APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIAN GREEN, Respondent, v. PIERCE COUNTY, Petitioner.	))))))))	No. 98768-8 EN BANC Filed: May 27, 2021

MONTOYA-LEWIS, J.—The Public Records Act[1] (PRA) was created to inform the people of Washington of the actions of agencies and to ensure access to the records of the same. RCW 42.56.030. It requires agencies to produce records at the public's request. Certain records relating to public employment—including photographs and the month and year of birth of people who work in state criminal justice agencies—are exempt from public request. RCW 42.56.250(8). However, members of the "news media" are entitled to these exempt records. *Id*; RCW 5.68.010(5). In this case, this court must determine whether an individual or his YouTube channel qualifies as "news media." We conclude that the statutory definition of "news media" requires an entity with a legal identity separate from the individual. Here, Brian Green has not proved that he or the Libertys Champion[2] YouTube channel meets

[1] Ch. 42.56 RCW.

[2] The YouTube channel is entitled "Libertys Champion," without an apostrophe.

the statutory definition of "news media," and, thus, he is not entitled to the exempt records. Therefore, we reverse the trial court in part. We affirm the trial court's denial of Pierce County's motion to compel discovery.

I. FACTS AND PROCEDURAL HISTORY

A. Factual Background

1 The County-City Building Incident

On November 26, 2014, Green and Peter Auvil went to the County-City Building in Tacoma to file a document and pay a parking ticket. As they went through security, the guard asked to search Auvil's bag. Auvil refused. A Pierce County deputy sheriff came to assist, and Auvil began to record a video of the interaction on his phone. The deputy told Green and Auvil that if they refused to allow the security guard to search the bag, they could either enter the building without the bag or just leave with the bag. Green and Auvil refused to leave, pointing out that the building is a public space and that they had legitimate reasons to be there. Auvil continued to refuse to allow the security guard to search the bag, arguing that the security checkpoint was a violation of his privacy rights. The conversation escalated, and the deputy asked the men to leave. When Green stood too close to him, the deputy shoved Green and caused him to fall backward onto the floor. The deputy arrested Green for criminal obstruction and took him to jail. He was released approximately 24 hours later. The prosecuting attorney's office dismissed the charge.

2. The PRA Request

On December 14, 2017, Green e-mailed a PRA request to the Pierce County Sheriff's public records office. He requested "[a]ny 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." Clerk's Papers (CP) at 15. He requested the office "construe [the] request in the broadest possible terms under the Public Records Act." *Id*. His e-mail also stated that "[n]one of the following request(s) for documents will be used for commercial purposes." *Id*. He sent the e-mail using the e-mail address for his musical band, the "Brian Green Band," and he signed the e-mail with the title, "Investigative Journalist." *Id*.

Susan Stewart, an office assistant in the "Public Disclosure Unit" for the Pierce County Sheriff's Department, timely responded to Green's PRA request. She provided him with 11 pages of records, but she did not include the photographs or dates of birth he requested. In her e-mail response, she explained that this information was exempt pursuant to RCW 42.56.250(8).[3] They exchanged a series of e-mails in which Green asked Stewart to release the photographs and dates of birth because he believed he was entitled to those records. Green said he was "working on a story

[3] RCW 42.56.250 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language at issue in this case, we refer to the current version of the statute.

concerning the Pierce County Jail" and again signed his e-mail with the title, "Investigative Journalist." *Id.* at 20. Stewart cited to the statutory definition of "news media" under RCW 5.68.010(5) and asked Green to provide further information about who he was working for. Green explained he met the definition of "news media" because he was

> a journalist that primarily covers local court cases on my Youtube [sic] channel. My channel is called "Liberty's Champion" [sic]. . . . I appear in many of the videos giving commentary on events. My channel has nearly 6,000 subscribers. My Youtube [sic] channel meets the definition of RCW 5.68.010(5) because it is a news agency that is in the regular business of gathering and disseminating news via the internet.

