

No. 96578-1

NO. 49726-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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.

REPLY OF APPELLANT SEIU 925

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I. ARGUMENT

A. The Standard Of Review Is De Novo.

The standard of review is de novo. In an action seeking injunctive relief under RCW 42.56.540 to protect information from disclosure through the Public Records Act (“PRA”), appellate review is de novo. In addition to the cases cited in Appellant’s Opening Brief, this has been noted in *Robbins, Geller, Rudman & Dowd LLP v. Office of the Att’y Gen.*, 179 Wn. App. 711, 719-20, 328 P.3d 905 (2014); *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 370-71, 374 P.3d 63 (2016); *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993); *Progressive Animal Welfare Soc. (“PAWS”) v. Univ. of Washington*, 125 Wn.2d 243, 252-53, 884 P.2d 592 (1994); and other cases. Appellate review is de novo regardless of whether the trial court’s order granted¹ or denied² injunctive relief, whether the relief sought in the trial court was a preliminary injunction³ or a permanent injunction,⁴ and whether the trial court’s order was stayed pending resolution of the appeal.⁵

Moreover, where, as here, the record consists only of affidavits, documentary evidence, and memoranda of law, the appellate court stands in the same position as the trial court and review is de novo with regard to both the facts and the law. *See, e.g., SEIU Healthcare 775NW v. Dep’t of*

¹ *See, e.g., Robbins, Geller, Rudman & Dowd LLP*, 179 Wn. App. at 719-20.

² *See, e.g., SEIU Healthcare 775NW v. State, Dep’t of Soc. & Health Servs.*, 193 Wn. App. 377, 390–92, 377 P.3d 214 (2016).

³ *See, e.g., Nw. Gas Ass’n v. Washington Utilities & Transp. Comm’n*, 141 Wn. App. 98, 112-13, 168 P.3d 443 (2007).

⁴ *See, e.g., Robbins, Geller, Rudman & Dowd LLP*, 179 Wn. App. at 719-20.

⁵ *See, e.g., Dawson*, 120 Wn.2d at 788.

Soc. and Health Serv., 193 Wn. App. 377, 391, 377 P.3d 214 (2016); *Robbins, Geller, Rudman & Dowd*, 179 Wn. App. At 719-20; *Doe*, 185 Wn.2d at 371; *Dawson*, 120 Wn.2d at 788; *Nw. Gas Ass’n v. Washington Utilities & Transp. Comm’n*, 141 Wn. App. 98, 112-13, 168 P.3d 443 (2007); *Ames v. City of Fircrest*, 71 Wn. App. 284, 292, 857 P.2d 1083 (1993); *PAWS*, 125 Wn.2d 243 at 252-53. *See also* State Respondent’s Opening Brief⁶ (“DEL Brief”) at 8.

Additionally, the issues presented in this appeal are questions of statutory interpretation that are subject to de novo review. Specifically, the issues presented in this appeal are whether the phrase “any lists or names” in RCW 74.04.060(4) includes the lists of the names and contact information of caregivers requested by the Freedom Foundation (“FF”), and whether RCW 42.56.640(1) and RCW 43.17.410(1) apply retroactively to pending PRA requests. Both of these issues are matters of statutory interpretation, which are reviewed de novo. *See, e.g., SEIU Healthcare 775NW*, 193 Wn. App. at 398 (“Statutory interpretation is a matter of law that we review de novo.”); *Doe*, 185 Wn.2d at 371 (“[W]hether RCW 4.24.550 is an ‘other statute’ for purposes of the PRA is a question of law that this court reviews de novo.”).

The cases cited by FF, *Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727 (2015), and *Speelman v. Bellingham/Whatcom Cnty. Hous. Auth.*, 167

⁶ SEIU 925 notes that, while the State of Washington Department of Early Learning (DEL)’s brief is titled “State Respondent’s Opening Brief,” this brief appears to be a response to Appellant’s Opening Brief and not an opening brief in support of a counter-appeal. For the sake of consistency, references to the State’s brief herein will be to “DEL Brief.”

Wn. App. 624, 273 P.3d 1035 (2012), are clearly distinguishable because they did not involve injunctive relief sought under the PRA injunction statute, RCW 42.56.540.⁷ As the cases cited above make clear, appellate review is de novo in an action seeking injunctive relief under RCW 42.56.540 to protect information from disclosure through the PRA. FF has not identified any PRA case in which appellate review was under the abuse of discretion standard.

