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THE SUPREME COURT  
STATE OF WASHINGTON

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

v.

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

and

FREEDOM FOUNDATION,  
Petitioner/Respondent/Defendant.

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**RESPONDENT UNIONS' ANSWER TO AMICUS CURIAE BRIEF  
OF ALLIED DAILY NEWSPAPERS OF  
WASHINGTON, SEATTLE TIMES COMPANY, WASHINGTON  
COALITION FOR OPEN GOVERNMENT, WASHINGTON  
NEWSPAPER PUBLISHERS ASSOCIATION, AND  
WASHINGTON STATE ASSOCIATION OF BROADCASTERS**

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Kathleen P. Barnard, WSBA #17896  
Kristina M. Detwiler, WSBA #26448  
Laura Ewan, WSBA #45201  
Kristen L. Kussmann, WSBA #30638  
Edward Earl Younglove III, WSBA #5873

*Counsel for Respondents/Appellants/Plaintiffs*

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## I. INTRODUCTION

Respondent “Unions”<sup>1</sup> submit this Answer to the *Amicus Curiae* Brief (“ACB”) of various media entities.<sup>2</sup>

## II. ARGUMENT

### A. The Unions’ State Employee Members Properly Rely On The Washington Courts For Enforcement Of Their Constitutional Right of Privacy.

*Amici* unjustifiably decry the lower court’s careful and well-reasoned analysis in this case concerning constitutional privacy issues by asserting an unfounded comparison between this case and *In Re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986), wherein the court found an implied privacy exemption from disclosure within the statutory language of the Public Record Act (“PRA”) and which prompted a legislative counter response. This deceptive analogy collapses immediately upon inspection of the differences between the courts’ and legislature’s roles in interpreting constitutional provisions rather than statutory enactments.

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<sup>1</sup> Teamsters Local Union No. 117 (“Local 117”), Washington Federation of State Employees (“WFSE”), International Brotherhood of Electrical Workers Local 76 (“Local 76”), United Association Local 32 (“Local 32”), Washington Public Employees Association Local 365 (“WPEA”), Professional & Technical Employees Local 17 (“PTE Local 17”), and Service Employees International Union Healthcare 1199NW (“SEIU 1199NW”) (collectively, “the Unions”).

<sup>2</sup> Allied Daily Newspapers of Washington, Seattle Times Company, Washington Coalition for Open Government, Washington Newspaper Publishers Association and the Washington State Association of Broadcasters (collectively “*Amici*” or “Media”).

The legislature responded to *Rosier* by enacting an amendment to the PRA to include a specific privacy exemption, now codified at RCW 42.56.050, but also to limit exemptions to express rather than implied exemptions, RCW 42.56.070(1). As this Court explained, the “Legislature did not intend to entrust to either agencies or judges the extremely broad and protean exemptions that would be created by” reading them as implied in the general language of the statute. *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 260, 884 P.2d 592 (1994). *Amici* argue that the Court of Appeals’ constitutional analysis mirrors that of the discredited *Rosier* analysis, complaining that a constitutional privacy protection from disclosure would “eviscerate” the PRA in the same way as *Rosier*’s judicially implied statutory exemption. ACB at 6. Putting aside the obvious problem for *Amici*’s argument presented by the legislature’s enactment of a statutory privacy exemption as an additional response to *Rosier*, the analogy is grounded in the assertion of a false similarity between the court’s role in interpreting statutory intent and in adjudicating constitutional rights.

First, as even *Amici* are ultimately forced to admit, “*Rosier* was not a constitutional case,” ACB at 4, and therefore did not involve, as this case does, the protections from disclosure provided by article I, section 7 of the Washington Constitution, which is supreme over statutory enactments.

