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No. 96578-1

SUPREME COURT OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,

Petitioner,

v.

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

Respondent

and

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,

Respondent.

**SUPPLEMENTAL BRIEF OF RESPONDENT FREEDOM
FOUNDATION**

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I. INTRODUCTION

Once again, this Court is called upon to decide whether to limit or uphold the right of the people of the State of Washington to remain informed about the instruments that they have created – that right safeguarded by the people, to the people, under the Public Records Act, RCW 42.56.

Service Employees International Union 925 (“SEIU 925” or the “Union”) asks this Court to apply an amendment to the Public Records Act (“PRA”) retroactively, to bar release of records that are the subject of a PRA request made prior to the enactment and effective date of the amendment. Furthermore, the records requested prior to enactment of the amendment were indisputably subject to disclosure at the time of the request but, due to delays associated with litigation, have not yet been produced by the agency.

To reach this result, the Union asks this Court to find that the voters who passed the amendment intended for the amendment to apply retroactively to cut off pending PRA requests, despite the facts that: such application is disfavored by the Court, there is no express language suggesting such intent, such an inference butts squarely against the PRA’s mandate to indulge every presumption towards disclosure of records, and a vested right in public documents is created when a request for public documents is made.

The Foundation asks that this Court reject the Union’s invitation to limit the PRA, and find that the amendment here does not apply retroactively.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the voters of Washington State intended Initiative 1501, which bars state agencies from releasing licensed and licensed exempt care providers' contact information under the Public Records Act, to apply retroactively to cut off pending PRA requests for that information?

2. Whether, where a new statute adds an exemption to the PRA, the new exemption's precipitating or triggering event is the request for records, or the agency's release of the records?

3. Whether persons who make PRA requests enjoy a vested right in the non-exempt records they have requested?

III. STATEMENT OF THE CASE

Respondent Department of Early Learning ("DEL") administers a program that allows eligible low-income families to receive a subsidy for child care expenses. The family may employ either a licensed or a license-exempt care provider. CP at 890-92. These licensed and licensed-exempt care providers are quasi-public employees, subject to exclusive collective bargaining representation on a limited set of subjects. RCW 41.56.028.

Petitioner, Service Employees International Union 925, is a private labor organization representing licensed and licensed exempt providers in collective bargaining with the State of Washington. CP at 6-7. In 2014, the national Supreme Court recognized that quasi-public employees like

licensed and license-exempt care providers enjoy the right to choose to be union members and pay union dues, or not, under the First Amendment. See *Harris v. Quinn*, 573 U.S. 616 (2014).

Respondent Freedom Foundation (the “Foundation”)¹ is a non-profit organization dedicated to advancing individual liberty, free enterprise, and accountable government. One of its purposes is to inform public employees – including licensed and license-exempt care providers – about their First Amendment free speech and associational right to associate or not associate with a union. Clerk’s Papers (CP) at 455-56.

The PRA, at RCW 42.56, requires agencies such as DEL to make available public records for public inspection. It further imposes timelines and duties that are triggered when a request is made, and imposes penalties for violations of those timelines and duties. For many years the Foundation has made public records requests under the PRA to DEL for lists of licensed and license-exempt providers, to include the names, work mailing addresses, and work email addresses for licensed and license-exempt family child care providers. The Foundation uses these lists to inform providers of their rights. CP at 455.

¹ Respondent formerly did business as “Evergreen Freedom Foundation.”

DEL has not opposed production of records responsive to these requests. However, every time a care provider exercises his or her right to not associate or contribute financially to SEIU 925, SEIU 925 loses that provider's financial contribution. As such, SEIU 925 has requested multiple injunctions to enjoin DEL from releasing records responsive to the Foundation's requests. CP at 465-460. Though SEIU 925's requests for injunctions have been consistently denied, the litigation has resulted in long delays, thereby inhibiting the Foundation's work, and often rendering the information it receives useless by the time it is duly received. *Id.*

In 2016, SEIU 925 and sister union SEIU 775 created, sponsored, and funded statewide Initiative 1501 ("I-1501"), costing about \$1.8 million. CP at 460.² In relevant part, I-1501 exempts licensed and license-exempt care providers' information from public inspection under the PRA. CP at 304-05; Laws of 2017, ch. 4, sec. 8, 10. While SEIU 925 and SEIU 775 were

² See also *Boardman v. Inslee*, C17-5255 BHS, 2017 WL 1957131, at *1 (W.D. Wash. May 11, 2017) (unpublished) ("While the state courts grappled with Plaintiffs' rights to receive the records under the then-applicable provisions of the PRA, the Washington State legislature was dealing with proposals by certain unions to create a new exemption under the PRA that would prevent disclosure of the records. These efforts in the legislature failed. However, unions SEIU 775 and SEIU 925 also sponsored I-1501 through the 2016 general election ballot initiative process. Ultimately, I-1501 was passed by the state electorate and, through the initiative process, the unions' efforts successfully resulted in a PRA exemption that prevents the disclosure of contact information for members of the unions' bargaining units. As a result of I-1501, the State has denied Plaintiffs' recent PRA requests seeking up-to-date contact information for homecare providers, thereby hindering Plaintiffs' ability to efficiently identify and contact homecare providers to inform them of their First Amendment right to opt out of union dues and membership.")

collecting signatures to pass I-1501, nearly every major Washington newspaper inveighed against I-1501 to the voters as a piece of self-serving legislation. CP at 461, 685-838.

