Case No. 16-36038

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOES 1-10, individually and on behalf of others similarly situated;
JOHN DOES 1-10, individually and on behalf of others similarly situated,

Plaintiffs-Appellees,

v.

DAVID DALEIDEN, an individual,

Defendant-Appellant,

ZACHARY FREEMAN; UNIVERSITY OF WASHINGTON; PERRY TAPPER, Public Records Compliance Officer at the University of Washington, in his official capacity,

Defendants.

Appeal from the United States District Court for the
Western District of Washington, Seattle, Case No. 2:16-cv-01212-JLR.
The Honorable James L. Robart, Judge Presiding

AMICUS BRIEF OF THE WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF DEFENDANT-APPELLANT DALEIDEN

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CORPORATE DISCLOSURE STATEMENT

The Washington Coalition for Open Government has no parent corporation and no publicly held company owns 10% or more of the Coalition's stock.

/s/ Michele Earl-Hubbard
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INTEREST OF THE AMICUS

The Washington Coalition for Open Government ("WCOG") is an independent, non-partisan non-profit 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. WCOG consists of individuals and organizations intent on preserving and protecting Washington's laws related to preserving government transparency, including the Washington Public Records Act (RCW 42.56 et seq.) and Open Public Meetings Act (RCW 42.30 et seq.) Its mission is to represent the public in matters where open government issues are raised, are threatened, or deserve broader exposure. Further, WCOG conducts public workshops and forums around the state, involving the public, public officials, and the media in discussing government accessibility as provided in the various statutes that assure such access and accountability from our public agencies. The broad and vague rationale at issue here for withholding public records, if upheld by this Court, would stymie the rights of the public and of WCOG to monitor their government and hold it accountable. The case concerns more than whether these requestors can get these records, but whether the PRA the people of Washington enacted through initiative will lose meaning or force.

WCOG has sought consent from all parties to this appeal for the filing of this brief, and consent has been granted by Defendant-Appellant and Defendants University of Washington and Perry Tapper. No answer has been received from

Defendant Zachary Freeman, and Plaintiffs-Appellees have declined to consent. A Motion to file this Amicus Brief is filed with this Brief.

No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The District Court's preliminary injunction orders the withholding and redaction of public records in the absence of an applicable exemption from disclosure, and provides an unworkable rule. Though the requestor below agreed to allow the University of Washington ("UW") to redact the names and contact information of all individuals identified in the responsive records (other than the eight abortion clinic employees specifically identified in Daleiden's request), the District Court nonetheless proceeded to enter an injunction against all "personally identifying information or information from which a person's identity could be derived with reasonable certainty for all individuals" including, but not limited to:

> (a) information that identifies or provides the location of an individual,
> (b) information that would allow an individual to be identified or located,
> (c) information that would allow an individual to be contacted,
> (d) names of individuals, (e) phone numbers, (f) facsimile numbers,
> (g) email and mailing addresses, (h) social security or tax identification numbers, and (i) job titles.

Order at 25-26 (Dkt. #88).

In several key ways, this decision extends beyond any prior PRA decision. First, it erroneously recognizes constitutional privacy interests in *public* records. Second, it orders the government to censor information which fails to qualify for any PRA exemption, a failure which necessarily mandates disclosure. In so doing, it contradicts nearly two decades of Washington State law declaring that public employees and public employment contact information are "public"—not "private," and not exempt. And finally, it violates the plain language of the statute that PRA exemptions must be narrowly construed and a decade of Washington State case law holding that the exemptions only be applied based on the information within the four corners of the record, not on evidence or speculation about potential information from additional sources. If allowed to stand, the District Court's decision will dilute the PRA's mandatory terms and swallow its pro-disclosure mandate. The PRA may not and should not be read to prevent the disclosure of public agencies' public business, especially when those public activities are of unquestionably legitimate public concern.

