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STATE OF WASHINGTON
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NO. 95441-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE ASSOCIATED PRESS, NORTHWEST NEWS NETWORK,
KING-TV (“KING 5”), KIRO 7, ALLIED DAILY NEWSPAPERS OF
WASHINGTON, THE SPOKESMAN-REVIEW, WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION, SOUND PUBLISHING,
INC., TACOMA NEWS, INC. (“THE NEWS TRIBUNE,”) and THE
SEATTLE TIMES,

Plaintiffs/Respondents/Cross-Appellants

v.

THE WASHINGTON STATE LEGISLATURE; THE WASHINGTON
STATE SENATE, THE WASHINGTON STATE HOUSE OF
REPRESENTATIVES, Washington state agencies; and SENATE
MAJORITY LEADER MARK SCHOESLER, HOUSE SPEAKER
FRANK CHOPP, SENATE MINORITY LEADER SHARON NELSON,
and HOUSE MINORITY LEADER DAN KRISTIANSSEN,

Defendants/Appellants and Cross-Respondents

**REPLY BRIEF OF THE ASSOCIATED PRESS, NORTHWEST
NEWS NETWORK, KING-TV, KIRO 7, ALLIED DAILY
NEWSPAPERS OF WASHINGTON, THE SPOKESMAN-REVIEW,
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION,
SOUND PUBLISHING, INC., TACOMA NEWS, INC. and THE
SEATTLE TIMES**

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I. ARGUMENT AND AUTHORITY

This cross-appeal concerns whether the trial court erred in determining that the four individual legislators, named here as defendants, were “agencies” under the Public Record Act (“PRA”), and that the House of Representatives, State Senate, and State Legislature were not “agencies” under the PRA. The Defendants argue that neither group of defendants constitute “agencies” under the PRA, or that they Constitutionally could not be an “agency” but they point to irrelevant and inapplicable case law, distort the legislative provisions and history under review, and argue for a reading they wish to be accepted, without any definitional support in the Statute itself. Defendants inaccurately claim the Media agrees with arguments they make, or fails to address relevant arguments, when the Media’s briefing itself belies those claims. The Court should hold that all of the Defendants are agencies under the Act, and order the production of records, award appellate fees and costs, and remand to the trial court for an award of trial court level fees, costs and penalties once all responsive records have been produced.

A. The PRA Today.

The PRA today—and back when it was passed as Initiative 276 (“I-276”) by the people in 1972—requires “all state agencies and all local agencies” to produce public records, broadly defined. RCW 42.56.010,

originally codified as RCW 42.17.020. “‘State agency’ includes every state office, department, division, bureau, board, commission, or other state agency.” RCW 42.56.010(1).

The question in this appeal is whether the offices of the four individually-named legislators, the Senate, House and/or Legislature are “state agencies” for purposes of the PRA. The only appropriate answer to this question is yes as explained below and in the Media’s Opening Brief.

B. Initiative I-276.

The PRA originated as part of Initiative I-276, passed by the people of the State of Washington in 1972. I-276 required state and local agencies to produce public records and campaign finance disclosures to provide for greater government transparency. The Defendants do not appear to dispute that the people of the State of Washington who passed Initiative I-276 in November 1972 meant the law to apply to all public officials as well as all branches of government including the Legislature. The Initiative came a year after the Legislature’s efforts to create a repository of certain defined “legislative records” with the office of the Chief Clerk of the House and Secretary of the Senate—clearly indicating that the Legislature’s 1971 action was not sufficient in the public’s mind since it passed a much broader Initiative the next year. I-276 required all state, county, and city governments to allow and provide access to their

records and required disclosure of all political campaign and lobbying contributions and expenditures as well as full access to information concerning the conduct of government. CP 228-249. The measure became the Public Disclosure Act and was codified at RCW 42.17 et seq. in 1973. I-276's declaration of policy included the following:

SECTION 1. Declaration of Policy. It is hereby declared by the sovereign people to be the public policy of the State of Washington: ...

