No. 95262-1

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, et al.,

Respondent,

v.

WASHINGTON STATE CENTER FOR CHILDHOOD DEAFNESS AND HEARING LOSS, et al.,

Respondent,

and

FREEDOM FOUNDATION,

Petitioner.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 80,000 members and supporters, dedicated to the preservation of civil liberties; it has long sought to protect both privacy rights and the public's right to oversight of government. The ACLU has participated in numerous cases involving the Public Records Act as *amicus curiae*, as counsel to parties, and as a party itself; it has similarly participated in numerous cases involving the privacy guaranteed by Article 1, Section 7 of the Washington State Constitution. In addition to litigation, the ACLU has participated in legislative and rule-making processes involving privacy, public records, and the intersection of the two.

ISSUES TO BE ADDRESSED BY *AMICUS*

1) Whether Article 1, Section 7 protects the privacy of personal information contained in public records.

2) Whether the combination of employee names and birthdates is exempt from disclosure pursuant to the Public Records Act (PRA), Chapter 42.56 RCW.

STATEMENT OF THE CASE

The Freedom Foundation submitted public records requests to a number of state agencies, asking for lists of employee names and

birthdates. When the agencies indicated that they were going to release the records, several public employee unions filed motions for injunctions to prevent disclosure. Although the superior court denied the injunctive motions, the Court of Appeals reversed, holding that the privacy guarantees of Article 1, Section 7 prevented the disclosure of employees' birthdates. *See Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 1 Wn. App. 2d 225, 404 P.3d 111 (2017) (*WPEA*).

This case asks whether Article 1, Section 7 applies to disclosure of public records, and whether birthdates are private information protected from public disclosure.

ARGUMENT

A. Article 1, Section 7 Applies to Disclosure of Personal Information in Public Records

Article 1, Section 7 of the Washington Constitution guarantees that "[n]o person shall be disturbed in his private affairs … without authority of law." It does not mention either search or seizure, and is not limited to them. Instead, Article 1, Section 7's broad inclusion of "private affairs" provides broad protection against governmental invasion of privacy in all contexts, including improper disclosures of personal information.

1. It Is Well-Established that Disclosure of Information Can Violate Privacy

Most of the jurisprudence interpreting Article 1, Section 7 has focused on the disturbance of privacy caused by gathering information (search and seizure), but it has long been recognized that dissemination of information can also disturb one's privacy. For example, two of the four prongs of the invasion of privacy tort involve disclosure of information, not its gathering. *See* Restatement (Second) of Torts § 652D ("Publicity Given to Private Life"); Restatement (Second) of Torts § 652E ("Publicity Placing Person in False Light"). Similarly, one aspect of constitutional privacy "is the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). This Court has itself determined that disclosure of personal information contained in governmental records or discussed in governmental proceedings implicates the privacy rights guaranteed by Article 1, Section 7. *See Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) (considering statute mandating closure of proceedings and sealing of court records involving child victims of sexual assault).

It is not surprising that all of these diverse sources recognize that disclosure of information can invade one's privacy; they simply reflect the

reality of human experience. Common sense tells us that disclosure of personal information is often at least as harmful as the gathering of that information. While a person may be upset to discover that his or her sensitive personal information is in another's hands, the harm may be limited if the information remains with only one other person. The harm is increased, however, if the sensitive information spreads to additional people, and is vastly magnified if the information is publicized so that it becomes common knowledge. Indeed, that magnified harm is so well known that wrongdoers may use fear of publication to extort money from people hoping to preserve their privacy. *See* RCW 9A.56.130, RCW 9A.04.110(28)(e)-(f) (defining the felony of extortion in the second degree).

The harm of disclosure is particularly acute when the information was originally freely shared, perhaps with a friend, or for limited purposes. In such cases, disclosure is the *only* harm to privacy. There are many examples of this, referred to by a myriad of terms in different contexts, including blabbing, breach of confidence, revenge porn, outing, and secondary use. However it is styled, the damage done is often significant—and often is referred to as a *betrayal*. It is clear that, in at least some instances, disclosure of personal information is a profound disturbance of one's private affairs. Accordingly, when the disclosure is

by a governmental entity, it must be justified by authority of law in order to comport with Article 1, Section 7.