Below, WCOG explains why the District Court's Preliminary Injunction Order should be overturned. First, there are no constitutional privacy interests in a public record. The Plaintiffs-Appellees did not identify any applicable statutory exemptions for the information and the constitutional "privacy" or "association" arguments they raised must fail and should not have been held to support the injunction. Second, the District Court's order to "redact[] all personally indentifying [*sic*] information or

information from which a person's identity could be derived" is a standard that is vague and unworkable, and would swallow up the PRA's open government mandate. Simply working for the government, either as an employee or in some other professional capacity, does not give rise to the privacy concerns that trigger protection from disclosure. The narrow test for privacy prevents withholding when the information is one of legitimate public concern. Here, the public has a right to know the identity of public employees who receive public money to perform public tasks. Particularly when dealing with medical research, the source of the research is essential to analyzing the research itself. Thus, reversing the District Court's order is imperative to preserving the PRA's interpretive mandate and purpose.

ARGUMENT

I. The release of records at issue does not implicate constitutional rights.

The Washington Supreme Court has concluded that "an individual has no constitutional privacy interest in a public record." *Nissen v. Pierce Cty.*, 357 P.3d 45, 56, 183 Wash.2d 863, 883 (Wash. 2015) (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457, 97 S. Ct. 2777, 2797, 53 L. Ed. 2d 867 (1977) ("public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.")). Just three months ago, the Washington Court of Appeals clearly extended this holding to First Amendment claims of associational privacy. *West v.*

Vermillion, 384 P.3d 634, 639, 196 Wash. App. 627 (Wash. Ct. App. 2016). In *West*, the court "reject[ed the]... argument that the First Amendment's right to association protects public records" because "associational rights under the First Amendment are constitutional privacy rights, and an individual has no constitutional privacy interest in a public record." *Id.*, 384 P.3d at 639. *See also O'Neill v. Shoreline*, 187 P.3d 822, 831, 145 Wash. App. 913 (Wash. Ct. App. 2008) (rejecting right of association claim based on required production of email from constituent to Deputy Mayor), *affirmed in relevant part by* 240 P.3d 1149, 170 Wash.2d 138 (Wash. 2010).

Therefore, if a public record in the government's possession contains some form of "identifying information" about an individual, that individual can have no constitutional privacy interest in the record—precisely because it is already a *public* record in the government's possession.

Under the PRA, "public records" are broadly defined as

> any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

RCW 42.56.010(3). *West* and *Nissen*, which each dealt with records in the possession of a public employee, clarified that in such circumstances whether a record is subject to disclosure hinges on whether the record was prepared, owned, used, or retained within the scope of employment. *Nissen*, 357 P.3d at 54; *West*, 384 P.3d at 640.

Here, no party argues that any of the requested records are not *public* records, and for good reason. The records are undisputedly owned, retained, used, and mostly prepared by the government. The government also possesses all of these records. Order at 3 ("UW notified Plaintiffs that absent a court order issued by August 4, 2016, it would provide documents responsive to Mr. Daleiden's PRA request without redaction at 12:00 p.m. on August 5, 2016.").

Further, the records responsive to this request—invoices, communications, and purchase orders—are *quintessential* public records. The records document: i) a government laboratory's transactions; ii) of government business; iii) at government expense; iv) carried out with nongovernmental organizations and personnel. These particular records reveal transactions of acute public interest, debate, and concern, and transactions that display government actors' and contractors' management of taxpayer dollars. Daleiden's Brief at 6-9.

Moreover, the requested records do not contain wholly private information "unrelated to any acts done by them in their public capacity." *Nixon*, 433 U.S. at 457. On the contrary, the records reveal the administration of public business. Order at 2 (Daleiden's request sought "all documents that relate to the purchase, transfer, or procurement of human fetal tissues, human fetal organs, and/or human fetal cell products at the [UW] Birth Defects Research Laboratory from 2010 to present."). *Nissen*, 357 P.3d at 52 ("[R]ecords can qualify as public records if they contain any

information that refers to or impacts the actions, processes, and functions of government."). Unquestionably, the records at issue are public records under Washington's PRA.

