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No. 95262-1

THE SUPREME COURT
STATE OF WASHINGTON

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

v.

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

and

FREEDOM FOUNDATION,
Petitioner/Respondent/Defendant.

RESPONDENT UNIONS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

I. IDENTITY OF RESPONDENTS AND RELIEF REQUESTED 1

II. INTRODUCTION..... 1

III. ARGUMENT..... 2

 A. THE CONSTITUTIONAL RIGHT TO PRIVACY GUARDS AGAINST INTRUSIONS INTO PRIVACY INTERESTS THAT A CITIZEN SHOULD BE ENTITLED TO HOLD, REGARDLESS OF WHETHER THOSE INTERESTS HAVE BEEN HISTORICALLY RECOGNIZED..... 2

 B. THE RIGHT OF PRIVACY EVOLVES ALONG WITH TECHNOLOGICAL CHANGE..... 6

 C. THE PRA MAY BE OUTPACED BY TECHNOLOGY, BUT THE CONSTITUTION IS NOT. 8

 D. DISCLOSING BIRTHDATES LINKED WITH NAMES COULD RESULT IN SUBSTANTIAL HARMS, WHICH DEMONSTRATES THAT AN INDIVIDUAL CITIZEN HAS A RIGHT TO EXPECT THAT THE GOVERNMENT WILL GUARD THAT INFORMATION FROM DISCLOSURE 11

 E. BIRTHDATES ARE FREQUENTLY PROTECTED FROM DISCLOSURE BY OTHER COURTS INTERPRETING STATUTORY PRIVACY EXEMPTIONS..... 14

 F. WHETHER BIRTHDATES ARE AVAILABLE FROM OTHER SOURCES DOES NOT NEGATE THE PRIVACY INTERESTS HERE..... 16

IV. CONCLUSION 19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>City of Seattle v. McCready</i> , 123 Wn.2d 260, 868 P.2d 134 (1984).....	5
<i>Daly v. Metropolitan Life Ins. Co.</i> , 782 N.Y.S.2d.....	12
<i>Delaware County v. Schaefer ex rel Philadelphia Inquirer</i> , 45 A.3d 1149 (Pa., 2012).....	12
<i>Goyer v. N.Y. State Dep’t of Env’tl. Conservation</i> , 813 N.Y.S.2d 628 (N.Y. Sup. Ct. 2005).....	9
<i>Hearst Corp. v. State</i> , 882 N.Y.S.2d 862 (N.Y. Sup. Ct. 2009).....	13, 15
<i>In Re Personal Restraint of Maxfield</i> , 133 Wn.2d 332, 945 P.2d 196 (1997).....	2, 3, 5, 17
<i>Investigation Technologies, LLC, v. Horn</i> , 798 N.Y.S.2d 345 (2004).....	15
<i>John Doe A v. Wash. State Patrol</i> , 185 Wn.2d 363, 374 P.3d 63 (2016).....	9
<i>King County v. Sheehan</i> , 114 Wn. App. 325, 57 P.3d 307 (2002).....	9
<i>Kyllo v. United States</i> , 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).....	8
<i>Nissen v. Pierce Cty.</i> , 183 Wn.2d 863, 357 P.3d 45 (2015).....	9, 10

