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No. 53289-1

No. 98768-8

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

PIERCE COUNTY,

Appellant,

v.

BRIAN GREEN

Respondent.

RESPONDENT'S RESPONSE BRIEF

Joseph Thomas, #49532
Law Office of Joseph Thomas
5991 Rainier Ave. S., # B
Seattle, Washington 98118
(206) 390-8848
Joe@JoeThomas.org

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I. INTRODUCTION

This appeal presents a certified issue of first impression, under RAP 2.3(b)(4), of the issue whether Respondent Brian Green and his YouTube Channel, Libertys Champion, constitute "news media" for the purposes of the Public Records Act under RCW 5.68.010(5) and RCW 42.56.250(8). This Court of Appeals should affirm, award costs and attorney's fees on appeal, then remand this case back to the trial court for further proceedings.

The importance of this appeal cannot be understated as Washington's Media Shield statute are essential for the effective functioning of the Republic. "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know." *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting). The right to know is what is at stake in this above entitled appeal affecting news media published: by unpaid high school and college students, volunteer citizen journalists, among others.

Both the Washington Public Records Act and the Washington Media Shield statute uphold the public's right to know. *C.f.* RCW 42.56.030; *State v. Rinaldo*, 36 Wn. App. 86, 100 (1983) *aff'd on other grounds* 102 Wn.2d 749 (1984). The Public Records Act facilitates the

production of government documents to individuals through its broad mandate. The Media Shield statute protects the reporter while gathering the news, so that it can be in turn reported to the public.

Broad protection for news media must be afforded by this court as it is already under attack by entities, including Pierce County.[1] If any of the protections are limited then the media will become an arm of the government. Washington's Media Shield statute is important to reinforce the First Amendment protections for the media.

This Court of Appeals should affirm the trial court's ruling to protect the integrity of the Public Records Act and the Media Shield statute.

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[1] Recently the Pierce County Prosecuting Attorney's Office subpoenaed "emails texts and/or phone messages, which tend to demonstrate, acknowledge, or show Tacoma News Tribune receipt of Dr. Megan Quinn's whistleblower complaint against Pierce County. *See* Alexi Krell, *The News Tribune objects to subpoena from prosecutor seeking whistleblower records*, The News Tribune, August 15, 2019, available at: https://www.thenewstribune.com/news/local/article233966032.html (last accessed December 16, 2019). Similar subpoenas were sent to other local news organizations including KOMO 4, KING 5 and KIRO 7. *Id.* The Editor of *The News Tribune* Dale Phelps was quoted by his newspaper as stating "[t]his seems to be kind of a poster child for what the government is not allowed to subpoena." *Id.* The Pierce County Prosecuting Attorney's Office appears to believe it is above the law, and also appears to exhibit a disdain for all news media.

Subsequently, the entire *News Tribune* Editorial Board came out against the Pierce County Prosecuting Attorney's Office violation of the Media Shield statute in RCW 5.68.010(5). *See* News Tribune Editorial Board, Pierce County prosecutors shouldn't mess with free press. We won't lay down our shield, The News Tribune, August 25, 2019, available at: https://www.thenewstribune.com/opinion/editorials/article234323237.html (last accessed December 23, 2019).

See ER 201 ("Judicial notice may be taken at any stage of the proceeding").

II. COUNTER STATEMENT OF THE CASE

A. THE DISPUTE

On November 26, 2014, Respondent Brian Green was accompanying a friend to the Pierce County-City Building to pay a parking ticket. CP 416. As Mr. Green passed through security, Mr. Green asked the individuals operating the security checkpoint what law authorized the security checkpoint. CP 416. The interaction escalated to a Pierce County Sheriff's Deputy called for assistance and Mr. Green's friend began video recording. CP 416; CP 5; CP 37. The video of the interaction is publicly available on YouTube at: https://www.youtube.com/watch?v=JwFG4Dtkz5M. CP 5; CP 37. More verbal interactions ensued, culminating in, the Sheriff's Deputy violently pushing Mr. Green and causing him to fall back several paces as he fell to the floor. CP 416. Mr. Green was subsequently arrested and charged with a gross misdemeanor for obstruction the Sheriff's Deputy. CP 416. The charges were dismissed. CP 416.

B. PUBLIC RECORDS ACT REQUEST

On December 14, 2017, Mr. Green made the following Public Records Act request to the Pierce County Sheriff's Office:

> Any and all records of official photos and/or birth date and/or rank and/or position and/or badge number and/or date hired and/or ID Badge for all

> detention center and/or jail personnel and/or deputies on duty November 26 & 27 2014.

CP 416-17. Mr. Green signed the request with his name his name to the request and underneath his name, he identified himself as an investigative journalist. CP 417.

Pierce County responded to the request and provided some records but indicated that dates of birth and official photos of Corrections Staff were exempt under RCW 42.56.250(8) for all requestors other than news media. CP 417. Specifically, the Appellant Pierce County's Public Records Officer testified to the trial court that she produced to Respondent Brian Green "11 pages of records that were responsive to his request, which included the name rank, badge number, hire date, and position of personnel requested." CP 244.

Correspondence ensued where Mr. Green explained that he believed he was news media because he had a YouTube Channel called Libertys Champion and he provided a brief description of it. CP 417. Specifically, Mr. Green explained to Pierce County that he is "a journalist that primarily covers local court cases on my YouTube Channel." CP 8-9; CP 40. Mr. Green gave Pierce County the link to his YouTube Channel as evidence that he is a journalist pursuant to the statutory definition. CP 9; CP 40. The link Mr. Green gave Ms. Pierce County is:

https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA. CP 9; CP 40. To provide further clarification for Pierce County, Mr. Green explained that at the time of the communication the purpose of Libertys Champion, YouTube Channel is to gather and disseminate the news via the internet. CP 9; CP 40.

Pierce County maintained that Mr. Green did not fall within the definition of news media and did not provide the records at issue. CP 417. Mr. Green filed suit in the Thurston County Superior Court on December 14, 2018 as a result of Pierce County's denial of his request. CP 417.

C. LIBERTYS CHAMPION

Libertys Champion is a YouTube Channel continuously operated by Mr. Green since 2013. CP 417. In the findings of fact, the trial court adopted Mr. Green's description of Libertys Champion. CP 417.

> 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.

Libertys Champion describes itself as "Exposing Corruption, Educating the People." CP 417. Examples of titles of videos included on the channel are "Singled Out: Student Barred from School for Freedom of Expression, Educators Bully Family, Public," "A Licenses to Kill: Badges Do Grant Extra Rights," and "Pierce County Deputy Assaults Disabled Black Man, Snatches His Cane, and Arrests Him for Obstruction." CP 417-18.

The trial court found as a matter of fact that Libertys Champion has more than 12,000 subscribers. CP 418. As a sample period, during the roughly two months between November 12, 2018 and January 10, 2019, Libertys Champion uploaded 10 videos, or approximately one video per week. CP 418. There is no indication in the record that the frequency of content on Libertys Champion has materially deviated from this rate over time. CP 418.

III. ARGUMENT

Mr. Green and his YouTube channel, Libertys Champion, constitute news media for the purposes of the Public Records Act under RCW 5.68.010(5) and RCW 42.56.250(8). This Court should affirm the trial court's rulings that: 1. Additional discovery or development of the record is not needed; 2. Libertys Champion and Respondent Brian Green

are news media pursuant to RCW 5.68.010(5); and 3. Appellant Pierce County violated the Public Records Act.

A. RCW 5.68.010(5) Dictates the Outcome of this Appeal

This Court of Appeals is bound by the parties' mutual agreement in the trial court "that the outcome of this case turns on whether Mr. Green qualifies as 'news media' under RCW 5.68.010(5)." CP 420. The record is absent of Appellant Pierce County challenging this agreement, which is memorialized in the merits order, either in this Court of Appeals or in the trial court.