Accordingly, *Nixon, Nissen*, and *West* should control. The principle that "an individual has no constitutional privacy interest in a public record" is not only doctrinally correct, it makes perfect logical sense. *See Nissen*, 357 P.3d at 56. The constitutional interest in "informational privacy" protects individuals from being forcibly compelled to disclose certain sensitive personal information *to the government*. *See State v. Arreola*, 290 P.3d 983, 988, 176 Wash.2d 284, 291 (Wash. 2012) (comparing the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution); *State v. Athan*, 158 P.3d 27, 33 160 Wash.2d 354, 366 (Wash. 2007) ("The term 'private affairs' generally means 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.'"); *Service Employees International Union Local 925 v. Freedom Foundation*, __ P.3d __, 2016 WL 7374228 at *8 (Wash. App. Ct., Dec. 20, 2016) ("Interpreting and applying article I, section 7 requires a two-part analysis. The first step requires determining whether the ***State*** unreasonably intruded into a person's 'private affairs.' ***If a person's private affairs are not disturbed, our analysis ends and there is no article I, section 7 violation.***") (emphasis added) (internal citations omitted); *Robinson v. City of Seattle*, 10 P.3d 452,

461, 102 Wash. App. 795, 812 (2000) ("The ultimate inquiry [of Article 1, section 7] is whether the government has unreasonably intruded into a person's private affairs."). Constitutional privacy protections prevent the *government* from peering into areas of protected privacy. This is no constitutional aberration. The Bill of Rights protects against government intrusion. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 (1984) ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."). Therefore, without government intrusion, there is no violation of individual liberty, and thus no violation of the constitution. Thus, it follows that a constitutional "informational privacy interest" cannot apply to information already in the government's possession. Constitutional privacy rights prohibit the government from initially procuring the information, not disclosing records already in its possession.[1] While public record laws, such as the PRA, have

[1] In *Service Employees International Union Local 925 v. Freedom Foundation*, __ P.3d ___, 2016 WL 7374228 at *7-9 (Wash. Ct. App., Dec. 20, 2016), Division II of the Washington Court of Appeals discussed Article I, Section 7 in the context of public records because appellants first raised the argument at the trial level before the Washington Supreme Court rejected the principle that public records can be withheld pursuant to a constitutional right to privacy in *Nissen*, 357 P.3d 45. Additionally, the court examined and discussed cases where the *government* intruded on individuals' private affairs, not cases where individuals had already voluntarily provided the information to the government. *Id.* (discussing *State v. Gunwall*, 720 P.2d 808, 106 Wash.2d 54 (Wash. 1986); *State v. Butterworth*, 737 P.2d 1297, 48 Wash. App. 152 (Wash. 1987)).

adopted narrowly construed privacy exemptions to prevent the disclosure of certain information, those are based on solely on statutory exemptions. RCW 42.56.050 ("The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.").

Because there can be "no constitutional privacy interest in a public record," the District Court's order must be reversed to the extent it relied upon that basis.[2]

[2] Even if the Court applied its "informational privacy" balancing from *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999), it would still be forced to reach the same result. In that case, a bankruptcy petition preparer argued that the government would violate his right to informational privacy by compelling him to include his Social Security Number on bankruptcy petitions, because the government made those petitions publicly available pursuant to 11 U.S.C. § 110(c). The Court acknowledged that the preparer likely had a legitimate constitutional privacy interest in the nondisclosure of his SSN, name, and address, *id.* at 958, but concluded that the speculative harms he alleged he might suffer as a result of disclosure could not overcome the government interest in public access to judicial proceedings, generally, and bankruptcy proceedings, specifically. *Id.* at 960. In this case, the personally identifying information, itself, is not highly sensitive information like SSNs. Moreover, the interest in public access under the PRA is at least an equally compelling government interest as public access to judicial proceedings. "The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions... Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests." *Progressive Animal Welfare Soc. v. Univ. of Washington*, 884 P.2d 592, 597, 125 Wash.2d 243, 251 (Wash. 1994). Thus, just like the "public access" interest in *In re Crawford*, the PRA facilitates and effectuates a basic constitutional guarantee that "[a]ll political power is inherent in the people, and governments derive their just powers from the