Moreover, FF provides no authority for its claim that, in an action seeking injunctive relief under RCW 42.56.540, the standard of review is different when the trial court's order involved a preliminary injunction rather than a permanent injunction, or that the standard of review is different when the trial court's denial of a preliminary injunction was stayed pending appeal, as it likely was in all cases in which there is an appellate court decision reviewing the trial court's denial of injunctive relief sought under RCW 42.56.540; in the absence of a stay, the records would be released and there would be no reason to pursue an appeal that sought to prevent their disclosure. While FF attempts to distinguish this case from *Nw. Gas* on the grounds that the trial court's decision here was stayed pending appeal, the same was true in *Nw. Gas*. See *Nw. Gas*, 141 Wn.App. at 110 ("On March 30, our court commissioner stayed the trial court's order that the WUTC disclose the shapefile data to the Newspapers

⁷ *Huff* involved a request for injunctive relief to enjoin placement of an initiative on the ballot, and *Speelman* involved a request for injunctive relief challenging the termination of a Section 8 housing subsidy. See 184 Wn.2d 643 and 167 Wn. App. 624.

and Buckner.”). *See also Dawson*, 120 Wn.2d at 788 (appellate review is de novo in a PRA case in which the trial court’s order denying injunctive relief was stayed pending appellate review). FF’s attempt to create a new standard for appellate review in PRA cases where the trial court’s order was stayed should be rejected. As in all other cases involving injunctive relief sought under the PRA injunction statute, appellate review is de novo.

B. FF Is Mistaken Regarding The Public Interest And Irreparable Harm Elements Of The Injunction Standard.

To obtain injunctive relief under the PRA injunction statute, RCW 42.56.540, SEIU 925 must show: (1) that the requested records pertain to SEIU 925 or its members, (2) that there is a likelihood that a PRA exemption applies or that another statute prohibits disclosure of the records, and (3) that disclosing the records would not be in the public interest and would cause substantial and irreparable harm to SEIU 925 or its members. *SEIU Healthcare 775NW*, 193 Wn. App. at 391-93. With regard to the third element, FF is mistaken regarding both the public interest and the harm that are at issue in this case. FF argues that whether the disclosure of requested records is in the public interest turns on whether the court believes that what the requestor will do with the records after obtaining them is or is not in the public interest. FF Brief at 12-13. Thus, FF argues that the question this Court must answer is whether it is in the public interest for FF to engage in a political campaign to encourage

union members not to support their union.⁸ However, this is not the question the Court must address to determine whether disclosure of the records at issue in this case is in the public interest. The question this Court must answer is whether disclosure of the requested records is or is not in the public interest, regardless of the identity of the requestor or what he or she intends to do with the records after they are disclosed. In this case, the question is whether it is in the public interest to disclose the names and personal contact information of child care providers through the PRA.

In adopting Initiative 1501, the people determined that it is not in the public interest to disclose the sensitive personal information of vulnerable individuals and their caregivers, including the information sought in the request at issue in this case,⁹ and made clear that protecting this information from disclosure is the “public policy” of the State of Washington. CP 306. Moreover, in adopting RCW 74.04.060(4), the Legislature determined that “any list or names” maintained by state agencies for the administration of public assistance programs shall not be disclosed for commercial or political purposes. RCW 74.04.060(4). This reflects a state policy that it is not in the public interest to disclose this information for commercial or political purposes. This Court should not

⁸ Because the union members FF intends to target in its campaign are not legally required to pay union dues, FF describes its campaign as seeking to “inform people of their constitutional rights.” FF Brief at 12-13.

⁹ The parties agree that the requested information falls squarely within the scope of the sensitive personal information that is protected from disclosure by RCW 42.56.640(1) and RCW 43.17.410(1), which were adopted by popular vote in Initiative 1501. *See* FF Brief at 31 (“On its face, I-1501 addresses the very records at issue in this case.”)

disturb the judgment of the people and the Legislature that public disclosure of the information at issue in this case is not in the public interest.

