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NO. 95262-1

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, et al.

Respondents/Plaintiffs,

v.

WASHINGTON STATE CENTER FOR CHILDHOOD DEAFNESS AND HEARING LOSS et al.; and FREEDOM FOUNDATION,

Respondents/Defendants,

and

FREEDOM FOUNDATION,

Petitioner/Respondent/Defendant.

STATE RESPONDENTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This appeal raises a matter of first impression for this Court of whether a privacy right under article 1, section 7 of Washington's Constitution prevents state agencies from releasing public employees' names in conjunction with their birthdates in response to a Public Records Act (PRA) request. The Court of Appeals' decision in this case is the first Washington appellate decision holding that records may be withheld to protect a constitutional privacy interest. In reaching this constitutional question, the Court of Appeals' decision declined to address any of the statutory basis asserted by the Unions as a basis for withholding the requested records.

The state agencies and community colleges (collectively agencies) receiving the requests did not identify any statute that would exempt the requested records from release. They determined the requested records should be produced and would have done so had they not been restrained by order of the superior court after the agencies provided third party notification to the various unions. The agencies are prepared to produce the requested records if directed or permitted to do so by this Court.

II. STATEMENT OF THE CASE

This case arises under the PRA, RCW 42.56. On April 7, 2016, Freedom Foundation employee, Jami Lund, made requests to the 46 agencies for a list of the first name, middle initial, last name, birthdate, and work email address of employees represented by various bargaining units. Clerk's Papers (CP) 123-24[1]. All of the bargaining units identified in the requests are formed under the authority of the Personnel System Reform Act, RCW 41.80.

Each agency that received the request identified a responsive record comprised of a list generated from electronic records. The agencies did not identify any statutory exemption that would block disclosure of the requested record. Because no Washington appellate court had found a constitutional privacy right to operate as an exemption to the PRA, the agencies had no basis on which to consider or apply such an exemption. However, as authorized in RCW 42.56.540, the agencies provided notice to employees of the request and of the agencies' decision to release records if not timely enjoined. CP 128-29. In general, unions representing the bargaining units also received notice from the agencies. CP 1327.

[1] Lund submitted separate requests to each agency or community college identifying specific bargaining units. The request, at CP 123-24, is demonstrative of all the requests. The only difference among the requests is the receiving agency and identification of the agency bargaining unit(s).

On April 20, 2016, Teamsters Local Union No. 117, Washington Federation of State Employees, International Brotherhood of Electrical Workers Local 76, United Association Local 32, Washington Public Employees Association Local 365, Professional & Technical Employees Local 17, and SEIU 1199NW (collectively the Appellants) filed Complaints to enjoin the agencies from releasing the records. CP 22-29, 1469-76, 2020-26, 2787-93, 3616-25. Thurston County Superior Court Nos. 16-2-01547-34, 16-2-01573-34, 16-2-01826-34, 16-2-01875-34, and 16-2-01749-34.

The trial court granted Preliminary Injunctions in all five cases. CP 186-87. Though not consolidated by the trial court, all five cases were aligned on the trial court's docket, with a unified briefing schedule and a hearing date for permanent injunction. CP 398-400. At the close of the hearing on July 29, 2016, the trial court denied the Appellants' Motions for Permanent Injunction. CP 1443-47. The cases were timely appealed to the Court of Appeals and subsequently consolidated into the present action.

The Appellants sought temporary relief from the Court of Appeals to stay release of all the information in the records. By Ruling dated August 16, 2016, as clarified on August 17, 2016, Commissioner Schmidt found there was not a debatable issue as to names and work email addresses and did not stay their release. He did find, however, that there was a debatable issue whether employees' dates of birth are exempt, and enjoined

their release. Consequently, employees' names and work email addresses were produced, but the dates of birth were withheld while the matter was reviewed by the Court of Appeals.

On October 31, 2017, the Court of Appeals issued its decision. The Court held that state employees have a privacy interest under article 1, section 7 of the Washington Constitution preventing the release of dates of birth when associated with the employee's name. The Court did not address whether any of the statutory exemptions identified by the Appellants applied to the requested records, nor did the Court address the Appellants' assertion of freedom of association protections under article 1, section 5 of the state constitution.