Similarly, the District Court erred when it relied upon an alleged claim of right of association between the government and public employees and the facilities from which the University received or purchased fetal tissue as a basis for finding a Constitutionally-based exemption. The Plaintiffs-Appellees did not adequately describe the nature of their alleged association, how it was Constitutionally protected, or how withholding of these public records regarding public business was necessary to protect such a right of association. Like informational privacy, the right of association is commonly understood to allow non-governmental individuals to associate with one another, ***free from interference by the government***—and not to protect the rights of individuals or of businesses to "associate" with the government. *See, e.g.*, *Roberts*, 468 U.S. at 619 ("Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of individual liberty."). The District Court accepted a Constitutional "right of association" claim as a Constitutionally-prescribed exemption to the production of public records including invoices, payment records, and other documents showing public business conducted at public expense between the government and other businesses. The District Court erred in issuing the injunction Order based on the right of association claim and should be overturned.

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consent of the governed, and are established to protect and maintain individual rights." Wash. Const. art. I § 1.

II. The District Court's "personally identifying information" standard is vague and unworkable and dramatically disrupts the PRA's interpretive mandate.

Plaintiffs-Appellees did not show a statutory exemption. They instead relied on the alleged Constitutional right to privacy and right of association claims discussed above. "The PRA is 'a strongly worded mandate for broad disclosure of public records'" that must "be liberally construed." *Bainbridge Island Police Guild v. City of Puyallup,* 259 P.3d 190, 194, 172 Wash.2d 398, 408 (Wash. 2011) (quoting *Hearst Corp. v. Hoppe,* 580 P.2d 246, 249, 90 Wash.2d 123, 127 (Wash. 1978)); *Fisher Broadcasting–Seattle TV LLC v. City of Seattle,* 326 P.3d 688, 691-92, 180 Wash.2d 515, 521 (Wash. 2014). The PRA requirement of disclosure is broadly construed and exemptions are narrowly construed to "assure that the public interest will be fully protected." RCW 42.56.030. The exemptions are concrete and are to be narrowly applied. *Id.* This is to ensure the PRA's stated purpose and intent that Washington citizens "do not yield their sovereignty to the agencies that serve them," nor yield the "right to decide what is good for the people to know and what is not good for them to know." *Id.* Instead, the PRA explicitly recognizes that citizens should remain informed "so that they may maintain control over the instruments they have created." *Id.*

But in this case, relying on the non-existent Constitutional privacy and association claims, the District Court effectively displaced Washington citizens' right to be informed by ordering that the State, before disclosing, scrub the records of the following information:

> all personally indentifying [*sic*] information or information from which a person's identity could be derived with reasonable certainty for all individuals. Such information includes but [is] not limited to
> (a) information that identifies or provides the location of an individual, (b) information that would allow an individual to be identified or located, (c) information that would allow an individual to be contacted, (d) names of individuals, (e) phone numbers, (f) facsimile numbers,
> (g) email and mailing addresses, (h) social security or tax identification numbers, and (i) job titles.

Order at 25-26. Daleiden claims that the District Court's standard will result in "a document production so heavily scrubbed of information [it will] be practically worthless for investigative purposes." Daleiden Brief at 11. WCOG agrees. Citizen investigations of agency conduct fit exactly within the citizen control envisioned, and explicitly permitted, by Washington's PRA. *See* RCW 42.56.030. The removal of *all* information which could conceivably identify *any* individual, including but of course "not limited to" yet another list of vaguely defined categories, eviscerates the public's right to know highly relevant details about the Birth Defects Research Laboratory, and hold that state agency accountable. The untethered, expansive scope of the Court's injunction effectively eviscerates the letter and spirit of the PRA, and establishes a dangerously vague and confusing precedent for PRA requests in the future.

A. The types of personal information protected by the District Court's "personally identifying information" standard are not the types of information protected from disclosure by either the statutory or constitutional rights to privacy.