"Unchallenged findings of fact are verities on appeal." *Rush v. Blackburn*, 361 P. 3d 217, 222 (Wash. Ct. App. 2015); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808 (1992). "Unchallenged conclusions of law become the law of the case." *Rush*, 361 P. 3d at 222; *King Aircraft, Inc. v. Lane*, 68 Wn. App. 706, 716 (1993). Although it can be disputed whether the agreement made by both parties in the trial court that the outcome of this case turns on whether Mr. Green qualifies as news media under RCW 5.68.010(5) is a finding of fact, a conclusion of law, or a mixed question of law and fact, the agreement remains unchallenged.

The trial court properly identified the issues in dispute. At the beginning of the analysis in the merits order, the trial court ruled that since "Mr. Green was not incarcerated at the time he made the request at issue.

As a result, 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. This is in accordance with the trial court's instructions for the briefing on the merits.

> What I want to hear from you is why you believe your statutory construction about why this type of media entity counts as media in this context is appropriate under the statutory construction, then I will hear from Mr. Cornelius as to why he believes his construction is correct, and then we will have the reply brief and we will have the hearing.

Verbatim Report of Proceedings at 4. The record is absent of Appellant Pierce County objecting, at any point in the proceeding, to the issue in dispute as identified by the trial court.

It appears Appellant's attorney of record Pierce County Deputy Prosecuting Attorney Daniel Hamilton is intent on violating the agreement from the trial court by featuring most of Appellant's argument on RCW 42.56.250(8). Mr. Hamilton raises RCW 42.56.250(8) under a thinly guised veil to taint this appeal and smear Respondent Brian Green's good name by calling him a prior inmate.[2] The term prior inmate appears nine

[2] A 2015 *Associated Press* study of prosecutorial misconduct in Washington State found that Pierce County led Washington State in cases being overturned on appeal because of the Pierce County prosecutors' flagrant prosecutorial misconduct. Specifically, from 2012-2015 that 17 of the 30 cases of prosecutorial misconduct were in Pierce County and made by Pierce County Deputy Prosecuting Attorneys. *See* Martha Bellise, Prosecutor misconduct blamed in many reversed cases in Pierce County, Seattle Times, published Aug. 03, 2015, available at: https://www.seattletimes.com/seattle-news/crime/many-pierce-county-cases-reversed-because-of-prosecutors/ (last accessed Dec. 10, 2019).

separate times in Appellant Pierce County's opening brief, including featured prominently in the second sentence of the introduction on page one. *See* Appellant's Opening Br., November 01, 2019. RCW 42.56.250(8) excludes from the definition of news media, for the purposes of the Public Records Act, "persons in the custody of a criminal justice agency." It is uncontested the plain language of RCW 42.56.250(8) only applies to individuals currently incarcerated. CP 420. Consequently, Respondent Brian Green's incarceration is irrelevant to this appeal. Appellant Pierce County's attorney of record Daniel Hamilton substantial purpose in repeatedly mentioning the prior incarceration is to impermissibly embarrass Respondent Brian Green in the public court record. *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").

This Court of Appeals should disregard Appellant Pierce County's arguments about prior incarceration as it is only brought up to unethically embarrass Respondent Brian Green and to taint this Court's judgment of the case.

See ER 201 ("Judicial notice may be taken at any stage of the proceeding").

B. Overview of Construction of RCW 5.68.010(5)

RCW 42.56.250(8) states:

> Photographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies as defined in RCW 10.97.030. The news media, as defined in RCW 5.68.010(5), shall have access to the photographs and full date of birth. For the purposes of this subsection, news media does not include any person or organization of persons in the custody of a criminal justice agency as defined in RCW 10.97.030.

RCW 5.68.010(5) states:

> The term "news media" means:
>
> (a) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution;
>
> (b) Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity; or
>
> (c) Any parent, subsidiary, or affiliate of the entities listed in (a) or (b) of this subsection to the extent that the subpoena or other compulsory process

> seeks news or information described in subsection (1) of this section.

The trial court found Respondent Brian "Green was not incarcerated at the time he made the request at issue. As a result, 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. There is no reason for this Court of Appeals to deviate from the trial. Although it can be disputed whether the agreement for the issue in this appeal of whether Mr. Green is news media pursuant to RCW 5.68.010(5) is a finding of fact, a conclusion of law, or a mixed question of law and fact, the agreement remains unchallenged.

Washington courts have the duty when interpreting a statute "to discern and implement the legislature's intent." *Lowy v. PeaceHealth*, 280 P. 3d 1078, 1083 (Wash. 2012); *State v. Ervin*, 239 P. 3d 354, 356 (Wash. 2010); *State v. Jacobs*, 154 Wash.2d 596, 600 (2005). To determine the Legislature's intent Washington courts, look to see if the "plain language of a statute is unambiguous and legislative intent is apparent," if it is then Washington courts "will not construe the statute otherwise." *Lowy v. PeaceHealth*, 280 P. 3d 1078, 1083 (Wash. 2012); *State v. J.P.*, 69 P.3d 318, 320 (2003). "Plain meaning may be gleaned 'from all that the Legislature has said in the statute and related statutes which disclose

legislative intent about the provision in question." *Lowy v. PeaceHealth*, 280 P. 3d 1078, 1083 (Wash. 2012) (quoting *Dep't of Ecology v. Campbell & Gwinn*, LLC, 43 P.3d 4, 10 (Wash. 2002)); *accord Nissen v. Pierce County*, 357 P. 3d 45, 55 (Wash. 2015).

It is agreed by both parties the language of RCW 5.68.010(5) is clear and unambiguous. CP 306.

1. Relevant Legislative Intent

Given that that cardinal rule in statutory interpretation is to "to discern and implement the legislature's intent," *Lowy*, 280 P. 3d at 1083, it warrants brief mention that the relevant legislative intent in this case is not as it appears at first glance.

To answer whether the Legislature intend for people such as Respondent Brian Green to obtain photographs and birthdates of corrections deputies and staff, this Court of Appeals must answer whether the Legislature intended for people such as Respondent to be compelled through a subpoena or otherwise, a confidential news source. This is due to the Legislature deciding, in the Public Records Act, to incorporate the definition of "news media" from the statutory provision protecting the media from being compelled to reveal confidential sources. Thus, to the extent statutory construction in this case requires consideration of any policy the Legislature intended to effectuate through its statutory

language, the Court must be mindful of the Legislature's intent in both provisions.

a. Public Records Act

It is well-established by Washington courts that the legislative intent of the Public Records Act to be a "strongly worded mandate for broad disclosure of public records." *Nissen v. Pierce County*, 357 P. 3d 45, 52 (Wash. 2015); *Yakima County v. Yakima Herald-Republic*, 170 Wash.2d 775, 791 (2011) (quoting *Soter v. Cowles Publ'g Co.*, 162 Wash.2d 716, 731 (2007) (quoting *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 127 (1978))). The plain language of the statute reads the Public Records Act "shall be liberally construed and its exemptions narrowly construed" to ensure that the public's interest is protected. RCW 42.56.030; *Nissen*, 357 P. 3d at 52. "Liberal construction requires that we resolve ambiguous provisions in favor of government transparency" and that its "exceptions be narrowly confined." *Columbia Riverkeeper v. Port of Vancouver*, 395 P. 3d 1031, 1038 (Wash. 2017); *see Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wash.2d 507, 515 (1997). The plain language of the Public Records Act instructs that in the "event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." RCW 42.56.030.

b. News Media Shield

Washington's news media shield law has its origins in common law. Washington courts first recognized the news media privilege in *Senear v. Daily Journal-American*, 97 Wash.2d 148 (1982). There, the Washington Supreme Court held that journalists have a qualified common law privilege with respect to their sources of information, but it confined the privilege to civil cases. Two years later, in *State v. Rinaldo*, 102 Wash.2d 749, 755 (1984), the Washington Supreme Court extended the qualified common law privilege for journalists to criminal cases.

In 2007, the legislature codified this privilege in RCW 5.68.010. In doing so, it extended the privilege both to members of the news media and to nonnews media parties. RCW 5.68.010(1) (news media); RCW 5.68.010(3) (nonnews media).