2. People Do Not Lose Constitutional Privacy Simply Because Government Agencies Maintain Information About Them

The Freedom Foundation ignores Article 1, Section 7's broad protection of private affairs, and categorically asserts that there is no constitutional privacy interest in disclosure of personal information contained in public records. Petitioner's Supplemental Brief at 5. Without mentioning either *Whalen* or *Allied Daily Newspapers*, the Freedom Foundation seizes on (and misinterprets) this Court's statement that "an individual has no constitutional privacy interest in a *public* record." *Nissen v. Pierce County*, 183 Wn.2d 863, 883, 357 P.3d 45 (2015). This reliance is misplaced.

First, the context clearly shows that *Nissen* was simply distinguishing between different types of records held by a public official on his personal cell phone, and considering the constitutional implications of forcing the official to turn over each type of those records to a governmental entity. Many of those records are entirely personal in nature, but some could relate to the official acting in his government capacity, and qualify as public records. That line in *Nissen* merely repeated the uncontroversial proposition that the custodian of public records—there,

the public official who held the records on his personal phone—does not have a privacy interest in holding those records. The official did not assert, and this Court did not consider, privacy rights in the *contents* of the public records—an issue that would take considerably more than a single line to resolve. In fact, in the very same passage, this Court also stated that "public officials have 'constitutionally protected privacy rights in matters of personal life *unrelated to any acts done by them in their public capacity*.'" *Id.* at 883 n. 10 (quoting and emphasizing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977)).[1]

Second, the Freedom Foundation fails to appreciate the difference between the federal and state constitutions. It claims that "[o]nce the government possesses information, and it is a *public* record, an individual can no longer assert a constitutional privacy interest in that information." Petititioner's Supp. Br. at 9; *see also* Brief of Resp. Freedom Foundation at 18. There is some support for this proposition under the federal constitution, where the United States Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S.

[1] Public employees' birthdates are, of course, "unrelated to any acts done by them in their public capacity." The Freedom Foundation's quotation from *Nixon*, saying one cannot assert privacy to information "that he has already disclosed to the public," Petitioner's Supp. Br. at 9, is also inapposite, as the employees here have disclosed their birthdates solely to their employers, not to the public.

735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); *accord, e.g.*, *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). *But see United States v. Jones*, 565 U.S. 400, 417, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring) ("More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.").

That proposition has been soundly rejected, however, under Article 1, Section 7, which continues to protect personal information even after it has been shared with another. "It is unrealistic to say that the cloak of privacy has been shed because [third parties] are aware of this information." *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986) (quotation and citation omitted) (finding privacy rights in phone records and explicitly rejecting *Smith v. Maryland* under Article 1, Section 7); *see also State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007) (finding privacy rights in bank records and explicitly rejecting *Miller* under Article 1, Section 7). Just as privacy is not defeated by limited disclosures of information to banks and utilities in order to participate in modern society, it is not defeated by providing information to the government. A limited disclosure of information to an employer, even a government employer, for employment purposes is much different than publication of that

information to the world at large.[2] Simply put, Article 1, Section 7 demands that courts look at the nature of personal information, and the *specifics* of any previous disclosures, to determine whether it constitutes a "private affair."

The present case directly addresses the privacy only of birthdates, but the argument advanced by the Freedom Foundation is not limited to birthdates. Public records in today's world contain a vast quantity of personal information, much of which is incredibly sensitive and private, and the Freedom Foundation would relegate its protection solely to the Legislature. This is plainly incorrect; protection of the "privacy interests which citizens of this state have held, and should be entitled to hold," is guaranteed by our constitution, and cannot be contingent upon eventual legislative action. *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

Recognition of constitutional protection is especially necessary because legislative action can be slow; reliance solely upon statutory protection would leave Washingtonians' privacy at risk for extended periods, especially as the volume and scope of public records requests

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[2] For that matter, privacy rights continue to exist even when information has been widely disseminated, including by the media and on the Internet, if the subjects of the information did not voluntarily consent to that publication. *See Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011).

continually grows. While the Legislature does enact new exemptions from public disclosure almost every year, it is often only in response to either a problematic request for certain records, or after agency employees realize that they possess sensitive data. And that may be long after that type of public record was first created, potentially putting Washingtonians' privacy at risk. For example, health care information is now protected by RCW 42.56.360(2), but that provision was not enacted until 1991, almost two decades after the PRA was enacted. *See* Laws of Washington (1991), ch. 335, § 902. Credit card numbers and similar personal financial information are now protected by RCW 42.56.230(5), but were unprotected by the PRA for over 25 years until passage of Laws of Washington (2000), ch. 56, § 1. Fortunately, *amicus* is not aware of requests for and disclosure of such sensitive medical and financial information during those years, but it is preposterous to think that Washingtonians had no cognizable privacy interest in the public dissemination of that information by governmental entities until the PRA was amended to add statutory protection. Yet that is exactly the result that would be dictated by the Freedom Foundation's categorical rejection of constitutional privacy interests in public records.