As noted above, the agencies found no statutory basis for withholding the requested records. Accordingly, as soon as each agency finished collecting and processing the requested list, it stated its decision to release the records unless a court order timely prevented it from doing so. Initially, agencies were under trial court order not to release the requested lists. Each agency released employee names and email addresses when the Court of Appeals dissolved all judicial restraints on their release. The agencies continue to withhold employee dates of birth from release in compliance with Commissioner Schmidt's ruling but are prepared to release all records if directed or permitted to do so by this Court.

III. ARGUMENT

A. Standard of Review

Judicial review of agency action under the PRA, including application of an exemption, is de novo. RCW 42.56.550(3). The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Ameriquest Mortg. Co. v. Office of Att'y. Gen.*, 177 Wn.2d 467, 486, 300 P.3d 799 (2013). In this case, that burden falls on the Appellants.

Issues of constitutional interpretation present questions of law that also are reviewed de novo. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014).

B. Whether a Privacy Interest Under Article 1, Section 7 of the Washington Constitution Prevents Release of Records To a Public Disclosure Request Is a Question of First Impression

The Appellants assert that disclosure of the requested records would violate constitutional privacy rights. The Court of Appeals decision here is the first to find that a privacy interest under article 1, section 7 of Washington's Constitution prevents release of records in response to a public disclosure request. Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. 1, § 7. At the time the agencies responded to the requests at issue here, no appellate court had found a constitutional privacy exemption from the disclosure requirements of the PRA, so there

was no basis for the agencies to consider or apply such an exemption. Moreover, as Washington courts have recognized, constitutional rights generally are personal, and the agencies would have been unable to assert a represented employee's constitutional rights in their stead. *See, e.g.*, *In re Marriage of Akon*, 160 Wn. App 48, 59, 248 P.3d 94 (2011) (citing *Rakas v. Illinois*, 439 U.S. 128, 138, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)).

There is no doubt that a constitutional exemption from the PRA would have to be accommodated by the PRA, either as an "other statute" under RCW 42.56.070(1) or based on constitutional supremacy. *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013) (citing *Wash. Ass'n for Substance Abuse & Violence Prevention v. State,* 174 Wn.2d 642, 654, 278 P.3d 632 (2012); *Yakima County v. Yakima Herald–Republic,* 170 Wn.2d 775, 808, 246 P.3d 768 (2011); *Seattle Times Co. v. Serko,* 170 Wn.2d 581, 594–97, 243 P.3d 919 (2010)). But due to the personal nature of the privacy interest at issue, the unions and requester are best situated to argue the issues in this matter. As such, the agencies do not intend to participate in the June 12, 2018, oral argument.

Washington courts have consistently directed that agencies rely on statutory exemptions from disclosure, and that they determine whether an exemption applies based on information within the four corners of the record with exemptions construed narrowly in favor of disclosure.

Predisik v. Spokane Sch. Dist. No. 81, 182 Wn.2d 896, 906, 346 P.3d 737 (2015); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 187, 142 P.3d 162 (2006); *King Cty. v. Sheehan*, 114 Wn. App.325, 341, 57 P.3d 307 (2002). Guided by those principles, the agencies determined that no statutory exemption prevented disclosure of the requested lists, and determined they should be disclosed. To the full extent permitted by the trial court and the Court of Appeals, they have been timely produced to the requester. At all times in this matter, the agencies have complied fully with the PRA, and they stand ready to satisfy their obligations under law in accordance with this Court's resolution of the issues.

IV. CONCLUSION

In responding to the public record requests at issue here, the agencies found no statutory or other exemption that applied to the records. The agencies would have produced them in full to the requester had they not been enjoined from doing so, and they did release those portions of the requested records that the courts permitted. The agencies remain ready to produce the remaining portion of the requested records at such time as they

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are permitted or directed to do so by this Court.

RESPECTFULLY SUBMITTED this 6 day of April, 2018.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6 day of April, 2018, at Olympia, WA.

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