2. Legislature Intended Broad Construction of RCW 5.68.010(5) Through the Repeated Use of the Word "Any"

The Washington Legislature intended a broad meaning of the word news media when ubiquitously used the word "any" six times in the definition of news media in RCW 5.68.010(5) to mean all.

It cannot be disputed that the word "any" is universally construed by Washington Courts to mean all. The word "any" has been given broad and inclusive connotations. *State v. Sutherby*, 165 Wash.2d 870, 880-81

(2009) (citing *Rosenoff v. Cross*, 95 Wash. 525, 527 (1917)); *State ex rel. Evans v. Bhd. of Friends*, 41 Wash.2d 133, 145 (1952) (the state constitution's prohibition on legislative authority to authorize any lottery or grant any divorce was unambiguously phrased in the broadest sense). The meaning of the phrase "any order" has been held to be "so plain as to admit of no argument as to the [ ] meaning." *State ex rel. Tacoma E. R.R. v. Pub. Serv. Comm'n*, 102 Wash. 589, 591 (1918) (internal quotation marks omitted) (quoting *State ex rel. Great N. Ry. v. Pub. Serv. Comm'n*, 76 Wash. 625, 627 (1913) (citing *State ex rel. R.R. Comm'n v. Or. R.R. & Nav. Co.*, 68 Wash. 160 (1912))). In *State ex rel. Tacoma Eastern Railroad*, the Washington Supreme Court emphasized that "any" must mean 'all' because if it meant anything less, the legislature would have said as much. 102 Wash. at 591-92 ("[W]e are constrained to hold that the legislature, in using the words 'any order,' meant all orders, unless they had specifically excepted there from certain orders or class of orders in the foregoing statutes.").

In RCW 5.68.010(5) the word any is the first word used in each of the subsections a through c. *See* RCW 5.68.010(5)(a)-(c). First, in RCW 5.68.010(5)(a) the initial word of the subsection is "any" which is used as an adjective to describe entity classifications that are news media. Moreover, the word "any" is used in RCW 5.68.010(5)(a) twice more for a

total of three times in the subsection which is only a single sentence. Second, in RCW 5.68.010(5)(b) the initial word of the subsection is "any" which is used as an adjective to describe persons who are engaged in news gathering on behalf of an entity as identified in RCW 5.68.010(5)(a).[3] Third, in RCW 5.68.010(5)(c) the initial word of the subsection is "any" which is used to describe organizations with a relationship to entities defined by RCW 5.68.010(5)(a) and RCW 5.68.010(5)(b).

It is agreed by both parties that the statute cannot be read in isolation and the statutory canon of noscitur a sociis is applicable here. *See e.g.* Appellant's Opening Br., at 28, November 01, 2019. "A principle consistent with this view is that of noscitur a sociis, which provides that a single word in a statute should not be read in isolation, and that the meaning of words may be indicated or controlled by those with which they are associated." *State v. Roggenkamp*, 106 P. 3d 196, 200 (Wash. 2005). In *Roggenkamp*, court explained the doctrine noscitur a sociis with the following example "[t]o carve up the phrases 'reckless manner' and 'reckless driving' by severing 'reckless' from each phrase in order to read it in isolation would clearly violate the dictates of the aforementioned doctrine of noscitur a sociis." *Roggenkamp*, 106 P. 3d at 200. Since the word 'any' is used six separate times in RCW 5.68.010(5), this Court of

[3] RCW 5.68.010(5)(b) uses the word 'any' a second time when stating the person may be from "any entity" from RCW 5.68.010(5)(a).

Appeals would carve up the statute by not considering the word "any" with the other terms it is coupled with.

Appellant Pierce County acquiesces to Respondent Brian Green's argument concerning the statutory construction of the word 'any' meaning all in the context of RCW 5.68.010(5) by repeatedly failing to address it. In the trial court, Appellant Pierce County failed to address Respondent Brain Green's argument that the statutory construction of the word "any" means all. *C.f.* CP 178-79 (Respondent's argument about the construction of the word "any"); CP 296-318 (Appellant's failure to address the argument). Then again, in its opening brief Appellant also failed to address the statutory construction of the word "any." *See generally* Appellant's Opening Br., November 01, 2019.

Moreover, Appellant in its opening brief uses the word 'any' to in conformity with the well-established case law cited above. For example, Appellant argues that Respondent's broad interpretation of RCW 5.68.010(5) is wrong "because it would transform each of the billions of social media accounts, or any other type of abstract or intangible thing, into 'news media.'" *See* Appellant's Opening Br., at 27, November 01, 2019. Here Appellant is using the word 'any' to mean all types of abstract or intangible things to further its argument that Respondent's argument is wrong because it is overbroad. A second example is when

Appellant argue in the opening brief that: "[i]n any case, for many of the same reasons that a YouTube account is not a news media 'entity,' a person claiming to have such an account also is not a news media 'entity.'" *See* Appellant's Opening Br., at 38, November 01, 2019. Here Appellant is again using the word any to mean in all cases. It cannot be disputed that Appellant's own use of the word any conforms with the case law stating the word any means all.

3. Legislature Intended Broad Construction of RCW 5.68.010(5) Through the Repeated Use of the Word "Or"

The Washington Legislature the intended a broad meaning of the word news media when ubiquitously used word 'or' eighteen times in the definition of news media in RCW 5.68.010(5) as a disjunctive to provide a multitude of alternates

In the context of statutory interpretation, Washington courts have interpreted the word 'or' as disjunctive absent clear legislative intent to the contrary. *See, e.g., HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 473 n.94 (2003) ("Ordinarily, the word 'or' does not mean 'and' unless there is clear legislative intent to the contrary."); *State v. Riofta*, 134 Wn. App. 669, 682 (2006) ("We presume that the word 'or' does not mean 'and' and that a statute's use of

the word 'or' is disjunctive to separate phrases unless there is a clear legislative intent to the contrary."), *aff'd*, 166 Wn.2d 358 (2009).

First, in RCW 5.68.010(5)(a) the word "or" is used eight separate times. Second, in RCW 5.68.010(5)(b) the word "or" is used six separate times. Third, in RCW 5.68.010(5)(c) the word "or" is used four separate times.

The widespread use of the word "or" peppered throughout RCW 5.68.010(5) was used to create alternatives to create a very broad definition of news media.

4. Recent Binding Precedent Construed RCW 5.68.010(1)(a) "Very Broadly" While Focusing on the Word "Any"

Recently, the Division I Court of Appeals for the State of Washington, construed RCW 5.68.010(1)(a)[4] very broadly and rejected the request to construe it narrowly. *Republic of Kazakhstan v. Does 1-100*, 368 P. 3d 524, 530 (Wash. Ct. App. 2016). Specifically, the Court of Appeals centered its analysis on the word 'any,' which appears twice in RCW 5.68.010(1)(a). *Id.* The Court of Appeals held RCW 5.68.010(1)(a) "protects against disclosure of the identity of a source of *any* news or information" and "against the disclosure of any information that *would*

[4] RCW 5.68.010(1)(a) is a sister provision the part of the statute that is at issue in this appeal, RCW 5.68.010(5).

tend to identify a source." *Id.* (emphasis in original). The *Kazakhstan* court construed the word "any" to mean all, just as Respondent Brian Green argues this Court should likewise construe the statute in RCW 5.68.010(5).

In the *Kazakhstan* case, the Republic of Kazakhstan sued 100 unnamed individuals alleging they stole privileged emails from government officials. *See Kazakhstan*, 368 P. 3d at 525. In connection with that lawsuit, the Republic of Kazakhstan sought a subpoena from eNom, Inc., an Internet domain name registration company based in King County, Washington. *Id.* The subpoena sought domain name registrant information and Internet Protocol (IP) and/or Mac addresses for a website operated by "Respublika," an opposition newspaper based in Kazakhstan that published several of the stolen e-mails. *Id.*

The *Kazakhstan* court's ruling that RCW 5.68.010(1)(a) is very broad should be highly persuasive upon this Court of Appeals, as it is the first court to construe any provision of RCW5.68.010.

