

**No. 96578-1**

NO. 497263-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,  
Appellant,

v.

EVERGREEN FREEDOM FOUNDATION, d/b/a FREEDOM  
FOUNDATION,  
Respondent,

and

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,  
Respondent.

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**OPENING BRIEF OF APPELLANT**

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## I. INTRODUCTION

Appellant SEIU 925 is the collective bargaining representative of in-home child care providers, who provide child care to families receiving child care subsidies through the Working Connections Child Care (“WCCC”) program. In this case, SEIU 925 appeals the decision of Thurston County Superior Court Judge Mary Sue Wilson denying its request for injunctive relief to prevent Respondent Washington State Department of Early Learning (“DEL”) from disclosing a list of the names, addresses, and email addresses of child care providers to Public Records Act (“PRA”) requestor and Respondent Freedom Foundation (“FF”).

For several years, FF has used PRA requests to attempt to obtain lists of the names and contact information of child care providers represented by SEIU 925 and individual home care providers (“IPs”) represented by SEIU 775 as part of a campaign to persuade them to cease financially supporting their unions. This court recently noted that FF’s purpose in seeking to obtain these lists is political. *SEIU Healthcare 775 NW v. Dep’t of Soc. and Health Serv.*, 193 Wn.App. 377, 406, 377 P.3d 214 (2016) (Referring to request for list of IPs). When it submitted the request for names and contact information of child care providers that is the subject of this case, FF informed DEL that it intended to use the requested information for the same purpose that this court characterized as political in *SEIU Healthcare 775NW*.

RCW 74.04.060(4) governs the disclosure of information obtained in the administration of public assistance programs covered by Title 74, including the WCCC program. It expressly prohibits state agencies, including DEL, from disclosing “any list or names” for political purposes. Because the evidence presented to the trial court established that SEIU 925 was likely to prevail on its claim that FF sought to use the requested list of names of child care providers for political purposes, the trial court erred in denying SEIU 925’s request for injunctive relief. The trial court erred by concluding that RCW 74.04.060(4) applied only to lists or names of applicants and recipients, where the plain language of the statute contains no such restriction.

The trial court further erred in denying injunctive relief because RCW 43.17.410(1) prohibits disclosure of the requested information and the requested information is exempt from disclosure under RCW 42.56.640(1). RCW 43.17.410(1) and RCW 42.56.640(1) were adopted in Initiative 1501, which was approved by voters on November 8, 2016, and became effective law on December 8, 2016. RCW 43.17.410(1) expressly prohibits the disclosure of the requested information and RCW 42.56.640(1) explicitly exempts the requested information from disclosure under the PRA. The trial court acknowledged that Initiative 1501 prohibits state agencies from disclosing the requested records and that it was effective law at the time the trial court rendered its decision in this case; however, the court erred by failing to apply the law in effect at the time of its decision, and by concluding that the voters did not intend for

the initiative to apply to pending PRA requests.

For the reasons set forth below, this Court should reverse the trial court's denial of injunctive relief and remand for entry of an order enjoining DEL from disclosing the requested list of the names, addresses, and email addresses of child care providers.

## **II. ASSIGNMENTS OF ERROR**

- A. The trial court erred in denying SEIU 925's request for injunctive relief where the evidence established that SEIU 925 has a clear legal right to the protection of the requested records because RCW 74.04.060(4) prohibits DEL from disclosing them and the evidence established a well-grounded fear of immediate invasion of that right and irreparable injury to SEIU 925 where DEL notified SEIU 925 that it would release the records unless SEIU 925 obtained an injunction.
- B. The trial court erred in denying SEIU 925's request for injunctive relief where the evidence established that SEIU 925 has a clear legal right to the protection of the requested records because RCW 43.17.410(1) prohibits DEL from disclosing them and the evidence established a well-grounded fear of immediate invasion of that right and irreparable injury to SEIU 925 where DEL notified SEIU 925 that it would release the records unless SEIU 925 obtained an injunction.
- C. The trial court erred in denying SEIU 925's request for injunctive relief where the evidence established that SEIU 925 has a clear legal right to the protection of the requested records because RCW 42.56.640(1) exempts the records from disclosure under the Public Records Act and the evidence established a well-grounded fear of immediate invasion of that right and irreparable injury to SEIU 925 where DEL notified SEIU 925 that it would release the records unless SEIU 925 obtained an injunction.

### III. STATEMENT OF THE CASE

WCCC, the largest child-care subsidy program in Washington, funds child care to support qualifying low-income working families. CP 276. The WCCC program is largely funded through the federal Temporary Assistance to Needy Families federal “welfare” program (“TANF”). *Id.* The WCCC subsidy is authorized as a public assistance program pursuant to RCW 74.04. *See* RCW 74.04.004(5) (“Public assistance” or “public assistance programs” means public aid to persons in need including ... working connections child care subsidies.”). The Department of Social and Health Services (“DSHS”) maintains a list of child care providers who provide care to families that receive WCCC subsidies, which includes the names and personal contact information of providers. CP 276. DSHS shares that information with DEL. *Id.*

SEIU 925 represents in-home child care providers, both those who are licensed to care for children in their own homes, and those who are exempt from licensing who are referred to as “family, friend and neighbor” providers (“FFN”). *Id.* at 275. Providers who meet certain criteria can provide non-licensed child care for their family, friends and neighbors. WAC 170-290-0003 and WAC 170-290-0130 through 0167. SEIU 925 is the exclusive bargaining representative of both licensed and license-exempt providers and is signatory to a contract with the State of Washington that determines, among other things, the manner and rate of subsidy payments to providers throughout the state. RCW

41.56.028(2)(c); CP 275. SEIU 925 collects dues payments from its members, except that those providers who do not wish to be members of SEIU 925 and thus do not pay any dues or fees. CP 275.

