No. 103370-2

WASHINGTON SUPREME COURT

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CITIZEN ACTION DEFENSE FUND, a Washington nonprofit,

*Appellant*,

*v.*

WASHINGTON STATE OFFICE OF FINANCIAL MANAGMENT in the OFFICE OF THE GOVERNOR, an agency of the State of Washington,

*Respondent*.

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# MEMORANDUM OF AMICUS CURIAE WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF REVIEW

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## I. IDENTITY AND INTEREST OF AMICUS

WCOG, a Washington nonprofit corporation, is an independent, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business. For more information about WCOG go to www.washcog.org.

WCOG is the state's freedom of information association, Washington citizens' representative organization on the National Freedom of Information Coalition, and a champion of the public's right of access in its educational programs and in court. WCOG has a legitimate interest in assuring that the Court is properly briefed on important issues involving the PRA.

## II. STATEMENT OF THE CASE

### A. The legislature has never addressed the question of whether or when OFM's records should be disclosed. That question is exclusively governed by a narrow construction of the PRA's deliberative process exemption which was enacted by the voters in 1972.

The superior court correctly ruled that the deliberative process exemption in RCW 42.56.280 must be construed

***narrowly***, and that the "deliberative process" expired when OFM and the unions signed the agreement. CP 128, 130. Division II erroneously reached the opposite result by broadly interpreting the deliberative process exemption, contrary to RCW 42.56.030. *Opinion* at 16.

OFM argues that the *Opinion* is "in lockstep with the statutory scheme governing collective bargaining." *Answer* at 1. But this alleged "statutory scheme" has never provided any specific PRA exemption for OFM's records. Although the legislature could have enacted a clear PRA exemption for collective bargaining at any time in the past fifty (50) years it has not done so. This case is governed by the PRA, which required the Court of Appeals to construe the "deliberative process" narrowly. RCW 42.56.030.

The PRA was enacted in 1972 by popular initiative, ***not*** by the legislature. Laws 1973 c 1 (Initiative Measure No. 276, approved November 7, 1972). That original enactment included a "deliberative process" exemption that (i) does ***not*** mention

collective bargaining, and (ii) has ***not*** been amended for fifty (50) years:

> (i) Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action.

Laws 1973 c 1 § 31; former RCW 42.17.310(i)(i). The PRA was recodified in 2005 as Chap. 42.56 RCW without any change to the exemption. *See* RCW 42.56.900; RCW 42.56.280.

The legislature has ***never*** amended or clarified the deliberative process exemption enacted by the voters in 1972. Nor has the legislature enacted a specific statutory exemption for collective bargaining records. For fifty (50) years the legislature has deferred to the voter-enacted PRA on the question of whether or when OFM's collective bargaining records should be disclosed.

The fact that the 1973 legislature adopted a collective bargaining exemption for the Open Public Meetings Act, RCW 42.30.140(4)(a) (OPMA), shows that the legislature knows how

to enact exemptions for collective bargaining when it wishes to do so. The lack of any legislative PRA exemption for fifty (50) years demolishes OFM's argument that any legislative determination of public policy actually supports OFM's position.

In contrast, the legislature has explicitly reiterated that PRA exemptions must be construed narrowly. The original 1972 PRA explicitly required liberal construction. Laws 1973 c 1 § 1; former RCW 42.17.010(11). In *Hearst v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978) this Court confirmed that the declarations of policy in the PRA "are a command that … exceptions be narrowly confined." In 1992 the legislature confirmed that public policy requires PRA exemptions to be "narrowly construed." RCW 42.56.030; Laws of 1992, ch. 139, § 2. In 2007 the legislature amended RCW 42.56.030 to further clarify that the PRA supersedes any conflicting statutes. RCW 42.56.030; Laws of 2007, ch. 197, § 2. In the seventeen years that have elapsed since then the legislature still has not taken any

action on the question of whether or when OFM's records should be exempt under the PRA.

### B. The undisputed facts show that OFM chose to wrongfully withhold public records pursuant to a broad interpretation of a waivable PRA exemption.

Unlike other statutes that prohibit the disclosure of certain records, PRA exemptions are waivable by the agency. *John Doe A. v. Wash. State Patrol*, 185 Wn.2d 363, 380, 374 P.3d 63 (2016). In response to CADF's waiver argument OFM concedes, *sub silentio*, the deliberative process exemption in the PRA is waivable. WCOG takes no position on whether OFM actually waived the exemption in this case. What matters in this case is that no "statutory scheme" required—or even permitted—OFM to withhold the records from CADF. OFM unilaterally chose to withhold the records pursuant to a broad construction of a waivable PRA exemption. CP 111.

Unlike *Washington State Council v. City of Spokane*, 200 Wn.2d 678, 520 P.3d 991 (2022), on which OFM relies to support its policy arguments, the state labor unions have ***not*** been

involved in this case. The unions were never invited to oppose disclosure of OFM's records under RCW 42.56.540, and the unions never intervened. Even after the superior court ruled that OFM's records were not exempt the unions still did not appear in this case, even as amicus curiae.