<i>Nixon v. Adm'r of Gen. Servs.</i> , 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).....	10
<i>Okla. Pub. Employees Ass'n v. State ex rel. Okla. Office of Pers. Mgmt.</i> , 267 P.3d 838 (Okla. 2011).....	12, 14
<i>Oliva v. United States</i> , 756 F.Supp. 105 (E.D.N.Y. 1991)	15
<i>Olmstead v. United States</i> , 277 U.S. 438, 48 S.Ct. 564 (1928).....	2
<i>Pennsylvania State Educ. Ass'n v. Commonwealth , Dep't of Cmty. & Econ. Dev.</i> , 637 Pa. 337, 148 A.3d 142 (2016).....	9
<i>Prall v. New York City Dept. of Corrections</i> , 10 N.Y.S.3d 332, 129 A.D 3d 734 (2015)	14
<i>Rhinehart v. Seattle Times Co.</i> , 98 Wn.2d 226, 654 P.2d 673 (1982).....	2
<i>Riley v. California</i> , ___ U.S. ___, 134 S.Ct. 2473, 189 L. Ed. 2d 430 (2014).....	7
<i>Schiller v. INS</i> , 205 F.Supp.2d 648 (W.D. Tex. 2002).....	15
<i>Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.</i> 191 Ariz. 297, 955 P.2d 534 (Ariz. 1998)	12, 13
<i>Service Employees International Union Local 925 v. Freedom Foundation</i> , 197 Wn.2d 203, 389 P.3d 641 (2016).....	4
<i>State v. Boland</i> , 115 Wn.2d 571, 800 P.2d 1112 (1990).....	3, 5, 17
<i>State v. Chacon Arreola</i> , 176 Wn.2d 284, 290 P.3d 983 (2012).....	2

<i>State v. Hinton</i> , 179 Wn.2d 862, 319 P.3d 9 (2014).....	2, 3, 6, 7, 18
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	6
<i>State v. Jean</i> , 407 P.3d 524 (Ariz. 2018).....	8
<i>State v. Miles</i> , 160 Wn.2d 236, 156 P.3d. 864 (2007).....	4
<i>State v. Myrick</i> , 102 Wn.2d 506, 688 P.2d 151 (1984).....	3, 7
<i>State v. Puapuaga</i> , 164 Wn.2d 515, 192 P.3d 360 (2008).....	3, 4
<i>State v. Simpson</i> , 95 Wn.2d 170, 622 P.2d 1199 (1980).....	2, 3
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	6
<i>Tex. Comptroller of Pub. Accounts v. AG of Tex.</i> , 354 S.W.3d 336 (Tex. 2010).....	13, 14
<i>U.S. Dep’t of Defense v. Fed. Labor Relations Auth.</i> , 510 U.S. 487, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994).....	16
<i>United States v. Jones</i> , 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).....	7, 8

Statutes

RCW 9.73.0307
RCW 9.35.02011

Articles

L. Sweeney, Simple Demographics Often Identify People Uniquely, Data
Privacy Working Paper 3 (2000).13

Washington Constitution

Article I, Section 71-6, 10, 19

I. IDENTITY OF RESPONDENTS AND RELIEF REQUESTED

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 UFCW Local 365, Professional & Technical Employees Local 17, and Service Employees International Union Healthcare 1199NW (collectively, “the Unions”) request this Court uphold the Court of Appeals’ decision declaring dates of birth with names to be private information protected from disclosure.

II. INTRODUCTION

The Court should reject the Freedom Foundation’s attempt to relegate Washington citizens’ constitutional privacy rights to *only* those historically recognized, to the exclusion of aspects of modern life deserving of privacy protections—particularly those that develop with advances in technology. Reading article I, section 7 of the Washington Constitution to protect information without explicit historical protection in light of technological advances is consistent with settled Washington constitutional law. The Court should also continue to apply its previous recognition that constitutional protections attach to “voluntary”

disclosures of private affairs made for limited purposes to birthdates State employees supply to their employer.

III. ARGUMENT

A. The Constitutional Right to Privacy Guards Against Intrusions Into Privacy Interests That A Citizen Should Be Entitled To Hold, Regardless Of Whether Those Interests Have Been Historically Recognized.

Article I, section 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs . . . without authority of law.” The provision “is grounded in a broad right to privacy.” *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). The right to privacy “has been described as ‘the most comprehensive of rights,’ protecting citizens ‘in their beliefs, their thoughts, their emotions, and their sensations.’” *State v. Hinton*, 179 Wn.2d 862, 878, 319 P.3d 9 (2014) (quoting *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 240, 242, 654 P.2d 673 (1982) and *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564 (1928) (Brandeis, J., dissenting)).