FF has for several years used PRA requests to attempt to obtain lists of the names and contact information of child care providers represented by SEIU 925 and IPs represented by SEIU 775 so that it can contact them as part of an advocacy campaign to persuade them to cease financially supporting their unions. CP 21. This court recently noted that FF's purpose in seeking to obtain these lists "appears to be political". *SEIU Healthcare 775NW v. Dep't of Soc. and Health Serv.*, 193 Wn.App. 377, 406, 377 P.3d 214 (2016) (Referring to request for list of IPs).

On November 4, 2016, DEL notified Plaintiff that it received a PRA request from FF seeking:

1. The first name, last name, work mailing address, and work email address of all licensed family child care providers, as defined by RCW 41.56.030(7).
2. The first name, last name, work mailing address, and work email address of all license-exempt family child care providers, as defined by RCW 41.56.030(7).

CP 285-86.

FF informed DEL that it intended to use the requested information for the same purpose that it has sought similar lists for several years, including the list of IPs at issue in *SEIU Healthcare 775NW*: "to inform providers of their constitutional and statutory rights regarding union

membership and representation.”<sup>1</sup> *Id.* DEL notified SEIU 925 that absent a TRO prohibiting the release of the information, DEL intended to release the information by November 22, 2016. *Id.*

On November 8, 2016, Washington voters approved Initiative 1501 (“I-1501”) by a vote of 70.64% to 29.63%.<sup>2</sup> The law became effective on December 8, 2016. Const. art. II, § 1(d). I-1501’s purpose is to “protect the safety and security of seniors and vulnerable individuals”. CP 299. The law contains two independent statutory provisions protecting the names, addresses, and email addresses of family child care providers from disclosure by state agencies. First, RCW 43.17.410(1) prohibits the disclosure of this information by any state agency, including DEL. RCW 43.17.410(1) provides, “neither the state nor any of its agencies shall release sensitive personal information of vulnerable individuals or sensitive personal information of in-home caregivers for vulnerable populations, as those terms are defined in RCW 42.56.640.” RCW 42.56.640(2)(b) provides that “sensitive personal information” includes names, addresses, and email addresses in addition to other personally identifying information. RCW 42.56.640(2)(a) provides that “in-home caregivers for vulnerable populations” includes “family child care providers as defined in RCW 41.56.030.” *Id.*

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<sup>1</sup> In *SEIU Healthcare 775NW*, 193 Wn.App. at 227, this Court noted that FF’s stated purpose for requesting the list of IPs in that case was “to correspond with the individual providers and notify them of their constitutional right to refrain from union membership and fee payments.” This Court stated, “As the trial court noted, this purpose appears to be political rather than commercial.”

<sup>2</sup>See <http://results.vote.wa.gov/results/current/State-Measures-Initiative-Measure-No-1501-concerns-seniors-and-vulnerable-individuals.html> (last visited Nov. 29, 2016).

In addition to prohibiting the release of the requested information by any state agency in RCW 43.17.410(1), I-1501 explicitly exempts such information from disclosure under the PRA in RCW 42.56.640(1). *See* RCW 42.56.640(1) (“Sensitive personal information of vulnerable individuals and sensitive personal information of in-home caregivers for vulnerable populations is exempt from inspection and copying under this chapter.”).

The initiative states that RCW 43.17.410(1) and RCW 42.56.640(1) promote the public policy of protecting vulnerable populations from identity theft, consumer fraud, and other forms of victimization. CP 299, 304, 306; RCW 9.35.001(2); RCW 43.17.410(1). The initiative further states that the law must be liberally construed to promote this public policy. CP 306.

SEIU 925 filed a motion for a TRO on November 16, 2016. On November 18, the parties agreed to extend the November 22 deadline until December 9 so that the requested records would not be released prior to a hearing on SEIU 925’s motion for a preliminary injunction. CP 311, 317. As a result, the trial court did not rule on SEIU 925’s TRO motion.

On December 9, 2016, the Honorable Mary Sue Wilson, Thurston County Superior Court, denied Plaintiff’s motion for a preliminary injunction. CP 967-68. Judge Wilson explained her ruling in an oral decision that is incorporated into the trial court’s written order. CP 968;

Verbatim Report of Proceedings (“VRP”)<sup>3</sup>.

