insinuates would follow from a finding for petitioner, ranging from extortion to revenge porn, are all prevented by a proper application of the statutory right to privacy, RCW 42.56.050.

Additionally, the cases on which the ACLU relies, *Whalen v. Roe*, 429 U.S. 589, 97 S.ct. 869 (1977) and *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993) do not support the ACLU's position. *Whalen* was not a case regarding disclosure to the public, but rather to the state as part of a drug control program. *Whalen*, 429 U.S. at 589. ("Public disclosure of the patient's identity is prohibited [by the statute being challenged]). In fact, the Supreme Court explicitly rejected a

search-esque theory similar to that advanced by ACLU, instead limiting their holding to the 14th Amendment to the United States Constitution. ACLU Brief at 3.[7] In *Eikenberry*, this Court did not address public records, but rather court records which are not subject to the PRA. Instead, *Eikenberry* applied the *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36–39, 640 P.2d 716 (1982) factors to a request regarding victims of sexual assault. The *Eikenberry* case is from a totally different body of law, and has no place in this appeal.

V. CONCLUSION

This Court should reverse the Court of Appeals, reinstate the Superior Court's decision, and award costs on appeal to the Foundation.

RESPECTFULLY SUBMITTED on May 29, 2018.

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[7] *Whalen*, 429 U.S. at 604 n. 32. ("The Roe appellees also claim that a constitutional privacy right emanates from the Fourth Amendment, citing language in *Terry v. Ohio, 392* U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889, at a point where it quotes from *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now.")

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 29, 2018, I electronically filed the above with both the Court of appeals, before 5:00 pm, and the Supreme Court, immediately after. The inadvertent Court of Appeals filing caused a delay, but as all relevant parties had actual service within the timeframe, please forgive this oversight and consider the foregoing document and appendix when reaching your conclusions in this case. I filed and served the same by email upon the following:

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