And unlike in *Wash. Council*, the record in this case does not contain any evidence to suggest that the unions care one way or the other. The record shows only that OFM chose to withhold its own records based on its own broad construction of the deliberative process exemption. CP 111.

## III. ISSUES PRESENTED

- Whether this case warrants review under RAP 13.4(b).
- Whether OFM has carried its burden under RCW 42.56.550(4) to prove that the records at issue were still pre-decisional for purposes of RCW 42.56.280 and *Progressive Animal Welfare Soc. v. UW*, 125 Wn.2d 243, 884 P.2d 592 (1995) (*PAWS II*), even after the bargaining agreement had been signed by OFM and the unions.

- Alternatively, whether OFM has carried its burden under RCW 42.56.550(4) to prove that, ***after*** the signed agreements were posted on OFM's website on or about December 14, 2022, disclosure would be still be "injurious to the deliberative or consultative function of the process [and] that disclosure would inhibit the flow of recommendations, observations, and opinions." *PAWS II*, 125 Wn.2d at 256.

## IV. ARGUMENT

### A. This court must engage in *de novo* review to determine whether or not OFM has carried its burden of proof under RCW 42.56.550(4).

Under the PRA this Court's review of the lower courts' decision is *de novo*. *PAWS II*, 125 Wn.2d at 252. The question before this Court is whether OFM has carried its burden to prove that its refusal to produce the requested records "is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." *Id.* at 251-252.

## B. Under the ***narrow*** construction of RCW 42.56.280 required by the PRA, the "deliberative process" is the negotiation between OFM and the unions which ends when those parties sign the agreement.

The explicit OPMA exemption for collective bargaining, RCW 42.56.140(4)(a), shows that the legislature could have enacted a clear PRA exemption at any time in the last fifty (50 years). It has not done so. Instead the legislature has deferred to the PRA enacted by the voters, which provides OFM with only a waivable "deliberative process" exemption. RCW 42.56.280. At the same time the legislature has confirmed that (i) PRA exemptions must be construed narrowly, ***and*** (ii) the PRA supersedes conflicting statutes. RCW 42.56.030.

Notwithstanding OFM's arguments about a "statutory scheme," no ***legislative*** enactment authorized or required OFM to withhold the records from CADF. OFM unilaterally chose to withhold the records pursuant to its own broad "interpretation" of a waivable PRA exemption. CP 111. The fact that OFM could have chosen a narrower construction of RCW 42.56.280—***or waived the exemption entirely***—demonstrates that there is no

state policy against the disclosure of OFM's records. Only the PRA and its explicit policy of narrow construction matter in this case. RCW 42.56.030.

This Court's decision in *Washington Council*, *supra*, does ***not*** support OFM's position either.[1] In striking down a local ordinance requiring public bargaining sessions, this Court noted that the ordinance conflicted with state law, including both OPMA and the PRA. 200 Wn.2d at 693-94. But this case has nothing to do with OPMA, and no state statute required OFM to withhold its records in this case. The applicable "statutory scheme" in this case is the PRA, which explicitly requires the deliberative process exemption to be construed narrowly, to the point of superseding other state laws. RCW 42.56.030.

[1] *Wash. Council*, 200 Wn.2d at 693-694, quotes the State's amicus brief in that case for the erroneous proposition that RCW 42.56.280 is an "explicit exemption[] for collective bargaining." As explained above, no specific PRA exemption for collective bargaining has ever been enacted. RCW 42.56.280 is a narrow, waivable PRA exemption for deliberative processes.

All of the prior cases confirm that the deliberative process exemption must be ***narrowly*** construed. *Hearst*, 90 Wn.2d at 128; *PAWS II*, 125 Wn.2d at 251, *ACLU v. Seattle*, 121 Wn. App. 544, 549, 89 P.3d 295 (2004); *West v. Port of Olympia*, 146 Wn. App. 108, 116, 192 P.3d 926 (2008). CADF correctly points out that the Court of Appeals below did not construe RCW 42.56.280 narrowly, erroneously ignoring the requirement of narrow construction in RCW 42.56.030.

OFM concedes that the Court of Appeals attempted to "balance" certain policy considerations rather than construing the exemption narrowly as the PRA explicitly requires. *Answer* at 26. Neither judges nor administrative agencies are entrusted with construing broad and malleable PRA exemptions. *PAWS II*, 125 Wn.2d at 260. Both courts and agencies are explicitly directed to construe PRA exemptions narrowly. *Id*.

OFM also argues that the Court of Appeals' construction is "narrow when viewed in the context of the duration of the statutory collective bargaining process." *Answer* at 26. There is

nothing "narrow" about an construing the deliberative process exemption to allow OFM to withhold public records until after the legislature has finally funded an agreement. Under a correct *narrow* construction of RCW 42.56.280, OFM's waivable deliberative process exemption expires when the parties sign an agreement, regardless of what happens later in the legislature.