Id. at 27. He also provided Stewart with a link to the Libertys Champion YouTube channel.[4] Stewart reviewed the link and conducted a Google search regarding Green's assertion that he was a journalist. She discovered the website for Green's musical band and noted that the band's name matched the e-mail address that Green used for his PRA request. Stewart also sought legal advice regarding Green's PRA request before concluding that Green and the Libertys Champion YouTube channel did not meet the statutory definition of "news media." She again denied his PRA

[4] The video from the County-City Building incident was posted on the Libertys Champion YouTube channel.

request for the officers' and jail staff's photos and dates of birth.

B. Procedural History

Green filed a complaint against Pierce County, seeking disclosure under the PRA. He alleged that he and the Libertys Champion YouTube channel met the statutory definition of "news media" and that Pierce County violated the PRA when it withheld the photographs and dates of birth he requested. Green alleged that the statutory definition of a "news media" should be interpreted broadly to include him and his YouTube channel because he gathers and reports news on the Libertys Champion YouTube page, which purportedly exposes government corruption in Washington State. Further, he alleged that he, individually, was also news media because he researches, creates, and posts videos on the Libertys Champion's YouTube page.

Pierce County responded, stating that its decision to withhold the records was proper under the PRA. It alleged that Green and the Libertys Champion YouTube channel were not "news media" because the statutory definition requires Libertys Champion to be a legal entity separate from Green. Otherwise, it cautioned, every person with a social media account would be considered news media. It posited that to be "news media," Libertys Champion must have corporate structure, generate revenue, have employees, and pay compensation.

To that end, Pierce County served Green with interrogatories and a request for production, seeking information about Libertys Champion's organizational structure and Green's legal relationship with it. When Green did not respond, Pierce County filed a motion to compel discovery. Before ruling on Pierce County's motion to compel or Green's complaint, the trial court first considered the issue of whether Green or the Libertys Champion YouTube channel met the statutory definition of "news media."

The trial court held a hearing and found the Libertys Champion YouTube channel and Green are "news media." It concluded that the statutory definition of "news media" does not require a specific corporate form or financial profit. It also noted that the Libertys Champion YouTube channel has been in existence for several years and publishes videos approximately every week with the purpose of gathering and disseminating news. Therefore, it found that the YouTube channel meets the statutory definition of "news media." Even though the trial court thought that it was not necessary to determine Green's role because "Mr. Green ***is*** Liberty's Champion," it found in the alternative that Green also meets the statutory definition because he was acting as Libertys Champion's agent. *Id.* at 443. The court also concluded that additional discovery was not necessary to resolve the issue and denied Pierce County's motion to compel.

The trial court then stayed proceedings and certified the issue for immediate appeal under RAP 2.3(b)(4), which this court accepted. Order Certifying

Appeal for Transfer, *Green v. Pierce County*, No. 53289-1-II, at 1 (Wash. Ct. App. July 10, 2020); Ruling Accepting Certification, *Green v. Pierce County*, No. 98768-8, at 1 (Wash. July 14, 2020). Four amici curiae briefs were filed by the following interested organizations: the First Amendment Clinic at Duke Law School; the Pierce County Corrections Guild; the Washington State Association of Broadcasters, the Radio Television Digital News Association, and Washington Newspaper Publishers Association; and Allied Daily Newspapers of Washington.

We conclude Green and the Libertys Champion YouTube channel do not meet the statutory definition of "news media," and we reverse the trial court in part. We affirm the trial court's denial of Pierce County's motion to compel discovery.

II. ANALYSIS

This court reviews questions of statutory interpretation de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). When interpreting a statute, "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent." *Id.* "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. The plain meaning is derived from the statute and related statutes. *Id.* at 11. If the statute is susceptible to more than one reasonable interpretation, then the statute is

ambiguous and the court turns to legislative history. *Id.* at 12.

This court also reviews challenges to agency actions under the PRA de novo. RCW 42.56.550(3); *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 791, 246 P.3d 768 (2011). The PRA is a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Under the PRA, agencies are required to make public records available for inspection and copying, unless the record is specifically exempt. RCW 42.56.070(1). The PRA exemptions are narrowly construed, and the agency bears the burden to prove that its refusal to disclose the records is in accordance with the law. RCW 42.56.030, .550(1).