On November 2, 2016, the Foundation submitted another public records request for care providers' names, work emails, and work mailing addresses. CP at 454-56. Within five (5) days as required under the PRA, DEL responded to the Foundation's request. DEL did not identify any exemptions that applied to barring release of providers' information. CP at 455, 470. DEL has consistently maintained it is "prepared to release the records consistent with its determination that no exemption in the Public Records Act applies to the requested records," CP at 901, and informed SEIU 925 that it would release providers information on November 22 if SEIU 925 did not obtain a court order enjoining release. *Serv. Employees Int'l Union Local 925 v. Dep't of Early Learning*, 49726-3-II, 2018 WL 4455865, at *2 (Wash. Ct. App. Sept. 18, 2018) ("Decision Below").

On November 8, 2016, the voters passed I-1501, with an effective date of December 8, 2016. On November 16, 2016, SEIU 925 filed for an injunction against the Foundation and DEL to prevent release of records responsive to the Foundation's request. CP at 5. On December 2, SEIU 925 filed a motion for a preliminary injunction, alleging, *inter alia*, that the Court should apply I-1501 retroactively to bar release of the requested

records. CP at 437, 450. SEIU 925 scheduled its hearing for December 9. Decision Below at *2. On December 8, I-1501 became effective.

On December 9, the trial court rejected all of SEIU 925's bases for an injunction and denied SEIU 925's request for an injunction. Decision Below at *3. However, the trial court granted a stay to give SEIU 925 time to request a stay from the Court of Appeals. *Id.* The Court of Appeals also granted a stay of the trial court's denial. *Id.*

In the Court of Appeals, SEIU 925 argued, among other things, that I-1501 applies retroactively to bar release of the records requested. *Id.* The Court of Appeals rejected that, and all of SEIU 925's other arguments. *Id.*

SEIU 925 requested that this Court grant review on two issues: whether the Court of Appeals applied the correct standard and correctly interpreted evidence of the voters' intent in I-1501, and whether new exemptions in the PRA cut off pending PRA requests or not. This Court granted review.

IV. ARGUMENT

The Court of Appeals did not err when it affirmed the decision of the trial court, which concluded among other things that, where an organization makes a records request under the PRA and the responding agency does not identify an exemption that applies to the records, but subsequently the legislature/voters enact an amendment that will undeniably exempt the

records from release in future requests, the amendment does not cut off the pending PRA request. This Court should affirm the decision below.

There is no evidence that Washington voters intended I-1501 to apply retroactively to cut off PRA requests that were pending at the time of its enactment, and, under the PRA, the agency must release the records that were nonexempt at the time of the request, regardless if a later amendment makes those records exempt. Finally, a PRA request for non-exempt records creates a vested right to enjoyment of those records.

Because it seeks to enjoin release of records under RCW 42.56.540, SEIU 925 bears the burden of proof to prevent production. *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 370–71, 374 P.3d 63, 66 (2016). This Court reviews actions under the PRA and the injunction statute, RCW 42.56.540, *de novo. Id.*

A. The voters did not intend to apply I-1501 retroactively to halt DEL from producing records under PRA requests that were pending prior I-1501's enactment

This Court's “fundamental objective” in applying a statute or amendment “is to ascertain and carry out the Legislature's intent.” *In re Estate of Haviland*, 177 Wn.2d 68, 75–76, 301 P. 3d 31, 35 (2013) (internal citations omitted). Where the amendment in question was passed by voter initiative, the Court ascertains the collective intent of the voters who enacted it. *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d

570, 585, 192 P.3d 306, 313 (2008) (citations omitted). All standard rules of statutory construction otherwise apply. *Id.*

The Court disfavors retroactive application of amendments because retroactive application of laws may violate the *ex post facto* doctrine, affect vested rights and violate due process, affect judicial functions, disturb a party's reasonable reliance on former law, or otherwise cause manifest injustice. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn. 2d 494, 507, 198 P.3d 1021, 1027 (2009) (internal citations omitted). For these reasons, amendments are presumed to operate prospectively. *Id.* at 507. Only where the legislature explicitly provides for retroactive application, or the amendment is curative or remedial, is this presumption overcome. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 223, 173 P.3d 885, 891 (2007).

Here, (1) I-1501 is neither curative nor remedial since it affects a PRA requestor's statutory right to receipt of records under the PRA, and (2) there is no evidence that voters intended I-1501 to apply retroactively to cut off pending PRA requests.

1) I-1501 is neither curative nor remedial.

A curative amendment clarifies or technically corrects an ambiguous statute. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn. 2d 566, 584, 146 P.3d 423, 433 (2006), as corrected (Nov. 15, 2006) (internal citations omitted). A remedial amendment is one which relates to practice,

procedures and remedies, and may be applied retroactively when it does not affect a substantive or vested right. *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334, 1339 (1997) (internal citations omitted).

I-1501, codified in relevant part under RCW 42.56.640 and RCW 43.17.410, is neither curative nor remedial, since it does not correct an ambiguous statute, and it does not relate to practice, procedures, or remedies, but instead exempts certain records from inspection and copying under the PRA. Exempting records from inspection and copying cuts off a statutory right, and therefore cannot be curative or remedial.³

2) *There is no evidence that the voters intended to apply I-1501 retroactively.*

Where an amendment is neither curative nor remedial, the Court presumes that the voters did not intend for it to be applied retroactively to cut off enjoyment of rights.

