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No. 53289-1

No. 98768-8

COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

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PIERCE COUNTY,

*Appellant,*

v.

BRIAN GREEN

*Respondent.*

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RESPONDENT'S RESPONSE TO AMICUS CURIAE  
MEMORANDUM OF PIERCE COUNTY CORRECTIONS  
GUILD

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## I. INTRODUCTION

There is no balancing of any interests in this above entitled appeal. The documents wrongfully withheld are not private in any sense of the word. The plain language of RCW 42.56.250(8)<sup>1</sup> states that “news media in RCW 5.68.010(5), shall have access to the photographs and full date of birth.” The reason for the Washington Legislature making it a mandatory duty for agencies to produce the documents to the news media is for the news media to then disseminate it to the public. *See Thornhill v. Alabama*, 310 US 88, 101-02 (1940) (explaining “The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”).

Amicus Pierce County Corrections Guild is misguided with its analysis and its argument should be unpersuasive to this Court.

## II. CLARIFICATION

Before turning to the issues that are presented for reconsideration, it is helpful to clarify the nature of this lawsuit. Amicus Pierce County Corrections Guild wrongfully states in its amicus brief that: “Brian Green did not make this PRA request as a journalist but as an aggrieved jail inmate.” *See Pierce County Corrections Guild Amicus Br.* at 4. This is

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<sup>1</sup> Formerly RCW 42.56.250(9).

categorically false. While Amicus Pierce County Corrections Guild is entitled to argue the law, it is not entitled to re-imagine the factual record in order to smear Mr. Green’s good name.<sup>2</sup> The trial court found as a matter of fact that: “Mr. Green was not incarcerated at the time he made the request at issue.” CP 420. None of the factual findings by the trial court have been challenged by Appellant Pierce County. As an unchallenged factual finding it is a verity on appeal that Mr. Green was not incarcerated at the time he made his Public Records Act request.

This appeal is not an opportunity for Amicus Pierce County Corrections Guild and Appellant Pierce County to smear Respondent Brian Green’s good name just because he had the misfortune of being unlawfully arrested.

## **II. ARGUMENT**

### **A. Mr. Green Does Not Have the Burden of Proof In This Appeal**

Amicus Pierce County Corrections Guild argues that Respondent Brian Green has the “burden of proof to show his YouTube channel is subject to the narrow ‘news media’ exemption to the Public Records Act.” *See* Pierce County Corrections Guild Amicus Br. at 4. This argument contains numerous inaccuracies, and conclusory statements that should be

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<sup>2</sup> See RPC 4.4(a) (stating “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person”).

disregarded by this Court.

First, the plain language of the Public Records Act states “[t]he burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1). Amicus Pierce County Corrections Guild reasons that “when an exemption n to the Public Records Act applies, the burden shifts to the party seeking disclosure.” *See* Pierce County Corrections Guild Amicus Br. at 4. This misapprehends the issue in this case. The claimed exemption is still in dispute and the parties agreed in the trial court that it turns on whether Respondent Brian Green is news media under RCW 5.68.010(5). *See* CP 420. Consequently, since the exemption is still in dispute, under the plain language of RCW 42.56.550(1) Appellant Pierce County still has the burden of proof since it is an agency subject to the Public Records Act.

Second, the trial court correctly ruled in the merits order that “the parties properly agree that the outcome of this case turns on whether Mr. Green qualifies as ‘news media’ under RCW 5.68.010(5).” CP 420. Amicus Pierce County Corrections Guild argues the constitutional privacy rights of the corrections officers must be a consideration. *See* Pierce County Corrections Guild Amicus Br. at 4-5. This argument is

nonsensical. The plain language of RCW 42.56.250(8)<sup>3</sup> states in pertinent part: “[t]he news media, as defined in RCW 5.68.010(5), shall have access to the photographs and full date of birth.” The purpose behind the Washington Legislature mandating access to photographs and dates of birth to the news media is for the news media to disseminate it to the public. *See Thornhill v. Alabama*, 310 US 88, 101-02 (1940) (explaining the freedom “of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”). The Washington Legislature specifically mandated the news media to receive the documents so it could distribute it to the public