5. RCW 5.68.010(5) Must Be Construed Broadly In Accordance with the First Amendment's Protections of Freedom of the Press

This Court cannot construe RCW 5.68.010(5) in a way that would infringe upon the First Amendment's protections of the Freedom of the Press. The First Amendment to the United States Constitution prevents

the government from making laws which that infringe upon the freedom of the press.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *See* U.S. Const. amend. I.

At common law a reporter's privilege is "[p]remised upon the First Amendment, the privilege recognizes society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public." *In re Madden*, 151 F. 3d 125, 128 (3rd Cir. 1998); *accord Bartnicki v. Vopper*, 200 F. 3d 109, 120 (3rd Cir. 1998) (explaining "[i]f the acts of `disclosing' and `publishing' information do not constitute speech, it is hard to imagine what does fall within that category. . .").

Courts in published opinions, including the United States Supreme Court, have repeatedly stated there is no difference between traditional press and any new and emerging press. *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"); *Obsidian Finance Group, LLC v. Cox*, 740 F. 3d 1284, 1291 (9th Cir. 2014) (stating "[t]he protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story"); *Snyder v. Phelps*, 580 F.3d 206, 219 n. 13 (4th Cir.2009), aff'd, 131 S.Ct. 1207 (2011) ("Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the media."); *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir.2000) (holding that "a distinction drawn according to whether the defendant is a member of the media or not is untenable").

The foremost First Amendment scholars also argue the First Amendments protections of freedom historically has applied to all who have made mass communications. *See also* Eugene Volokh, Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today, 160 U. Penn. L. Rev. 459 (2012) (arguing with extensive citations that from the framing of the First Amendment to the modern era, the common understanding of the freedom of the press was meant to apply to all who used technology of mass production).

The statute RCW 5.68.010(5) acts to clarify the First Amendment

of the United States Constitution. This is known as constitutionalism by proxy. *See e.g.* John F. Preis, Constitutional Enforcement by Proxy, 95 Va. L. Rev. 1663 (2009). Governments pass laws to define the constitution. For example, anti-discrimination laws, like the Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination, define the Equal Protection Act of the Fourteenth Amendment. *See* 29 U.S.C. 206(d); U.S. Const. amend. XIV.

Under the First Amendment to the United States Constitution the construction of RCW 5.68.010(5) must be broad and encompassing. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat. Bank of Boston v. Bellotti*, 435 US 765, 777 (1978).

Thus, RCW 5.68.010(5) acts as a proxy to define the First Amendment. RCW 5.68.010(5) cannot remove protections guaranteed by the First Amendment.

C. Respondent Brian Green and his Libertys Champion YouTube Channel are Unequivocally News Media Pursuant to RCW 5.68.010(5)

The trial court correctly concluded that Mr. Green and his Libertys Champion YouTube channel are unequivocally news media pursuant to

RCW 5.68.010(5). This Court of Appeals should affirm the trial court's ruling.

1. Libertys Champion is "Any Entity" Under the Standard of RCW 5.68.010(5)(a)

Libertys Champion meets the standard set forth in RCW 5.68.010(5)(a) to determine news media.

The statute does not define "any entity." "To give undefined terms meaning, [courts] may look to dictionary definitions and related statutes." *LaCoursiere v. Camwest Development, Inc.*, 339 P. 3d 963, 967 (Wash. 2014).

"Under the doctrine of noscitur a sociis, the meaning of a word may be determined by reference to its relationship to other words in the statute. And under the doctrine of ejusdem generis, general words accompanied by specific words are construed to embrace only similar objects. The ejusdem generis rule is generally applied to general and specific words clearly associated in the same sentence in a pattern such as `[specific], [specific], or [general]' or `[general], including [specific] and [specific]." *State v. Van Woerden*, 967 P. 2d 14, 18 (Wash. Ct. App. 1998) (internal quotation marks and citations omitted).

The trial court correctly reasoned that:

> These two canons of statutory construction mean that, in determining the definition of "entity," the

Court must consider the other items in the list that precede it: a "newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company." It is clear the Legislature intended to consider each of the items in this list to be specific examples of the general category of "entity," as the section immediately following this section refers to items in this list generally as "entit[ies]." *Buschmann v. Kennaugh*, 144 Wn. App. 776, 780, 183 P. 3d 1124 (2008) ("A statute is to be considered as a whole, with effect given to all the language used."); RCW 5.68.010(5)(b) "Any person who is or has been an employee. . . of any entity listed in (a) of this subsection. . . .").

Nothing about the items in this list suggests or requires a specific corporate form. There is nothing about the term "newspaper," for example that requires that it be a registered corporation or limited liability company rather than a sole proprietorship or a partnership. A newspaper may exist in many different forms – it may be a corporation or it may be run by an individual without corporate registration out of his or her basement. The same is true of the other items in this list.

If the Legislature intended to impose a corporate form requirement in the statute, it would have to arise by the addition of "or any entity" at the conclusion of the list. But no reasonable construction of those words would ascribe the meaning to that expression. If the Legislature wanted to impose such a requirement, it coud have and would have, stated so explicitly. The complete definition of "entity" and the Court's determination of whether Libertys Champion falls within it, however, requires consideration of the words that follow it.

CP 422-23.

The other items in the list that precede the word entity are undefined in the statute. *See generally* RCW 5.68.010. As explained above, the reason why these terms are undefined is because the Washington Legislature wanted to create a very broad definition of news media.

Libertys Champion meets the definition of "any entity" because it meets the definition of newspaper or periodical.

a. Libertys Champion is a Newspaper Under RCW 5.68.010(5)(a)

Libertys Champion is a "newspaper." A "newspaper" is one of the specific entities enumerated in the plain language of RCW 5.68.010(5)(a). The term "newspaper" is undefined in the statute. *See id.*

"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 "newspaper" is: "a publication issued at regular and usually close intervals, especially daily or weekly, and commonly containing news, comment, features, and advertising." *See* Newspaper, Dictionary.com (December 20, 2019, 9:52 AM),

https://www.dictionary.com/browse/newspaper. Appellant Pierce County fails to provide a definition or legal standard for newspaper.

Libertys Champion easily meets the common definition of a newspaper with the uncontested findings of facts made by the trial court.[5]

> 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. The trial court found as a matter of fact that Libertys Champion has more than 12,000 subscribers. CP 418. As a sample period, during the roughly two months between November 12, 2018 and January 10, 2019, Libertys Champion uploaded 10 videos, or approximately one video per week. CP 418. There is no indication in the record that the frequency of content on Libertys Champion has materially deviated from this rate over time. CP 418.

[5] Appellant Pierce County does not challenge any of the findings of facts made from the trial court in its opening brief submitted on November 01, 2019.

The uncontested findings of fact clearly show that Libertys Champion meets the common definition of a newspaper as it is a publication published with fixed intervals that may contain news, comments, features, etc. Libertys Champion is published on the internet where it is publicly available free of charge at: https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA. That publication occurs at an interval of once a week. CP 418. Moreover, Libertys Champion publishes news and commentary (opinion) pieces.

b. Libertys Champion is a Periodical Under RCW 5.68.010(5)(a)

Libertys Champion is a "periodical." A "periodical" is one of the specific entities enumerated in the plain language of RCW 5.68.010(5)(a). The term "periodical" is undefined in the statute. *See id.*

"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 "periodical" in noun form is: "a periodical publication." *See* Periodical, *Merriam-Webster Dictionary* (December 20, 2019, 9:38 AM), https://www.merriam-webster.com/dictionary/periodical. When periodical is used as an adjective, such as in "periodical publication," it is defined as: "published

with a fixed interval between the issues or numbers." *See* Periodical, *Merriam-Webster Dictionary* (December 20, 2019, 9:38 AM), https://www.merriam-webster.com/dictionary/periodical. Appellant Pierce County fails to provide a definition or legal standard for publication.