Washington’s privacy protections exceed those granted by the U.S. Constitution. “Unlike the Fourth Amendment, [Washington] Const. art. I, § 7 ‘clearly recognizes an individual’s right to privacy with no express limitations.’” *In Re Personal Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997) (quoting *State v. Simpson*, 95 Wn.2d 170, 178, 622

P.2d 1199 (1980)). Finding a violation of the right of privacy under this provision turns on whether the State has unreasonably intruded into a person's "private affairs." *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984) (citing *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)). The difference between the federal and state constitutional rights of privacy has been explained as follows:

Const. art. I, § 7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment, **but is not confined to the subjective privacy expectations of modern citizens** who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives. Rather, **it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold**, safe from governmental trespass absent a warrant.

State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990) (emphasis added) (quoting *State v. Myrick*, 102 Wn.2d 506, 510–11, 688 P.2d 151 (1984)). Thus, determining "whether a cognizable privacy interest exists under [article I, section 7] is thus not merely an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold." *Maxfield*, 133 Wn.2d at 339; *State v. Puapuaga*, 164 Wn.2d 515, 522, 192 P.3d 360, 363 (2008).

Our courts have long applied a two-prong analysis as to what constitutes constitutionally protected "private affairs." *Hinton*, 179 Wn.2d

at 869. Private affairs are determined “**in part**, ... by examining the historical treatment of the interest asserted.” *Puapuaga*, 164 Wn.2d at 522 (emphasis added). “If history does not show whether the interest is one entitled to protection under article I, section 7, [courts ask] whether the expectation is one that a citizen of this state is entitled to hold.” *Id.*¹

Where, as here, historical analysis does not show an interest is protected by article I, section 7, the Court considers “whether the expectation of privacy is one that a citizen of this State is entitled to hold.” *Puapuaga*, 164 Wn.2d at 522. This analysis includes a review of (1) the nature and extent of the information that may be obtained as a result of the governmental conduct and (2) the extent that the information has been voluntarily exposed to the public. *Service Employees International Union Local 925 v. Freedom Foundation*, 197 Wn.2d 203, 223, 389 P.3d 641 (2016); *Puapuaga*, 164 Wn.2d at 363-364; *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007).

Service Employees Local 925 recognized that a matter may be a “private affair” even where it has clearly not been treated as such

¹ Erroneously interpreting this phrase in *Puapuaga*, the Foundation contends that a privacy interest exists only if it has been recognized as having been historically held and that, only if that history is unclear, may the court consider whether it is one that citizens are entitled to hold. It therefore argues that the Court of Appeals erred in holding that “either historical treatment or a reasonable expectation of privacy can create a constitutional privacy interest.” Petition for Review at 7-8. As demonstrated *infra*, the Foundation’s interpretation of *Puapuaga* and the analysis of what constitutes a “private affair” are erroneous and inconsistent with the Court’s jurisprudence.

historically, if it involves an expectation of privacy a citizen is entitled to hold. After noting that SEIU made no argument that the information (names and contact information of childcare providers) requested under the PRA had historically been treated as private, the court went on to consider, and reject, the argument that the providers held constitutionally protected expectations of privacy in that information. In doing so, the decision makes clear that ultimately “[t]he assessment of whether a cognizable privacy interest exists under [article I, section 7] is . . . an examination of whether the expectation [of privacy] is one which a citizen of this state should be entitled to hold.” *Maxfield*, 133 Wn.2d at 339 (quoting *City of Seattle v. McCreedy*, 123 Wn.2d 260, 270, 868 P.2d 134 (1984)). Accordingly, Washington’s right of privacy is not wholly dependent on historical recognition of the specific interest at issue. Instead, if the right has not been historically recognized, inquiry shifts to consideration of the nature and extent of the asserted privacy right at issue, which *must* account for changing technological circumstances.