The PRA contains several provisions that can exempt portions of certain records to the extent that disclosure would violate public employees' and other

individuals' right to privacy. *See* RCW 42.56.230(3) (public employees); *see also* RCW 42.56.230(4) (taxpayers); *see also* RCW 42.56.240(1) (person whose information is contained in intelligence or investigative files); *see also* RCW 42.56.240(14) (person who is captured on footage recorded on a law enforcement body cam). When any of these privacy exemptions are at issue, the right to privacy is analyzed under the standard set forth in RCW 42.56.050 ("a person's right to privacy... is... violated 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.").

The "highly offensive" prong looks to whether a particular request would disclose highly "sensitive, personal information." *DeLong v. Parmelee*, 236 P.3d 936, 955, 157 Wash. App. 119, 157 (Wash. App. Ct. 2010), *review granted, cause remanded*, 248 P.3d 1042, 171 Wash.2d 1004 (Wash. 2011); *see also Dawson v. Daly*, 845 P.2d 995, 1003, 120 Wash.2d 782, 796 (Wash. 1993) ("the right of privacy applies only to the intimate details of one's personal and private life"). The Washington Supreme Court in *Hearst v. Hoppe*, 580 P.2d at 253 defined the "right to privacy," in the PRA by adopting the Restatement (Second) of Torts §652D, the tort of publication of private facts. According to *Hearst*, "the comment to the Restatement illustrates what nature of facts are protected by this right to privacy." *Id.*, 580 P.2d at 253.The Court elaborated:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely

> to himself or at most reveals only to his family or to close personal friends. **Sexual relations**, for example, are normally entirely private matters, as are **family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.** When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest... **We therefore adopt the Restatement standard as the controlling [definition].**

Id. at 253 (emphasis added).

Washington courts have repeatedly employed the *Hearst* standard in PRA privacy cases. *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405,* 189 P.3d 139, 148, 164 Wash.2d 199, 216 (Wash. 2008) ("disclosure of the identity of a teacher accused of sexual misconduct is highly offensive to a reasonable person."). In *Cowles Pub. Co. v. State Patrol*, the Court of Appeals remarked that RCW 42.56.230(3) "was intended to shield only that **highly personal information** often contained in employment and other personnel files." *Cowles Pub. Co. v. State Patrol*, 724 P.2d 379, 386, 44 Wash. App. 882, 891 (Wash. App. Ct. 1986), *rev'd on other grounds*, 748 P.2d 597, 109 Wash.2d 712 (Wash. 1988) (emphasis added).[3] In *Human Rights Comm'n v. Seattle*, the Court of Appeals applied the *Hearst* standard and found that

[3] "Such information might include, but is not limited to, the *particular employee's union dues, charitable contributions, deferred compensation, medical records, disabilities, employment performance evaluations*, and *reasons for leaving employment*... Likewise, the phrase may include those *sensitive records relating to health*, or *marital and family information necessary for calculating health plans, job benefits*, and *taxes*." *Cowles*, 724 P.2d at 386, 44 Wash. App. at 891 (emphasis added).

RCW 42.56.230(3) exempted applicants' answers to certain employment application questions which "elicit[ed] the most private and confidential matters pertaining to the life of the applicant," information "replete with substantial and comprehensive private matters pertaining to the applicant and his past activities." *Human Rights Comm'n v. Seattle*, 607 P.2d 332, 335, 25 Wash. App. 364, 369-70 (Wash. App. Ct. 1980).

The *Hearst v. Hoppe* standard (which incorporates the Restatement):

> [I]illustrates what nature of facts are protected by this right to privacy, and taken in context makes clear that the PRA will not protect everything that an individual would prefer to keep private. The PRA's 'right to privacy' is narrower. **Individuals have a privacy right under the PRA only in the types of 'private' facts fairly comparable to those shown in the Restatement.**

Predisik v. Spokane School District No. 81, 346 P.3d 737, 741, 182 Wash.2d 896, 905 (Wash. 2015) (citations omitted).