Libertys Champion easily meets the common definition of a periodical with the uncontested findings of facts made by the trial court.[6]

> 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. The trial court found as a matter of fact that Libertys Champion has more than 12,000 subscribers. CP 418. As a sample period, during the roughly two months between November 12, 2018 and January 10, 2019, Libertys Champion uploaded 10 videos, or approximately one video per week. CP 418. There is no indication in the record that the frequency of

[6] Appellant Pierce County does not challenge any of the findings of facts made from the trial court in its opening brief submitted on November 01, 2019.

content on Libertys Champion has materially deviated from this rate over time. CP 418.

The uncontested findings of fact clearly show that Libertys Champion meets the common definition of a periodical as it is a publication published with fixed intervals. Libertys Champion is published on the internet where it is publicly available free of charge at: https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA. That publication occurs at an interval of once a week. CP 418.

2. Libertys Champion is in "the Regular Business of News Gathering and Disseminating News" Pursuant to RCW 5.68.010(5)(a).

Respondent Brian Green and Libertys Champion are in the "regular business of news gathering and disseminating news" pursuant to RCW 5.68.010(5)(a). As the trial court identified, the statute does not provide a definition of the terms therein.

"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 "regular" is: "recurring, attending, or functioning at fixed, uniform, or normal intervals." *See* Regular, *Merriam-Webster Dictionary* (December 20, 2019, 11:19 AM), https://www.merriam-webster.com/dictionary/regular. A common

definition of the term "business" is: "role, function." *See* Business, *Merriam-Webster Dictionary* (December 20, 2019, 11:21 AM), https://www.merriam-webster.com/dictionary/business. To illustrate this definition of the word "business" the *Merriam-Webster Dictionary* uses the following illustration – "how the human mind went about its business of learning." *Id.*

Under the doctrine of noscitur a sociis the terms "regular" and "business" must be read together. "[A] single word in a statute should not be read in isolation, and that the meaning of words may be indicated or controlled by those with which they are associated." *State v. Roggenkamp*, 106 P. 3d 196, 200 (Wash. 2005).

When the terms "regular" and "business" are read together it means a recurring role or function at normal intervals. This definition makes sense in the terms of the structure of the subsection. In RCW 5.68.010(5)(a) the term "regular business" precedes and modifies "news gathering and disseminating news." Consequently, the statute is requiring that news gathering occur at common intervals. This is consistent to the common definitions of newspapers and periodicals provided above.

Libertys Champion easily meets the common definition of a periodical with the uncontested findings of facts made by the trial court.[7]

> 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. The trial court found as a matter of fact that Libertys Champion has more than 12,000 subscribers. CP 418. As a sample period, during the roughly two months between November 12, 2018 and January 10, 2019, Libertys Champion uploaded 10 videos, or approximately one video per week. CP 418. There is no indication in the record that the frequency of content on Libertys Champion has materially deviated from this rate over time. CP 418.

The sheer popularity of Libertys Champion is evidence of its news gathering. The trial court found as a matter of fact that Libertys Champion

[7] Appellant Pierce County does not challenge any of the findings of facts made from the trial court in its opening brief submitted on November 01, 2019.

has more than 12,000 subscribers on YouTube.[8] The amount of subscribers to Libertys Champion is consistent with other major news media organizations across Washington: the Seattle Times[9] newspaper has more than 21,600 subscribers on its YouTube channel; KIRO 7 News[10] channel has more than 4,600 subscribers on its YouTube channel; KING 5[11] news channel has more than 32,800 subscribers on its YouTube channel; The News Tribune[12] newspaper has more than 7,700 subscribers on its YouTube channel; Q 13[13] news channel has more than 3,800 subscribers on its YouTube channel; the Spokesman Review[14] newspaper has more than 660 subscribers on its YouTube channel; the Bellingham

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[8] The number of subscribers to Libertys Champion has only increased since the trial court issued its merits order on April 05, 2019. Currently, Libertys Champion has more than 14,100 subscribers. *See* Libertys Champion, YouTube channel, available at: https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA (last accessed December 19, 2019 at 12:04 PM).

See ER 201 ("Judicial notice may be taken at any stage of the proceeding").

[9] The Seattle Times, YouTube channel, available at: https://www.youtube.com/user/seattletimesdotcom (last accessed February 27, 2019 at 2:41 PM).

[10] KIRO 7 News, YouTube channel, available at: https://www.youtube.com/user/KIRO7Seattle (last accessed February 27, 2019 at 2:42 PM)

[11] KING 5, YouTube channel, available at: https://www.youtube.com/user/KING5 (last accessed February 27, 2019 at 2:42 PM).

[12] The News Tribune, YouTube channel, available at: https://www.youtube.com/user/TacomaNewsTribune (last accessed February 27, 2019 at 2:44 PM).

[13] Q 13, YouTube channel, available at: https://www.youtube.com/user/WAMostWanted (last accessed February 27, 2019 at 2:45 PM).

[14] The Spokesman Review, Youtube channel, available at: https://www.youtube.com/channel/UCZxnJTRtX2sS9lQTM1r8Ubg (last accessed February 28, 2019 at 6:11 AM).

Herald[15] newspaper has more than 3,000 subscribers on its YouTube channel. The number of subscribers to Mr. Green report on Libertys Champion is above that average[16] of major news organizations in Washington State.

It would be absurd for the Washington Legislature to couple the terms "regular" and "business" to mean some sort of for-profit activity.

3. Respondent Brian Green is "Any Person" Under RCW 5.68.010(5)(b).

Alternatively, Respondent Brian Green also meets the standard of "news media" since he is a "any person" under RCW 5.68.010(5)(B).[17]

RCW 5.68.010(5)(b) states:

> Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity.

The trial court found in the merits order:

> In a very real sense, Mr. Green ***is*** Libertys Champion. He owns, administers, and manages it. The Court finds that any analysis under RCW

[15] The Bellingham Herald, Youtube channel, available at: https://www.youtube.com/user/bellinghamherald (last accessed February 28, 2019 at 6:13 AM).

[16] The average subscribers to the news media enumerated in the previous paragraph is about 10,594 (rounded to the nearest whole number and excluding Libertys Champion).

[17] It appears that Appellant Pierce County makes the argument for the first time, in passing, that Respondent Brian Green did not have standing. *See* Appellant's Opening Br., at 21, November 21, 2019. The record is absent of Appellant Pierce County challenging standing in the trial court. RAP 2.5(a) prohibits new arguments on appeal.

> 5.68.010(5)(b) is unnecessary in these circumstances due to the identity between Mr. Green and Libertys Champion. In the alternative, the Court finds that Mr. Green is an agent of Libertys Champion and was acting within the scope of that agency when he made the public records request at issue.

CP 426 (emphasis in original).

Appellant Pierce County fails to address the trial court's ruling. This Court of Appeals should summarily uphold the trial court's ruling as there is not any argument to the contrary.

Instead of addressing the trial court's ruling, Appellant Pierce County impermissibly makes a new argument in its opening brief that Respondent Brian Green is not engaged in "bona fide news gathering" pursuant to RCW 5.68.010(5)(b).[18] CP 427 (stating Pierce County did not formally raise the argument of bona fide news gathering at the trial court).

Furthermore, the record is absent of Appellant Pierce County ever asking Respondent Brian Green what his purpose with the Public Records Act request at issue in this lawsuit is. There is no way for Appellant Pierce County to know the purpose of his request without asking him. "The existence of a subjective belief will frequently turn on factors which a [a party] cannot reasonably be expected to know" without performing

[18] At the trial court, Appellant Pierce County argued that Respondent Brian Green was not engaged in "bona fide newsgathering" for Public Records Act requests that are not at issue at this lawsuit. *See* CP 302 n 6.

discovery or simply asking him. *Gomez v. Toledo*, 446 US 635, 641 (1980). But Appellant Pierce County made a strategic decision never to ask Respondent Brian Green his intent with the Public Records Act request at issue in this appeal. Under RAP 2.5(a), "[i]t has long been the law in Washington that an 'appellate court may refuse to review any claim of error which was not raised in the trial court.'" *State v. O'Hara*, 217 P. 3d 756, 760 (Wash. 2009).