FF is also mistaken regarding the harm that is at issue in this case. FF focuses only on the harm to SEIU 925. In doing so, it ignores the fact that the public disclosure of the personal contact information of caregivers harms SEIU 925's members, the caregivers whose personal information is disclosed. Where state law protects personal information from disclosure, the public disclosure of that information causes irreparable harm to the individuals whose information is disclosed because, once their personal information is released, it "cannot be retrieved and returned to a protected or confidential status." *See Nw. Gas*, 141 Wn. App. at 121. In adopting Initiative 1501, the people recognized that the public disclosure of the sensitive personal information of vulnerable individuals and their caregivers is harmful because it increases their risk of victimization. Moreover, in adopting RCW 74.04.060(4), the Legislature recognized that the disclosure of lists or names of individuals maintained in the administration of public assistance programs for commercial or political purposes is harmful because it could subject them to unwanted commercial or political solicitation.¹⁰ This harm to SEIU 925's members

¹⁰ *See Florida Bar v. Went For It, Inc.*, 515 US 618, 624-25, 115 S.Ct. 2371 (1995) (holding that the interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers" was a substantial interest); *Rowan v. U.S. Post Office Dep't*, 397 US 728, 729-30, 90 S.Ct. 1484 (1970) (finding the interest in protecting individuals from unwanted solicitation in their homes substantial).

clearly constitutes irreparable harm.

C. The Plain Meaning Of RCW 74.04.060(4) Prohibits Disclosure Of Any Lists Or Names Maintained In The Administration Of Title 74 Programs.

1. Reading 74.04.060(4) In The Context Of The Statute As A Whole Shows That It Applies To Any Lists Or Names Maintained In The Administration Of Title 74 Programs.

It is well established that the plain meaning of the words chosen by the Legislature must be given effect as the expression of the Legislature's intent. *See, e.g., Planned Parenthood of Great Nw. v. Bloedow*, 187 Wn. App. 606, 621, 350 P.3d 660 (2015). The meaning of RCW 74.04.060(4) is clear. It prohibits any person, body, association, firm, corporation, or other agency from soliciting, publishing, disclosing, receiving, using, or knowingly permitting the use of "any lists or names" for "commercial or political purposes of any nature." RCW 74.04.060(4). The plain language of RCW 74.04.060(4) clearly refers to "any lists or names" that are sought for commercial or political purposes. It does not refer to applicants or recipients, nor does it exclude caregivers. It plainly includes any lists or names maintained in the administration of the programs governed by Title 74, and provides that such lists or names shall not be disclosed for commercial or political purposes. The language is clear, and it should be given effect.

FF and DEL urge this Court to ignore the plain meaning of RCW

74.04.060(4) and read the phrase “any lists or names” to refer only to lists or names of applicants or recipients. They argue that reading RCW 74.04.060(4) in the context of the statute as a whole and the statutory scheme of Title 74 compels the conclusion that, when the Legislature chose the phrase “any lists or names,” it intended to refer only to applicants or recipients. This argument relies on the mistaken premise that RCW 74.04 deals only with applicants and recipients of public assistance programs. However, the statute is not so limited. RCW 74.04 deals broadly with the administration of public assistance programs, addressing the powers of the agencies charged with administering those programs and the duties and responsibilities of the individuals employed by those agencies. *See* RCW 74.04.004 *et seq.* Accordingly, the provisions of RCW 74.04 that deal with information maintained by those agencies in the administration of Title 74 programs should not be read to apply only to applicants or recipients unless the text of the provision so indicates. Thus, reading the statute as a whole in the context of the broader statutory scheme of Title 74 demonstrates that 74.04.060 instructs the individuals responsible for the administration of public assistance programs regarding when they may disclose information that was obtained or compiled in the administration of those programs.

RCW 74.04.060(1)(a) and RCW 74.04.060(4) address different categories of records and serve different purposes. RCW 74.04.060(1)(a) prohibits the officers and employees of the department, the authority, and the county offices from disclosing “the contents of any records, files,

papers and communications” except for purposes directly connected with the administration of Title 74 programs. As explained on pages 17-20 of Appellant’s Opening Brief, the fact that RCW 74.04.060(1)(a) prohibits the disclosure of this information “for the protection of applicants and recipients” does not limit the scope of the information protected from disclosure in that provision. The provision plainly prohibits disclosure of “the contents of any records, files, papers and communications” maintained in the administration of Title 74 programs except “for purposes directly concerned with the administration of these programs.” RCW 74.04.060(1)(a).