This presumption may be overcome only where the legislature explicitly provides for retroactive application. *See Densley*, 162 Wn. 2d at 223. The fact that I-1501 was passed by voters does not alter this analysis, except that the Court also considers what the average lay voter would have

³ Apparently acknowledging I-1501's substantive nature, SEIU 925 has never argued that I-1501 is curative or remedial. *See* Decision Below at 5 ("SEIU 925... affirmatively states that it "does not rely" on whether the statutes are curative or remedial to support their argument that the statutes apply retroactively.")

believed passage of the initiative would have accomplished. *Am. Legion Post #149*, 164 Wn. 2d at 585.

Neither I-1501’s text, language of intent, nor voter pamphlet explicitly provide for retroactive application. Nor do these materials suggest that the average voter intended I-1501 to be retroactive. SEIU 925 fails to overcome the presumption against retroactive amendments.⁴

i. The average voter would not have believed that I-1501 applied retroactively based on its text

Neither I-1501’s language of intent, PRA exemption, nor its bar under RCW 43.17 provide for retroactive application—explicitly or otherwise. Its language of intent does not suggest retroactivity. CP at 299. Laws of 2017, ch. 4, sec. 2. Its RCW 42.56.640 does not. Laws of 2017, ch. 4, sec. 8; CP at 304. Nor does its RCW 43.17.410. Laws of 2017, ch. 4, sec. 10; CP at 305. In fact, its language contains no suggestion that I-1501 would be applied retroactively to ongoing conduct. I-1501’s tenses are present, future, or infinitive tenses used in the future sense (such as in the phrase “it is my intent to eat...,” or “it is my plan to travel to...” etc.):

⁴ SEIU 925 argues, and the Court of Appeals below agreed, erroneously, that the Court need only find that the language of I-1501 “fairly conveys” retroactive intent. The Court below cited *State v. Rose*, 191 Wn. App. 858, 861, 365 P.3d 756, (2015), for this proposition. Decision Below at *4. The Court of Appeals mistakenly applied the *Rose* standard. The Court in *Rose* was applying a different rule specific to amendments repealing criminal laws intersecting with RCW 10.01.040, the 1901 “savings” statute. Under that standard, voters need only “fairly convey” retroactive intent—instead of *expressly* convey retroactive intent. Incidentally, here, even using the relaxed *Rose* standard, the Court below found that the voters did not “fairly convey” an intent to apply I-1501 retroactively.

- “It is the intent of this initiative to protect...”
- “...information of vulnerable individuals... is exempt...”
- “To protect vulnerable individuals... neither the state nor any of its agencies shall release...”

This Court has consistently stated that the use of present or future tenses shows an intent to apply the amendment prospectively only. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn. 2d 15, 30, 864 P. 2d 921, 931 (1993) (“[The] presumption in favor of prospectivity is strengthened when the Legislature, as here, uses only present and future tenses in drafting the statute.”) (citations omitted)

Not only did the voters, in passing I-1501, employ present and future tenses, but the infinitive forms are narrowed and qualified (*e.g.*, “It is the intent of this initiative to protect the safety and security of seniors and vulnerable individuals by... prohibiting...”).

ii. *The average voter would have believed I-1501 would apply prospectively because I-1501 focused on crime*

Finally, it is entirely implausible that the average voter would have understood I-1501 to be retroactive, because ***not all of I-1501 can be applied retroactively.***

In addition to its PRA related sections, I-501 operated to enhance criminal penalties for identity theft. Laws of 2017, ch. 4, sec. 5; CP at 301-

02. The *ex post facto* protections of the state and federal constitutions would prohibit a retroactive application of the parts of I-1501 enhancing criminal penalties, however. See *In re Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801, 805 (2004). While it is conceivably possible that the legislature could intentionally craft legislation such that portions of it were retroactive and other portions not retroactive, I-1501 reflects no such sophisticated intent.

But at any rate the question is not what kind of legislation is possible, but rather what the *average voter* would have *believed* I-1501 would do, based on the text of the amendment and supporting materials. I-1501's opening language of intent starts by referencing the criminal penalties portion of I-1501:

This act may be known and cited as the seniors and vulnerable individuals' safety and financial *crimes* prevention act.

CP at 299 (*italics added*). Likewise, the voter guide focuses on I-1501's increased criminal and civil penalties. The first three paragraphs describing the effect of I-1501 describe I-1501's effect on *criminal* and civil penalties. Appendix at 009 (Declaration of Robert Lavitt in the Court of Appeals, Exhibit B). Finally, the very caption above the ballot entry bubble refers, first, to I-1501's enhanced criminal and civil penalties:

This measure would increase the penalties for criminal identify theft and civil consumer fraud targeted at seniors or vulnerable individuals; and exempt certain information of

vulnerable individuals and in-home caregivers from public disclosure.

Id.

The effect of I-1501’s focus on enhanced criminal penalties on the mind of the average voter cannot be underestimated. Of all the legal concepts familiar to the average lay person, the constitutional requirement for fair notice of the laws by which she is governed probably ranks even with *Miranda* warnings and the right to counsel. The average voter, seeing that I-1501 would increase criminal penalties for identity theft, undoubtedly believed that I-1501’s only be prospectively applied, since to apply it retroactively would violate the *ex post facto* clause.⁵

B. I-1501’s triggering event is the request for production of records under the PRA

An amendment may be deemed prospective if the event that triggers its application occurs *after* its enactment. *In re Flint*, 174 Wn.2d 539, 547, 277 P.3d 657, 661 (2012) (“Prospective application of a statute occurs when the event that triggers or precipitates operation of the statute takes place after