Appellant Pierce County had every opportunity to ask Respondent Brian Green his intent with the Public Records Act request at issue in this lawsuit, but instead is playing impermissible gotcha games in this Court of Appeals. "As a policy matter, the purpose of the PRA is best served by communication between agencies and requestors, not by playing 'gotcha' with litigation." *Hobbs v. State*, 335 P. 3d 1004, 1011 n. 12 (Wash. Ct. App. 2014). Appellant Pierce County is not a mind reader. Consequently, for some unknown reason Appellant Pierce County abdicated its duty to communicate with Respondent Brian Green about the purpose of his request.

In the alternative, the circumstantial evidence in this lawsuit identifies that Respondent Brian Green intended to publish a news story about his unlawful arrest. It is undisputed that Respondent Brian Green was unlawfully arrested by the Pierce County Sherriff's Office. CP 416. It

is further undisputed that Respondent Brian Green's made his Public Records Act seeking documents regarding his unlawful imprisonment. *See* Appellant's Opening Brief, at 43, November 01, 2019. It is a bona fide news story to report on unlawful arrests, as it is illustrative of government abuse.

4. Appellant Pierce County's construction of RCW 5.68.010(5) impermissibly rewrites the statute adding words to it

Appellant Pierce County violates the canon of construction prohibiting adding words to a statute because the judiciary is to interpret the Legislature's intent, not to re-write it. Washington courts "must not add words where the legislature has chosen not to include them, and [ ] must construe statutes such that all of the language is given effect." *Lake v. Woodcreek Homeowners Ass'n*, 243 P. 3d 1283, 1288 (Wash. 2010) (internal quotation marks omitted).

The opening brief of Appellant Pierce County spills a lot of ink impermissibly adding words into RCW 5.68.010(5) and consequently changing the statute's meaning. Appellant Pierce County adds the words about commerce, business entity, occupation, and corporate structure to change the meaning of the statute. *See e.g.* Appellant's Opening Br., at 30-32, November 01, 2019.

The Washington Legislature never intended to add an economic or financial component to RCW 5.68.010. Otherwise if it had it would have used specific language identifying an economic or financial component to the statute like Delaware and Florida did to their news media statutes.

The Delaware Reporters' Privilege Act defines a reporter in part as an individual who is "earning his or her principal livelihood" through the dissemination of news. 10 Del. C. §§ 4320(4)(a); Exhibit A. Specifically, the reporter must earn his principal livelihood "by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice" in the dissemination of news. 10 Del. C. §§ 4320(4)(a). Delaware's media shield statute was approved on July 09, 1973.

Florida's journalist privilege only applies to "professional journalist[s]" and not all journalists. *See* Fla. Stat. § 90.5015(1)(a); Exhibit B. A professional journalist is defined by the statute as:

> A person regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine. Book authors and others who are not professional journalists, as defined in this paragraph, are not included in the provisions of this

section.

See Fla. Stat. § 90.5015(1)(a); Exhibit B.

Both the Delaware and Florida media shield statutes incorporate clear economic or financial bright-line standards to help define who the media is and is not. The Delaware statute creates very specific economic and employment requirements for a reporter to receive protection from the media shield statute – "earning his principal livelihood by, or in each of the preceding three weeks or four of the preceding eight weeks had spent at least twenty hours" disseminating news. 10 Del. C. §§ 4320(4)(a); Exhibit A. Since Delaware's statute was passed in 1973, approximately 34 years before Washington's statute, the Washington Legislature presumably knew about the Delaware statute and made the decision not to incorporate the economic and employment requirements from it. Similarly, the Florida statutes only applies to "professional journalists" who are "working as a salaried employee" and excludes journalists who are paid hourly. *See* Fla. Stat. § 90.5015(1)(a); Exhibit B

Here, there is no such language in Washington State's media shield law in RCW 5.68.010(5). The Washington State Legislature knew how to add such language in the statute if it wanted to. The Washington State Legislature could have added a bright-line standard if it wanted to add an

economic or financial aspect to the statute, but it chose not to.[19]

This Court of Appeals should not find Appellant Pierce County's arguments concerning commerce, business entity, occupation, and corporate structure to be unpersuasive.

D. Appellant Pierce County Failed to Meet its Statutory Burden of Proof Under RCW 42.56.550(1) to Establish that its Claim of Exemption under 42.56.250(8)

Appellant Pierce County continue to fail to meet its statutory burden of proof under RCW 42.56.550(1) and instead impermissibly switches the burden to Respondent Brian Green.

The plain language of the Public Records Act requires "[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).

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[19] Appellant Pierce County gives passing treatment to the brand-new issue that for the effective operation of RCW 42.56.540 of the Public Records Act, new media must be business entities. This is patently untrue as Pierce County is involved currently in a lawsuit where the Pierce County Prosecuting Attorney's Association successfully served Respondent Brian Green under RCW 42.56.540 to seek court protection from a production of records. *See PCPAA and Cornelius v. Green and Pierce County*, 19-2-11698-1 (Pierce County Superior Court filed Oct. 24, 2019). Appellant's attorney, DPA Daniel Hamilton knew of this lawsuit as he is a Plaintiff in it.

See ER 201 ("Judicial notice may be taken at any stage of the proceeding").

It is uncontested that this is a Public Records Act lawsuit where Appellant Pierce County denied Mr. Green the right to copy and inspect records. CP 416-17. Appellant Pierce County claimed and still maintains the documents are exempt from production under RCW 42.56.250(8) of the Public Records Act. CP 417; *See e.g.* Appellant's Opening Br., at 1, November 01, 2019. The plain language of RCW 42.56.250(8) exempts from disclosure "[p]hotographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies" to everyone, but news media. It is Appellant Pierce County's burden to prove the exemption of RCW 42.56.550(1) applies and that Respondent Brian Green is not news media.

This is prejudicial because repeatedly throughout the opening brief Appellant Pierce County argues that Respondent Brian Green did not prove he is news media. *See e.g.* Appellant's Opening Br., at 22, November 01, 2019 (stating "Plaintiff provided no evidence showing exactly what or who the account allegedly was an 'organization' of"); *Id.* at 41 (stating " Plaintiff offered no evidence at the time of his request, or thereafter, that he regularly engaged in news gathering and disseminating").

Appellant Pierce County erroneously argues the "burden of showing that [the news media shield law] privilege applies in any given

situation rests entirely upon the entity asserting the privilege." *See e.g*. Appellant's Opening Br., at 19, November 01, 2019. This is based upon a false premise. Here Respondent Brian Green is not asserting the media shield statute as a testimonial privilege. However, he is asserting the news media shield statute to prove he meets the definition of news media in order for Appellant Pierce County to produce the documents to him.

E. No Error Occurred in the Denial of Discovery

The trial court correctly utilized its discretion to deny Appellant Pierce County's motion to compel. This Court of Appeals should affirm the trial court's denial of the motion to compel, as Appellant Pierce County does not establish an abuse of discretion.

"It is within the trial court's discretion to deny a motion to compel discovery and we will not disrupt the ruling absent an abuse of discretion." *Clarke v. State, Attorney General's Office*, 138 P. 3d 144, 149 (Wash. Ct. App. 2006). "The abuse of discretion standard again recognizes that deference is owed to the judicial actor who is better positioned than another to decide the issue in question." *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299 (1993) (internal quotation marks omitted). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons." *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 743 (Wash. 2010) (citing *Mayer v. Sto Indus., Inc.*, 156

Wash.2d 677, 684 (2006)).

Appellant makes two separate arguments as to why discovery is needed: 1. If Libertys Champion is commercial in nature this above entitled lawsuit is precluded under the Washington Trade Names Act, Chapter 19.80 RCW; 2. If Libertys Champion is commercial in nature this above entitled lawsuit is precluded under RCW 42.56.070(8) of the Public Records Act. Neither of these arguments are persuasive.