3. This Court Need Not Decide the Scope of Constitutional Privacy in Public Records

While it is thus clear that Article 1, Section 7 protects the privacy of personal information contained within public records, the scope of that protection has not yet been delineated. Determining that scope involves difficult questions, and *amicus* respectfully suggests this is not the appropriate case in which to make those determinations. The Court of Appeals decided this case solely on constitutional grounds, and did not address any of the statutory arguments raised by the unions. *See WPEA*, 1 Wn. App. 2d at 229 n. 2. Its approach ignored the doctrine of constitutional avoidance; this Court should take the opposite approach, and resolve this case on statutory grounds. *See, e.g., Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). As discussed below, disclosure of employees' birthdates in combination with their names would violate their right to privacy, so the birthdates are exempt from disclosure under RCW 42.56.230(3). There is thus no need for this Court to go further and expound on the scope of constitutional privacy protection in relation to public disclosure.

There are at least two difficult questions this Court would need to answer if it decides on constitutional grounds. First, it is unclear what types of information within public records fall within "private affairs," and

whether that is coterminous with the types of information protected in the search and seizure context. Second, it is unclear what qualifies as "authority of law" in the disclosure context.

The Freedom Foundation would have this Court collapse both questions and adopt a rational basis test, with misplaced reliance on *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997). *Ino Ino* was decided before this Court clarified that the proper approach to "interpretation of article I, section 7 involves a two-part analysis," first "determining whether the action complained of constitutes a disturbance of one's private affairs" and then determining "whether 'authority of law' justifies the intrusion." *Miles*, 160 Wn.2d at 243-244. *Ino Ino* did not make either of those determinations; instead it simply held that Article 1, Section 7 provides no greater protection than the federal constitution in the particular context of licensure of nude dancing. *See Ino Ino*, 132 Wn.2d at 124. Adoption of a rational basis test to generally govern disclosure of personal information held by government entities, as urged by the Freedom Foundation, would effectively transform Article 1, Section 7 into a nonentity; the same rational basis would be required in any event to uphold any statute, regardless of whether it had privacy implications.

The Court of Appeals correctly followed the two-step analysis, but had little guidance on how to decide either question. As discussed below,

birthdates have become sensitive information in today's society, but sensitivity is only one aspect of the "private affairs" analysis, and it is unclear how the rest of the analysis works in the context of public records. And there was simply no relevant precedent for the question of "authority of law." In the search and seizure context, a warrant is the touchstone for authority of law, and a statute only suffices if it incorporates equivalent protection to a warrant or subpoena issued by a neutral magistrate. *See Miles*, 160 Wn.2d at 247-249. Since warrants are inapplicable to disclosure, some other test is necessary in the disclosure context. One possibility is a "justification" test, as used by the Court of Appeals. *See WPEA*, 1 Wn. App. 2d at 236-37. Another possibility is a balancing test, weighing the interests both for and against disclosure. *See Allied Daily Newspapers*, 121 Wn.2d at 211.

Amicus respectfully suggests this Court need not decide these difficult constitutional questions, and should instead find statutory protection for the employees' birthdates.

B. Employee Birthdates Are Exempt from Public Disclosure as a Violation of the Employees' Right to Privacy

Personal information in employees' personnel files[3] is exempt from public disclosure "to the extent that disclosure would violate their

[3] The Freedom Foundation does not dispute that the records at issue here qualify as personnel files.

right to privacy." RCW 42.56.230(3). The right to privacy is "violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050. In other words, RCW 42.56.230(3) "protects personal information that the employee would not normally share with strangers." *Dawson v. Daly*, 120 Wn.2d 782, 796, 845 P.2d 995 (1993). Birthdates are one such example.