⁵ To support its argument that the voters intended I-1501 to apply retroactively, SEIU 925 also argues that I-1501 features such a strong statement of public policy that voters would have intended I-1501 to be applied retroactively. While this is a valid consideration, a ‘strong’ statement of public policy, alone, cannot show legislative intent to apply an amendment retroactively—and this is for good reason, since there would be very little to guide Courts in distinguishing between the relative strength of public policy statements. *See City of Ferndale v. Friberg*, 107 Wn.2d 602, 605, 732 P.2d 143, 146 (1987) (finding retroactive intent where the legislature used the past tense in “important provisions” of the statute, “no vested rights existed by the effective date of the statute,” and the statute had a “strongly stated public purpose” that would be served by retroactive application).

its enactment.”). The Court looks to “the subject matter regulated by the statute,” its plain language, and context to determine when the precipitating event is. *See In re Estate of Haviland*, 177 Wn.2d 68, 75, 301 P.3d 31, 35 (2013) (citing *In re Carrier*, 173 Wn.2d 791, 809, 272 P.3d 209, 218 (2012)). The Court continues to look to the will of the voters in determining when the precipitating event is. However, “a statute will not be applied retroactively if it affects a substantive or vested right.” *State v. T.K.*, 139 Wn.2d 320, 333, 987 P.2d 63, 70 (1999), *as amended* (Oct. 28, 1999), *overturned due to legislative action* (July 22, 2001)

I-1501’s triggering event is the request for records, not the agency’s production of them. The subject matter regulated by the I-1501 are records requests under the PRA, no evidence suggests that the voters intended I-1501 to cut off pending PRA requests, and PRA requests create a substantive—in fact vested—right to the records requested.⁶

First, PRA records are “[t]he subject matter regulated by” I-1501’s sections 8 and 10. Section 8 is incorporated into the PRA, and section 10 makes explicit reference to the PRA. RCW 43.17.410 (“neither the state nor any of its agencies shall release sensitive personal information of vulnerable individuals... as those terms are defined in RCW 42.56.640.”).

⁶ The PRA request creates a vested right to non-exempt records, *see* sec. C, below, but this conclusion is not necessary to the conclusion that I-1501 cannot be applied retroactively.

Not only does I-1501 relate to records releases under the PRA textually, but I-1501's sections 8 and 10 are subject to the PRA's strong mandate for public disclosure because RCW 42.56.070 provides the "other statute" mechanism that incorporates I-1501's section 10. Like all of the PRA's exemptions, "other statute" exemptions are narrowly construed. Thus, I-1501's RCW 42.56.640 and RCW 43.17.410, the latter incorporated into the PRA via RCW 42.56.070, are construed liberally towards disclosure.

Second, for the precipitating event to be the records request, not production, is simply the more practical and workable rule. Unlike the date of production, which can be arbitrarily set by the agency, negotiated, and otherwise adjusted, the date of the request is certain. With a fixed date, the agency does not need to review changes in the law as they occur.

Finally, a PRA request creates, at least, a substantive right to those records and where a statute affects a substantive right, it must "be presumed that the legislature intended it to apply to future transactions." *Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 641, 538 P.2d 510, 514 (1975) (where statute creates new cause of action, it cannot be retroactive).⁷

⁷ As pointed out by SEIU 925, the Court of Appeals came to the opposite conclusion regarding RCW 43.17.410's triggering event in *Puget Sound Advocates for Ret. Action v. Dep't of Soc. & Health Servs.*, 50430-8-II, 2018 WL 5617942, at *4 (Wash. Ct. App. Oct. 30, 2018) (unpublished). The PSARA Court dedicated no analysis to the relationship between I-1501, however, and seems to have failed to appreciate that, by exempting records under the PRA's "other statute" exemption, I-1501 had to be interpreted consistently with the PRA. In contrast with the PSARA Court, in the decision below in this

C. A request for records under the PRA creates a vested right in those records

A PRA request creates a vested right in the non-exempt records available at the time. A statute cannot be applied retroactively to infringe a vested right, since this violates due process.

“If a statute's application changes the legal effect of prior facts or transactions, then the statute's application is more properly characterized as retroactive.” *In re Flint*, 174 Wn.2d 539, 547, 277 P.3d 657, 661 (2012) (citations and quotations omitted). A statute may not be applied retroactively to infringe a vested right. *In re Carrier*, 173 Wn.2d 791, 810, 272 P.3d 209, 219 (2012). “This notion finds root in the due process clauses of the Fifth and Fourteenth Amendments.” *Id.* Thus, while due process does not prevent new laws from going into effect, it does prohibit changes to the law that retroactively affect rights which vested under the prior law. *Id.* A vested right is a legal or equitable title “to the present or future enjoyment of property, a demand, or a legal exemption from a demand....” *In re Carrier*, 173 Wn. 2d 791, 811, 272 P. 3d 209, 219 (2012) (citations omitted)

case, the Court of Appeals correctly acknowledged that, under the PRA, “when a statute affecting the disclosure of records is amended after a party has made a records request and where the statute is not retroactive in nature, the controlling law is the law in existence at the time the request was made.” Decision Below at *6. The Court of Appeals’ decision is consistent with this Court’s dicta in *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 375 n. 2, 374 P.3d 63 (2016), *review denied*, 189 Wn.2d 1019 (2017) (“After the records request was made... the legislature amended [the relevant statute].... Because this section was not made retroactive, we consider the statute as it existed at the time the request was made.”).