**B. Mr. Green Has Established That He Is News Media Pursuant to RCW 5.68.010(5)**

**1. Mr. Green’s YouTube Channel Meets the Definition Of News Media**

**a. The Legislature Did Not Intend A Narrow Definition of News Media**

First, the plain language of RCW 5.68.010(5) is clear and unambiguous in that the Washington Legislature intended for there to be a broad definition of news media. Washington courts are bound by the plain language of the statute, unless it is ambiguous and only then may courts “resort to statutory construction, legislative history, and relevant case law

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<sup>3</sup> Formerly RCW 42.56.250(9).

for assistance in discerning legislative intent.” *State v. Ervin*, 169 Wn.2d 815, 820 (Wash. 2010) (quoting *Christensen v. Ellsworth*, 162 Wash.2d 365, 373 (2007)). Amicus Pierce County Corrections Guild does not contest the plain language of the statute. Instead, it impermissibly jumps straight to statutory construction. *See* Pierce County Corrections Guild Amicus Br. at 4-5. This Court should disregard Amicus Pierce County Corrections Guild statutory construction arguments as the plain language of the statute is ambiguous.

Second, Amicus Pierce County Correction Guild does not provide any law or authority to support its argument concerning the construction of the statutory term entity. *See* Pierce County Corrections Guild Amicus Br. at 9. Washington courts will not consider arguments without legal authority. *West v. Thurston County*, 168 Wn.App. 162, 195 (2012) (stating the party did not cite to any “authority to support this argument, we do not further consider it.”); *Joy v. Department of Labor and Industries*, 170 Wn.App. 614, 629 (2012) (stating “[w]e do not consider Joy's conclusory vested rights argument in her opening brief that was unsupported by citation to authority.”).

Third, there will be no abuse of the system with a broad definition of news media under RCW 5.58.010(5). Amicus Pierce County Corrections Guild argues that under article 1, section 5 of the Washington

Constitution all persons may publish and this is problematic. *See* Pierce County Corrections Guild Amicus Br. at 9. But this ignores history – constitutionally there has always been a broad definition of news media, without a problem. *C.f. Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 905-06 (2010) (stating “[w]ith the advent of the Internet and the decline of print and broadcast media ... the line between the media and others who wish to comment on political and social issues becomes far more blurred”); *Time, Inc. v. Hill*, 385 US 374, 388-89 (1967) (quoting 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.)) (“As James Madison said, ‘Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.’”).

Fourth, Respondent Brian Green engages in bona fide news gathering and reporting. Amicus Pierce County Corrections Guild makes a conclusory argument that Mr. Green does not engage in bona fide news reporting. *See* Pierce County Corrections Guild Amicus Br. at 9-10. No definition or legal standard for bona fide news reporting is provided by Amicus Pierce County Corrections Guild. This is nothing more than a conclusion without any legal authority and should be disregarded by this Court. *West v. Thurston County*, 168 Wn.App. 162, 195 (2012). Also, this Court should consider that Mr. Green’s reporting on corruption and

courts has long been considered bona fide news reporting by the United States Supreme Court. “The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings.” *Estes v. Texas*, 381 US 532, 539 (1965).

Each of these argument should be unpersuasive to this Court as none of them are grounded in the plain language of the statute.

**b. Mr. Green’s YouTube Account Is Bona Fide Journalism**

Amicus Pierce County Correction Guild’s argument concerning bona fide journalism is nothing more than a conclusory argument that should be disregarded by this Court. *West v. Thurston County*, 168 Wn.App. 162, 195 (2012). Bona fide is an undefined statutory term found in RCW 5.68.010(5)(b). Amicus Pierce County Corrections guild provides no definition or legal standard to determine bona fide and instead merely makes an argument that Mr. Green does not engage in bona fide journalism.