Second, the legislative response to *Rosier* said nothing about, and could say nothing about, this Court’s inherent power to interpret the Washington Constitution’s right of privacy and determine its application to disclosure under the PRA. *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978) (“The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary.”); *Nissen v. Pierce County*, 183 Wn.2d 863, 884, 357 P.3d 45 (2015) (“Of course, the public’s statutory right to public records does not extinguish an individual’s constitutional rights in private information.”).<sup>3</sup> Clearly, *Amici’s* overly facile comparison with *Rosier* presents a false analogy that this Court should reject.

**B. Individual Dates of Birth Of Specific Individual Public Employees Are Not Outside The Protections of Article I, Section 7 of the Washington Constitution, Simply Because That Information Is Contained Within State Records.**

*Amici* refuse to accept the plain meaning of *Nissen* and deride the possibility of constitutional protection by referring to the “supposed extra-statutory right of privacy in public records”, as something that simply cannot exist. ACB at 6. First, continuing their denial of the reach of the

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<sup>3</sup> See also, *State v. Gunwall*, 106 Wn.2d 54, 66, 720 P.2d 808 (1986) (the “state constitution imposes *limitations* on the otherwise plenary power of the state”); Wash. Const. art. I, § 29 (“The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”); *White v. Clark Cty.*, 188 Wn. App. 622, 631, 354 P.3d 38 (2015) (Washington Constitution “may exempt certain records from production [under the PRA] because [it] supersedes contrary statutory laws.”) (*citing Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013)).

constitution to limit the PRA in any way, *Amici* assert that courts, in considering whether privacy limits on disclosure under the PRA exist in constitutional provisions, have not “been receptive to any of these constitutional theories,” and that therefore negates the Unions’ claim to privacy protections here. ACB at 6-7. Even if *Amici* correctly described the three cases cited in support of their proposition (which they do not), article I, section 7 privacy interests, which are the issue here, were addressed only in one of those cases, and its reasoning has been repudiated by the Washington Supreme Court.<sup>4</sup>

*Amici* rely extensively on the one case that does address, albeit cursorily, article I, section 7; they cite *Bellevue John Does v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 120 P.3d. 616 (2005) as holding that article I, section 7 does not apply to limit disclosure under the PRA. However, they fail to take into account the eviscerating effect on that cursory ruling that was effectuated by the Supreme Court reversal of the companion

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<sup>4</sup> *John Doe No. 1 v. Reed*, 561 U.S. 186, 130 S.Ct. 2811 (2010), examined whether general release of a petition referendum violated the First Amendment, did not decide the constitutionality of release of the information in the petition at issue, and made no mention of privacy rights. *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016), as described in greater detail below, dealt not with whether any constitutional privacy interest prevented release of records, but whether constitutional claims of the rights of association and privacy were implicated in requiring an employee to review records on their private email that would be potentially responsive to a PRA request. Notably, *Amici* fail to mention another case imposing constitutional prohibitions on disclosure of documents in response to a PRA request. *See, Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013) (the constitutional gubernatorial communications privilege was held to prevent PRA disclosure of a governor’s documents).

holding in that case that the PRA's statutory privacy exemption did not apply. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 208, fn. 10, 189 P.3d 139 (2008).<sup>5</sup>

Analyzing the statutory exemption, the Supreme Court held that the court of appeals erred in holding that the teachers whose names it would have allowed to be disclosed did not have a statutory privacy interest, and also reversed as to the court of appeals' holding that the weight of the public's interest in obtaining the names outweighed the interests of the teachers in preventing disclosure. *Id.*, at 212-216, 219-228. Although for prudential reasons it did not reach the constitutional question of whether article I, section 7 also prohibited disclosure, the Court's handling of the statutory issue completely undercut the persuasive value of the lower court's holding on the constitutional privacy issue. Because the court of appeals had simply applied the same repudiated statutory analysis in deciding that the article I, section 7 also did not prohibit disclosure, the Supreme Court's reversal hollowed out the constitutional holding of the court of appeals.