Certain records related to public employment and licenses are exempt from the PRA. RCW 42.56.250. "Photographs and month and year of birth in the personnel files of . . . employees and workers of criminal justice agencies" are specifically exempt from disclosure. RCW 42.56.250(8). However, the legislature carved out an exception for the news media to have access to this otherwise exempted information. *Id*. The PRA applies the definition of "news media" from the news media shield law, which protects the news media from being compelled to disclose their sources. *Id.* The news media shield law defines "news media" according to three categories:

> (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;
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> (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.

RCW 5.68.010(5).

A. Burden of Proof

As a threshold matter, the parties disagree as to who bears the burden to prove whether Green or his YouTube channel meet the definition of "news media." Green argues that the burden belongs to Pierce County because the agency is required to prove a PRA exemption. Pierce County argues that the burden falls on Green because, under the news media shield law,

the person asserting news media status bears the burden to prove they meet the statutory definition.

Generally, the agency has the burden to prove a record is exempt from the PRA. RCW 42.56.550(1). The agency must identify the specific type of record and the applicable exemption. RCW 42.56.210(3), .520(4). However, this case is not merely concerned with a PRA exemption; rather, it involves a question of whether *an exception to the exemption* applies. Once the agency identifies the record and exemption, the burden shifts to the person seeking an exception to that exemption. RCW 42.56.210(2); *see Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 567-68, 618 P.2d 76 (1980) (holding that the patient has the burden to prove an exception to the medical records exemption). The PRA exempts a category of records from public request. RCW 42.56.250(8). Then, the PRA provides that the news media exception carves out a category of requesters to whom the agency must disclose those records. *Id.* When the question is whether the requester can claim news media status and qualify for an exception, the requester is in the better position to prove they are news media.

In its response to Green's PRA request, Pierce County properly identified the type of records and the applicable exemption. Therefore, Pierce County has satisfied its burden, and the burden shifts to Green, as the party asserting the news media exception to the PRA exemption. Green is in the best position to prove whether he or the Libertys Champion YouTube channel meets the definition of "news media" and qualifies

for an exception to the PRA exemption. Therefore, Green has the burden of proof.

B. Statutory Definition of "News Media"

Under RCW 5.68.010(5), there are three definitions of "news media." Only (a) and (b) are at issue in this case, and we address each in turn.

1. *RCW 5.68.010(5)(a)*

First, we consider whether the Libertys Champion YouTube channel meets the statutory definition of "news media." RCW 5.68.010(5)(a) defines "news media" as

> [a]ny 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.

The statute requires a two-part analysis. First, the purported member of the news media must fall under one of the listed traditional news outlets or the general term, "entity." Second, it must be engaged "in the regular business of news gathering and disseminating news or information to the public." RCW 5.68.010(5)(a). Libertys Champion fails the first part of the test.

Therefore, it does not meet the statutory definition of "news media."

YouTube is an online video sharing platform that allows people to watch and stream videos. Users generate and upload content by posting videos to their YouTube channels. Those channels may be owned and operated by individuals, companies, or other organizations. Green runs the Libertys Champion YouTube channel, and he does not dispute the trial court's finding that they are one and the same.

The Libertys Champion YouTube channel does not fit into any of the categories of traditional news outlets listed in the statute, nor is it an "entity." The parties focus their arguments on the meaning of the word "entity" in the statute. This court does not examine a specific word in a vacuum; rather, we must consider the context of the surrounding text to determine the legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 11-12. The legislature used the general word "entity" following a list of traditional news outlets. Under the canon of construction ejusdem generis, the meaning of a general word is construed consistent with the specific terms in the statute. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 970, 977 P.2d 554 (1999) ("'[S]pecific terms modify or restrict the application of general terms where both are used in sequence.'" (alteration in original) (quoting *Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244 (1972))). Also, the doctrine of noscitur a sociis directs that a word is not read in isolation; rather, the word's meaning is determined by its relationship to other words in the statute. *State v.*

Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) ("'[T]he meaning of words may be indicated or controlled by those with which they are associated.'" (internal quotation marks omitted) (quoting *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999))).