In any event, RCW 74.04.060(4) serves a different purpose. It prevents the disclosure and use of any “lists or names” maintained in the administration of Title 74 programs for commercial or political purposes. While FF argues that RCW 74.04.060(4) was adopted to prevent the disclosure of the identities of welfare recipients in order to shield them from the stigma that would purportedly be caused by the disclosure of their identities to friends and neighbors, the text of the provision demonstrates that 74.04.060(4) does not serve this purpose. Unlike RCW 74.04.060(1)(a), RCW 74.04.060(4) does not protect the privacy interests of applicants and recipients by generally safeguarding the contents of records and files maintained for Title 74 programs and prohibiting their disclosure for any purpose except as required to administer the programs. Rather, RCW 74.04.060(4) prohibits disclosure only of lists or names that are sought for commercial or political purposes. If the purpose of this

provision were to protect the identities of applicants or recipients from being discovered by friends and neighbors, the provision would not allow curious friends and neighbors to obtain the lists or names while prohibiting disclosure to those who seek to obtain them for commercial or political purposes. Rather, it appears that 74.04.060(4) is aimed at preventing individuals who provide their names and contact information to state agencies for the administration of Title 74 programs from becoming targets of commercial or political solicitation. This is why the provision protects lists or names only where they are sought for commercial or political purposes.

It is not uncommon for a statute to protect personal information that was provided to the government from being disclosed for this reason. For example, the Driver's Privacy Protection Act ("DPPA") similarly prohibits the disclosure of personal information contained in driving records for use in surveys, marketing, or solicitations unless consent is obtained from the individual whose personal information is disclosed. 18 U.S.C. 2721(b)(12). Similarly, the Federal Election Campaign Act ("FECA") provides that lists of the names and contact information of individuals who contributed to political committees "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes." 52 U.S.C. 30111(a)(4).

Because RCW 74.04.060(4) seeks to prevent personal information that was provided to the government in the administration of Title 74 programs from being used for commercial or political purposes, there is no

reason to believe that the Legislature intended to limit the scope of that provision to applicants or recipients, while allowing the personal information of other individuals who were required to provide it to the government in order to participate in Title 74 programs to be used for commercial or political purposes. There is no evidence suggesting that the Legislature believed applicants or recipients were any more likely to be targeted for commercial or political solicitation, or any more deserving of protection from such solicitation, than other individuals whose names appear on lists maintained for the administration of Title 74 programs, including the caregivers who have been targeted for political solicitation by FF in this case. Rather, RCW 74.04.060(4) seeks to prevent personal information that was provided to the government for the administration of Title 74 programs from being used for commercial or political purposes, without regard to an individual's status as an applicant or recipient. Accordingly, this Court should not read RCW 74.04.060(4) as applying only to applicants and recipients where such a limitation is plainly not supported by the text or purpose of that provision.

2. References To Applicants And Recipients Elsewhere In RCW 74.04.060 Demonstrate That, Where The Legislature Intended To Refer To Applicants Or Recipients, It Did So Directly.

FF and DEL argue that the fact that the Legislature referenced applicants or recipients in other provisions of RCW 74.04.060 demonstrates that RCW 74.04.060(4), which does not mention applicants

or recipients, refers only to applicants and recipients. This does not follow. The fact that other provisions refer directly to applicants or recipients proves only that, where the Legislature intended to refer to applicants or recipients, it did so directly. In *State v. Tracer*, 173 Wn.2d 708, 718, 272 P.3d 199 (2012), the Supreme Court of Washington explained, “It is a basic rule of statutory construction that the legislature intends different terms used within an individual statute to have different meanings.” Accordingly, that the Legislature referred to “a recipient of welfare assistance” in RCW 74.04.060(1)(a), to “recipients of welfare assistance” in RCW 74.04.060(1)(c), and to “recipients in the county receiving public assistance under this title” in RCW 74.04.060(2), demonstrates that, where the Legislature intended to refer to recipients, it knew how to do so. Where the Legislature chose a different phrase (“any lists or names”) in RCW 74.04.060(4), it intended that phrase to have a different meaning. The meaning of “any lists or names” is clear, and it should be given effect.