In the oral decision, Judge Wilson acknowledged reaching a different conclusion “a few weeks ago” in a similar PRA case, finding a likelihood that RCW 74.04.060 exempted similar records from disclosure. VRP 42:5-11. The trial court acknowledged that RCW 74.04.060(4) — which prohibits the disclosure of “any lists or names for commercial or political purposes of any nature” — contains no language indicating that the Legislature intended “any lists or names” to mean only lists or names of either applicants or recipients of public assistance. VRP 42:5-43:5. In fact, Judge Wilson noted that the provision “is written quite broadly”. VRP 42:7-9. Nonetheless, the trial court concluded that RCW 74.04.060(4) applies only to lists or names of applicants or recipients, and that the provision does not apply to any other lists or names obtained by state agencies in the administration of public assistance programs governed by Title 74, including the list of the names and personal contact information of child care providers that is the subject of this case. VRP 42:20-43:5.

RCW 74.04.060(1)(a) states that “for the protection of applicants and recipients”, DSHS, the health care authority, and county offices are prohibited from disclosing “the contents of any records, files, papers and communications” except for purposes directly connected with the

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<sup>3</sup> The verbatim report of proceedings appears on page 421-480 of SEIU 925’s Appendix in Support of Motion for Emergency Injunctive Relief Pending Appeal, filed with the Court of Appeals on December 13, 2016.

administration of public assistance programs. The trial court concluded that the foregoing prohibits the disclosure only of records, files, papers and communications that directly refer to applicants or recipients. VRP 42:20-43:5. Judge Wilson then concluded that RCW 74.04.060(4), which contains no reference to applicants or recipients, is a subset of (1)(a) and is therefore subject to the same limitation the trial court read into (1)(a). *Id.* The trial court explained that it added this limitation to RCW 74.04.060(4) despite the fact that it does not appear in the statute because it believed the obligation to construe exemptions to the PRA narrowly required the court to read “any lists or names” to mean lists or names only of applicants or recipients, as adding that language to the statute would make the provision narrower. VRP 42:11-43:5.

With regard to I-1501, the trial court acknowledged that the law prohibited disclosure of the requested records and that it was effective at the time the trial court decided this case. VRP 43:9-17. However, the court concluded that because FF requested the records before the effective date of the initiative, it must determine whether the law applied retroactively. The court acknowledged that an initiative will be applied retroactively where there is an indication that the voters so intended, and that such an indication may be found in “a legislative statement of a strong public policy that would be served by retroactive application.” VRP 43:18-44:8. Judge Wilson found that the initiative contained a legislative statement of a public policy “to protect seniors and vulnerable individuals from identity theft and other financial crimes by preventing the release of

public records that could be used to victimize them.” VRP 44:17-21. However, the trial court concluded that this policy would not be served by applying the law to pending PRA requests and that an average voter would not believe that the initiative was intended to prevent agencies from continuing to release public records that could be used to victimize seniors and vulnerable individuals when it became law. VRP 45:1-11. The trial court reasoned that the initiative did not contain “a statement that it’s important to stop something right now that’s in progress.” VRP 45:1-4. Judge Wilson thus concluded that the law did not prevent state agencies from continuing to release records that contained sensitive personal information of in-home caregivers for vulnerable populations in response to pending PRA requests . *Id.*

Noting that this matter raised two “novel” issues on which there is no appellate authority, the trial court ordered DEL not to release the disputed records until December 19, 2016, in order to give SEIU 925 the opportunity to file this appeal and seek emergency injunctive relief to preserve the fruits of its appeal. VRP 52:13-16, 55:17-23.

On January 25, 2017, Division II Commissioner Eric Schmidt granted SEIU 925’s motion for emergency injunctive relief and enjoined the release of the records until this appeal is resolved. Commissioner’s Ruling (January 25, 2017).

## IV. ARGUMENT

### A. Standard of Review

The standard of review is de novo. *See, e.g., SEIU 775 v. State Dep't of Soc. & Health Servs.*, 48881-7-II, 2017 WL 1469319, at \*2 (Wash. Ct. App.)(Apr. 25, 2017) (“We review de novo a trial court’s actions under the PRA and the injunction statute.”). *See also Nw. Gas Ass’n v. Washington Utilities & Transp. Comm’n*, 141 Wn. App. 98, 112-13, 168 P.3d 443 (2007) (“The appellate court reviews de novo the trial court’s denial of an injunction sought under the PRA where the record comprises declarations, memoranda of law, and other documentary evidence”). *See also SEIU Healthcare 775NW*, 193 Wn. App. 377, 398 (“Statutory interpretation is a matter of law that we review de novo.”).

To obtain an injunction, SEIU 925 must show that: (1) it has a clear legal or equitable right; (2) it has a well-grounded fear of immediate invasion of that right, and (3) the acts complained of are either resulting in or will result in actual and substantial injury to it. *See, e.g., Ameriqwest Mortgage v. AGO*, 148 Wn. App. 145, 157, 199 P.3d 468, 472-73 (2009).