While modern life may “diminish privacy in many aspects” for Washington citizens (*see Boland*, 115 Wn.2d at 577), advances in technology and the creation of a digital cyber world subject to growing abuses, enabled in part by knowledge of intimate personal facts about an individual—such as that person’s name and date of birth—have created a

greater expectation of privacy in such information. Moreover, the fact that the State has the information sought (because employees were required to give it to the State) does *not* undercut employees' entitlement to hold an expectation of privacy in full names with birthdates. As this Court has explained, "[g]iven the realities of modern life, 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." *Hinton*, 179 Wn.2d at 873.

B. The Right of Privacy Evolves Along with Technological Change.

Viewing privacy protections in light of technology is not a new idea. When applying state and federal constitutional privacy protections, courts, including in Washington, account for and scrutinize the potential harms from evolving technology. This issue is frequently addressed regarding the suppression of evidence of criminal activity, where courts scrutinize use of a new technology's ability to intrude into private affairs. *See, e.g., State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003) (use of a global positioning system (GPS) to track an individual's physical whereabouts); *State v. Young*, 123 Wn.2d 173, 186-188, 867 P.2d 593, 599-601 (1994) (use of an infrared device (thermal imagery) to view inside a house); *Hinton*, 179 Wn.2d at 865 (examination of an individual's

text messages). In *Hinton*, the court stated that viewing text messages “exposes a ‘wealth of detail about [a person’s] familial, political, professional, religious, and sexual associations.’” 179 Wn.2d at 869 (quoting *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 955, 181 L.Ed.2d 911 (2012)). The *Hinton* court also noted that technological aspects of modern life “do not extinguish privacy interests that Washington citizens are entitled to hold.” 179 Wn.2d at 870 (citing *Myrick*, 102 Wn.2d at 513).

These cases demonstrate that courts recognize “private affairs” in light of technologies’ introduction into modern life where there was no historical recognition. This is consistent with this Court’s approach in that “[t]his court has consistently extended statutory privacy in the context of new communications technology, despite suggestions that we should reduce the protections because of the possibility of intrusion.” *Hinton*, 179 Wn.2d at 872 (citing RCW 9.73.030(1) protecting private communication transmissions).

A similar recognition of the impact of evolving technology involves courts applying Fourth Amendment protections. For example, in *Riley v. California*, the U.S. Supreme Court held that police may not search a cell phone incident to arrest without a warrant. ___ U.S. ___, 134 S.Ct. 2473, 2485, 189 L. Ed. 2d 430 (2014). The *Riley* court reasoned that

cell phones can “reveal an individual’s private interests or concerns” and “[d]ata on a cell phone can also reveal where a person has been,” thus “reconstruct[ing] someone’s specific movements down to the minute, not only around town but also within a particular building.” *Id.* at 2489-90 (citing *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)); *see also Kylo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (holding that use of thermal imaging device “to explore details of the home that would previously have been unknowable without physical intrusion” constituted a presumptively unreasonable search). Courts recognize an expectation of privacy that is invaded by previously unknown technology, for example, tracking a vehicle surreptitiously through GPS. *See, e.g., State v. Jean*, 407 P.3d 524, 532-33 (Ariz. 2018).

Thus, in assuring constitutional privacy protection, it is well-established for courts to consider technology and the increased threats of personal intrusion. Thus, it is crucial in this case to recognize how far technology and the potential for identity theft have outpaced the statute purportedly allowing disclosure of employee names and birth dates.

C. The PRA May Be Outpaced by Technology, But the Constitution Is Not.

The Foundation irrelevantly argues that discussing the risks of disclosure of names and dates of birth together is merely the same