Here Amicus Pierce County Corrections Guild relies upon two federal cases to establish that Mr. Green is not bona fide news media -- *Von Bulow By Auersperg v. Von Bulow*, 811 F. 2d 136 (2<sup>nd</sup> Cir. 1987) and

*Shoen v. Shoen*, 5 F. 3d 1289 (9<sup>th</sup> Cir. 1993). The problem is neither of these cases even mention the statutory term “bona fide.” The Washington Legislature specifically used the term “bona fide” in RCW 5.68.010(5)(b). These cases cannot be persuasive to construe the statutory term “bona fide” when neither case mentions the term once.

“To determine the ordinary meaning of undefined terms, courts may look to standard English dictionaries.” *Kitsap County v. Allstate Ins. Co.*, 964 P. 2d 1173, 1178 (Wash. 1998).

A common definition of the term “bona fide” is “made in good faith.” See Bona Fide, Black’s Law Dictionary, at 186 (8th ed. 2004) (defining bona fide as: “1. Made in good faith; without fraud or deceit. 2. Sincere; genuine.” ); see also Bona Fide, Merriam-Webster Dictionary, (February 07, 2020, 8:23 AM), <https://www.merriam-webster.com/dictionary/bona%20fide> (defining bona fide as: “1 : neither specious nor counterfeit : genuine has become a bona fide celebrity 2 : made with earnest intent : sincere a bona fide proposal 3 law : made in good faith without fraud or deceit a bona fide offer to buy a farm”).

The unchallenged findings of facts establish that Mr. Green is engaged in bona fide journalism.

Libertys Champion and Mr. Green gather[] information of potential public interest by researching current events, contacting public

officials and government offices for information, and making Public Records Act requests for documents. The information and documents sought [are] intended to be conveyed to a broad segment of the public through Libertys Champion, which is publicly available (free of charge) to any person with an internet connection. Libertys Champion and Mr. Green uses its editorial skills in not only selecting the stories to cover, but also in writing the commentary used in its editorials uploaded and featured on Libertys Champion.

CP 417. Then specifically to the Public Records Act request at issue in this appeal, Mr. Green told Appellant Pierce County at the time of the request that he is an investigative journalist. CP 417.

Mr. Green acted in good faith by identifying himself as an investigative journalist at the time of the Public Records Act request. Then before that request was made Mr. Green established a record of posting stories regularly for years. Nothing about Mr. Green's representation or motivations dishonest, misleading.

There is nothing vindictive about Mr. Green's request. The nature of Mr. Green's reporting on government corruption and courts has long been recognized by the United States Supreme Court as within the ambit of news media. *Estes v. Texas*, 381 US 532, 539 (1965).

**2. Mr. Green's And His YouTube Channel Are Entities Engaged In The Regular Business Of News Gathering**

Amicus Pierce County Corrections Guild argues “[t]aking RCW 5.68.010(5) as a whole, it is clear that the legislature was only intending to codify the reporter’s privilege for those who had it at common law — ‘bona fide’ journalists.” *See* Pierce County Corrections Guild Amicus Br. at 14. It reasons the undefined statutory term “bona fide” necessarily includes the intent of the actor. *Id.*

The common law case precedent provided by Amicus Pierce County Corrections Guild in its amicus brief helps to define the term intent in the context of media shield. “[T]he critical question for deciding whether a person may invoke the journalist's privilege is whether she is gathering news for dissemination to the public.” *Shoen v. Shoen*, 5 F. 3d 1289, 1293 (9<sup>th</sup> Cir. 1993); *Von Bulow By Auersperg v. Von Bulow*, 811 F. 2d 136, 144 (2<sup>nd</sup> Cir. 1987).