RCW 42.56.540 permits a party to obtain an injunction preventing disclosure of records sought under the PRA. To obtain an injunction under RCW 42.56.540, SEIU 925 must satisfy the first two requirements listed above by showing that the requested records specifically pertain to SEIU 925 or its members and demonstrating a likelihood that the records fall within an exemption to disclosure under the PRA. *SEIU Healthcare 775NW* 193 Wn. App. at 391-93; RCW 42.56.540. To satisfy the third

requirement, SEIU 925 must show that disclosing the records is not in the public interest and would substantially and irreparably harm SEIU 925 and its members. *Id.*

Because a preliminary injunction is designed to preserve the status quo until the court can conduct a hearing on the merits, the court “does not need to resolve the merits of the issues for permanent injunctive relief.” *Id.* at 221. Rather, “the trial court considers only the *likelihood* that the moving party ultimately will prevail at a trial on the merits.” *Id.* (emphasis in original). Accordingly, to obtain a preliminary injunction preventing disclosure of records under the PRA, a party must only show “a likelihood that an exemption applies and that the disclosure would clearly not be in the public interest and would substantially and irreparably damage” the party. *Id.*

In this case, it is not disputed that the requested records specifically pertain to SEIU 925’s members, as the records consist of a list of their names and personal contact information. Moreover, it is clear that disclosure of the names, addresses, and email addresses of family child care providers is not in the public interest, as Initiative 1501 expressly declares that disclosure of this information would violate “the public policy of protecting seniors and vulnerable individuals from identity theft, consumer fraud, and other forms of victimization.” CP 306.

It is further clear that disclosure of the disputed records would constitute substantial and irreparable harm to SEIU 925, as Washington courts have recognized that disclosure of the disputed records in a PRA

case constitutes substantial and irreparable harm to the party seeking an injunction preventing disclosure of the records because once the records are released the harm to the party seeking to prevent their disclosure cannot be undone. *See Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141 Wn.App. 98, 121-22, 168 P.3d 443 (2007). There is no dispute in this case that SEIU 925 and its members will suffer this substantial and irreparable harm if injunctive relief is not granted, as DEL has announced that it will release the requested records unless SEIU 925 obtains an injunction. *See* CP 286.

As is demonstrated below, the trial court erred by concluding that SEIU 925 failed to show a likelihood that the requested records are exempt from disclosure under the PRA because RCW 74.04.060(4) prohibits disclosure of the requested records, RCW 43.17.410(1) prohibits disclosure of the requested records, and the requested records are exempt from disclosure under RCW 42.56.640(1).

**B. The Trial Court Erred by Denying SEIU 925's Request For Injunctive Relief Where RCW 74.04.060(4) Prohibits Disclosure Of The Requested Records.**

RCW 42.56.070(1) provides that records are exempt from disclosure under the PRA where an "other statute" prohibits the disclosure of such records. When interpreting a statute which serves as an "other statute" under RCW 42.56.070(1), the court applies the same rules of statutory interpretation that apply in any statutory interpretation case. *See, e.g., Planned Parenthood of Great Nw. v. Bloedow*, 187 Wn. App. 606,

621–23, 350 P.3d 660, 666–67 (2015). Thus, “[w]hen the meaning of the statute is plain on its face, the court must give effect to that plain meaning as the expression of the legislature's intent.” *Id.* (citing *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007)). A court may not add words to the statute that the Legislature chose not to include. *Id.* (citing *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010)). See also *Dot Foods, Inc. v. Washington Dep’t of Revenue*, 166 Wn.2d 912, 920, 215 P.3d 185, 189 (2009) (“To achieve such an interpretation, we would have to import additional language into the statute that the legislature did not use. We cannot add words or clauses to a statute when the legislature has chosen not to include such language.”); *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535, 536 (1978) (“It is not within our power to add words to a statute even if we believe the legislature intended something else but failed to express it adequately.”).

RCW 74.04.060(4) expressly prohibits disclosure of lists or names for political or commercial purposes of any nature. The statute provides:

It shall be unlawful, except as provided in this section, for any person, body, association, firm, corporation or other agency to solicit, publish, disclose, receive, make use of, or to authorize, knowingly permit, participate in or acquiesce in the use of any lists or names for commercial or political purposes of any nature.

RCW 74.04.060(4) clearly qualifies as an “other statute” under RCW 42.56.070(1), as it expressly prohibits the disclosure of records. *SEIU 775 v. State Dep’t of Soc. & Health Servs.*, 48881-7-II, 2017 WL 1469319, at \*2

(Wash. Ct. App.)(Apr. 25, 2017) (noting that a statute qualifies as an “other statute” where it clearly prohibits disclosure of records).

The WCCC subsidy is a public assistance program covered by RCW 74.04. *See* RCW 74.04.004(5) (“Public assistance” or “public assistance programs” means public aid to persons in need including ... working connections child care subsidies.”); *See also* CP 201. RCW 74.04.060(4) explicitly limits what can be done with information obtained in the administration of public assistance programs governed by Title 74, providing that any lists or names may not be disclosed where they will be used for commercial or political purposes. DEL came into possession of the names and contact information of SEIU 925-represented providers because that information was forwarded from DSHS in the administration of the WCCC subsidy program, through which the child care providers represented by SEIU 925 provide care to recipients of WCCC subsidies. CP 276. The fact that FF has requested the information from DEL rather than DSHS is immaterial, as RCW 74.04.060(4) prohibits *any* agency from disclosing lists or names for a commercial or political purpose, and from knowingly permitting or acquiescing in the use of lists or names for such purposes.

FF clearly seeks the requested information for political purposes. FF has for several years used PRA requests to attempt to obtain lists of the names and contact information of child care providers represented by SEIU 925 and IPs represented by SEIU 775 so that it can contact them as part of a campaign to persuade them to cease financially supporting their unions.