“linkage” argument rejected in *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002). Petition at 15. First, Sheehan addressed only the statutory privacy exemption in the PRA, not the constitutional right of privacy at issue here. Although it has since been codified and amended, the people first enacted the PRA via initiative in 1972—over 45 years ago. *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). In the meantime, numerous vast technological leaps are undeniable. Within that technological advancement is a heightened ability to locate and use personal information for harmful purposes, including identity theft. For example, even a simple electronic aggregation of records allows far easier search and abuse by identity thieves than would scattered, individual files. *Goyer v. N.Y. State Dep’t of Env’tl. Conservation*, 813 N.Y.S.2d 628, 639 (N.Y. Sup. Ct. 2005) (holding that personal information (including birthdates) in hunting licenses were exempt from disclosure). *See also Pennsylvania State Educ. Ass’n v. Commonwealth, Dep’t of Cmty. & Econ. Dev.*, 637 Pa. 337, 361, 148 A.3d 142, 156 (2016) (“constitutionally protected privacy interests must be respected even if no provision of [public disclosure law] speaks to protection of those interests.”).²

² Similarly here, as set forth in the Unions’ briefing to the Court of Appeals and in their Opposition to Review, the Court of Appeals was correct in holding that this Court’s statement in *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 884, 357 P.3d 45 (2015), regarding

Second, similar to one's social security number, and other forms of "passwords," individuals have a constitutionally protected privacy interest in their full names paired with dates of birth precisely because in our society a citizen is entitled to expect the information to be guarded from disclosure, given the harms of disclosure. These harms that could be caused by the government's release of that paired information are cognizable and present considerable access into citizens' personal lives, as discussed below.

This case charges the Court with halting the potential disclosure of personal information, which is soundly deserving of constitutional privacy protection. The fact that the Washington legislature has yet to address constantly evolving technological developments that implicate privacy rights does not mean that this Court's constitutional jurisprudence, giving full meaning to citizen's constitutional right to privacy, cannot recognize the concomitant evolution of privacy interests in personal information, or

constitutional privacy interests in public records, was dictum and does *not* provide the precedent the Foundation asserts it does. In *Nissen*, the Court commented that there is no privacy interest under the Fourth Amendment to the U.S. Constitution or under article 1, section 7, of the Washington Constitution protecting public employees from a search of their personal devices to segregate public records from information contained in the devices that was "*unrelated to any acts done by them in their public capacity.*" *Nissen*, 183 Wn.2d at 884, n.10, 357 P.3d at 56 (*quoting Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (emphasis is the Washington Supreme Court's). Once those public records were segregated, the *Nissen* Court noted that those records should be reviewed for analysis of whether they were to be disclosed pursuant to a PRA request, and expressed no opinion concerning any exemption of constitutional interest that might apply to prohibit disclosure. *Id.* Thus, there is no blanket erasure of constitutional protection for information held by the government, as the Foundation asserts.

cannot take into account changing technology and attendant harms that were not previously expressly recognized.

D. Disclosing Birthdates Linked with Names Could Result In Substantial Harms, Which Demonstrates That An Individual Citizen Has A Right To Expect That The Government Will Guard That Information From Disclosure.

The Legislature has recognized the rights of individual citizens to protection from identity theft. *See* RCW 9.35.020(1) (“[n]o person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime”). Indeed, the State of Washington likely obtained employees’ birthdates only through compliance with the federally mandated I-9 process which requires employees to provide their birthdates. Disclosure for purposes other than those served by that process would violate federally mandated restrictions on the use of documents submitted to provide identity in the I-9 process. Department of Homeland Security regulations restrict the use of driver’s license documents used to verify identity by providing that:

[a]ny information contained in or appended to the Form I-9, ... used to verify an individual's identity or employment eligibility, may be used only for enforcement of the Act and sections 1001, 1028, 1546, or 1621 of title 18, United States Code.

8 CFR § Sec. 274a.2 (b)(4) (emphasis added). DHS regulations are indicative of the federal acknowledgment of the sensitivity of a person's name and birthdate and the protections it deserves.