The court of appeals simply relied on its statutory analysis to hold that the constitutional analysis did:

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<sup>5</sup> As described below *Amici* further mischaracterize this case in describing the analysis that applies in adjudication of article I, section 7 privacy rights.

not yield a different result than the privacy definition in the Public Records Act. First, the request here is for disclosure of information about conduct occurring in the course of performing a public duty, not information of an intimate personal nature, and to that extent the claimed interest in confidentiality is not constitutionally protected. Second, the public has a valid interest in monitoring complaints of sexual misconduct in public schools, even those that have not been proved true.

*Bellevue John Does 1-11*, 129 Wn.App. at 861. This is the identical reasoning in the court of appeals' statutory analysis that was reversed by the Supreme Court when it held that teachers did have a privacy interest in documents that did "not identify substantiated misconduct and the teacher is not subject to any form of discipline or restriction", and that the public does "not have a legitimate concern in unredacted letters of direction when such letters do not identify any substantiated allegations or impose any discipline." *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wash. 2d 199, 223, 224, 189 P.3d 139 (2008).

Just as *Amici's* reliance on *Bellevue John Does* is unavailing, their reliance on *Nissen v. Pierce County*, 183 Wn.2d 863, 883, 357 P.3d 45 (2015), to assert that this Court has categorically held there is no constitutional privacy interest in a public record is superficial and erroneous. ACB at 7. Here, the lower court correctly held that "*Nissen* offers no comment on the extent to which article I, section 7 creates an expectation of privacy to information contained within public records."

*Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 1 Wn. App. 2d 225, 235, 404 P.3d 111 (2017), *review granted*, 190 Wn. 2d 1002, 413 P.3d 15 (2018) (“WPEA”).

*Amici* ignore the context in which the *Nissen* court made its statement about lack of privacy rights in public records, as well as the contexts of both *Nixon v. Adm’r of General Servs.*, 422 U.S. 425, 97 S.Ct. 2777 (1977) (the only case cited by *Nissen* in connection with the statement) and *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016), *review denied*, 187 Wn.2d 1024, 390 P.3d 339 (2017), *cert. denied*, 138 S. Ct. 202, 199 L. Ed. 2d 115 (2017), upon which *Amici* rely. All three courts analyzed whether constitutional privacy interests prevented required *review* of information on a device (or records) of a public official, not *release* of the material. *Nissen*, 183 Wn.2d at 883-84; *Nixon*, at 422 U.S. at 463; *West*, 196 Wn. App. at 634, 637.

Even as *Amici* describe *Nissen*, it involved an asserted privacy interest in the *location* of the records, not the assertion of a privacy interest in the *contents* of the records: “The prosecutor claimed that requiring him to obtain these records from his personal device violated his constitutional right to privacy under both art. 1 § 7 and the Fourth Amendment.” ACB at 7 (*quoting Nissen*, 183 Wn.2d at 883 n.9). Thus, *Nissen* examined “the mechanics of searching for and obtaining public records stored by or in the

control of an employee,” specifically records on a private cell phone used by a county prosecutor to conduct county business. 183 Wn.2d at 883. Only in that context—a search of a private location for public records—did *Nissen* state that “an individual has no constitutional privacy interest in a *public* record” and therefore hold that the prosecutor could be required to search his private cell phone, used for government business, for records potentially responsive to a PRA request. *Id.* (emphasis in original).

Notably, the Court specifically stated that once the public record materials were identified, the county would then separately need to review the records to determine whether release of any material was prohibited by law, an endeavor that would occur after the Supreme Court’s ruling. *Id.* at 888. Thus, *Nissen* did not reach the question of whether article I, section 7 prevents release of the *content* of any of the material identified as a public record, which is the issue before the Court here.

Similarly, in *Nixon*, the U.S. Supreme Court examined the constitutionality of the Presidential Recordings and Materials Preservation Act, which provided for the federal general services administrator to take custody of presidential papers and tape recordings of former president Richard Nixon, and promulgate regulations providing for government archivists to screen the materials and subsequently determine the terms under which the public could access those materials. 422 U.S. at 429.