CP 21. In litigation involving FF’s request for a list of IPs represented by SEIU 775, which was requested for the same purpose that FF has requested the list at issue in this case, this Court determined that at least one purpose of the request – and its intended use – was political. *SEIU Healthcare 775NW*, 193 Wn. App at 377. Specifically, the Court stated:

As discussed above, the Foundation’s stated purpose in requesting the lists is to correspond with the individual providers and notify them of their constitutional right to refrain from union membership and fee payments. Notifying individuals of their constitutional rights does not directly involve the generation of revenue or financial benefit. As the trial court noted, **this purpose appears to be political** rather than commercial.

*Id.* (emphasis added). Accordingly, it is clear that FF has requested the information here for a political purpose, as FF informed DEL that it intended to use the requested information for precisely the same purpose it had intended to use the information in *SEIU Healthcare 775NW*: “to inform providers of their constitutional and statutory rights regarding union membership and representation.” CP 286. If DEL produces the requested list, FF will both “receive” and “make use of” the list “for commercial or political purposes” in violation of RCW 74.04.060(4). Thus, because FF will use the list for political purposes, RCW 74.04.060(4) prohibits DEL from disclosing the records to FF.

The trial court erred by concluding that RCW 74.04.060(4) applied only to lists or names of applicants and recipients. The plain language of the statute contains no such restriction. Rather than applying the normal

rules of statutory interpretation, the trial court erred by adding words to the statute that the Legislature did not include in order to construct an artificially narrow interpretation of RCW 74.04.060(4) that is at odds with the plain language of the statute.

First, the trial court erred in concluding that RCW 74.04.060(4) is a subset of RCW 74.04.060(1)(a) and that it is subject to the same limitations the court erroneously read into (1)(a). RCW 74.04.060(4) is not a subset of (1)(a), but a separate provision that addresses different categories of records. RCW 74.04.060(1)(a) applies to “any records, files, papers and communications” in the possession of DSHS, the health care authority, or the county offices. RCW 74.04.060(4) applies to “any lists or names” in the possession of “any person, body, association, firm, corporation or other agency”. Thus, (1)(a) is in certain respects broader and in certain respects narrower than (4). Neither provision is a subset of the other; they are independent provisions that address different categories of records. There is nothing in the text of the statute that indicates that RCW 74.04.060(4) is a subset of (1)(a) or that whatever limitations apply to (1)(a) would also apply to (4).

Moreover, the text of the statute does not support the trial court’s conclusion that RCW 74.04.060(1)(a) applies only to records, files, papers and communications that directly refer to applicants or recipients. RCW 74.04.060(1)(a) provides that “for the protection of applicants and recipients”, the department, the authority, and the county offices are prohibited from disclosing “the contents of any records, files, papers and

communications”, except for purposes directly connected with the administration of the public assistance programs covered by Title 74. The clause indicating that the purpose of (1)(a) is to protect applicants and recipients simply indicates the reason why the individuals and entities identified in (1)(a) are prohibited from disclosing “the contents of any records, files, papers and communications” except for purposes directly connected with the administration of public assistance programs. This statement of purpose does not limit “the contents of any records, files, papers and communications” to only those that directly refer to an applicant or recipient.

As Initiative 1501 demonstrates, a legislative statement that the purpose of prohibiting disclosure of certain records is to protect a particular group of persons does not limit the scope of the records that are protected from disclosure to only those that refer to those persons directly. RCW 43.17.410(1) is structured similarly to RCW 74.04.060(1)(a) and clearly illustrates this point. Just as RCW 74.04.060(1)(a) does, RCW 43.17.410(1) begins with a statement of the legislative purpose. Just as RCW 74.04.060(1)(a) states that certain records may not be disclosed “for the protection of applicants and recipients,” RCW 43.17.410(1) states that certain records may not be disclosed “to protect vulnerable individuals and their children”. *See* RCW 74.04.060(1)(a) and RCW 43.17.410(1). As in RCW 74.04.060(1)(a), the statement of purpose is the first clause of RCW 43.17.410(1), and it is set off from the rest of the provision by a comma. Just as RCW 74.04.060(1)(a) does, RCW 43.17.410(1) goes on to identify

the entities that are subject to the provision. *See* RCW 74.04.060(1)(a) (“... the department, the authority, and the county offices and their respective officers and employees are prohibited ...”); RCW 43.17.410(1) (“... neither the state nor any of its agencies shall release ...”). Just as RCW 74.04.060(1)(a) does, RCW 43.17.410(1) then identifies the records that are protected from disclosure. *See* RCW 74.04.060(1)(a) (“... the contents of any records, files, papers and communications ...”); RCW 43.17.410(1) (“... sensitive personal information of vulnerable individuals or sensitive personal information of in-home caregivers for vulnerable populations ...”).