The private facts described in the Restatement are far narrower and specific than "all personally indentifying [*sic*] information or information from which a person's identity could be derived." Order at 25. In fact, this information is nothing like the highly personal, sensitive information that the PRA's right to privacy shields from disclosure. Instead, the Court draws its redaction standard to avoid purely speculative (in this case) threats and harassment individuals associated with this particular public activity could face if that association is made public. But that inquiry looks far beyond the records themselves to make the determination, which courts may not do. "Agencies and courts must review each responsive record and discern from

its four corners whether the record discloses factual allegations that are truly of a private nature, using the Restatement as a guide." *Predisik*, 346 P.3d at 741. Given the nature of the communications, invoices, and purchase orders at issue in this case, it is hard to imagine that the records contain details about identifiable individuals' sexual histories, family quarrels, humiliating illnesses, or other intimate personal details. On the contrary, these individuals are in the records because of their participation in the government's fetal tissue procurement processes. Knowing who these people and organizations are and what they are doing is exactly the type of information the PRA exists to disclose.

A very similar analysis occurs under the constitutional information privacy analysis (although WCOG believes it cannot have any application here). Circuits that recognize the right begin by evaluating the sensitivity of the information that is, itself, at issue. *See In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (Social Security Numbers indiscriminately disclosed alongside names and addresses); *Fadjo v. Coon*, 633 F.2d 1172, 1174 (5th Cir. 1981) (the most private details of a person's life); *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (medical records); *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994) ("Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition."). Perhaps this constitutional privacy right could exempt an individual's

Social Security Number that might be listed in the records,[4] but it would certainly not exempt "all personally indentifying [*sic*] information or information from which a person's identity could be derived." Under such a standard, this constitutional privacy right (which arguably does not even apply to public records) would swallow up the entire PRA.

Moreover, the public's right to know who is performing public business is always, or should be, disclosable under the PRA. In *King County v. Sheehan*, 57 P.3d 307, 317, 114 Wash. App. 325, 344 (2002), the Washington Court of Appeals determined that the names of police officers could not be redacted or exempted from disclosure, even if the proposed redaction was intended to protect them from reprisals. But the *Sheehan* Court observed that "police officers are public employees, paid with public tax dollars. They are granted a great deal of power, authority, and discretion in the performance of their duties." *Id.* at 318. The Washington appellate court rejected the attempt to withhold the names of the police officers confirming the age-old principle that a government cannot be run by an anonymous work force and that the public has a right to know who it employs and who performs its public business. *Id.* at 316 ("But police officers are public employees, paid with public tax dollars. They are granted a great deal of power, authority, and discretion in the

[4] However, Social Security Numbers are already exempt from disclosure under the PRA. RCW 42.56.230(5).

performance of their duties. *Amici* Media Associations provide examples of investigative journal reporting based in significant part on information obtained from public records containing the names of police officers..."); *Tacoma Public Library v. Woessner*, 951 P.2d 357, 366, 90 Wash. App. 205, 233 *review granted, cause remanded*, 972 P.2d 101, 136 Wash.2d 1030 (Wash. 1998) ("The purpose of the PDA[5] is to keep the public informed so it can control and monitor the government's functioning."). Moreover, Daleiden's interest in investigating the government's fetal tissue transfer practices is "undoubtedly related to governmental operations and a legitimate matter of public concern" just as in *Sheehan. Sheehan,* 57 P.3d at 318. Indeed, the same interests in documenting and publicizing potential corruption that the *Sheehan* Court recognized is demonstrated by the Findings of Congress' Selective Investigative Panel. Daleiden Brief at 5-9, 25.

Apparently, many of the identifiable individuals in the records here are public employees or public contractors performing public business, and the rest are individuals who voluntarily engaged in business with the government. Under the PRA's right to privacy cases, a requestor has the right to know who is performing the public functions documented in the records—regardless of those individuals' preference that their public involvement be concealed. *See Predisik*, 346 P.3d at 741,

[5] The Washington Public Records Act used to be part of the Public Disclosure Act or PDA at RCW 42.17, before being moved to RCW 42.56 and renamed the Public Records Act.