3. References To “Welfare Recipients” Or “Children” In Other Statutes Do Not Establish That Caregivers Must Be Excluded From The Language Of RCW 74.04.060(4), Which Plainly Includes Them.

Equally unpersuasive is FF’s argument that decisions interpreting the phrase “welfare recipients” in RCW 42.56.230(1) and “children” in RCW 42.56.230(2)(a)(ii) show that the phrase “any lists or names” in RCW 74.04.060(4) must be read to exclude caregivers. FF Brief at 17.

That the Court has found that the phrase “welfare recipients” in RCW 42.56.230(1) does not include their caregivers and that the phrase “children” in RCW 42.56.230(2)(a)(ii) does not include their caregivers proves nothing about the meaning of “any lists or names” in RCW 74.04.060(4). The phrase “any lists or names” is clearly broader than the specific terms “welfare recipients” or “children.”

SEIU 925 does not rely on any “linkage” argument of the type addressed in *SEIU Healthcare 775NW*, 193 Wn. App. at 409, and *SEIU Local 925 v. Freedom Found.*, 197 Wn. App. 203, 220, 389 P.3d 641 (2016). It does not claim that the caregivers of applicants or recipients should be included in RCW 74.04.060(4) because information regarding the caregiver can be traced to the applicant or recipient. SEIU 925 asks only that the plain language of RCW 74.04.060(4) be given effect, and that caregivers not be excluded from statutory language (“any lists or names”) that plainly includes them.

4. The Term “Political” Must Be Given Its Ordinary Meaning.

FF apparently does not dispute that it seeks the requested list of provider names for a political purpose, given the ordinary meaning of the term. FF Brief at 19-20. Rather, because “political” is not defined in RCW 74.04.060, FF invites the court to adopt definitions found in other statutes rather than giving the term its ordinary meaning. FF Brief at 27. However, Washington courts have long held that, where a statute does not define a term, the court looks to the usual and ordinary meaning of the

word as defined in a dictionary. *See Burton v. Lehman*, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). The court does not turn to other statutes where the text of a statute is clear but a term is not defined: “a statutory term that is left undefined should be given its usual and ordinary meaning and courts may not read into a statute a meaning that is not there.” *Burton*, 153 Wn.2d at 422-23 (quoting *State v. Hahn*, 83 Wn.App. at 832).

The language of RCW 74.04.060(4) is not ambiguous. If this Court can discern the meaning of that provision based on the usual and ordinary meaning of the words used by the Legislature, it must do so without resorting to definitions provided in other statutes that the Legislature chose not to reference or incorporate into RCW 74.04.060. *See Burton*, 153 Wn.2d at 422-23 (quoting *Hahn*, 83 Wn.App. at 832).

In this case, the parties apparently agree that the Foundation will use the list for political purposes. *See* FF Brief at 19-20. This Court agreed in *SEIU Healthcare 775NW*, 193 Wn. App. 377, 406 (2016). That conclusion is consistent with the ordinary meaning of the word “political.” Reliable dictionaries do not limit the definition of “political” purposes to advocacy relating to an election or ballot measure, as FF urges. Rather, the term is defined broadly. Merriam-Webster’s Collegiate Dictionary 960 (11th ed. 2009) (definition of “political”: “of, relating to, involving, or involved in politics”) (definition of “politics”: “competition between competing interest groups or individuals for power and leadership”). Accordingly, this Court should decline the invitation to impose a far more restrictive definition of “political” based on definitions from other statutes

that the Legislature chose not to reference or incorporate into RCW 74.04.060.

D. The Plain Meaning Of RCW 74.04.060(4) Does Not Violate The First Amendment.

1. RCW 74.04.060(4) Is Not Subject To Heightened Scrutiny Because It Is Not A Content-Based Speech Restriction.

FF's First Amendment argument fares no better. Applying the plain meaning of RCW 74.04.060(4) does not create a content-based speech restriction that would subject the statute to heightened scrutiny. RCW 74.04.060(4) does not restrict commercial or political speech. It merely restricts access to government records. It is well established that such restrictions do not violate the First Amendment. In *Houchins v. KQED, Inc.*, 438 U.S. 1, 9, 98 S. Ct. 2588, 57 L.Ed.2d 553 (1978), the U.S. Supreme Court stated, "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." Accordingly, in *City of Seattle v. Egan*, 179 Wn. App. 333, 335 (2014), this Court explained, "The Public Records Act (PRA), chapter 42.56 RCW, is a legislatively created right of access to public records. The legislature is free to restrict or even eliminate access without offending any constitutional protection."