Employees' birthdates are not of legitimate concern to the public because they have absolutely no relation to the conduct of any government business. At best, the public's interest in an employee's birthdate is gossipy, and at worst is maleficent (e.g., intended to foster identity theft).

Similarly, disclosure of birthdates is highly offensive to a reasonable person. Employees provided their birthdates to their employing agencies for routine employment purposes, and reasonably expected that their birthdates would be used only for those employment purposes. Over the past fifty years, there have been a variety of formulations of fair information practices, and a core tenet of each of them—corresponding to ordinary societal expectations—is a restriction on secondary use of information. *See, e.g.*, U.S. Dep't of Health, Education, and Welfare, *Report of the Secretary's Advisory Committee on Automated Personal Data Systems: Records, Computers, and the Rights of Citizens* (1973)

("There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.").

Release of birthdates to the public is a far different use than the employment purposes for which the birthdates were provided, and such disclosure against the employees' wishes is highly offensive. Besides simply believing that their birthdates are none of the public's business, employees also reasonably fear that disclosure of their birthdates will open them to risk of identity theft, and that "disclosure could lead to public scrutiny of individuals concerning information unrelated to any governmental operation and impermissible invasions of privacy." *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 222, 951 P.2d 357 (1998) (holding that employee ID numbers are exempt from public disclosure).

The Freedom Foundation's dismissal of the privacy interest in birthdates as requiring a "linkage" analysis, Brief of Resp. Freedom Foundation at 11-14, fails to appreciate the nature of information sensitivity. Almost no information is sensitive by itself; the sensitivity comes from its context, and its combination with other pieces of information. For example, information about the existence of sexual relations between two people is the quintessential example of sensitive information, but there is a huge difference in sensitivity between the fact

that a married couple has sexual relations, and the fact that a married supervisor has sexual relations with a junior employee. Similarly, financial account numbers are by themselves meaningless, but they enable access to a list of financial transactions. In turn, many of those transactions are themselves probably not particularly sensitive if considered in isolation but, as this Court has explained, it is the combination of all this information that reveals one's "political, recreational, and religious" affiliations, along with details of the person's "travels, their affiliations, reading materials, television viewing habits, financial condition, and more." *Miles*, 160 Wn.2d at 246-47. And, of course, disclosure of financial account numbers facilitates identity theft and other financial wrongdoing. That context and combination of information is what makes financial account numbers indisputably sensitive. Birthdates now share many of the same characteristics.

The strongest argument against recognizing a privacy interest in birthdates comes from the Restatement (Second) of Torts § 652D cmt. b. It lists a variety of types of information to illustrate facts that are *not* private, and includes birthdates among those. That comment does not, however, have the force of law. It is only a guide to interpretation, and must be read with consideration for when it was written—in an age before the Internet, or indeed widespread computerization of any form. Significantly, the

entire concept of identity theft barely existed when the comment was written. In the decades since, both professionals and ordinary consumers have increasingly learned about the dangers of identity theft, and about the need to protect our data.

The notion of privacy is a societal construct, and may change over time. For example, telephone numbers were once considered to be entirely public, with directories published and delivered to every door; only a very few people chose to pay extra to have an "unlisted" number. Now, most cell phone numbers and many landline numbers are kept private, and divulged only to friends or those with a need to know. Rather than looking at a static list of types of information written decades ago, *amicus* respectfully suggests that this Court consider the nature of information and its role in society as it exists today.

Both the need for contemporaneous interpretation and the nature of information sensitivity are illustrated by Social Security Numbers (SSNs). SSNs contain no sensitive information in and of themselves; they are simply a string of digits. Indeed, for many years SSNs were not considered to be at all sensitive. A multitude of public and private entities routinely requested SSNs, and people freely supplied their SSNs without thinking twice, even having their SSNs printed on their personal checks, available for any payee to use. Entities requesting SSNs included not just financial

entitites such as banks and tax authorities, but also utilities, health care entities, and even such minor entities as video rental stores. Many of these entities even adopted SSNs as identifiers for their own accounts. Over time, this widespread use of SSNs transformed their nature; SSNs became the key to assembling a multitude of information about a person's life, including financial information and health care information. And, slowly, the societal perception of SSNs also changed; rather than being viewed as innocuous, they are now widely accepted as falling among the most sensitive of information. *See, e.g.*, *Bennett v. Smith Bundy Berman Britton, PS*, 176 Wn.2d 303, 313, 291 P.3d 886 (2013) ("sensitive information such as medical records, social security numbers, or the identities of victims"); *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 254, 884 P.2d 592 (1994) (*PAWS*) ("disclosure of a public employee's social security number would be highly offensive to a reasonable person and not of legitimate concern to the public").