Once the materials were screened, the Act required the administrator to account for legal and constitutional privileges, but those were not at issue in the case. *Id.* at 460. Thus *Nixon*, like *Nissen*, did not reach whether constitutional privacy protections prevented public release of presidential documents and tape recordings materials. *Id.* at 465.

Finally, *West* addressed review of records contained in a private email account, and the court of appeals expressly followed *Nissen* as dispositive in holding that no constitutional right of privacy prevented review of a personal email account to segregate documents that were public records from those that were not. 196 Wn. App at 630, 637, 642. *West*, like *Nissen*, involved a public official’s “assert[ion of] constitutional rights to privacy in *the place* potentially containing public records.” *Id.* at 638 (emphasis added). In *West*, the “place” was a private email account, and in *Nissen* it was a private cell phone. As in *Nissen* and *Nixon*, *West* did not determine there could not be a constitutional privacy interest preventing *release* of material retrieved.

*Amici* assert that *West* “recognized that *Nissen* is not limited to ‘private device’ cases”, ACB at 9, but *West* does not so state. Rather, the quoted language relates to a claim of associational privacy asserting that release of campaign related material could chill a first amendment right to associate. The *West* court responded that “*Nissen*’s holding was mindful of

the associational privacy rights the First Amendment affords elected officials” and that review of private email for public records would not violate the First Amendment protections afforded to associational privacy. 196 Wn. App. at 639. Thus, what *West* actually said is that *Nissen*’s statements regarding the article I, section 7 privacy interest in review of material on a private device for records can also apply to the analysis of First Amendment associational privacy interests. *Id.* at 638-39.

In *West*, the court of appeals noted that it was unable to apply a constitutional analysis to the disclosure of any particular public record or content therein, because the record before it was in an identical posture as in *Nissen*, where, although the Court ordered a culling of public from private records, it could not then review the public records to determine whether they should be *disclosed* because the specific records were not yet before it. 196 Wn. App. at 639-40. Therefore no analysis of constitutional prohibitions on disclosure could be done without rendering an advisory opinion. *Id.* Thus, even if *West*’s statements on constitutional privacy interests in searches for public records commingled with private records on private devices extends beyond that context, it would be contrary to *Nissen* and *West* to hold that no separate review of the public records, once found, to consider legal impediments to *disclosure* was required. *Nissen*, 183 Wn.2d at 883, fn. 10 (once screened, records would need to be

reviewed for possible prohibitions against release); *accord, Nixon*, 422 U.S. at 457 (specifically recognizing constitutional privacy interests can exist in public employee records because “public officials...are not wholly without constitutionally protected privacy interests in matters of personal life unrelated to any acts done by them in their public capacity”).

Here, the first inquiry, whether the records sought are public records, may be answered with a definitive “no.” Dates of birth linked with state employee names do not relate to the conduct of government or the performance of any governmental or proprietary function. RCW 42.56.010(3). Second, even if specific dates of birth linked to specific individual employees were held to be public records under the PRA’s framework in which potentially responsive material is screened before disclosure for any exemptions or prohibitions against release, including both statutory and constitutional privacy protections, release of that specific information should be held to violate those individual employees’ rights of privacy under article I, section 7.

The court below thus correctly characterized as *dicta* the clause in *Nissen* quoted by *Amici*, as addressing “the extent to which private devices could be searched for public records” and not “the extent to which article I, section 7 creates an expectation of privacy to information contained within public records.” *WPEA*, 1 Wn. App. 2d at 235. Clearly, *Nissen* and

*West* do not support the categorical prohibition that article I, section 7 privacy interests can never prevent *release* of records. Instead, under an individualized analysis, article I, section 7 prevents involuntary release of public employee dates of birth paired with names.