After an agreement is signed OFM and the unions have no control over whether the legislature subsequently approves the signed agreement, and the legislature can only accept or reject the entire agreement. CP 99. No case supports broadly interpreting the "deliberative process" to continue after OFM has made a legally binding decision to sign the agreement. In *PAWS II*, 125 Wn.2d at 256-57, the NIH deliberative process ended when a grant proposal was funded. In *ACLU*, 121 Wn.2d at 554, the deliberative process ended when the negotiated agreement was presented to the city council for adoption. In *West*, 146 Wn. App. at 108, the deliberative process ended when the port entered into the lease at issue. In this case, the narrowly-construed

"deliberative process" of OFM ended when OFM bound itself to the signed agreement.

The Court of Appeals erred as a matter of law. At any time in the past fifty (50) years the legislature could have acted on OFM's policy concerns to enact a specific PRA exemption for collective bargaining. But it has not done so. The ***only*** applicable public policy in this case is the well-established and explicit statutory policy that the PRA must be interpreted liberally and its exemptions must be construed narrowly. RCW 42.56.030; *PAWS II*, 125 Wn.2d at 251. Under the proper narrow construction of RCW 42.56.280 the agency is OFM, and the "deliberative process" ended when OFM signed the agreement.

### C. In the alternative, OFM has no evidence to establish that disclosure of records after the signed agreement is published would be injurious to the deliberative process or that disclosure would inhibit the flow of recommendations, observations, and opinions.

Even if the "deliberative process" continues until legislative approval, as OFM suggests, OFM still bears the burden to prove that the records remain exempt under all of the

other elements set forth in *PAWS II*. Specifically, OFM must also prove, *inter alia*, "that disclosure would be injurious to the deliberative or consultative function of the process [and] that disclosure would inhibit the flow of recommendations, observations, and opinions." 125 Wn.2d at 256.

The trial court ruled only that "pre-decisional disclosure" would be injurious to the deliberative process, CP 129, permitting OFM to withhold the records only until OFM had made its "final decision" to sign the agreement. Neither the trial court nor the Court of Appeals ruled that OFM had carried its burden to prove that ***subsequent*** disclosure would also harm the deliberative process as required by *PAWS II*. The Court of Appeals erred as a matter of law in reversing the trial court's narrow construction of "deliberative process" without any determination that the other *PAWS II* factors were met.

In *ACLU*, *supra*, the court relied on eight declarations that explained in detail how disclosure of the parties' lists ***during*** collective bargaining would negatively impact the bargaining

process. The only "evidence" supporting OFM's decision to continue to withhold records is one paragraph in the declaration of OFM's Labor Relations Manager, Gina L. Comeau. CP 100 (¶ 10). Comeau's opinion that negative impacts "could" result from disclosure is not evidence of any particular injury to the deliberative process, as required by *PAWS II*. Relying on Comeau's conclusory opinion that the *PAWS II* elements are met is contrary to *Hearst* and *PAWS II*, which state that "leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization." *PAWS II*, 125 Wn.2d at 270 n.17 (citing *Hearst*, 90 Wn.2d at 131).

### D. The substantial public importance of this case warrants review under RAP 13.4(b)(4).

CADF correctly notes that this case raises issues of substantial public importance, *Petition* at 6, which should be determined by this Court under RAP 13.4(b). WCOG agrees that the important question of when OFM's bargaining records become disclosable should be decided by this Court. OFM does not even argue otherwise.

### E. The conflict between *PAWS II* and the published opinions of Division I and Division II warrants review under RAP 13.4(b)(1) and (2).

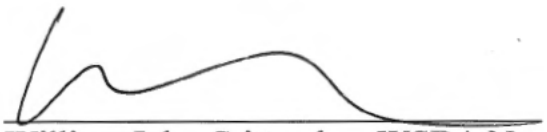
OFM opposes review under RAP 13.4(b)(1) and (2), arguing that there is no conflict between the Court of Appeals opinion below and *PAWS II*, *ACLU* or *West*. *Answer* at 16, 23. But Division Two itself stated in the *Opinion* that it was not bound by Division One's decisions in *ACLU* and *West*, which construed the "deliberative process" more narrowly. *Opinion* at 14. Both Divisions claim to have correctly interpreted *PAWS II*. The apparent conflict between *PAWS II* and the decisions of the Court of Appeals warrants review by this Court under RAP 13.4(b)(1)(2).

## V. CONCLUSION

For all these reasons this Court should grant review of the Court of Appeals opinion below.

This memorandum contains 2491 words, excluding those parts exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 11th day of October, 2024.

By: 

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## CERTIFICATE OF SERVICE

The undersigned certifies that on the 11th day of October, 2024, true and correct copies of this amicus memorandum and the *Motion for Leave to File Memorandum of Amicus Curiae* were served on the parties as follows:

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