(2) That the people have the right to expect from their **elected representatives at all levels of government** the utmost of integrity, honesty and fairness in their dealings.

(3) That the people shall be assured that the private financial dealings of their **public officials**, and of candidates for those offices, present no conflict of interest between the public trust and private interests....

(5) **That public confidence in government at all levels is essential and must be promoted by all possible means.**

(6) That public confidence in government **at all levels** can best be sustained by assuring the people of the impartiality and honesty of the officials in all public transactions and **decisions**....

(11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, **full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.**

The provisions of this act shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and **full access to public records so as to assure continuing public confidence in fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.**

CP 228-249 (emphasis added).

I-276 mandated that “Each agency, in accordance with published rules, shall make available for public inspection and copying all public records.” I-276 defined public record as follows: “‘Public record’ includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.” I-276 defined “state agency” as follows: “‘State agency’ includes **every state office, public official, department, division, bureau, board, commission or other state agency**. (emphasis added). The underlying terms “state office, public official, department, division, bureau, board, commission or other state agency” were not defined.

C. The 1977 Amendment.

In 1977, the Legislature amended the definition of “agency” in the Act to remove the words “public official” but kept the remaining parts of the definition. The bill summary made clear the edit was “to be more specific in **encompassing all governmental units at each level of state and local government**.” CP 250-292 (emphasis added).

D. The 1992 Amendment

In 1992, the Legislature amended the Act to add the following mandate, now found at RCW 42.56.030, and in 1992 found at RCW 42.17.251:

The people of this state do not yield their sovereignty to the **agencies** that serve them. The people, in delegating authority, do not give their **public servants** the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the **instruments that they have created**. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

(emphasis added).

E. The 1995 Amendment, ESSB 5684.

In 1995, the Legislature amended the Act again through ESSB 5684 which was enacted into law. CP 121-177. The 1995 amendment did not alter the definition of “state agency” or the definition of “public records” to be produced by state agencies. CP 123-124 at ¶(1) and CP 132 at ¶(36). “State agency” continued to be defined as “**every state office, department, division, bureau, board, commission, or other state agency.**” CP 123-124 at ¶(1) (emphasis added). The 1995 amendment, however, created a definition for the words “**State Office**”—which the Act defined as a “State Agency.” The amendment defined “State Office” for purposes of the definition of “agency” as follows: “**State office**’

means state legislative office or the office of governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner, superintendent of public instruction, state auditor, or state treasurer.” CP 132 at ¶(39) (emphasis added).

The same 1995 amendment also added a definition for “State Legislative Office” – a term contained within this new definition of “State Office.” “**State legislative office**” was defined as “**the office of a member of the state house of representatives or the office of a member of the state senate.**” CP 132 at ¶(38).

So the 1995 amendment made clear that “**the office of a member of the state house of representatives or the office of a member of the state senate**” was a “**state agency,**” and the amendment continued to require “**state agencies**” to **comply with the Act and produce public records**, which continued to be defined as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” CP 132 at ¶(36). In other words, the 1995 amendment further established that the individual offices of each Senator and Representative were state agencies under the Act and that those agencies had to respond to and produce records under the Act under the broad

definition of “public records” that applies to all other state agencies. The amendment did not define the terms “department, division, bureau, board, commission, or other state agency”, the other terms constituting a “state agency.”

Defendants argue that the definition of “State Office” was meant only to apply to campaign finance provisions of the law, but the 1995 amendment was amending the definition section of a single Act, the Public Disclosure Act, at RCW Chapter 42.17. The definition for “State Office” was placed at RCW 42.17.020, which was the definition section for the entire Act. Nowhere in the statute does it limit the definition of “state office” to only some parts of the Act. The addition of the definition for “State Office” to include “the office of a member of the state house of representatives or the office of a member of the state senate” was the definition that applied to the entire Act, which included the public record requirements.