**C. The Court Of Appeals Properly Applied The Personal Affairs Analysis Rather Than A Rational Basis Analysis.**

The lower court applied a long-standing test for article I, section 7 claims, which first inquires into whether there is a disturbance of private affairs, and if so, determines if authority of law nevertheless justifies the intrusion. *WPEA*, 1 Wn. App. 2d at 233 (citing *SEIU Local 925 v. Freedom Foundation*, 197 Wn. App. 203, 222, 389 P.3d 641 (2016)). *See also State v. Miles*, 160 Wn.2d 236, 243-44, 156 P.3d 864 (2007).

*Amici* misapprehend the context of the disclosure at issue here, **dissemination by the government**, and contend that the Court of Appeals erred in failing to apply a federal constitutional “rational basis” test, which has been used by Washington Courts to evaluate privacy claims raised by litigants who seek to prevent disclosure of personal information **to the government**. ACB at 10, citing *Bellevue John Does*, 129 Wn. App. at 861, and *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 123–24, 937 P.2d 154 amended, 943 P.2d 1358 (1997). As *Amicus* ACLU Washington states, these cases were decided before this Court broadly and explicitly

clarified the proper approach to evaluating any article I, section 7 claim. Brief of *Amicus* ACLU at 11.

However, to the extent the rational basis test is still viable in analyzing article I, section 7 claims, it is confined to the type of case where the government needs to obtain information in order to perform government services. In that situation, the Washington courts have held that the article I, section 7 right implicated is co-extensive with the federal privacy right, under which “disclosure of intimate information to governmental agencies is permissible if it is carefully tailored to meet a valid governmental interest, and provided the disclosure is no greater than is reasonably necessary.” *Ino, Ino*, 132 Wn.2d at 123–24; *see also*; *O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 117, 119 821 P.2d 44, 48 (1991) (legitimate state interest in law enforcement agencies free of corruption and secure in their employees' access to sensitive information justified polygraph requirement for civilian State Patrol job applicant); *Peninsula Counseling Ctr. v. Rahm*, 105 Wn.2d 929, 935, 719 P.2d 926 (1986) (county constitutionally provided patients' names and diagnoses to DSHS to allow for auditing of state subsidized mental health facilities).

Here, of course, the assertion is that **government dissemination of sensitive information** in its possession will violate article I, section 7. This Court has recognized that disclosure of personal information

contained in governmental records or discussed in governmental proceedings implicates the privacy rights guaranteed by article I, section 7. *See Allied Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) (noting that whether, in order to protect a child crime victim's privacy as guaranteed under art. 1, § 7, court proceedings could be closed required an individualized assessment to determine if the circumstances were sufficient to warrant court closure); *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 430–32, 138 P.3d 1053 (2006) (compelled discovery implicates article 1, section 7 privacy rights of third parties).

Despite this recognition of the reach of article I, section 7 to disclosure by the government, *Amici* may be contending, without expressly saying it, that an analysis is required of the fourth and sixth factors under *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), because this case does not present a search-and-seizure question.<sup>6</sup> Even if the *Gunwall* analysis is needed, the Unions' previous briefing has addressed in detail the separate state constitutional analysis, and the two *Gunwall* remaining factors: preexisting state law and matters of particular state or local concern, respectively. While historical protections for birthdates did not exist prior to the adoption of article I, section 7,

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<sup>6</sup> *Amici* wrongly state that the private affairs test has not been applied outside the search and seizure context, ACB at 12. *See Andersen v. King Cty.*, 158 Wn.2d 1, 44, 138 P.3d 963 (2006) (applying the state private affairs test to evaluate the privacy right asserted under article I, section 7 to marry someone of the same sex.)

the Rights Committee recognized that the term ‘private affairs’ would encompass privacy interests threatened by future technological developments” because it was concerned with addressing “advances in technology taking place in the late nineteenth century, such as the camera, telegraph, and telephone [which had] created new methods for invading the private affairs of individuals that were not explicitly protected by existing common law and statutory doctrines or by the Fourth Amendment ...”<sup>7</sup>

Moreover, the protection of Washington citizens from identity theft certainly is a matter of particular state concern. *See* Union’s Opening Brief to Court of Appeals at 14, 19-20 and cited material at 3rd Barnard Declaration Ex. D, Michelle N.M. Latta, *Governor’s Office of Administration v. Purcell: Clarifying the Personal Security Exception*, 22 Widener L.J. 403, 419-411 (2013), Union’s Supp. Brief at 12-15. *See also* Amicus Brief of ACLU Washington at 17-19.