The hallmark of a vested statutory right is that the person in whom the right has vested has satisfied all significant requirements for enjoyment of the right under the statute, and need perform no more. In *In re. Carrier*, for example, this Court considered whether a person convicted of a crime and subject to additional criminal penalties based upon a prior conviction, enjoyed a vested right to the vacated status of one of those prior convictions for sentencing purposes based upon the law in effect at the time. This Court found that the defendant did enjoy a vested right in the vacated status of the conviction because he had met all statutory conditions for obtaining relief: “Carrier met all the conditions for vacating his conviction under the preamendment version of former RCW 9.95.240.” *In re Carrier*, 173 Wn.2d at 812. Moreover, the vacated status “was not contingent on any future occurrence, and there were no conditions otherwise left unfulfilled.” *Id.*

In other words, where there is no legal or equitable reason to require the beneficiary to take further action to obtain a benefit, that right has legally vested. See *Noble Manor Co. v. Pierce Cty.*, 133 Wn.2d 269, 275, 943 P.2d 1378, 1381 (1997) (under common law and as extended by statute, once a land developer files a complete building permit, the developers enjoys a vested right in having the proposal processed under the regulations in effect at the time of the filing); *State v. Varga*, 151 Wn.2d 179, 197, 86 P.3d 139, 148 (2004) (discussing *State v. T.K.*, 139 Wn.2d 320, 332, 987 P.2d 63, 69

(1999)) (“In *T.K.*, we considered whether T.K. had a vested right to expunge his 1993 juvenile conviction from his record after two crime-free years provided that he committed no new offenses... We concluded that T.K. had a vested right under the former statute to expunge his conviction.”); *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 25, 380 P.2d 730, 732 (1963) (“It has been firmly established in this state, by a consistent series of decisions of this court, that the rights of claimants under the Workmen's Compensation Act are controlled by the law in force at the time of the person's injury, rather than by a law which becomes effective subsequently.”)

By contrast, unknown factors may deprive the individual of the property, demand or release from demand, the right has not yet vested. *See In re Estate of Haviland*, 177 Wn.2d 68, 79, 301 P.3d 31, 36–37 (2013) (probate beneficiary had no vested right in her husband’s estate because a claimant’s right in her deceased husband's property “depends upon the outcome of probate proceedings and whether there are claims of fraud, claims of undue influence, creditor claims, or other challenges.”); *State v. Varga*, 151 Wn.2d 179, 86 P.3d 139 (2004) (defendant had no vested right in his “washed out” conviction because whether or not offense “washed out” depended on whether defendant committed a crime in the future.).

Here, the Foundation's right to non-exempt records vested at the moment it made its PRA request. This is because at the time of the Foundation's records request, the Foundation had performed everything it was required to under the PRA, and DEL was required to produce non-exempt records. In other words, no intervening circumstances could prevent the Foundation's receipt of the records. *See* sec. B, above. This is identical to the situation in *In re. Carrier*, where the particular right in question vested at the moment all statutory conditions were met. 173 Wn.2d at 811.

Finding that PRA requests create a vested right to the records is the correct result. Under the PRA, the time in-between when a records request is made and when the production of records takes place is a "grace period," given to the agency to fulfill its duties. RCW 42.56.520 provides the framework for the agency's response, giving it time to identify the records, determine if an exemption applies, and estimate when release can take place. During this grace period, the agency is not 'consenting' to release the records, but is rather gathering the records which the requestor was already entitled to. This lag is certainly a reasonable accommodation to the agency, but at bottom it only acknowledges that the request *must* be fulfilled. In other words, every citizen has a right to access and view all disclosable records *at any given time*, but the voters recognized when they passed the PRA that the agency, practically, needed a "grace period" to logistically be

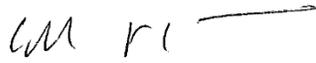
able to produce the records. This “grace period,” however, can ultimately undo the obligation itself, if the Court holds that a PRA requestor can *lose* her right to records if, during such time, the legislature changes the rules. The PRA obviously did not intend such an unjust result, particularly not when considering its policy of broad disclosure. This is consistent with the theory underlying the entire PRA in the first place: that “the people... do not yield their sovereignty to the agencies that serve them,” but instead only delegate authority to the State agencies that serve them. RCW 42.56.030.

It is for this reason that the Court below, and the Court in *Dragonslayer, Inc. v. Washington State Gambling Comm'n*, 139 Wn. App. 433, 449, 161 P.3d 428, 435 (2007), rightfully concluded that a PRA requestor enjoys a vested right in the records that were non-exempt at the time of the request.

V. CONCLUSION

Respondent Freedom Foundation requests that this Court affirm.

RESPECTFULLY SUBMITTED on May 3, 2019.



Caleb Jon F. Vandebos, WSBA #50321
P.O. Box 552, Olympia, WA 98507
p.360.956.3482 | f. 360.352.1874
sPhillips@freedomfoundation.com

Counsel for Respondent Freedom Foundation

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on May 3, 2019, I filed with the Clerk the foregoing Supplemental Brief of Respondent Freedom Foundation, and served the same by email, per agreement of counsel, to the following.

Robert Lavitt, No. 27758
Melissa Greenberg, No. 54132
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Attorneys for Respondent State of Washington and Department

Dated on May 3, 2019, at Olympia, Washington.



Jennifer Matheson

APPENDIX

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.

**DECLARATION OF COUNSEL ROBERT LAVITT IN SUPPORT OF
APPELLANT SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 925'S MOTION FOR EXPEDITED CONSIDERATION AND
EMERGENCY MOTION FOR INJUNCTIVE RELIEF PENDING
APPEAL**

Robert Lavitt, WSBA No. 27758
Michael Robinson, WSBA No. 48096
SCHWERIN CAMPBELL BARNARD IGLITZIN &
LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

I, Robert Lavitt, hereby declare as follows:

1. I am a partner in the firm of Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, and counsel of record for Appellant SEIU Local 925 (“Local 925”) in this matter.