1. The Washington Trade Names Act Does Not Apply to this Lawsuit

Appellant Pierce County wrongfully asserts the Washington Trade Names Act, RCW 19.80.010, *et. seq.*, precludes this lawsuit. However, both the statute and case law interpreting the statute make it abundantly clear the Trade Names Act does not apply to this lawsuit.

First, the well-established purpose of the Trade Names Act makes it clear the intent and spirit of the statute is not meant to preclude this litigation. "The purpose of the statute is to advise anyone extending credit to a business operating under an assumed name who are the real persons conducting the business." *Laliberte v. Wilkins*, 30 Wn. App. 782, 784 (1981); *Seattle Ass'n of Credit Men v. Green*, 45 Wn.2d 139, 142 (1954); *Bacon v. Gardner*, 38 Wn.2d 299, 303 (1951). Here there is nothing about credit or money in this lawsuit. This lawsuit is about

Respondent Brian Green, as an investigative journalist for Libertys Champion, exercising his statutory rights under the Public Records Act. It would be improper for this Court of Appeals to enlarge purpose of the Trade Names Act.

Second, Libertys Champion is not a business within the scope of the statute because it does not seek a profit. The statute defines business as "an occupation, profession, or employment engaged in for the purpose of seeking a profit." RCW 19.80.005(1). Mr. Green has already testified in a declaration to this Court that "I do not make any profit from Libertys Champion. Libertys Champion does not any have paid employees or paid contractors. Everyone who works at Libertys Champion does so on a volunteer basis." CP 347. The statute does not apply to Libertys Champion and Mr. Green because it is uncontroverted that Libertys Champion is not a business as defined by the statute because it does not seek a profit.

Third, since Mr. Green made the Public Records Act request with his individual and proper name, the Trade Names Act does not preclude this lawsuit. Since Mr. Green signed the Public Records Act requests with proper legal name, Brian Green, "[n]o one could be deceived or in doubt as to whom he did business with" fulfilling the purpose of the statute. *Laliberte v. Wilkins*, 30 Wn. App. 782, 785 (1981). As the plain language

of the statute identifies, the statute only applies when a person conducts business under a trade name. *See* 19.80.010. Since Mr. Green was not make this Public Records Act request with a trade name, it does not preclude this lawsuit.

2. The Defense of RCW 42.56.070(8) is Waived and is Irrelevant

Discovery should not be granted for Appellant Pierce County's brand-new defense of RCW 42.56.070(8) as it is irrelevant and waived.

RCW 42.56.070(8) in pertinent part provides:

> This chapter shall not be construed as giving authority to any agency. . . to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies. . . shall not do so unless specifically authorized or directed by law.

a. Waiver

Appellant Pierce County waived any right to argue a defense of RCW 42.56.070(8) by its inconsistent prior behavior, and it is dilatory in bringing the defense.

"[A] defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense." *King v. Snohomish County*, 47 P. 3d 563, 565 (Wash. 2002); *Lybbert v. Grant County*, 141 Wash.2d 29 (2000).

First, Appellant Pierce County waived the affirmative defense of RCW 42.56.070(8) through its inconsistent prior behavior. Specifically, Appellant Pierce County exhibited prior inconsistent behavior when it failed to perform its mandatory duty to investigate whether the list might be used for commercial purposes, while producing some of the responsive documents out of the singular request to Respondent Brian Green. CP 417. Recently, the Division II Court of Appeals for the State of Washington held when construing RCW 42.56.070(8) "that the agency must investigate when it has some indication that the list might be used for commercial purposes." *SEIU Healthcare 775NW v. State*, 377 P. 3d 214, 227 (Wash. Ct. App. 2016).[20] The Court of Appeals explained "that the agency must investigate when it has some indication that the list might be used for commercial purposes. . ." and "it must at least require a party requesting a list of individuals to state the purpose of the request." *SEIU Healthcare 775NW*, 377 P. 3d at 228. Appellant Pierce County's Public Records Officer testified to the trial court that she produced to Respondent Brian Green "11 pages of records that were responsive to his request, which included the name rank, badge number, hire date, and position of personnel requested." CP 244. If Pierce County genuinely believed that

[20] There appears to be a scrivener's error in *SEIU Healthcare 775NW v. State*, 377 P. 3d 214 (Wash. Ct. App. 2016). Throughout the entire opinion the Court uses the plain language from RCW 42.56.070(8), but cites the statute as RCW 42.56.070(9).

Respondent Brian Green would use these records for commercial purposes, then it would have investigated whether his request was for commercial purposes before producing any documents to him.

Second, Appellant Pierce County again waived this defense through prior inconsistent behaviors. RCW 42.56.070 is not mentioned once in Appellant Pierce County's response merits brief. *See* CP 296-318. RCW 42.56.070 is not mentioned once in Appellant Pierce County's motion to compel discovery. *See* CP 45-56. RCW 42.56.070 is not mentioned once in Appellant Pierce County's reply to its motion to compel discovery, to argue why the discovery was relevant and necessary. *See* CP 162-66. Appellant Pierce County never intended to argue RCW 42.56.070(8) as a defense, and instead Appellant's appellate attorney is reimagining the court record from the trial court.

b. Irrelevant

Appellant Pierce County's apparent brand-new defense of RCW 42.56.070(8) is irrelevant, and discovery cannot be compelled as it is outside the scope of this lawsuit.

RCW 42.56.070(8) only applies when the requesting party is "seeking the disclosure of the list for 'commercial purposes.'" *SEIU*

Healthcare 775NW v. State, 377 P. 3d 214, 223 (Wash. Ct. App. 2016).[21] The *S*EIU Healthcare 775NW the court when to hold that RCW 42.56.070(8) the term "commercial purposes" means "a business activity by any form of business enterprise intended to generate revenue or financial benefit." *SEIU Healthcare 775NW v. State*, 377 P. 3d 214, 226 (Wash. Ct. App. 2016).

First, the defense of RCW 42.56.070(8) is irrelevant because Respondent Brian Green never made a Pubic Records Act request for a list, as is required by RCW 42.56.070(8). The record is absent of Appellant Pierce County arguing that Respondent Brian Green and Libertys Champion made a request for a list of anything. Appellant Pierce County's Public Records Officer testified to the trial court that she produced to Respondent Brian Green "11 pages of records that were responsive to his request, which included the name rank, badge number, hire date, and position of personnel requested." CP 244. In the opening brief, Appellant Pierce County fails to explain how the Public Records Act request at issue in this lawsuit sought a list of anything.

[21] There appears to be a scrivener's error in *SEIU Healthcare 775NW v. State*, 377 P. 3d 214 (Wash. Ct. App. 2016). Throughout the entire opinion the Court uses the plain language from RCW 42.56.070(8), but cites the statute as RCW 42.56.070(9).

F. Motion for All Costs and Reasonable Attorney's Fees – Mr. Green is Entitled to an Award of All Costs and Reasonable Attorney's Fees under the Public Records Act as the Prevailing Party in this Appeal

Should Mr. Green prevail on appeal on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

RCW 42.56.550(4) of the PRA provides:

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

Washington courts recognize that "[s]trict enforcement of this provision discourages improper denial of access to public records." *Spokane Research Fund v. City of Spokane*, 117 P. 3d 1117, 1125 (Wash. 2005); *see also American Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503*, 95 Wn. App 106, 115 (1999). The PRA does not allow for court discretion whether to award attorney fees to a prevailing party. *PAWS v. UW* ("Paws I"), 114 Wn. 2d 677, 687-88 (1990); *Amren v. City of Kalama*, 929 P.2d 389, 394 (1997). The only discretion the court has is in determining the amount of reasonable attorney's fees. *Id.*

The Washington State Supreme Court in *Limstrom v. Ladenburg*,

136 Wn. 2d. 595, 616 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees – "[including] fees on appeal" – to the requestor. Should Mr. Green prevail on appeal on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

IV. CONCLUSION

This Court of Appeals should affirm the trial court's ruling that Respondent Brian Green and his YouTube Channel, Libertys Champion, constitute "news media" for the purposes of the Public Records Act under RCW 5.68.010(5) and RCW 42.56.250(8).