The government may provide access to records for certain purposes and not others. Such restrictions on the use of government records are permissible regulations of access to information and not

content-based speech restrictions. *See Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 949-952 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 689, 193 L.Ed. 2d 519 (2015); *Fed. Election Comm'n v. Int'l Funding Inst., Inc.*, 969 F.2d 1110 (D.C. Cir. 1992). For example, the DPPA prohibits the disclosure of personal information contained in motor vehicle records, including an individual's name and address, for certain purposes while permitting the disclosure of such information for other purposes. *See* 18 U.S.C. 2721. The statute prohibits disclosure for certain speech-related purposes, including where the information will be "used to contact individuals," 18 U.S.C. 2721(b)(5), and where it will be used "for surveys, marketing or solicitations" unless the state obtains the consent of the person to whom the personal information pertains, 18 U.S.C. 2721(b)(12). The statute also prohibits the use of personal information obtained from motor vehicle records "for any use not permitted under section 2721(b) of this title." 18 U.S.C. 2722(a). In *Dahlstrom*, a newspaper that sought to use personal information obtained from motor vehicle records in its reporting argued that the DPPA violated the First Amendment. The Seventh Circuit rejected this argument, holding that the DPPA's restrictions on access to and use of information contained in motor vehicle records are permissible content-neutral regulations. 777 F.3d at 947-950.

Similarly, in *Int'l Funding Inst., supra*, the D.C. Circuit rejected a First Amendment challenge to a provision of the FECA which provides that lists of the names and addresses of contributors to political committees that are provided to the Federal Election Commission are

generally available to the public but may not be “used by any person for the purpose of soliciting contributions or for commercial purposes.” 969 F.2d at 1113. The court rejected the argument that the statute infringed upon the First Amendment right to solicit contributions for a political cause, noting that it does not restrict political solicitation but merely chooses not to facilitate it by providing access to information that would make it more convenient or less expensive to identify one’s target audience. *Id.* at 1113-14. As Ruth Bader Ginsburg explained in her concurring opinion, the statute “does not condition access to FEC contributor lists by ACPA and other fund seekers on their abstaining from solicitation altogether, nor even does it inhibit them from contacting the very individuals whose names appear on the FEC lists they inspect (so long as solicitees’ names are obtained from an independent source).” *Id.* at 1119 (Ginsburg, J., concurring). Rather, “it is evident that IFI may still obtain names of potential contributors in each of two familiar ways: by itself undertaking the effort or by purchasing a list from a seller who has done the sweat work.” *Id.* The court also rejected the argument that, by making the donor lists available for other uses but restricting their use for political solicitation, the statute imposed an impermissible content-based restriction on political solicitation. Rather, the court concluded that the Legislature may choose to facilitate certain types of speech and not others by making information available only for certain purposes. *Id.* at 1115 (“Indeed, the Supreme Court has consistently given less than strict scrutiny to statutes that promote one, but not another closely related, first

amendment activity.”).

The Supreme Court reached the same conclusion in *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 129 S. Ct. 1093, 172 L.Ed.2d 770 (2009), holding that a state law which prohibited payroll deductions for political speech while allowing deductions for other forms of speech did not violate the First Amendment. The court noted, “[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.” 555 U.S. at 355 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)).

Like the above-cited statutes, RCW 74.04.060(4) places no restrictions on FF’s speech. It merely declines to facilitate FF’s political campaign by providing access to lists of the names and addresses of individuals in FF’s target audience. While obtaining these lists from the government may be more convenient and less expensive than building its canvassing lists through the traditional methods used by political campaigns, the First Amendment does not require DEL to subsidize FF’s political campaign in this manner. *See Int’l Funding Inst.*, 969 F.2d at 1113-14. RCW 74.04.060(4) does no more than the FECA and the DPPA. Like those statutes, RCW 74.04.060(4) comfortably meets constitutional scrutiny, as the government has a substantial interest in protecting individuals who provide personal information to the government for the administration of public programs from being targeted for commercial or political solicitation, and that interest is directly advanced by restricting