2. On December 12, 2016, I emailed counsel for Respondent Department of Early Learning (DEL), Morgan Damerow and Gina Comeau, and counsel for Respondent Freedom Foundation (“the Foundation”), David Dewhirst and Greg Overstreet (collectively “Counsel”), a copy of Local 925’s Notice of Appeal and informed Counsel that Appellant would be moving on an expedited basis for consideration of its emergency motion for injunctive relief pending appeal.

3. On December 13, 2016, I served Counsel via email copies of Local 925’s Emergency Motion for Injunctive Relief and Motion for Expedited Consideration, with the supporting declaration and appendix.

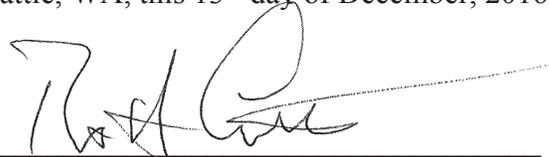
4. Local 925 filed its motion for a temporary restraining order on November 16, 2016 in Thurston County Superior Court to enjoin DEL from releasing records scheduled for release on November 22, 2016. On November 18, 2016, the court’s Commissioner heard oral argument from undersigned counsel and from the requester, the Foundation. During that argument, the Foundation agreed to waive any claim against DEL under the Public Records Act until after the matter could be heard before Judge

Wilson as a motion for a preliminary injunction. Attached as **Exhibit A** is a copy of Freedom Foundation's counsel's email to the parties memorializing that agreement.

5. Attached hereto as **Exhibit B** is a copy of the 2016 General Election Voter's Guide for Initiative Measure No. 1501.

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

Executed in Seattle, WA, this 13th day of December, 2016.



ROBERT LAVITT, WSBA No. 27758

DECLARATION OF SERVICE

I, Genipher Owens, hereby declare under penalty of perjury under the laws of the State of Washington that on December 13, 2016, I caused the foregoing Declaration of Robert Lavitt 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:

Gina Comeau
Morgan Damerow
Assistant Attorney General
Office of the Attorney General
7141 Cleanwater Drive SW
PO Box 40145
Olympia, WA 98504-0145
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E-mail: Knelsen@freedomfoundation.com
E-mail: Legal@freedomfoundation.com

SIGNED this 13th day of December, 2016, at Seattle, WA.


Genipher A. Owens, Paralegal

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925

VS.

EVERGREEN FREEDOM FOUNDATION, ET AL

WASHINGTON STATE COURT OF APPEALS DIVISION II

CASE No. 49726-3-II

DECLARATION OF ROBERT LAVITT

EXHIBIT A

Genipher Owens

From: David Dewhirst <DDewhirst@myfreedomfoundation.com>
Sent: Monday, November 21, 2016 4:36 PM
To: GinaD@atg.wa.gov; Damerow, Morgan (ATG); Gubser, Carly (ATG); amandak@atg.wa.gov
Cc: Robert Lavitt; Danielle Franco-Malone; Greg Overstreet; Kirsten Nelsen; Legal
Subject: [SUSPECTED SPAM] SEIU 925 v. WA DEL & Freedom Foundation, Case No. 16-2-4580-34 - Temporary Waiver
Attachments: 2016 11 21_NOT of Issue 12 09 16[7].pdf
Importance: High

Gina,

Pursuant to our discussion in court on Friday, November 18, and the attached notice of issue just filed by Robert Lavitt on behalf of his client, SEIU 925, Freedom Foundation hereby waives its right to seek the imposition of liability against the Department of Early Learning under RCW 42.56 as to the public records request at issue in this case, until the close of the TRO/preliminary injunction on December 9, 2016 at 1:30 PM. If hearing is moved to a later date, this waiver shall be void upon notice that the hearing has been moved.

Thank you.

—
David Dewhirst
Litigation Counsel | Freedom Foundation

DDewhirst@freedomfoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
FreedomFoundation.com

Bonorum. Quaerite Iudicium. Defende Oppressos. Laus Deo.

NOTICE: This e-mail (including attachments) is confidential and may be legally privileged. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution, or copying of this communication is strictly prohibited. Please reply to the sender that you have received the message in error, then permanently delete it.

— — —

From: Lee Gray <gray@workerlaw.com>
Date: Monday, November 21, 2016 at 4:21 PM
To: "GinaD@atg.wa.gov" <GinaD@atg.wa.gov>, "ThomasA2@atg.wa.gov" <ThomasA2@atg.wa.gov>, David Dewhirst <DDewhirst@myfreedomfoundation.com>, James Abernathy <jabernathy@myfreedomfoundation.com>
Cc: Genipher Owens <owens@workerlaw.com>, Robert Lavitt <lavitt@workerlaw.com>
Subject: 2756-233: SEIU 925 v. WA DEL & Freedom Foundation, Case No. 16-2-4580-34

Dear Counsel,

Attached please find a pdf copy of the pleading filed today with Thurston Co. Superior Court.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925

VS.

EVERGREEN FREEDOM FOUNDATION, ET AL

WASHINGTON STATE COURT OF APPEALS DIVISION II

CASE No. 49726-3-II

DECLARATION OF ROBERT LAVITT

EXHIBIT B

Voters' Guide

2016 General Election

Measures	Federal Candidates	Statewide Candidates	Legislative Candidates	Judicial Candidates
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+ State Measures

Initiative Measure No. 1433

concerns labor standards.