Defendants now argue that they narrowed the definition of “agency” nonetheless by creating a collection and production obligation for the Office of the Chief Clerk of the House and the Office of the Secretary of the Senate that had a narrower scope of records to be produced by those offices. But the language added as to the Secretary and Clerk did not in any way alter the definition of “agency” that in the very

same definition section was explicitly defined to cover the individual state legislative offices of each Senator and Representative.

The sentences added to the definition of “public record” for the office of the clerk and secretary read as follows:

For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

CP 132 at ¶(36) (emphasis added). The scope of records to be produced by the Clerk and Secretary did not include those of the individual legislators because the individual legislators, as defined “state agencies” were obligated to produce those themselves.

The 1995 amendment did not change the definition of “State Agency”, and “State Agency” was defined in this same amendment to still include “State Office,” and “State Office” was defined to include “State Legislative Office,” and “State Legislative Office” was defined as “the office of a member of the state house of representatives or the office of a member of the state senate.” CP 123-124, 132. So while the 1995 amendment created specific obligations for the newly-addressed offices of the chief clerk of the house and secretary of the senate, it did not in any

way reduce the public record obligation on individual Senators or Representatives or their respective individual State Legislative Offices, nor did it alter the obligation of the Legislature, Senate and House as State Agencies to comply with the public records law. Nor did the limitation of the records to be produced by the Clerk and Secretary limit the application of the Act to the Legislature, Senate or House. The definition of “legislative records” was solely tied to the duties of the Clerk and Secretary, and not in any way a narrowing of duties for other “agencies” under the Act.

Defendants now try to argue that by creating a disclosure obligation for the Secretary and Clerk and limiting those to “legislative records” as defined by another statute, that they were amending the PRA to not apply to any other part of the Legislature than the Office of the Secretary or Clerk. But inclusion of the Office of the Secretary and Office of the Clerk with their own narrower duties specifically did not alter the definition of “agency” or exclude the Legislature, Senate or House or any other of their subparts. As explained below, the original definition of “agency” covered, and still covers, not only the individual offices of the legislators but the Senate, House and Legislature and their other subparts. The narrower duties of the Clerk and Secretary were to prevent the Clerk and Secretary from being obligated to retrieve records from individual

legislators over whom they had no control.

F. 2005 Amendment, SHB 1133 Retaining Same Definitions as Campaign Finance and Ethics Laws.

In 2005, the Legislature separated RCW 42.17 into two parts.

The 2005 Amendment expressly stated what its motive was:

The legislature finds that chapter 42.17 RCW contains laws relating to several discrete subjects. Therefore, the purpose of this act is to recodify some of those laws and create a new chapter in the Revised Code of Washington that contains laws pertaining to public records.

Laws of 2005, ch. 274 § 1. Its sponsor, then Representative Toby Nixon, now President of the Washington Coalition for Open Government, made clear that he wanted to organize public record exemptions topically to make them easier for the public to locate them. CP 348. The separation was not meant to change in any way the meaning of either law, and the Bill and resulting law as passed, specifically confirmed that. Laws of 2005, ch. 274 § 1. The Bill went through modifications and was passed as SHB 1133 and signed into law. CP 360-594. The Amendment made clear that its purpose was not to change the law, but only to separate the provisions related to the PRA into its own chapter. CP 391 lines 22-26. More importantly, the new PRA did not contain its own definitions but specifically stated “The definitions in RCW 42.17.020 apply throughout this chapter.”

CP 391 lines 29-30. Thus the 2005 Amendment that created the separate Public Record Act specifically imported, and retained, the same definitions of State Agency, State Office, and State Legislative Office that had been part of the PRA since 1995.

G. 2007 Amendment, SHB 1445.

In 2007, the House introduced SHB 1445 to make some minor edits to the PRA. It included a definition section but repeated only three definitions: “agency”, “public record” and “writing”. CP 606 lines 7-CP 607 line 19. It kept the original definition for “state agency” from its predecessor location of RCW 42.17.020, and did not create a separate one for “state office” – which continued to be a subpart of “state agency”. *Id.* There was no indication in the Amendment, or any of the legislative history, that the definition of State Agency or State Office was to mean anything other than it had meant for the past 12 years since the 1995 Amendment.