It is beyond dispute that the statement in RCW 43.17.410(1) that the purpose for which certain information is protected from disclosure is “to protect vulnerable individuals and their children” does not limit the scope of the records protected in that provision to only those that directly refer to vulnerable individuals and their children. Rather, RCW 43.17.410(1) clearly prohibits state agencies from disclosing sensitive personal information of in-home caregivers for vulnerable populations as well as sensitive personal information of the vulnerable individuals themselves, and it does so for the purpose of protecting vulnerable individuals and their children. Thus, it is clear that a statement of the purpose for which certain records are protected from disclosure does not limit the scope of the records that are protected. Accordingly, the trial court erred by concluding that RCW 74.04.060(1)(a) applies only to records, files, papers and communications that directly refer to applicants

or recipients where that provision clearly states that for the purpose of protecting applicants and recipients, the specified entities and individuals are prohibited from disclosing “the contents of any records, files, papers and communications, except for purposes directly connected with the administration of the programs of this title”.

In any event, even if the Legislature had chosen to limit RCW 74.04.060(1)(a)’s reach to records that directly refer to applicants and recipients, it clearly enacted no such restriction in RCW 74.04.060(4). RCW 74.04.060(4) contains no reference to applicants or recipients. This difference in words in different subsections of the statute must be given effect. *See Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (it is “well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.”). That applicants and recipients are mentioned in RCW 74.04.060(1)(a) and not in RCW 74.04.060(4) suggests that whatever limitation, if any, exists regarding the scope of (1)(a), does not apply to (4). Accordingly, the trial court erred by concluding that (4) was subject to the same limitations the court read into (1)(a).

To conclude that RCW 74.04.060(4) applies only to lists or names of recipients or applicants, the trial court interpreted “any lists or names” to mean “lists or names of recipients or applicants.” In doing so, the trial court added words to the statute that the Legislature did not include. This is clear error. *See Bloedow*, 187 Wn. App. at 622; *Lake*, 169 Wash.2d at 526; *Dot Foods*, 166 Wn.2d at 920–21; *Vita*, 91 Wn.2d at 134.

**C. The Trial Court Erred by Denying SEIU 925’s Request for Injunctive Relief Where Initiative 1501 Prohibits Disclosure of the Requested Records.**

Initiative 1501 expressly prohibits the disclosure of the requested information — the names, addresses, and email addresses of family child care providers, as defined by RCW 41.56.030. RCW 43.17.410(1). The law contains two independent statutory provisions protecting this information from disclosure by state agencies. First, RCW 43.17.410(1) prohibits the disclosure of this information by any state agency, including DEL. Second, RCW 42.56.640(1) exempts this information from disclosure under the PRA.

The language of RCW 43.17.410(1) is clear: “neither the state nor any of its agencies shall release sensitive personal information of vulnerable individuals or sensitive personal information of in-home caregivers for vulnerable populations, as those terms are defined in RCW 42.56.640.” RCW 42.56.640(2)(b) provides that “sensitive personal information” includes names, addresses, and email addresses in addition to other personally identifying information. RCW 42.56.640(2)(a) provides that “in-home caregivers for vulnerable populations” includes “family child care providers as defined in RCW 41.56.030.” *Id.* Thus, RCW 43.17.410(1) is an “other statute” that expressly prohibits state agencies from disclosing precisely the information sought in the request at issue in this case. *See Bloedow*, 187 Wn. App. at 621 (a statute that expressly

prohibits disclosure of records qualifies as an “other statute” under RCW 42.56.070(1)).

**1. The Trial Court Erred By Concluding That RCW 43.17.410(1) and RCW 42.56.640(1) Do Not Apply Retroactively.**

The Supreme Court has recognized three separate bases for retroactive application of a statute: (1) where the Legislature or the voters so intended; (2) where the statute is remedial; and (3) where the statute is curative. *See, e.g. McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 324, 12 P.3d 144 (2000). In the case of a voter initiative such as I-1501, the effect of the initiative depends on the intent of the voters, which is determined by construing its language as an average voter would read it. *See State v. Rose*, 191 Wn. App. 858, 869, 365 P.3d 756 (2015); *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 585 (2008).

In *Rose*, the court held that an initiative decriminalizing adult marijuana use applied retroactively because an average voter would believe that the initiative’s language describing its intent – “The people intend to stop treating adult marijuana use as a crime and try a new approach” – meant that the initiative would prevent the state from prosecuting adult marijuana cases when it became law. *Id.* While courts may expect professional legislators to make their intention clear regarding retrospective application, *Rose* made clear that voter-approved initiatives are treated differently. The court looks at the language of the initiative “from the perspective of the average informed lay voter rather than from

the perspective of the legislature. Lay voters presented with an initiative that they are told will ‘stop treating adult marijuana use as a crime’ are more likely to make the common law assumption that prosecution will be ‘stopped’ on the effective date[.]” *Id.* at 869.

The initiative need not contain an express statement regarding retroactive application. Rather, where the language of the initiative conveys an intention to prohibit certain action in order to promote an important public policy that would be served by retroactive application, the court may infer that an average voter would believe the initiative will prevent that action when it becomes law. *Id.*, see also *City of Ferndale v. Friberg*, 107 Wn.2d 602, 605-06, 732 P.2d 143 (1987). In *Friberg*, the court held that a statute applied retroactively where there was “no express legislative statement of retroactive application”. *Id.* at 605. The court relied on “a legislative statement of a strong public policy that would be served by retroactive application.” *Id.* The court found that “retroactive application in this case would further the strongly stated public purpose” where the statute contained the following statement of intent:

The legislature finds that farming and the related agricultural industry have historically been and currently are central factors in the economic and social lifeblood of the state; that it is a fundamental policy of the state to protect agricultural lands as a major natural resource in order to maintain a source to supply a wide range of agricultural products; and that the public interest in the protection and stimulation of farming and the agricultural industry is a basic element of enhancing the economic viability of this state. The legislature further finds that farmland in urbanizing areas is often subjected to high levels of property taxation and benefit assessment, and that

such levels of taxation and assessment encourage and even force the premature removal of such lands from agricultural uses. ...