Here the unchallenged findings of facts clearly establish that Mr. Green intended to disseminate his reporting to the public. At the time of the Public Records Act request Mr. Green identified himself as an investigative journalist. CP 417. Then after some correspondence Mr. Green explained to the Pierce County Public Records Officer that “he had a YouTube channel called ‘Libertys Champion’ and he provided a brief

description of it.” CP 417. Moreover, the trial court found specifically that “Libertys Champion has over 12,000 subscribers.” CP 418. That approximately one news video per week is uploaded to Libertys Champion. CP 418.

These facts clearly show that Mr. Green intended to disseminate the records to the public meeting Amicus Pierce County Corrections Guild of a bona fide journalist. Even the case law cited by Amicus Pierce County Corrections Guild shows that Mr. Green is engaged in the regular business of news gathering.

**C. The Trial Court Correctly Denied Discovery And No Error Was Committed**

Amicus Pierce County Corrections Guild argues that discovery was wrongly denied by the trial court because more facts are needed about Mr. Green’s intent. *See* Pierce County Corrections Guild Amicus Br. at 15-19.

This argument misapprehends the nature of the discovery sought by Appellant Pierce County. The discovery sought by Appellant Pierce County in the motion to compel concerned Respondent Green’s and his YouTube channel’s business/economic status and bears no relation to the intent to publish. Appellant Pierce County sought to compel responses to “Interrogatories Nos. 13 and 14 and Requests for Production Nos. 2, 4, 5,

6, 7, 8, 9, and 10.” CP 45. Each of these discovery requests concern Mr. Green’s and Libertys Champion business/economic status. *See* CP 89-117. Intent refers to a state of mind. *State v. Powell*, 126 Wn.2d 244, 261 (1995). The court record is absent of any discovery requests that bear any resemblance to seeking information about Mr. Green’s journalistic intent or state of mind.

First, this argument is futile and should be summarily dismissed by this Court. This Court cannot order discovery to be reopened when the record is absent of the discovery to be sought in the first place. It is a wasted effort to reopen discovery for something that was not even originally sought.

Second, the argument that the trial court erred by denying Appellant Pierce County discovery on Respondent Brian Green’s intent is impermissible as it is only an argument raised by an amici. *See Pleas v. City of Seattle*, 49 Wn.App. 825, 827 n.1 (1987) (explaining pursuant to RAP 10.3(e) Washington courts “do not consider issues raised solely by amicus.”). Instead, Appellant Pierce County argues that discovery should be reopened to find out about Mr. Green and his YouTube channel’s

business/economic status.<sup>4</sup> See Appellant's Opening Br., at 45, November 01, 2019.

This Court should disregard Amicus Pierce County Corrections Guild's argument about discovery as it does not apply to what is being argued about on appeal.

Respectfully submitted this 27 day of February 2020.



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<sup>4</sup> On page 45 of Appellant Pierce County's Opening Brief it explains in detail why the trial court erred in denying it discovery.

If Plaintiff treated his use of the subject YouTube account for tax purposes like a hobby, that fact would be relevant because it would support the YouTube postings at issue being recreational and not made "in the regular business" of news gathering. See RCW 5.68.010(5)(a); discussion *supra*. at \_\_\_. If, on the other hand, Plaintiff's use was commercial, such would be relevant because the County would have several additional valid defenses – such as RCW 42.56.550 (statute of limitations) and RCW 42.56.070(8)(i.e. prohibiting disclosure of "lists of individuals requested for commercial purposes"). See *e.g.* CP 43.

See Appellant's Opening Br., at 45, November 01, 2019.

### Certificate of Service

I declare under penalty of perjury under the laws of the State of Washington that on the date specified below, I caused to be served a copy of the following documents via email through the Court of Appeals electronic portal:

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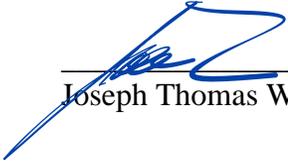
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