Initiative Measure No. 1464

concerns campaign finance laws and lobbyists.

Initiative Measure No. 1491

concerns court-issued extreme risk protection orders temporarily preventing access to firearms.

Initiative Measure No. 1501

concerns seniors and vulnerable individuals.

Initiative Measure No. 732

concerns taxes.

Initiative Measure No. 735

concerns a proposed amendment to the federal constitution.

+ Advisory Votes

Advisory Vote No. 14

House Bill 2768

Advisory Vote No. 15

Second Engrossed Substitute House Bill 2778

+ Proposed Amendments to the Constitution

Senate Joint Resolution No. 8210

concerns the deadline for completing state legislative and congressional redistricting.

Initiative Measure No. 1501

Ballot Title

[Full Text](#)

Initiative Measure No. 1501 concerns seniors and vulnerable individuals.

This measure would increase the penalties for criminal identity theft and civil consumer fraud targeted at seniors or vulnerable individuals; and exempt certain information of vulnerable individuals and in-home caregivers from public disclosure.

Should this measure be enacted into law?

Yes

No

Written by the Office of the Attorney General

- Explanatory Statement

The Law as It Presently Exists

It is currently a crime in Washington to knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit any crime. In other words, it is illegal to have or use another person's identity or financial information to commit a crime. This crime is known as identity theft and is punishable as a class C felony. If, however, the identity theft involves obtaining credit, money, goods, services, or anything else valued over \$1,500, it is considered a class B felony and is punishable with a longer maximum prison sentence and higher potential fines.

A person who is a victim of consumer fraud may be able to sue the wrongdoer in court to recover money or obtain other relief. Several state laws authorize these types of lawsuits and each law establishes the criteria for bringing a lawsuit and the remedies available. For example, the Consumer Protection Act permits a person who is injured by an unfair or deceptive action by a business to sue the business to stop the harm and recover damages caused by the unfair or deceptive act.

The Public Records Act generally requires government agencies to provide public records to anyone who asks for them. However, some types of records may not be disclosed by government agencies. For example, there are limitations on disclosure of certain types of financial information, including credit or debit card numbers and social security numbers. Some types of personal information may not be disclosed if the information would violate an individual's personal privacy. Disclosure of information violates personal privacy if it would be highly offensive to a reasonable person and the information is not of concern to the public. Generally, an individual's name, telephone number, and address are not considered personal information.

The Effect of the Proposed Measure if Approved

This measure would change criminal and civil laws that apply when vulnerable individuals or seniors are targets of identity theft or consumer fraud. The measure would define a "senior" as any person over the age of sixty-five. The definition of "vulnerable individual" would include a person (1) sixty years of age or older who cannot take care of himself or herself; (2) found by a court to be unable to take care of himself or herself; or (3) receiving home care services.

The measure would increase the criminal penalty for identity theft when a senior or vulnerable individual, as defined, is targeted. If a defendant were found guilty of knowingly targeting a senior or vulnerable individual when committing the crime of identity theft, the crime would be considered identity theft in the first degree and be punishable as a class B felony.

The measure would also increase civil penalties for consumer fraud that targets a senior or vulnerable individual, as defined. Any person who commits consumer fraud that targets such individuals would be subject to civil penalties of three times the amount of the actual damages.

The measure would change the Public Records Act to prohibit disclosing "sensitive personal information" of both vulnerable individuals and "in-home caregivers of vulnerable populations." The measure defines "sensitive personal information" to include names, addresses, GPS coordinates, telephone numbers, email addresses, social security numbers, driver's license numbers, or other personally identifying information. It would apply to the sensitive personal information of care providers contracted by the Department of Social and Health Services, home care aides, and certain family childcare providers. The measure provides specific circumstances when the government may disclose such information. For example, the measure would allow the information to be released to other government agencies or to a certified collective bargaining representative.

The measure also requires the Department of Social and Health Services to report to the Governor and Attorney General

about any additional records that should be made exempt from public disclosure to protect seniors and vulnerable individuals against fraud, identity theft, and other forms of victimization.

— Fiscal Impact Statement

Written by the Office of Financial Management
For more information visit www.ofm.wa.gov/ballot

Summary

Initiative 1501 would have no significant fiscal impact on state or local governments.

General Assumptions

- The effective date of the initiative is December 8, 2016.

Assumptions for Expenditure Analysis

Increasing criminal penalties for identity theft

Initiative 1501 (I-1501) increases the criminal penalties for the crime of identity theft to when the accused knowingly targets a senior or vulnerable individual when knowingly obtaining, possessing, using or transferring means of identification or financial information of another person with the intent to commit, or aid or abet, any crime. No new expenditures have been identified.

Increasing civil penalties for consumer fraud

I-1501 increases civil penalties for consumer fraud targeting seniors or vulnerable individuals, as defined in the initiative. Any consumer fraud that targets a senior or vulnerable individual would be subject to civil penalties of three times the amount of actual damages. No new expenditures have been identified.

Public records exemption

I-1501 provides a new exemption from public disclosure laws for sensitive personal information of vulnerable individuals and their in-home caregivers, as defined in the initiative. I-1501 would add the requirement that individual names, addresses, GPS coordinates, telephone numbers, email addresses, social security numbers, driver's license numbers and other personally identifying information be protected, and thus be redacted before disclosure. These additional redactions would result in little change to workload in responding to public records requests. It is assumed the initiative would not result in a significant increase or decrease in the number of public records requests. Minimal fiscal impact to the state or local governments is anticipated as a result of the new exemption.