State courts confronted with the same or similar issue as presented here—disclosure of employees' birthdates paired with their corresponding names—have also recognized that disclosure of that linked information poses significant dangers to the citizen whose information is disclosed. *See Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d at 535-36 (a date of birth can be used both to obtain further sensitive information about an individual and to commit identity theft); *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 191 Ariz. 297, 955 P.2d 534, 539 (Ariz. 1998); *Delaware County v. Schaefer ex rel Philadelphia Inquirer*, 45 A.3d 1149 (Pa., 2012) (dates of birth of county employees were exempt from disclosure as personal information; the information would have significantly increased the risk of identity theft). Indeed, the greatest financial and fraudulent dangers regarding birthdates arise when they are paired with other identifying factors. *Okla. Pub. Employees Ass'n v. State ex rel. Okla. Office of Pers. Mgmt.*, 267 P.3d 838, 849-50 (Okla. 2011) (“[t]he growing problem of identity theft is facilitated when birth dates are combined with other personal information”). “About half of the U.S. population (132 million of 248 million or 53%) are likely to be uniquely

identified by only {place, gender, date of birth}, where place is basically the city, town, or municipality in which the person resides.” L. Sweeney, *Simple Demographics Often Identify People Uniquely*, Data Privacy Working Paper 3 (2000), p. 2.³

Further, other courts have noted that “it is by now well established that the disclosure of an individual's full birth date, taken together with his or her full name and the details of employment, can be used to facilitate identity theft, thereby resulting [in] both economic and personal hardship to individuals.” *Hearst Corp. v. State*, 882 N.Y.S.2d 862, 875 (N.Y. Sup. Ct. 2009); *see also Scottsdale Unified Sch. Dist. No. 48*, 955 P.2d at 536 (noting that “birth dates are in fact private”). For example, with an employee’s name and birthdate, a maleficent individual could easily access and appropriate, *inter alia*, that employee’s social security number, financial information, criminal and arrest record, and possibly their complete medical history. *Tex. Comptroller of Pub. Accounts v. AG of Tex.*, 354 S.W.3d 336, 345 (Tex. 2010) (citing *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 955 P.2d 534, 539 (Ariz. 1998)).

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³ Available at <https://dataprivacylab.org/projects/identifiability/paper1.pdf> (last visited April 4, 2018).

E. Birthdates Are Frequently Protected From Disclosure By Other Courts Interpreting Statutory Privacy Exemptions.

Rightfully, individual's privacy concerns are reflected in the decision-making of courts confronted with release of birthdates, and those courts generally hold that individuals' privacy interest in their birthdates substantially outweighs any negligible public interest in disclosure.⁴ For example, under analogous circumstances, the Texas Supreme Court held that "[c]onsistent with the federal courts and those in other states, we conclude that disclosing state employee birth dates constitutes a clearly unwarranted invasion of personal privacy, making them exempt from disclosure" under Texas public disclosure law. *Tex. Comptroller of Pub. Accounts*, 354 S.W.3d at 347-48. Likewise, the Oklahoma Supreme Court held that "release of birth dates and employee identification numbers of State employees would constitute a clearly unwarranted invasion of personal privacy under 51 O.S. Supp. 2005 §24A.7(A)(2)." *Okla. Pub. Empls. Ass'n*, 267 P.3d at 848-51. In *Prall v. New York City Dept. of Corrections*, 10 N.Y.S.3d 332, 129 A.D.3d 734 (2015), the court ordered the withholding of the dates of birth of arrestees requested pursuant to the New York Freedom of Information Law (FOIL) on the basis of a state

⁴ These cases reflect courts adjudicating statutory privacy interests. However, the delineation of the harms that could result from disclosure and the recognition of the concomitant interest in maintaining the privacy of birthdates linked with names should inform this Court in its determination of whether Washington citizens have a constitutional right to hold a privacy interest here.

statute requiring the court to balance privacy interests against the public's right to know. This reported decision is consistent with an earlier unreported decision by a lower New York court withholding detainees' dates of birth from a request under N.Y. FOIL on the basis that "[p]ublic access is the general rule; but it is not inexorable, and the rule will give way whenever outweighed by other more compelling competing interests." *Investigation Technologies, LLC, v. Horn*, 798 N.Y.S.2d 345, 4 Misc.3d 1023(A) (2004)).