“Generally speaking, ‘[i]t is ... axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment.’” *Blomstrom v. Tripp*, 189 Wn.2d 379, 399–400, 402 P.3d 831 (2017) (internal citations omitted) (citing *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). However, “this enhanced protection depends on the context in question.” *Blomstrom*, 189 Wn.2d at 400. Here, the *Amici* fail to recognize

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<sup>7</sup> Justice Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431, 445 (2008).

appropriate context – that of government dissemination of sensitive information. The Court of Appeals appropriately took into account the magnitude of the harm that would be caused by the dissemination of birthdates linked with names, and the little value to the public in that dissemination. Thus, the Court of Appeals was correct in applying the longstanding more protective private affairs test rather than the federal rational basis test erroneously applied in the *Bellevue John Does* court of appeals decision, which was subsequently discredited by this Court *See supra, Section B.*

**D. Specific Individuals’ Specific Birthdates Are Matters of Private Affairs And No Justification Exists For Government Dissemination of That Information.**

*Amici* have not provided any reason to reject the evident nature of birthdates linked to individual’s names as those individuals’ personal affairs, as described in the Unions’ previous briefing and that of *Amicus* ACLU Washington. Rather, *Amici* have instead attempted to place the usefulness of that information to investigative reporting as a counter balance to the privacy interests of the state employees and to contend their interests outweigh those of the employees.

Under the rational basis test *Amici* would have the Court apply, disclosure of personal information is permissible if the request is tailored to meet a valid governmental interest and provided the disclosure is no

greater than is reasonably necessary. *O'Hartigan*, 118 Wn.2d at 117. In arguing that public employee dates of birth are of legitimate public concern, *Amici* focus on the use of employees' dates of birth in investigative journalism. ACB at 17-20. *Amici* base their argument on the statement in *Bellevue John Does*, 129 Wn. App. at 861, that "an individual has no privacy expectation in matters where 'the public has a valid interest.'" ACB at 17. However, as described above, that reasoning has lost all persuasive weight given this Court's analysis in reversing the same reasoning concerning the statutory privacy exemption at issue in the same case. *Bellevue John Does 1-11*, 164 Wn.2d at 225 (citing *Dawson v. Daly*, 120 Wn.2d 782, 799, 845 P.2d 995 (1993))<sup>8</sup>.

Under the private affairs test, if "a private affair has been disturbed, the second step is to determine whether authority of law, such as a valid warrant, justifies the intrusion." *SEIU Local 925 v. Freedom Foundation*, 197 Wn.App. 203, 222, 389 P.3d 641 (2016); *WPEA*, 1 Wn. App. 2d at 115-116. Here, the only authority asserted for disclosure is the PRA itself, which as the above discussion clearly demonstrates does not

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<sup>8</sup> Although to the extent *Dawson* can be read to imply an exemption to the PRA in the former RCW 42.17.330, that ruling was abrogated by *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 261 fn. 7, 884 P.2d 592 (1994). However the *Bellevue John Does Court* relied upon the *Dawson* analysis of the statutory privacy exemption, which remains a relevant and persuasive analogy for the constitutional issue presented here.