Birthdates are following the same arc as SSNs, transitioning from innocuous information to sensitive information. "The use of Social Security numbers as personal identifiers has fallen out of favor in recent years, particularly as states pass legislation to restrict their use," but "people are regularly requested to enter their date of birth by retailers and websites." Maryalene LaPonsie, *10 Ways You're Opening Yourself Up for*

Fraud, U.S. News & World Report, Apr. 5, 2018, <https://money.usnews.com/money/personal-finance/family-finance/articles/2018-04-05/10-ways-youre-opening-yourself-up-for-fraud>. The combination of name and birthdates can be used to determine other information about an individual. In fact, some information, such as criminal histories, can be obtained *only* with birthdates (or fingerprints)—not with SSNs. A variety of entities use birthdates as an authenticating piece of information. For example, the Department of Licensing requires a birthdate in order to change one's address online. *See Change your Driver license/ID card address*, <https://fortress.wa.gov/dol/dolprod/dolChangeAddress/EnterDriver.aspx>. Similarly, other entities use birthdates as a form of identity verification, allowing a person to gain account access, reset passwords, or even pick up prescription medicines.

This widespread use of birthdates now makes them desirable to identity thieves; they are one of the pieces of information that "can be used to open fraudulent accounts, file fake tax returns or otherwise commit identity theft." LaPonsie. Accordingly, the federal government warns people not to "respond to unsolicited requests for personal information (your name, *birthdate*, Social Security number, or bank account number)." USA.gov, *Identity Theft*, https://www.usa.gov/identity-theft> (emphasis

added). In fact, one identity theft expert warns that "the most dangerous piece of information you can give out is your birthdate." Lyenka Little, *What Can Thieves Find Using Your Zip Code?*, ABC News, Feb. 23, 2011, <http://abcnews.go.com/Business/identity-theft-zipcode-profiling-facebook/story?id=12944608> (quoting John Sileo). Disclosure of birthdates thus creates a real risk of identity theft for public employees—which cannot be the intent of the Public Records Act.

The privacy-invasive nature of public disclosure of employee birthdates is demonstrated by the very request at issue here. The Freedom Foundation wants to obtain employee addresses in order to contact those employees. It did not ask the agencies directly for the employees' addresses, because those addresses are exempt from disclosure pursuant to RCW 42.56.250(4). Instead, it asked for employees' birthdates. In the Freedom Foundation's own words, it "intends to use the requested public employees' names and birthdates to acquire additional contact information that is publicly available from the Secretary of State's office on the Voter Registration Database." Brief of Resp. Freedom Foundation at 15. In other words, the only reason it wants birthdates is in order to use those birthdates to circumvent the statutory protection for employee addresses. Requesters should not be allowed to so easily evade privacy protections, and public employees should not be forced to choose between maintaining

their statutorily-mandated privacy and exercising their rights of franchise. There is no legitimate public interest in information used to thwart the Legislature's will, and disclosure of such information is highly offensive.

More than twenty years ago, this Court recognized that disclosure of public employees' SSNs "would be highly offensive to a reasonable person and not of legitimate concern to the public", and held they were exempt from disclosure. *PAWS*, 125 Wn.2d at 254. Despite the compelling privacy rationale for protecting SSNs, the Legislature did not enact a specific exemption for them until just a few years ago. *See* Laws of Washington (2015), ch. 224, § 2. This Court should similarly recognize that disclosure of public employees' birthdates is a violation of their privacy, regardless of whether the Legislature has yet enacted a specific exemption for birthdates.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to affirm the Court of Appeals on other grounds. We ask the Court to reaffirm that Article 1, Section 7 protects privacy in the disclosure of public records, but this Court need not decide whether birthdates fall within the scope of that protection. Instead, *amicus* respectfully requests the Court to hold that the combination of employee names and birthdates is exempt from disclosure under RCW 42.56.230(3).

Respectfully submitted this 27th day of April 2018.

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