It is therefore the purpose of the legislature to establish, with the enactment of RCW 84.34.300 through 84.34.380, another mechanism to protect agricultural land which creates an analogous system of relief from certain benefit assessments for farm and agricultural land.

*Id.* at 606. There was nothing in the above-quoted statement expressing that the Legislature believed it was imperative to stop something that was in progress. Rather, the court concluded that “the Legislature’s intent to protect farms is clear” and that “retroactive application in this case would further the strongly stated public purpose.” *Id.*

In this case, the language of I-1501 clearly conveys the intent to immediately prevent the release of sensitive personal information that could be used to victimize vulnerable individuals in order to protect seniors and vulnerable individuals from identity theft and other forms of victimization. CP 299 (“It is the intent of this initiative to protect the safety and security of seniors and vulnerable individuals by ... prohibiting the release of certain public records that could facilitate identity theft and other financial crimes against seniors and vulnerable individuals.”); *see also* CP 304 (“It is the intent of part three of this act to protect seniors and vulnerable individuals from identity theft and other financial crimes by preventing the release of public records that could be used to victimize them.”). The language of I-1501 is as clear and forceful as the statements of intent in *Rose* and *Friberg*. It clearly conveys an intention to prevent

the disclosure of information for the purpose of protecting vulnerable people from an imminent threat of harm. Moreover, Initiative 1501 includes an express list of exceptions that clearly delineates the circumstances in which sensitive personal information will be disclosed after the effective date of the statute. CP 305-06. It does not indicate that such information will be disclosed in response to pending PRA requests. *Id.* Thus, as in *Rose*, an average voter presented with the language of I-1501, which he is told will prevent state agencies from releasing certain public records in order to protect seniors and vulnerable individuals, would likely believe that the initiative will prevent the release of that information when it becomes law, not that state agencies will continue to release it in circumstances not contemplated by the express list of exceptions provided in the initiative. *See Rose*, 191 Wn. App. at 866-69.

As in *Friberg*, I-1501 includes a clear statement of a strong public policy that would be served by retroactive application. The initiative clearly expresses that its intent is to protect vulnerable individuals by preventing the release of information that could be used to victimize them, and expressly provides that it must be liberally construed to promote this “public policy.” CP 306. This policy is clearly aimed at immediately preventing what voters considered to be a threat of imminent harm to vulnerable people. This is clearly a policy that would be served by retroactive application, as the release of information in response to pending PRA requests that could be used to victimize vulnerable individuals would be contrary to the strongly stated policy of protecting

such individuals from a threat of imminent harm.

Moreover, the court may look to the arguments in support of approval of I-1501 in the official Voters' Guide as further evidence of the voters' intention regarding retroactive application. *See Rose*, 191 Wn. App. at 869-70. The argument in favor of approval of the initiative, which was accepted by the majority of Washington voters, clearly expresses an intention that the release of sensitive personal information of caregivers for vulnerable populations be stopped immediately to prevent criminals from continuing to victimize vulnerable individuals. Declaration of Robert Lavitt In Support of SEIU 925's Motion for Expedited Consideration and Emergency Motion for Injunctive Relief Pending Appeal ("Lavitt Dec.") Ex. B at 5 (*Voters' Guide: 2016 General Election, Initiative Measure No. 1501*)(Nov. 8, 2016)) ("We cannot let fraudulent telemarketers and other criminals continue to prey on them. We need the protections offered by I-1501[.]").<sup>4</sup>

In this case, the trial court erred by concluding that voters intended to allow state agencies to continue to release sensitive personal information of seniors and vulnerable individuals, in response to pending PRA requests, after Initiative 1501 became law. The trial court recognized that an initiative applies retroactively where there is an indication that the voters so intended, and that such an indication may be found in "a legislative statement of a strong public policy that would be

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<sup>4</sup> Filed with the Court of Appeals, Division II on December 13, 2016.

served by retroactive application.” VRP 43:18-44:8. The trial court acknowledged that the initiative contained a legislative statement of a public policy “to protect seniors and vulnerable individuals from identity theft and other financial crimes by preventing the release of public records that could be used to victimize them.” VRP 44:17-21. However, the trial court concluded that this policy would not be served by retroactive application and that an average voter would not believe that the initiative would prevent the release of public records that could be used to victimize seniors and vulnerable individuals when it became law. VRP 45:1-11.