Under the doctrines of ejusdem generis and noscitur a sociis, the word "entity" must be interpreted to embrace something that is similar in nature to the specific types of traditional news outlets listed in the statute. The list includes only organizations. It does not include individuals. Indeed, the statute differentiates between organizations and the individuals who represent them. *Compare* RCW 5.68.010(5)(a) ("[a]ny newspaper, magazine or other periodical . . . or any entity"), *with* .010(5)(b) ("[a]ny person who is or has been an employee, agent, or independent contractor of any entity listed in (a)"). Under the plain meaning of the statute, the word "entity" cannot be construed to include an individual. An "entity" must be something with a legal identity separate from the individual.

Modern conceptions of "news media" continue to evolve and expand beyond the limits of the statutory definition, but that definition circumscribes our analysis. The legislature enacted the current statutory definition of "news media" in 2007, and the statute has never been amended. H.B. 1366, 60th Leg., Reg. Sess. (Wash. 2007). In 2007, it was unlikely the legislature could foresee how social media would advance to become an instrumental part of our daily lives. As social media developed, so has a "new news cycle." Ellyn M. Angelotti, *Twibel Law: What Defamation and Its*

Remedies Look Like in the Age of Twitter, 13 J. HIGH TECH. L. 430, 457 (2013). "With 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." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352, 130 S. Ct. 876, 75 L. Ed. 2d 753 (2010). Indeed, many people now access news through their social media accounts. During the Black Lives Matter protests over the last year, protesters, bystanders, and journalists alike posted copious social media posts and livestreams to keep people informed of the events. *See* James Yeh, '*I'm Out Here—I Am the News for Our People.' How Protestors Across the Country Are Keeping Informed*, COLUMBIA JOURNALISM REV. (Aug. 5, 2020), cjr.org/united_states project/protest-activistnews-social-media.php [https://perma.cc/2TUL-7FMX]. The evermore constant use of social media to access news demonstrates our increased reliance on and trust in social media, and it requires careful vetting to ensure that the news and stories we find are accurate. The manner in which we access news today is vastly different from how we did it in 2007, and this statutory definition may not comport with the current intersection of social media and the news. However, the legislature, not the court, is responsible for enacting statutes, and this court is bound by the statute's unambiguous language.

As Green points out, local news media entities such as the *Seattle Times*, KIRO 7 News, and the *Bellingham Herald* have adapted to the Internet and

created their own YouTube channels.[5] However, owning and operating a YouTube channel alone does not create a news media entity. A social media account is an extension of a person or an organization's presence into the virtual world and allows users to connect to the rest of the Internet. Emily M. Janoski-Haehlen, *The Courts Are All a 'Twitter': The Implications of Social Media Use in the Courts*, 46 VAL. U. L. REV. 43, 43 (2011). Unlike Libertys Champion, the other YouTube channels Green points to are owned and operated by valid legal entities.[6] A YouTube channel run by an individual does not meet the statutory definition of "news media."

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[5] Green and the First Amendment Clinic at Duke Law School, as amicus curiae, also argue that the definition of "news media" must be construed broadly so as to not infringe on the First Amendment's freedom of the press. However, there are no freedom of the press implications if there is no news media. Further, there is no First Amendment right to public information. "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally." *Houchins v. KQED, Inc.*, 438 U.S. 1, 16, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978) (Stewart, J., concurring).

[6] The Washington State Association of Broadcasters, the Radio Television Digital News Association, and Washington Newspaper Publishers Association amici argue that a YouTube channel cannot be a news media entity. However, under the statute, we are more concerned with to whom the channel belongs and less concerned with the medium. RCW 5.68.010(5)(a) (defining news media as an entity that gathers and disseminates news "by any means").