provide justification for dissemination. Nor have *Amici* demonstrated that their interests should outweigh the employees' privacy interests. Under either the rational basis or the private affairs test, simply because a document or piece of information would be useful for newspapers in investigative reporting does not make it subject to disclosure. Indeed, many pieces of information would be helpful to media in investigative reporting. For example, the numbers to employees' financial accounts would likely be useful in investigating financial crimes, and indeed those numbers by themselves may hold little meaning. However, they enable access to a list of financial transactions that this Court stated reveals one's "political, recreational, and religious affiliations," along with details of the person's "travels, their affiliations, reading materials, television viewing habits, financial condition, and more." *Miles*, 160 Wn.2d at 246-47. Releasing social security numbers supplied as part of the employment process would also certainly aid media in distinguishing between employees, but that information would clearly not be disclosed for risk of potential harms. *See Bennett v. Smith Bundy Berman Britton, PS*, 176 Wn.2d 303, 313, 291 P.3d 886 (2013) (describing "sensitive information such as medical records, social security numbers, or the identities of victims"); *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 254, 884 P.2d 592 (1994) ("disclosure of a public employee's

social security number would be highly offensive to a reasonable person and not of legitimate concern to the public”).

Simply because employees were required to reasonably share information with the government for purposes of public employment, they do not waive their rightful expectation of privacy prohibiting further disclosure. *Miles*, 160 Wn.2d at 246 (although individuals voluntarily share information with their bank, the state constitution protects the individuals’ privacy interest in that information.)<sup>9</sup> *See also State v. Hinton*, 179 Wn.2d 862, 873, 319 P.3d 9 (2014) (“the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7’s protection.”). Noting the similar “ongoing risk of identity theft and other harms from the disclosure of [employee full names and dates of birth],” and that the employee “would reasonably expect” their date of birth “would remain private.” *WPEA*, 1 Wn. App. 2d at 234.

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<sup>9</sup> Public employers, like other employers, collect personal information about their employees, such as their birthdates, for legitimate and necessary employment purposes. The disclosure of sensitive information to government agencies for hiring purposes does not provide adequate justification to allow disclosures to anyone who requests it. The employees’ disclosure of that information was not truly voluntary, i.e. not at the employee’s discretion and control. *WPEA* at 233.

The court of appeals next addressed the argument that the PRA is the authority of law “justifying” intrusion on this right of privacy. In balancing the respective interests involved, the Court correctly concluded that “although the PRA may allow the disclosure of such information, the PRA did not justify the intrusion into the state employees’ constitutionally protected expectation of privacy in their full names associated with their corresponding birthdates” because that information would “not inform the people of facts about an ‘instrument’ [of government] they have created or provide information that allows the people to maintain control over those instruments,” and because “public disclosure of this information would reveal discrete personal details of state employees not connected to their role as public servants.” WPEA 1 Wn.App.2d at 236.

### III. CONCLUSION

Because of the foregoing, this Court should affirm the lower court’s opinion in this case.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of May, 2018.

s/Kathleen Barnard  
Kathleen P. Barnard,  
WSBA #17896  
Laura Ewan, WSBA # 45201  
Schwerin Campbell Barnard  
Iglitzin & Lavitt LLP  
18 West Mercer Street,

s/Edward Earl Younglove  
Edward Earl Younglove III,  
WSBA #5873  
Younglove & Coker PLLC  
PO Box 7846  
1800 Cooper PT Rd. SW #16  
Olympia, WA 98507-7846

Suite 400  
Seattle, WA 98119-3971  
206-285-2828 (phone)  
206-378-4132 (fax)  
barnard@workerlaw.com  
ewan@workerlaw.com

*Attorneys for Appellants WPEA,  
PTE, and Teamsters Local 117*

s/Kristina Detwiler  
Kristina M. Detwiler, WSBA  
#26448  
Robblee Detwiler PLLP  
2101 Fourth Ave., Ste. 100  
Seattle, WA 98121  
206-467-6700 (phone)  
206-467-7589 (fax)  
kdetwiler@unionattorneysnw.com

*Attorneys for Appellants IBEW  
Local 76 and UA Local 32*

360-357-7791 (phone)  
360-754-9268 (fax)  
EdY@ylclaw.com

*Attorneys for Appellant WFSE*

s/Kristen Kussmann  
Kristen L. Kussmann, WSBA  
#30638  
Douglas Drachler McKee &  
Gilbrough LLP  
1904 Third Ave., Ste. 1030  
Seattle, WA 989101-1170  
206-623-0900 (phone)  
206-623-1432 (fax)  
kkussmann@qwestoffice.net