181 Wn.2d at 905 ("the PRA will not protect everything that an individual would prefer to keep private"); *see also SEIU 925 v. Freedom Foundation*, 2016 WL 7374228 (rejecting Washington State Constitutional privacy claim for PRA disclosure of names of child care providers to requestor despite State requirement that providers register with State to receive governmental payments, finding information disclosed did not intrude into the private affairs of the providers).

B. The District Court's redaction standard nullifies the PRA's pro-disclosure mandate.

This requestor agreed that names could be redacted. Such a restriction, particularly as it applies to public employees, was not supported by the law since the identities of public employees should be disclosed. *See* supra. But the very broad, amorphous, holding for redacting information the agency thinks "could" or "would" identify the person also runs afoul of a decade of PRA case law, and creates an unworkable standard for this case, and, if upheld, all others that follow. Washington courts have a decade of case law mandating that exemptions be assessed based on the four corners of a document and not based on review of material one could learn from some other document or some other source. The doctrine was illustrated with the case of *Koenig v. Des Moines*, 142 P.3d 162, 158 Wash.2d 173 (Wash. 2006), where a father asked for records of an investigation of his daughter's alleged molestation by her stepfather, and because a PRA exemption exempted the names of child victims of sexual assault, the agency argued it could not produce anything because simply

redacting the child's name yet producing the remaining records would tacitly admit to the father who the child was. Looking to the four corners of the document, the Washington State Supreme Court ordered that the records be produced with the name redacted and rejected the "outside knowledge," "linkage," or "connect-the-dots" inquiries.[6]

In *Prison Legal News v. Department of Corrections*, the State tried to argue for broad withholding of information about inmates who suffered medical issues claiming that those within the prison population could possess outside knowledge allowing them to learn the inmate's identity through details such as ailment, location, or type of injury. *Prison Legal News v. Department of Corrections*, 115 P.3d 316, 324, 154 Wash.2d 628, 644 (Wash. 2005). The Washington Supreme Court rejected the attempt, finding that to be exempt the information must identify the inmate to the public at large with no outside or specialized knowledge.

In *Bainbridge Island Police Guild v. City of Puyallup*, the Washington State Supreme Court ordered the production of investigative records showing that a police

[6] This standard not only reflects the PRA's pro-disclosure mandate, it is the only tenable administrative standard available to agencies. Under the District Court's Order in this case, the State would be in violation of the Order if it under-redacts and thus discloses some shred of information that could conceivably lead to the identification of a particular individual. But at the same time, a state agency must narrowly construe exemptions. *See* RCW 42.56.030. by scuttling the "four corners" rule, the District Court's Order puts the state in a very precarious position, wherein it faces potential liability from both the requestor and an objector/court. This same tension will spread to nearly every other request for records if the District Court's standard remains intact.

officer was falsely accused of misconduct, with the officer's name redacted to requestors who knew the officer's name. 259 P.3d at 202. The quoted passage in the District Court's Order from this case misconstrues the Supreme Court's holding and reasoning. The Supreme Court in *Bainbridge Island* was rejecting the idea that a court should look at the specialized knowledge one might possess or look beyond the four corners of a record to determine if the record or part of the record was exempt. The Supreme Court was not supporting such a search.[7]

The District Court erred by issuing an injunction based on Constitutional claims that were not shown and cannot exist here given the nature of the records. The District Court further entered an order requiring the agency to look outside the record and decide what information "could" or "would" identify a person, in direct contradiction to a decade of Washington case law interpreting its own PRA expressly rejecting such a practice.

The records here were not shown to be exempt. The District Court's Order should be overturned.

[7] The exact point of the District Court's Order regarding the *Bainbridge Island* case may have been to reject an argument that publicity automatically prevented exemption, but even then, the District Court missed the point. Under Washington law, information is exempt based on privacy when disclosure is both highly offensive and of no legitimate public concern, and disclosing generally known information cannot meet the test of being "highly offensive." Information must be private in the first place to be the basis of an invasion of privacy claim.

CONCLUSION

The District Court's Order should be reversed.

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STATEMENT OF RELATED CASES

WCOG is not aware of any related cases pending in the Ninth Circuit Court of Appeals.

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I electronically filed the foregoing Amicus Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 5,519 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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