Libertys Champion does not fit into any of the specific categories of traditional news outlets, nor does it fit into the general category of "entity." Libertys Champion is a YouTube channel that does not have a legal identity separate from Green. The trial court found, "Mr. Green ***is*** Liberty's Champion," and Green does not dispute this fact. CP at 426. Indeed, Green has stated that "Libertys Champion does not exist without Mr. Green." *Id.* at 181. The Libertys Champion YouTube channel fails the first step of the analysis, so we do not reach the issue of whether it is "in the regular business of news gathering and disseminating news or information to the public."[7] RCW 5.68.010(5)(a).

2. *RCW 5.68.010(5)(b)*

Next, we consider whether Green, individually, meets the statutory definition of "news media." RCW 5.68.010(5)(b) defines "news media" as

> [a]ny 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

[7] Green argues that Libertys Champion is a newspaper or periodical because of its rate of publication, the size of its audience, and its purpose to research and report to the public on government corruption. These arguments go to the second step of the analysis—whether the news media entity is engaged "in the regular business of news gathering and disseminating news or information to the public"—but they have no bearing on whether Libertys Champion is a "news media entity." RCW 5.68.010(5)(a). Libertys Champion is not "news media" simply because it has a YouTube channel and regularly posts content.

> such entity, and who obtained or prepared the news or information that is sought while serving in that capacity.

This definition defines "news media" as an individual and—similar to the definition under RCW 5.68.010(5)(a)—it requires multiple steps to the analysis. First, the person must be an employee, agent, or independent contractor of a news media entity as defined in (a). This definition is derivative of (a), and an individual can be "news media" only when they have one of these statutorily required connections to a valid news media entity. Then, the person must also be "engaged in bona fide news gathering" for the news media entity and must have "obtained or prepared" the information in that capacity. RCW 5.68.010(5)(b).

Once again, Green cannot satisfy the first part of this test because the Libertys Champion YouTube channel is not a news media entity under (a). If there is no news media entity, Green cannot be an employee, agent, or independent contractor of a news media entity. Therefore, we do not reach the question of Green's relationship to his YouTube channel. Green fails the first step of the analysis, so we also do not reach the issue of whether he was "engaged in bona fide news gathering" or obtained the news or information on behalf of a news media entity.[8] *Id.* Under the plain

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[8] Green argues that he meets the definition under (b), pointing to the trial court's finding that he administers and manages the Libertys Champion YouTube channel. He stated that he posts videos that purportedly expose government corruption in Washington State. To produce his stories, he researches current events,

meaning of the statute, Green, individually, does not meet the statutory definition of "news media."

Nor do we reach the issue of Green's intent in seeking the exempt records. The parties and amici dispute the relevance of Green's intent in his PRA request. Pierce County and the Pierce County Corrections Guild amicus argue the court should consider his intent in its analysis. They argue that the trial court should have denied the PRA complaint on the basis that Green was not engaged in bona fide news gathering because he impermissibly sought these particular records for personal reasons—allegedly to retaliate against the officials who were involved in his arrest and detention. The Washington State Association of Broadcasters, the Radio Television Digital News Association, and Washington Newspaper Publishers Association amici and Allied Daily Newspapers of Washington amicus argue against the court considering intent. Although he does not expressly argue that the court should not consider intent, Green faults Pierce County for not inquiring about his intent in seeking the records and argues it cannot bring the argument on appeal. In the alternative, Green argues he was engaged in bona fide news gathering because his intent was to publish a news story about his arrest,

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contacts public officials and public offices, and makes PRA requests. This evidence goes to the later steps of the analysis: whether Green is engaged in bona fide news gathering or whether he obtained the information on behalf of a news entity. It does not have any bearing on the threshold question of whether he is an employee, agent, or independent contractor of a news media entity.

claiming his imprisonment was unlawful and demonstrates government abuse. While a requester's intent may be relevant when determining whether they were engaged in bona fide news gathering or whether they obtained the information in that capacity, it has no bearing on whether a news media entity exists or what a person's relationship is to that entity. Therefore, we do not reach the issue of intent.