Courts also frequently find that birth dates implicate substantial privacy interests and are protected from disclosure under federal law public disclosure law. *See, e.g., Oliva v. United States*, 756 F.Supp. 105, 107 (E.D.N.Y. 1991) (holding that, under FOIA Exemption 6, "dates of birth [] are a private matter, **particularly when coupled with . . . other information**" and disclosure "would constitute a clearly unwarranted invasion of personal privacy") (emphasis added); *Schiller v. INS*, 205 F.Supp.2d 648, 663 (W.D. Tex. 2002) (holding that, under FOIA Exemption 7(c) "the privacy interest of these individuals **in their names and identifying information, i.e. birth date**, outweighs the public interest in disclosure") (emphasis added); *Hearst Corp. v. State*, 24 Misc. 3d 611, 882 N.Y.S.2d 862, 875 (N.Y. Sup. Ct. 2009) (concluding that "a reasonable person would find the **disclosure of their precise birth dates**,

taken together with their full name and other details of their State employment, to be offensive and objectionable”) (emphasis added).

F. Whether Birthdates Are Available From Other Sources Does Not Negate The Privacy Interests Here.

Birth dates may be available from other sources; commercial transactions, personal banking, and participation in social media all involve the required disclosure of private information such as credit card numbers, bank account information, as well as personal identifiers such as social security numbers, driver’s licenses, birthdates, etc. People provide this information in order to enjoy modern conveniences, but rely on explicit safeguards and privacy protections for that information because disclosure could lead to abuse of that intimate personal information.

Similarly, in the modern electronic world, providing birthdate information to one’s employer or government should not involve a relinquishment of privacy because an “individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.” *U.S. Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994) (government employees have a privacy interest in nondisclosure of their home

addresses under FOIA Exemption 6, even though home addresses often are publicly available through telephone directories and voter lists).

Congruently, this Court has recognized that a person’s disclosure of otherwise “private” information may be for a limited purpose. Applied to telephone numbers dialed by an individual, the Court said that, “[a] telephone is a necessary component of modern life’ and the necessary disclosure to the telephone company of numbers dialed does not change the caller’s expectation of privacy ‘into an assumed risk of disclosure to the government.’...This disclosure has been necessitated because of the nature of the instrumentality, but more significantly the disclosure has been made for a limited business purpose and not for release to other persons for other reasons.” *Maxfield*, 133 Wn.2d at 341 (emphasis added); *see also, Boland*, 115 Wn.2d at 581 (recognizing a constitutional privacy interest in a person’s garbage left curbside for pickup because garbage pickup is “necessary to the proper functioning of modern society” and [w]hile a person must reasonably expect a licensed trash collector will remove the contents of his trash can, this expectation does not also infer an expectation of governmental intrusion).

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The recognition that disclosures for a limited or specific purpose do not constitute a relinquishment of constitutional privacy protection against other disclosures also applies to dates of birth provided to the State in its role as an employer. By providing his/her date of birth to an employer, an employee is disclosing private information for the limited purpose of securing employment, *not* as a general disclosure, and *not* with diminished privacy expectations. Disclosure of private information—even if it seldom pertains to the job itself—is often provided in order to obtain employment. It is generally provided as a “personal identifier” or as a key to obtaining other information (much of it private) about a prospective employee, such as for background checks for those seeking employment working with children, vulnerable adults, or in law enforcement. It is provided to the employer with the reasonable expectation of limited access by others for a specific use—but is still, ultimately, private information.

By providing her date of birth to an employer, an employee is disclosing private information for the limited purpose of securing employment—*not* as a generalized disclosure, and *not* with diminished expectations of privacy. *Hinton*, 179 Wn.2d at 873 (“Given the realities of modern life, 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.”)

IV. CONCLUSION

For these reasons, the Court should hold that constitutional privacy protection encompasses the information at issue and forecloses its release by the State.

RESPECTFULLY SUBMITTED this 6th day of April, 2018.

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