Both the 2005 and 2007 Amendments made clear that the Legislature was not changing the meaning of the PRA or the definitions of the agencies subject to its requirements but was merely reorganizing the provisions to make them easier for the public to find them and understand them.

The Defendants now try and claim this separation of the PRA in 2005, and the transfer of just three definitions in 2007 without providing definitions for any of the terms those definitions include, is meant to show the Legislature meant to exempt itself from the PRA. The Amendment does not support that claim, nor does the legislative history. The definitions of “State Office” and “State Legislative Agency” now found in RCW 42.17A apply with equal force to the PRA which does not contain its own definitions of the terms, particularly since from 1995 to 2007 the PRA specifically applied those definitions.

Nothing about the reorganization of the campaign finance, ethics and public record portions of RCW 42.17 caused them to no longer be “related statutes.” Courts “derive the plain meaning from the language of the statute and related statutes.” O.S.T. ex rel. G.T. v. Blue Shield, 181 Wn.2d 691, 696-97, 335 P.3d 416 (2014). RCW 42.56 and RCW 42.17A were originally passed into law together as part of Initiative 276 and were located in the same chapter for more than 30 years until 2005. As the trial court correctly held, this is the “epitome of being ‘related statutes’ that courts consider when determining the plain meaning of a statute. These [2005 and 2007] amendments do nothing to change that fact.” CP 797.

The PRA does not currently contain a definition for “state office” but for more than 12 years it did as part of RCW 42.17.020. The amendment in 2005 separating the PRA into its own chapter did not include a definition section and referred back to all the definitions from RCW 42.17.020. The 2007 Amendment inserted only definitions for “agency”, “writing” and “public record” and left the other underlying terms undefined. It was correct for the trial court to interpret those terms based on the common definitions the PRA had shared with the campaign finance law in RCW 42.17.020 since its passage in 1972. That common definition had contained a definition for “State Office” since 1995.

H. The Other Terms for State Agency Have Never Been Defined, and Include the Legislature, Senate and House.

The Statute, whether at RCW 42.17 or RCW 42.56, has never defined the terms “department, division, bureau, board, commission, or other state agency” that are included in the definition of “state agency.” These terms were in the original Initiative 276 passed by the people in 1972, and they have remained in the definition for the past 45 plus years. It is clear the people who passed Initiative 276 meant for the Act to apply to all branches of government, and did not intend to exclude the Legislature, Senate or House. Defendants complain that the Defendants’ view of an “agency” is narrow and does not include a legislative branch or

legislators, but the meaning attached to the term when passed by the people clearly was not so narrow. Further, the 1992 Amendment—referring to “agencies” that serve the people, denying “public servants” the right to decide what the people should know, and insisting on the public remaining informed “so they may control the instruments they have created”—indicates a broad meaning of the word “agencies” to cover all “public servants” and “all instruments” the people have created. RCW 42.56.030, and in 1992 found at RCW 42.17.251. Nothing in the text suggests an intention to narrow the meaning of “agencies” to exclude the Legislature, Senate or House.

The Media offered evidence of all the other times the State or others, including in other State and Federal Statutes, have used the term “agency” to refer to the Legislature, Senate or House, and did so to show that that usage was a common, and typical, one, and thus a normal and reasonable one for those who voted for Initiative 276 to apply to the Legislature, Senate and House. Further, the Legislature that has amended the Act over the last forty-five plus years can identify no place in the legislative history or language of the Amendments where any amendment was meant to exclude the Legislature, Senate or House, or any legislator, from the definition of agency, or any claim those entities were not included as agencies. Defendants cannot identify ANY statement to the

public, or within the Legislature, where this claim was made at the time of the Amendments. Instead, the two failed amendments described in the Media's Opening Brief, show that in 2003 and 2005 Legislators believed they were NOT removed from the definition of "agency" and tried, unsuccessfully, to amend the Act to remove themselves. The failed amendments are not offered to show the amendments failed to pass, but because their introduction illustrates that the Legislators did not even themselves believe that the definition of "agency" excluded them or the Legislature, Senate or House. The Bill Reports for the 2003 and 2005 failed amendments discussed in the Media's Opening Brief document the clear statement that the Legislators had concerns that the Act applied to them and some wanted to amend it to clearly remove themselves.