C. Motion To Compel

We conclude that neither Green nor the Libertys Champion YouTube channel meets the statutory definition of "news media." We also conclude the trial court did not abuse its discretion in denying the motion to compel discovery because further discovery is not necessary to resolve the issue. *See Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012) ("Appellate courts ordinarily review discovery rulings for abuse of discretion."); *see also Neigh. Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 717-19, 261 P.3d 119 (2011) (discovery is appropriate if the information sought is necessary to resolve a factual dispute). Therefore, we affirm the trial court's ruling denying Pierce County's motion to compel discovery.

III. CONCLUSION

We reverse in part. In order to access otherwise exempt records under the PRA, the requester bears the burden to prove an exception to the exemption applies. Green has not proved that he or the Libertys

Champion YouTube channel meets the statutory definition of "news media." Therefore, we reverse the trial court's ruling that Green and the Libertys Champion YouTube channel satisfy the exception for PRA requests made by the news media. Further, we affirm the trial court's denial of Pierce County's motion to compel discovery. We also deny Green's request for costs and fees, and we remand to the trial court with instructions to dismiss Green's complaint.

/s/ Montoya-Lewis, J.
Montoya-Lewis, J.

WE CONCUR:

/s/ González, C.J.
González, C.J.

/s/ Stephens, J.
Stephens, J.

/s/ Johnson, J.
Johnson, J.

/s/ Madsen, J.
Madsen, J.

/s/ Yu, J.
Yu, J.

/s/ Owens, J.
Owens, J.

WHITENER, J. (dissenting)—This case concerns a question central to our democracy: what counts as news media in the shifting landscape of the 21st century? Brian Green runs a YouTube channel called Libertys Champion, which, he claims is news media.

From his perspective, Libertys Champion's status as news media grants him the benefits of RCW 42.56.250(8) and RCW 5.68.010(5) and, thus, access to certain information otherwise exempt from disclosure under the Public Records Act (PRA), ch. 42.56 RCW. Pierce County and the majority disagree.

The majority denies Green the benefit of these statutes on the ground that to satisfy the requirements of being news media under RCW 5.68.010(5), Libertys Champion—or any other *thing* seeking the benefits of these statutes—"must be something with a legal identity separate from the individual." Majority at 13. My reading of the statute convinces me otherwise. Thus, Libertys Champion—Green's YouTube channel—cannot be precluded from counting as news media simply because it lacks a separate legal identity from Green.

Libertys Champion also meets the second requirement, which the majority does not reach: it is engaged in the regular business of news gathering and disseminating news or information. RCW 5.68.010(5)(a). I therefore would affirm the trial court and remand for further proceedings in line with this opinion.

ANALYSIS

This case concerns two interrelated statutes. First is a provision of the PRA, which reads:

> Photographs and month and year of birth in the personnel files of employees or volunteers of a public agency, including 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 42.56.250(8).

Also relevant here is the portion of RCW 5.68.010 that reads:

> (5) The term "news media" means:
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> (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.

I agree with the majority that determining whether something qualifies as "news media" under RCW 5.68.010(5)(a) is a two-step process in which courts first determine whether the "purported member of the news media" is one of the listed outlets or an "'entity,'" and, second, determine whether the entity engages "'in the regular business of news gathering and disseminating news or information to the public.'" Majority at 11 (quoting RCW 5.68.010(5)(a)).

I part ways with the majority, however, on its holding that to qualify as an "entity," Libertys Champion—or anything else—must be an organization "with a legal identity separate from the individual." *Id.* at 13.

The core of statutory interpretation is plain language analysis. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Nothing in the plain language of RCW 5.68.010(5)(a) commands that to qualify as an "entity," the thing in question must have a separate legal identity from an individual or must be an organization. This becomes clear when looking at the other terms in the statute, such as "newspaper." While major newspapers like the *Seattle Times* and the *New York Times* are of course organizations with separate legal entities, nothing in our statutory language requires it. Nor does the dictionary definition indicate that an organization is required. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1524 (3d ed. 2002) (defining "newspaper" as "a paper that is printed and distributed daily, weekly, or at some other regular and usu[ally] short interval and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest"). (While *Webster's* also defines "newspaper" as an "organization engaged in composing and issuing a newspaper," this does not suggest that the newspaper itself must have—or be run by—an organization to be considered a newspaper. *Id.*) The term "newspaper" thus encompasses not only the *New York Times* but also high school newspapers, community newspapers, and the like. Nothing *excludes* from the term

"newspaper" a single person putting together, editing, printing, and distributing a few pages of news or information—the analog equivalent of the digital task performed by Green via Libertys Champion. So, too, with the term "magazine"—while *The New Yorker* and *Scientific American* are separate legal entities, zines, for instance, commonly are created by one person, just like Libertys Champion.