access to lists or names maintained for the administration of Title 74 programs where the information is sought for commercial or political purposes. *See, e.g. Florida Bar v. Went For It, Inc.*, 515 US 618, 624-25, 115 S.Ct. 2371 (1995) (holding that the interest in “protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers” was a substantial interest); *Hill v. Colorado*, 530 US 703, 716-17, 120 S.Ct. 2480 (2000) (“The unwilling listener’s interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader ‘right to be let alone’ that one of our wisest Justices characterized as ‘the most comprehensive of rights and the right most valued by civilized men’”); *Rowan v. U.S. Post Office Dep’t*, 397 US 728, 729-30, 90 S.Ct. 1484 (1970) (government has a substantial interest in protecting individuals from unwanted solicitation in their homes).

Moreover, FF’s First Amendment argument does not support its claim that RCW 74.04.060(4) applies only to applicants and recipients, as the interpretation urged by FF would suffer from the same purported constitutional infirmity as the interpretation that flows from the plain meaning of the statutory language. Whether the statute applies to any lists or names maintained in the administration of public assistance programs, as the plain meaning of the statute clearly provides, or whether it applies only to lists of applicants and recipients, as FF urges, does not change the First Amendment analysis. If the statute were a content-based speech restriction in the first instance, it would remain so under the interpretation

urged by FF. In any event, because the statute is not a content-based speech restriction in either case, the First Amendment does not compel this Court to read into the statute a limitation that plainly is not supported by the text, and this Court should decline the invitation to do so.

E. The Plain Meaning Of RCW 74.04.060(4) Does Not Violate The Equal Protection Clause.

The plain meaning of RCW 74.04.060(4) also does not violate the Equal Protection Clause. While FF argues, FF Brief at 24-25, that the statute would treat union and non-union speech differently unless the phrase “any lists or names” is interpreted to refer only to applicants or recipients, that simply is not the case. The statute would apply equally to union and non-union speech regardless of whether “any lists or names” is given its plain meaning or the Court imposes the limitation urged by FF that plainly is not supported by the text of the statute. To the extent FF argues that, because SEIU 925 has received the names of the caregivers in the bargaining unit that it represents for collective bargaining, RCW 74.04.060(4) cannot be applied to FF’s political campaign, FF is clearly mistaken. SEIU 925 and FF are not similarly situated. SEIU 925 has not sought or obtained a list of the caregivers in the bargaining unit for which it serves as the exclusive collective bargaining representative for a commercial or political purpose. It obtained the names of the caregivers it represents for the purpose of representing them for collective bargaining. By contrast, by its own admission and as recognized by this Court, FF seeks to obtain lists or names of caregivers for a political purpose. Thus,

the distinction is not that union speech is treated differently than non-union speech, but that FF has sought lists or names for a purpose prohibited by the statute, while SEIU 925 has not.

F. Initiative 1501 Applies Retroactively Because That Is What The Voters Intended.

The parties apparently agree that a statute applies retroactively where there is legislative intent to apply the statute retroactively. DEL Brief at 19; FF Brief at 32. DEL correctly notes that where, as here, the relevant statute was adopted by a voter-approved initiative, the court must discern the legislative intent by looking to whether the average informed voter would have understood the initiative to apply retroactively, and cites *State v. Rose*, 191 Wn. App. 858, 868 (2015), in which the court applied this standard.¹¹ DEL Brief at 19. While FF argues that *Rose* is “inapposite” because it “dealt with an initiative’s interaction with an existing criminal non-retroactivity statute,” it does not explain why that would render inapposite the court’s analysis in *Rose* regarding what is required to demonstrate that an average voter intended an initiative to be applied retroactively. This analysis did not rely on any unique aspects of RCW 10.01.040, but on principles equally applicable to this case regarding what may be gleaned from the text of the initiative and supporting documents, such as the voter’s guide, to establish the intent of

¹¹ Other cases have also noted that, in construing an initiative, the court may discern the legislative intent by reading the language of the initiative as the average informed voter would have understood it. *See Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008). *See also* DEL Brief at 19.

the voters. FF has not shown that the court's analysis in *Rose* should be disregarded.