More explicitly, after the trial court in this case issued his ruling, the Legislature acted secretly, and swiftly, without a public hearing, and exempted themselves from the PRA by passing ESB 6617 (2018) available at <http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/6617.PL.pdf> (last visited 3/26/19). The Bill provided in relevant part as follows:

NEW SECTION. Sec. 1. The legislature intends to clarify that the legislature, like the judiciary, is a branch of government rather than an "agency" of the state as that term is used in chapter 42.56 RCW, the public records act, and that the legislature is subject to separate disclosure

requirements arising from its representative duties. Beginning in 1986, the supreme court of Washington has ruled that the public records act did not apply to the judicial branch, because the judiciary is a branch, not an agency, because there is a common law right of access to court records, and because the public records act did not specifically include courts or court files. The state supreme court has since adopted comprehensive rules to provide public access to case records and administrative records of the judicial branch. Similarly, the state Constitution requires the legislative houses to maintain journals, and to publish those journals, except such parts as require secrecy. During the essential legislative acts of floor deliberation and voting, the state Constitution requires the doors of the chambers to remain open, except where the public welfare requires secrecy. The presiding officers must sign legislation in open session. The state Constitution further requires the secretary of state to maintain records of official acts of the legislature. In addition, the state Constitution directs the legislative houses to adopt rules to govern their own proceedings. To protect the independence of legislative deliberations against interference by the other branches, the state Constitution provides that legislators are immune from civil process during the legislative session, and they are likewise immune from any civil or criminal liability for words spoken in debate. As John Adams explained in the Massachusetts state Constitution of 1780, "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." Correspondingly, the state Constitution also protects the right of the people to petition and communicate with their elected representatives. For these reasons, the legislature intends to establish records disclosure obligations that preserve the independent deliberation of the people's representatives while providing access to legislative public records. The legislative records disclosure obligations in this act establish continued public access to specified records of the legislature as originally codified in the public records act in 1995, as well as additional records

as provided in this act.

ESB 6617 (2018)

After one of the largest public backlashes the Legislature has experienced in decades, the Governor vetoed that Bill, and the veto was not overcome. The measure did not become law. While new bills were introduced this current legislative session again trying to claim the Legislature and Legislators had never been subject to the PRA, and to narrow the scope of records they would have to produce, those, too, have not succeeded.

The point of the failed 2003, 2005, and 2018 Bills is that when the Legislature intends to exempt itself and Legislators from the PRA, it says so, and does so explicitly in the proposed language. The Defendants here argue that the 1995, 2005 and 2007 Amendments secretly accomplished such exemption, but the actual language of those amendments show they did no such thing, and had they been successful, the failed attempts in 2003, 2005 and 2018 would not have been necessary.

The trial court here held that the Legislature, Senate and House were not “agencies” despite finding it reasonable that they fall within the definition of “division” or that the definition of “State Legislative Offices” could reasonably include the Legislature and its chambers as well. The

trial court did so solely because the Legislature listed the Office of the Secretary and Office of the Clerk in the 1995 Amendment but did not identify them as “agencies” but by name. This assigns too much importance to this addition. As explained in the Media’s Opening Brief, the narrower duties for the Clerk and Secretary, and their specific inclusion in the PRA by name, was in conjunction with the companion addition of a definition for “State Office” making it clear that the individual offices of the Senators and Representatives were “agencies” under the law and subject to the broader PRA record definition and production duties. The Amendment also came on the heels of a public scandal and public mistrust of the Legislature following the prosecution of staff for performing campaign activities for Legislators while being paid by tax payers to perform other Legislative work duties they were not in fact performing. The 1995 Amendment was a compromise to impose certain duties on the Clerk and Secretary but to reduce their obligation to gather records from the individual Legislators over whom they had no real control.