Department of Social and Health Services report

I-1501 would require the Department of Social and Health Services (DSHS) to report to the Governor and the Attorney General “about any additional records that should be made exempt from public disclosure to provide greater protection to seniors and vulnerable individuals against fraud, identity theft, and other forms of victimization.” Reporting would be required within 180 days of the effective date of the initiative. DSHS assumes the cost of reporting will be minimal and can be absorbed with current resources.

State agency prohibition on release of sensitive personal information

Subject to outlined exceptions, I-1501 would prohibit state agencies from releasing sensitive personal information, as defined in the initiative, of vulnerable individuals or their in-home caregivers. This prohibition is expected to have a minimal fiscal impact to the state as the additional redactions required under the initiative will result in an insignificant change to workload in responding to public records requests.

Arguments For and Against

Argument For	Argument Against
<p>Consumer Fraud and Identity Theft Hurt Us All</p> <p>You have heard the news and stories from family and friends targeted in scams. They often start with a telemarketer impersonating the IRS or a relative in distress, demanding money or personal information. With basic information, criminals can steal an identity, causing emotional stress, devastating personal finances and ruining credit. Fraud and identity theft hurt all of us and cause real financial and emotional damage.</p>	<p>Please vote no. Initiative 1501 isn’t what it claims to be. It was given an innocent-sounding title to deceive voters as to its true purpose. Initiative 1501 is an attack on vulnerable individuals by a powerful special interest that has poured over \$1.2 million into funding it.</p>
<p>We Need to Protect Seniors and Other Vulnerable People</p> <p>According to a recent study, over half of scam victims are over age 50. In fact, financial exploitation of seniors costs them \$2.9 billion every year.</p>	<p>Initiative 1501 was written by the Service Employees International Union (SEIU). Its goal is to rewrite the Public Records Act to prevent in-home caregivers and childcare providers from learning they no longer can be forced to pay dues to the union.</p> <p>Through Initiative 1501, SEIU ensures that it, and only it, will still receive caregivers’ information — even Social Security numbers — so it can continue capturing over \$20 million in dues from these</p>

For every case that is reported, it is estimated that 43 others are not.

As caregivers, advocates for seniors and retired people, and a public safety official, our priority is the health, safety and protection of our state's most vulnerable populations. We cannot let fraudulent telemarketers and other criminals continue to prey on them. We need the protections offered by I-1501 for their peace of mind and safety.

Increase Penalties and Prevent Release of Personal Information

I-1501 increases penalties on criminals who prey on senior citizens and other vulnerable people. It prevents the government from releasing information that could help identity thieves targeting seniors and the vulnerable. And it protects the personal information of caregivers.

Initiative 1501 is endorsed by consumer advocates, caregivers, law enforcement and public safety officials, and other community leaders. Please join us in approving Initiative 1501.

Rebuttal of Argument Against

Senior citizens, vulnerable people, and their caregivers are not special interests. When they are the victims of fraud or identity theft, they deserve justice in the form of increased penalties on the perpetrators of their crimes. I-1501 will

individuals every year. Caregivers have the right to stop paying SEIU, but the State isn't informing them of their right. If Initiative 1501 passes, caregivers will not even be able to contact each other to discuss issues of common concern.

Initiative 1501 is a shameless attempt by a powerful special interest to diminish government transparency and the rights of hard-working caregivers. Our strong government transparency laws should not be weakened to oppress low wage workers. Every person deserves to know his or her rights. Initiative 1501 empowers only the already-powerful.

Our Public Records Act, one of the best in the nation, shouldn't be manipulated for the enrichment of a wealthy special interest and for the purpose of keeping in-home caregivers and childcare workers in the dark.

Rebuttal of Argument For

Don't be deceived. The only two caregivers who helped draft the I-1501 pro statement are SEIU activists, not ordinary workers. That's because the measure only benefits union executives, not hard-working caregivers. It has nothing to do with protecting seniors from identity theft. It's all about

discourage fraudulent telemarketers and scam artists from profiting on our personal information and increase penalties when they do. I-1501 is supported by the Washington State Senior Citizens' Lobby because they recognize we all need its protections.

keeping caregivers from discovering they no longer have to share their paychecks with the union. Follow the money. I-1501 protects union bosses' wallets while hurting workers and vulnerable individuals.

Argument Prepared By

Argument Prepared By

Martha Corona, child care provider in Yakima; **Vera Kandrashuk**, in-home caregiver in Spokane; **Jerry Reilly**, Elder advocate in Olympia; **Robby Stern**, Puget Sound Advocates for Retirement Action; **John Urquhart**, King County Sheriff

Contact:

www.yeson1501.com;
info@yeson1501.com; (360) 329-2812

Brad Boardman, in-home caregiver who left SEIU; **Mary Jane Aurdal-Olson**, in-home caregiver who left SEIU; **Tim Benn**, family child care co-owner and advocate; **Deborah Thurber**, Spokane area family child care provider and advocate; **Toby Nixon**, President of Washington Coalition for Open Government; **Maxford Nelsen**, Director of Labor Policy, Freedom Foundation

Contact: (360) 362-3991;
info@1501truth.com;
1501truth.com

Who donated to these ballot measure campaigns?

FREEDOM FOUNDATION

May 03, 2019 - 4:54 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96578-1
Appellate Court Case Title: Service Employees International Union Local 925 v. Department of Early Learning, et al.
Superior Court Case Number: 16-2-04580-1

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Comments:

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