This Court of Appeals should affirm, award all costs and attorney's fees on appeal, then remand this case back to the trial court for further proceedings to determine a statutory penalty and award all costs and attorney's fees.

Respectfully submitted this 23 day of December 2019.

Joseph Thomas, WSBA # 49532

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:

- Respondent's response brief

To the following:

Mr. Daniel Hamilton
Pierce County Civil Deputy Prosecuting Attorney
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160

Dated this 23 day of December 2019.

_____
Joseph Thomas WSBA # 49532

Exhibit A

TITLE 10

Courts and Judicial Procedure

Procedure

CHAPTER 43. EVIDENCE AND WITNESSES

Subchapter II. Reporters' Privilege

§ 4320 Definitions.

As used in this subchapter:

(1) "Adjudicative proceeding" means any judicial or quasi-judicial proceeding in which the rights of parties are determined but does not include any proceeding of a grand jury.

(2) "Information" means any oral, written or pictorial material and includes, but is not limited to, documents, electronic impulses, expressions of opinion, films, photographs, sound records, and statistical data.

(3) "Person" means individual, corporation, statutory trust, business trust, estate, trust, partnership or association, governmental body, or any other legal entity.

(4) "Reporter" means any journalist, scholar, educator, polemicist, or other individual who either:

a. At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or

b. Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under paragraph (4)a. of this section.

(5) "Source" means a person from whom a reporter obtained information by means of written or spoken communication or the transfer of physical objects, but does not include a person from whom a reporter obtained information by means of personal observation unaccompanied by any other form of communication and does not include a person from whom another person who is not a reporter obtained information, even if the information was ultimately obtained by a reporter.

(6) "Testify" means give testimony, provide tangible evidence, submit to a deposition, or answer interrogatories.

(7) "Within the scope of his or her professional activities" means any situation, including a social gathering, in which the reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which the reporter intentionally conceals from the source the fact

that he or she is a reporter and does not include any situation in which the reporter is an eyewitness to or participant in an act involving physical violence or property damage.

10 Del. C. 1953, § 4320; 59 Del. Laws, c. 163, § 1; 70 Del. Laws, c. 186, § 1; 73 Del. Laws, c. 329, § 51.;

§ 4321 Privilege in nonadjudicative proceedings.

A reporter is privileged in a nonadjudicative proceeding to decline to testify concerning either the source or content of information that he or she obtained within the scope of his or her professional activities.

10 Del. C. 1953, § 4321; 59 Del. Laws, c. 163, § 1; 70 Del. Laws, c. 186, § 1.;

§ 4322 Privilege in adjudicative proceedings.

A reporter is privileged in an adjudicative proceeding to decline to testify concerning the source or content of information that he or she obtained within the scope of his or her professional activities if the reporter states under oath that the disclosure of the information would violate an express or implied understanding with the source under which the information was originally obtained or would substantially hinder the reporter in the maintenance of existing source relationships or the development of new source relationships.

10 Del. C. 1953, § 4322; 59 Del. Laws, c. 163, § 1; 70 Del. Laws, c. 186, § 1.;

§ 4323 Exceptions to the privilege in adjudicative proceedings.

(a) Unless the disclosure of the content of the information would substantially increase the likelihood that the source of the information will be discovered, the privilege provided by § 4322 of this title shall not prevent a reporter from being required in an adjudicative proceeding to testify concerning the content, but not the source, of information that the reporter obtained within the scope of his or her professional activities if the judge determines that the public interest in having the reporter's testimony outweighs the public interest in keeping the information confidential. In making this determination, the judge shall take into account the importance of the issue on which the information is relevant, the efforts that have been made by the subpoenaing party to acquire evidence on the issue from alternative sources, the sufficiency of the evidence available from alternative sources, the circumstances under which the reporter obtained the information, and the likely effect that disclosure of the information will have on the future flow of information to the public.

(b) The privilege provided by § 4322 of this title shall not prevent a reporter from being required in an adjudicative proceeding to testify concerning either the source or the content of information that the reporter obtained within the scope of his or her professional activities if the party seeking to have the reporter testify proves by a preponderance of the evidence that the sworn statement submitted by the reporter as required by § 4322 of this title is untruthful.

10 Del. C. 1953, § 4323; 59 Del. Laws, c. 163, § 1; 70 Del. Laws, c. 186, § 1.;

§ 4324 Determination of privilege claim.

A person who invokes the privilege provided by this subchapter may not be required to testify in any proceeding except by court order. If a person invokes the privilege in any proceeding other than a court proceeding, the body or party seeking to have the person testify may apply to the Superior Court for an order requiring the claimant of the privilege to testify. If the Court determines that the claimant does not qualify for the privilege under the provisions of this subchapter, it shall order the claimant to testify.

10 Del. C. 1953, § 4324; 59 Del. Laws, c. 163, § 1; 70 Del. Laws, c. 186, § 1.;

§ 4325 Waiver.

If a reporter waives the privilege provided by this subchapter with respect to certain facts, he or she may be cross-examined on the testimony or other evidence he or she gives concerning those facts but not on other facts with respect to which the reporter claims the privilege. A reporter does not waive or forfeit the

privilege by disclosing all or any part of the information protected by the privilege to any other person.

10 Del. C. 1953, § 4325; 59 Del. Laws, c. 163, § 1; 70 Del. Laws, c. 186, § 1.;

§ 4326 Short title.

This subchapter may be cited as the "Reporters' Privilege Act."

10 Del. C. 1953, § 4326; 59 Del. Laws, c. 163, § 1.;

Exhibit B

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The 2018 Florida Statutes

Title VII
EVIDENCE

Chapter 90
EVIDENCE CODE

View Entire Chapter

90.5015 Journalist's privilege.—

(1) DEFINITIONS.—For purposes of this section, the term:

(a) "Professional journalist" means a person regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine. Book authors and others who are not professional journalists, as defined in this paragraph, are not included in the provisions of this section.

(b) "News" means information of public concern relating to local, statewide, national, or worldwide issues or events.

(2) PRIVILEGE.—A professional journalist has a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news. This privilege applies only to information or eyewitness observations obtained within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes. A party seeking to overcome this privilege must make a clear and specific showing that:

(a) The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;

(b) The information cannot be obtained from alternative sources; and

(c) A compelling interest exists for requiring disclosure of the information.

(3) DISCLOSURE.—A court shall order disclosure pursuant to subsection (2) only of that portion of the information for which the showing under subsection (2) has been made and shall support such order with clear and specific findings made after a hearing.

(4) WAIVER.—A professional journalist does not waive the privilege by publishing or broadcasting information.

(5) CONSTRUCTION.—This section must not be construed to limit any privilege or right provided to a professional journalist under law.

(6) AUTHENTICATION.—Photographs, diagrams, video recordings, audio recordings, computer records, or other business records maintained, disclosed, provided, or produced by a professional journalist, or by the employer or principal of a professional journalist, may be authenticated for admission in evidence upon a showing, by affidavit of the professional journalist, or other individual with personal knowledge, that the photograph, diagram, video recording, audio recording, computer record, or other business record is a true and accurate copy of the original, and that the copy truly and accurately reflects the observations and facts contained therein.

(7) ACCURACY OF EVIDENCE.—If the affidavit of authenticity and accuracy, or other relevant factual circumstance, causes the court to have clear and convincing doubts as to the authenticity or accuracy of the proffered evidence, the court may decline to admit such evidence.

(8) SEVERABILITY.—If any provision of this section or its application to any particular person or circumstance is held invalid, that provision or its application is severable and does not affect the validity of other provisions or applications of this section.

History.—s. 1, ch. 98-48.

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