The separate references to these two staff offices within the Legislature was an insufficient basis to find the Legislature, Senate and House could not fall within the definition of “state office, department, division, bureau, board, commission, or other state agency” that are

included in the definition of “state agency” in RCW 42.56.010.

I. Defendants’ Vague Separation of Powers and Constitutional Argument Fails.

Defendants vaguely argue that the Legislature, Senate and House and individual Legislators cannot be “agencies” under the PRA based on separation of power or “Constitutional” concerns. They allude to “interbranch conflicts” that could arise, without explanation. The sole basis now apparently alleged is that the Court interpreted “agency” to include the Legislature and Legislators when the Defendants claim they did not explicitly include it. (Reply at 23). They claim the trial court overstepped by looking to the definition of “state office” that had been in the same definition section of the PRA provisions for 12 years when the Legislature failed to provide an alternate definition of that term when it moved the record provisions to RCW 42.56. The trial court did what he was supposed to do—interpret the law—based on a related statute that had been the same statute as the one being interpreted for 45 plus years. The Court is not re-writing a law; it is interpreting it as it is required to do. Furthermore, the Legislature never offered any definition at all for most of the terms described as a “state agency”, but the people of the State of Washington who passed the original Initiative ascribed a meaning to them that included the Legislature, and the Legislature never excluded itself—at

least not in a Bill that passed and was not vetoed.

To the extent the Defendants claim that subjecting them to the PRA violates the Speech and Debate Clause of the federal Constitution—a frivolous argument—the majority of the federal circuits have held that the Speech and Debate clause does not prohibit the disclosure of even privileged documents from the Legislator or Legislators, but rather forbids the evidentiary use of such documents to prosecute a Legislator. See, e.g., In Search of Electronic Communications of Fatahh, 802 F.3d 516, 529 (3rd Cir. 2015); U.S. v. Renzi, 651 F.3d 1012 (9th Cir. 2011). Further, the Washington Constitution’s speech and debate clause is far narrower than that of the federal Constitution, stating solely that “No member of the legislature shall be liable in any civil action or criminal prosecution whatsoever for words spoken in debate.” Washington Const. Art. III, §17. It is solely an immunity from liability based on words spoken in debate, not a privilege to withhold records related to legislative actions nor even a privilege not to be questioned about such activities. As such the state speech and debate clause provides no support for any separation of powers or Constitutional argument, nor does the federal Constitution.

It is not unconstitutional to allow the public to pass an Initiative that applies to all elected officials and branches of government. It is not unconstitutional for the Legislature to amend a statute such that it applies

to Legislators or the Legislature. The Defendants have failed to establish that their view of the appropriate interpretation of “agency” was meant by the people, or any amending Legislature, to have the narrow scope the Defendants now seek for it. The Defendants have failed to show that the Constitution will be violated if these Defendants are forced to provide the Media with their texts, emails, and calendars and the records of sexual harassment complaints and investigations at the State Legislature. Local legislative officials and local legislative agencies have been complying with the PRA for more than four decades. It is time for these Defendants to do the same.

J. The Two Named Senators and Two Named Representatives are Parties to this Lawsuit.

The Media made four separate PRA requests that are the subject of this lawsuit. Two of the requests went to the State Legislative Office of each and every one of the 49 State Senators at his or her official email address, including the two Senators named in this lawsuit as Defendants. CP750-754, 761-765. Two of the requests went to the State Legislative Office of each and every one of the 98 State Representatives at his or her official email address, including the two Representatives named in this lawsuit as Defendants. CP 755-760, 766-771. It is undisputed that all four of the PRA requests went directly to the individual Senators or

Representatives at their State Legislative Offices. The four State Legislative Offices that were sued were sued in their capacity as Senators or Representatives, and thus the Court absolutely had, and has authority to enter relief against them and their State Legislative Offices as well as against the Senate, House and Legislature. The Prayer for Relief included relief for all of the Defendants, including the two Senators and two Representatives.