The initiative need not contain an express statement regarding retroactive application. While FF cites *City of Ferndale v. Friberg*, 107 Wn.2d 602, 605 (1987), for the proposition that courts look first for express language indicating retroactive application, it neglects to mention that the same case goes on to say that, in the absence of such express language, "legislative intent may also be inferred from other evidence, such as ... a legislative statement of a strong public policy that would be served by retroactive application." *Id.* at 605. Moreover, the court in *Friberg* held that the statute at issue in that case applied retroactively despite the fact that "there is no express legislative statement of retroactive application," in large part because the court concluded that there was a statement of a strong public policy that would be served by retroactive application. *Id.* The same is true in this case, where I-1501 contains language that an average voter would read as prohibiting disclosure of records that could be used to victimize vulnerable individuals after the initiative becomes law, and contains a clear statement of a strong public policy that would be served by retroactive application.¹²

While FF argues that retroactive application would not advance I-1501's policy because FF does not intend to engage in identity theft, the intent of the voters in approving I-1501 was not merely to prohibit the

¹² This is discussed on pages 22 through 28 of Appellant's Opening Brief.

disclosure of sensitive personal information to particular requestors with an established record of predatory conduct, but rather to safeguard sensitive personal information without regard to the identity of the requestor in order to reduce the overall risk of victimization. Clearly, I-1501's policy objective of protecting caregivers' sensitive personal information from public disclosure would be served by preventing the disclosure of sensitive information in response to pending requests. The policy is clearly aimed at preventing what voters considered to be a threat of imminent harm to vulnerable people. It would run counter to the law's purpose to disclose the very information the initiative protects in response to a pending request.

Moreover, FF's and DEL's discussion of whether I-1501 is remedial or curative is not controlling because SEIU 925 does not rely on either of those bases for its conclusion that the initiative applies retroactively. Rather, SEIU 925 relies on the independent basis that I-1501 applies retroactively because of the legislative intent of the voters in approving it, as is demonstrated by construing the language of the initiative as an average voter would read it. Accordingly, the analysis of vested rights in *Dragonslayer, Inc. v. Gambling Comm'n*, 139 Wn. App. 433, 448 (2007) is similarly not controlling, as that analysis applies only to the question of whether an amendment to the PRA is remedial or not.¹³

¹³ Moreover, in this Court's analysis of legislative intent in *Dragonslayer*, this Court relied not on the absence of an express statement regarding retroactive application, but on the fact that the Legislature amended the House Bill to remove language stating that the amendments were "remedial and appli[ed] retroactively." *Dragonslayer*, 139 Wn. App. at 448-449. Accordingly, this Court concluded, "The legislature considered and rejected

As the *Dragonslayer* decision and other Washington cases recognized, the analysis of whether an amendment is remedial affects only one of at least three independent bases for determining that a statutory amendment applies retroactively and has no impact on the independent analysis of whether the Legislature—or the voters, in the case of a voter-approved initiative—intended the initiative to apply retroactively. *See, e.g., McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 324 (2000) (“an amendment will be applied retroactively if, ‘(1) the legislature so intended; (2) it is ‘curative’; or (3) it is remedial”).

Finally, this Court need not address FF’s argument regarding whether enhanced criminal penalties contained in I-1501 could be applied retroactively in criminal cases. FF Brief at 35. If this Court concludes that the voters intended for RCW 42.56.640(1) to apply to PRA requests that were pending when the statute became law, and such application is not precluded by the state or federal constitutions, the Court need not address whether other provisions could be applied retroactively in criminal cases that are not before the Court.

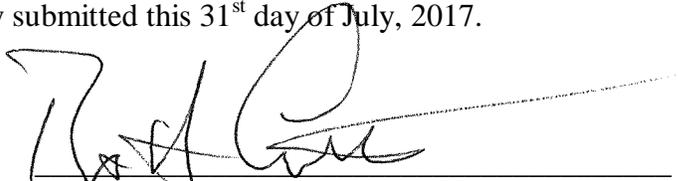
having the amendments apply retroactively.” *Id.* at 449. Thus, *Dragonslayer* is distinguishable because there is no similar legislative history in this case.

II. CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's Opening Brief, 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.

Respectfully submitted this 31st day of July, 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 July 31, 2017, I caused the foregoing Reply of Appellant SEIU 925 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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