The list of terms provided by RCW 5.68.010(5)(a) shows that "entity" is not limited to things that have a separate legal identity. *Webster's* agrees. It states that "entity" is synonymous with "being" and "existence." WEBSTER'S, *supra*, at 758. Although *Webster's* also notes that such an existence is especially an "independent, separate, or self-contained existence," even *that* definition is not the same as the separate legal identity required by the majority. *Id.* The trial court's conclusion that "Green ***is*** Liberty's Champion," Clerk's Papers (CP) at 426, does not mean that Libertys Champion lacks a self-contained existence. While *Black's Law Dictionary* offers a definition similar to the majority's definition, the definition in *Webster's* better captures the intent of the legislature evinced by the other terms in the statute. BLACK'S LAW DICTIONARY 673 (11th ed. 2019) (defining "entity" as "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners"). Thus, under the very canons of statutory construction invoked by the majority, I would hold that Libertys Champion qualifies as an "entity" under RCW 5.68.010(5)(a). *See State v. Roggenkamp*, 153 Wn.2d

614, 623, 106 P.3d 196 (2005) (discussing noscitur a sociis as a canon that "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.' ") (internal quotation marks omitted) (quoting *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)); *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 970, 977 P.2d 554 (1999) (defining ejusdem generis as a canon that commands that " '[s]pecific terms modify or restrict the application of general terms where both are used in sequence' " (quoting *Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244 (1972))).

The concerns animating the First Amendment's protection of the free press also favor including Libertys Champion in the definition of "entity" in this statute. The United States Supreme Court has remarked that "[f]reedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' " *Branzburg v. Hayes*, 408 U.S. 665, 704, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972) (alteration in original) (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452, 58 S. Ct. 666, 82 L. Ed. 949 (1938)). *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."); *Lehman v. City of Shaker Heights*, 418 U.S. 298,

306, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974) (Douglas, J., concurring) ("The First Amendment . . . draws no distinction between press privately owned, and press owned otherwise."). Indeed, the Court has made clear that "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg*, 408 U.S. at 704. While this case does not directly concern the First Amendment, *Branzburg* remains instructive, as its "lonely pamphleteer" has become today's solitary YouTuber, much as its "large metropolitan publisher" has become today's 24-hour news network. From the perspective of the First Amendment, distinguishing different news media based on size or organizational structure or status as a legal entity is disfavored, if not outright impermissible. To hold that RCW 5.68.010(5)(a) provides otherwise, as the majority does, risks construing the statute in an unconstitutional manner, a result we must avoid. *See Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015) ("We construe statutes to avoid constitutional doubt.").

Having concluded that Libertys Champion qualifies as an "entity," I would reach the second question: whether Libertys Champion engages "in the regular business of news gathering and disseminating news or information to the public by any means." RCW 5.68.010(5)(a). I would answer this question, as well, in the affirmative.

The statute does not provide a definition of any of these terms. I focus on the most essential: "news." In *Webster's*, "news" is defined as "a report of a recent event," "new information," and "fresh tidings." WEBSTER'S, *supra*, at 1524. This tracks with a definition suggested over a century ago by the United States Supreme Court, which indicated that "news" means "information respecting current events" and "the history of the day." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234, 39 S. Ct. 68, 63 L. Ed. 211 (1918). Similar, too, is the definition employed by the D.C. Circuit Court of Appeals in *Cause of Action v. Fed. Trade Comm'n*, 419 U.S. App. D.C. 74, 799 F.3d 1108 (2015). There, the court restated a definition of news media currently in a statute pertaining to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, requests, but taken, originally, from a prior D.C. Circuit case: to be considered a member of the news media, the FOIA "requester must: (1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience." *Cause of Action*, 799 F.3d at 1120.