*Attorneys for Appellant SEIU  
1199NW*

## CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of May, 2018, I caused the foregoing Answer to Brief of *RESPONDENT UNIONS' ANSWER TO AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, SEATTLE TIMES COMPANY, WASHINGTON COALITION FOR OPEN GOVERNMENT, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, AND WASHINGTON STATE ASSOCIATION OF BROADCASTERS* to be e-filed with the Washington Supreme Court, which will send notification of such filing to the attorneys of record listed below via electronic e-mail:

David M. S. Dewhirst	<a href="mailto:DDewhirst@freedomfoundation.com">DDewhirst@freedomfoundation.com</a>
Hannah S. Sells	<a href="mailto:HSells@freedomfoundation.com">HSells@freedomfoundation.com</a>
Kirsten Nelson	<a href="mailto:KNelsen@freedomfoundation.com">KNelsen@freedomfoundation.com</a>
James Abernathy	<a href="mailto:JAbernathy@FreedomFoundation.com">JAbernathy@FreedomFoundation.com</a>
	<a href="mailto:SOlson@freedomFoundation.com">SOlson@freedomFoundation.com</a>
	<a href="mailto:Legal@freedomfoundation.com">Legal@freedomfoundation.com</a>
Kathy Barnard	<a href="mailto:barndard@workerlaw.com">barndard@workerlaw.com</a>
Laura Ewan	<a href="mailto:ewan@workerlaw.com">ewan@workerlaw.com</a>
Edward E. Younglove	<a href="mailto:edy@ylclaw.com">edy@ylclaw.com</a>
	<a href="mailto:angie@ylclaw.com">angie@ylclaw.com</a>
Kristina M. Detwiler	<a href="mailto:kdetwiler@unionattorneynw.com">kdetwiler@unionattorneynw.com</a>
Kristen Kussmann	<a href="mailto:kkussmann@qwestoffice.net">kkussmann@qwestoffice.net</a>
Paul Drachler	<a href="mailto:pdrachler@qwestoffice.net">pdrachler@qwestoffice.net</a>
Jacob F. Metzger	<a href="mailto:jmetzger@questoffice.net">jmetzger@questoffice.net</a>

Jane Rockwell [JaneC@atg.wa.gov](mailto:JaneC@atg.wa.gov)  
Morgan B. Damerow [MorganD@atg.wa.gov](mailto:MorganD@atg.wa.gov)  
Ohad M. Lowy [ohadl@atg.wa.gov](mailto:ohadl@atg.wa.gov)

Nancy L. Talner [talner@aclu-wa.org](mailto:talner@aclu-wa.org)  
Douglas Klunder [klunder@aclut-wa.org](mailto:klunder@aclut-wa.org)

Eric M. Stahl [ericstahl@dwt.com](mailto:ericstahl@dwt.com)  
Christine Kruger [chrstinekruger@dwt.com](mailto:chrstinekruger@dwt.com)

Greg Overstreet [greg@ssnwhq.com](mailto:greg@ssnwhq.com)

Signed this 29<sup>th</sup> day of May, 2018.

*s/Kathleen Barnard*  
Kathleen Phair Barnard

**SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT**

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- morgand@atg.wa.gov
- ohadl@atg.wa.gov
- pdrachler@qwestoffice.net
- talner@aclu-wa.org
- valenzuela@workerlaw.com

**Comments:**

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Sender Name: Rebecca Huvar - Email: huvar@workerlaw.com

**Filing on Behalf of:** Kathleen Phair Barnard - Email: barnard@workerlaw.com (Alternate Email: )

Address:  
18 W. Mercer St., Ste. 400  
Seattle, WA, 98119  
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