The trial court concluded that an average voter intended to prevent the release of sensitive personal information that could be used to victimize seniors and vulnerable individuals in order to protect them from identity theft and other forms of victimization, but intended for state agencies to continue to release this information after the initiative became law in response to pending PRA requests. The trial court reasoned that the initiative did not contain “a statement that it’s important to stop something right now that’s in progress.” VRP 45:1-4. This conclusion is baffling. As *Friberg* established, the text of a statute or initiative need not contain an express statement that it is important to stop something that is currently in progress in order to contain a statement of a strong public policy that would be served by retroactive application. *See Friberg*, 107 Wn.2d at 606. Rather, it must simply contain a statement that expresses a strong public policy, and that policy must be one that would be served by retroactive application. *Id.* As explained above, Initiative 1501 clearly

contains a statement expressing a strong public policy of protecting seniors and vulnerable individuals from an imminent threat caused by the release of sensitive personal information that could be used to victimize them. This strong policy is clearly served by applying the law to PRA requests that were pending when the law became effective, as the release of sensitive personal information in response to such requests would run directly counter to the law's policy by subjecting vulnerable people to the very harm the statute seeks to prevent. Moreover, while *Friberg* and *Rose* do not require that there be a statement clearly expressing an intention to stop something that is in progress, the argument in favor of the initiative in the official voter's guide does just that, stating that passage of the initiative is necessary because "We cannot let fraudulent telemarketers and other criminals continue to prey on them." Lavitt Dec. Ex. B at 5 (*Voters' Guide: 2016 General Election, Initiative Measure No. 1501*)(Nov. 8, 2016)<sup>5</sup>; See also *Rose*, 191 Wn. App. at 869-70 (the court may look to the arguments in support of the initiative in the official voters' guide as evidence of the voters' intention regarding retroactive application). There is nothing in the initiative suggesting that the voters intended to allow state agencies to continue to release sensitive personal information of vulnerable individuals or their caregivers in response to pending PRA requests or that an average voter would believe that the initiative would have that effect. The trial court's conclusion that an average voter

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<sup>5</sup> See note 4, *supra*.

believed the statute would permit agencies to continue to disclose protected information was clear error.

**2. The Trial Court Erred By Failing To Apply The Law In Effect At The Time It Rendered Its Decision.**

The trial court further erred by failing to apply the law in effect at the time it rendered its decision. In *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711–12, 94 S. Ct. 2006, 2016, 40 L. Ed. 2d 476 (1974), the Supreme Court stated, “a court applies the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or the text or legislative history of the statute directs otherwise.” See also *In re Dependency of A.M.M.*, 182 Wn. App. 776, 784–90, 332 P.3d 500, 504–07 (2014) (noting that the rule stated in *Bradley* is “controlling authority”).

In this case, the trial court rendered its decision on December 9, 2016. CP 967-68. Initiative 1501 was approved by Washington voters on November 8, 2016, and the law became effective on December 8, 2016. Const. art. II, § 1(d). Thus, at the time the trial court rendered its decision, RCW 43.17.410(1) and RCW 42.56.640(1) had become law. The law in effect at the time of the trial court’s decision squarely prohibited any state agency from releasing the names, addresses, and email addresses of child care providers. RCW 43.17.410(1). It contains no exception for circumstances in which an individual or organization requested such information under the PRA before the law’s effective date. *Id.* It simply states that from the date the law takes effect, “neither the state nor any of

its agencies shall release sensitive personal information of vulnerable individuals or sensitive personal information of in-home caregivers for vulnerable populations[.]” *Id.*

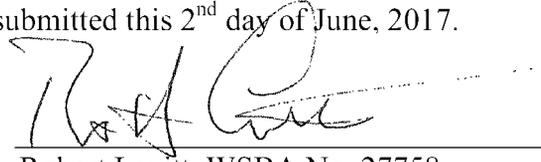
In its oral decision, the trial court acknowledged that Initiative 1501 was in effect at the time of the decision. VRP 43:9-11. The trial court further acknowledged that Initiative 1501 prohibited disclosure of the requested records. VRP 43:12-17. The trial court did not find that complying with Initiative 1501 would result in manifest injustice nor did it identify anything in the text or legislative history of the initiative directing the court to disregard RCW 43.17.410(1) and 42.56.640(1) where an organization requested records prior to the law’s effective date. Nonetheless, the trial court declined to apply RCW 43.17.410(1) and 42.56.640(1) because FF requested the records prior to the law’s effective date. VRP 45:1-11. This was error, as controlling precedent provides that a court applies the law in effect at the time of the decision. *See Bradley*, 416 U.S. at 711–12; *In re Dependency of A.M.M.*, 182 Wn. App.

## **V. CONCLUSION**

For the foregoing reasons, the Court should reverse the trial court’s denial of preliminary injunctive relief and remand for entry of an order enjoining DEL from disclosing the requested list of names, addresses, and email addresses of child care providers to the Freedom Foundation.

Respectfully submitted this 2<sup>nd</sup> day of June, 2017.

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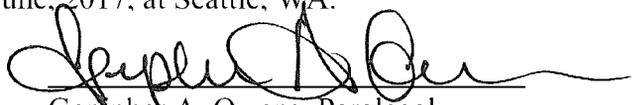
## DECLARATION OF SERVICE

I, Genipher Owens, hereby declare under penalty of perjury under the laws of the State of Washington that on June 2, 2017, I caused Appellant's Opening Brief to be filed with the Clerk of the Court via the Court of Appeals E-filing System and, pursuant to the e-service agreement between the parties, a true and correct copy of the same to be delivered via e-mail to the following:

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