K. Defendants Did Not Appeal the Denial of Its Motion to Strike, Nor Assign Error to that Decision, and Defendants Should Not be Allowed to Raise this Issue in a Reply Brief.

Defendants did not appeal the trial court's denial of its Motion to Strike the Rowland Thompson Declaration, nor did they assign error to the decision in their opening brief or Statement of Grounds. They instead sought to raise the issue for the first time in their Reply Brief less than three months before oral argument. They should not be allowed to raise the issue at this late stage, and this Court should decline to consider the issue. Contrary to their argument, the statements in the Thompson Declaration establish that the witness had personal knowledge for all statements offered as he personally saw and witnessed the events described both as a legislative staffer and then as a lobbyist for the media. (The Thompson Declaration was offered in rebuttal to Defendant's submission of a declaration of a staffer with limited tenure at the

Legislature and no foundation who sought to testify to staffers; and Legislators' understanding of the PRA following the 1995 Amendment.)

L. The Media is Entitled to an Award of Fees and Costs under the PRA and as a Prevailing Party in this Appeal.

Should the Media prevail on appeal in any respect, it should be awarded its fees and costs on appeal pursuant to the RCW 42.56.550(4)

PRA and RAP 18.1. RCW 42.56.550(4) of the PRA provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action [.]

Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.” Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005)**Error! Bookmark not defined.**; see also Am. Civil Liberties Union of Washington (“ACLU”) v. Blaine Sch. Dist. No. 503, 95 Wn. App. 106, 115, 975 P.2d 536 (1999). The PRA does not allow for court discretion in deciding **whether** to award attorney fees to a prevailing party. Progressive Animal Welfare Society v. University of Washington (“PAWS I”), 114 Wn.2d 677, 687-88, 790 P.2d 604 (1990); Amren v. City of Kalama, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). The only discretion

the court has is in determining the *amount* of reasonable attorney’s fees. Amren, 131 Wn.2d at 36-37.

The Supreme Court in Limstrom v. Ladenburg, 136 Wn.2d 595, 616, 963 P.2d 869 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees— “[including] fees on appeal”—to the requester.

Under RCW 42.56.550(4), a public records requestor who prevails against an agency in a PRA claim is entitled to mandatory reasonable attorney’s fees, all costs, and a daily penalty of up to \$100 per day which can be imposed per page. Wade’s Eastside Gun Shop v. Labor and Industries, 185 Wn.2d 270, 372 P.3d 97 (2016). Defendants have failed to perform an adequate search for records in violation of the PRA, silently withheld numerous records in violation of the PRA, and failed to timely cite exemptions and provide an adequate withholding log for these silently withheld records. The parties have stipulated that there are records that exist that would be responsive to the requests if the Defendants are subject to the PRA and that these were not produced, and that no explanation of exemption or withholding was made other than that the records are contended not to be subject to the PRA. This Court should thus further deem the Media the prevailing party on those additional claims in this appeal and rule that they are entitled to an award or reasonable attorney’s

fees, all costs, and statutory penalties in amounts to be determined by the trial court after subsequent briefing and hearing by the trial court and remand to the trial court for this additional trial court fee, cost and penalty award once all responsive records have been produced.

II. CONCLUSION

For the foregoing reasons, the Court should uphold the trial court's determination that the individual Legislators are agencies under the PRA and have violated the PRA, but reverse the trial court's finding that the Legislature, Senate or House are not agencies under the PRA or subject to the PRA. The Court should further award the Media its reasonable fees and costs for the work on the appeal and remand to the trial court for a determination of the award of trial court fees, costs and penalties which the Media is thus due and to have the records finally produced.

RESPECTFULLY SUBMITTED this 27th day of March, 2019.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on March 27, 2019, I filed with the State Supreme Court and delivered a copy of the foregoing Brief and this Certificate of Service by email pursuant to agreement to the following:

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