Libertys Champion easily meets these definitions of "news" based on the record. In answers to the State's interrogatories, Green described videos on Libertys Champion such as "Singled Out: Student barred from school for freedom of expression, Educators bully family, public," which concerned a situation in which "a kid wore [a] rebel hat to school . . . and the school officials made a big deal about it." CP at 103. Another described

was entitled "A License to Kill: Badges Do Grant Extra Rights," which involved a discussion regarding "justifiable homicide or use of deadly force by public officer[s]" and included footage of a "scheduled meeting of the Washington Association of Prosecuting Attorneys." *Id.* Still another was titled "Pierce County Deputy Assaults Disabled Black Man, Snatches His Cane, and Arrests Him for Obstruction," which dealt with a situation where "a disabled [B]lack man was waiting outside a courtroom in the Pierce County-City Building when the man made some remarks about the prosecutors," and then, after being told to leave and indicating he did not intend to leave, had his cane "snatched" by deputy sheriffs and then was "pushed . . . down onto a bench." *Id.* at 104.

Such items are similar to a recent article in the online edition of the *Seattle Times*, which dealt with reported dangerous behavior of a Pierce County sheriff. *See* Jim Brunner & Lewis Kamb, *Black Newspaper Delivery Driver Detained After Pierce County Sheriff Claims, Then Recants, Threat to Life*, SEATTLE TIMES (Mar. 18, 2021, 9:07 PM, updated Mar. 22, 2021, 8:16 PM), https://www.seattletimes.com/seattle-news/crime/black-newspaper-delivery-driver-detained-after-pierce-county-sheriff-claims-then-recants-threat-to-life/ [https://perma.cc/9LKL-AWBA]. As this comparison makes clear, Libertys Champion is news. Finding the material disseminated not newsworthy does not make it any less news.

Libertys Champion is also engaged in the regular business of news gathering and disseminating news

or information to the public by any means. RCW 5.68.010(5)(a). The record shows that posting videos was the regular practice of Libertys Champion. CP at 104. The videos—containing news and information, as the record shows, were also disseminated on the Internet via his YouTube channel. *Id.*[1]

Pierce County disagrees. It insists that Libertys Champion cannot be news media under RCW 5.68.010(5) because Libertys Champion is not in the commercial business of news gathering. But nothing in the plain language of RCW 5.68.010(5)(a) requires *commercial* business or any other similar terms Pierce County attempts to read into the statute. Reading the term "business" in light of the rest of the statute, it becomes clear such a requirement does not exist, for newspapers and magazines are both certainly included within the reach of RCW 5.68.010(5)(a) that are *not* commercial businesses. Furthermore, if we are to agree with Pierce County's restrictive reading of the statute, all that Green would be required to do is to register his sole entity into a limited liability company with one owner and a commercial business would then exist.

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[1] It also follows that Green, therefore, is acting as an agent of news media per RCW 5.68.010(5)(b). (While Pierce County argues that Green's reason for seeking the information disqualifies him from being engaged in bona fide news gathering, all Pierce County has produced are speculative accusations that Green is retaliating. The reasons why Green wants the information is not the focus of the inquiry that must be made when deciding has he met the requirements of RCW 5.68.010(5) or RCW 46.56.250(8).)

Most troublingly, throughout Pierce County's briefing can be found a certain disapprobation, as if Libertys Champion is simply *unworthy* of being considered news media or that what it seeks here is not newsworthy. For instance, Pierce County indicates the exemption to the PRA does not apply because of the material Green was denied and his apparent intent to distribute it.[2] It must be noted first that blocking this request based on the nature of the information sought, or whether it is to be distributed, is unsupported by RCW 42.56.250(8), which requires that the requester be "news media" under RCW 5.68.010(5)—nothing more. *See Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) ("[A] court must not add words where the legislature has chosen not to include them.").

More to the point, by arguing that Libertys Champion cannot have access to this information, Pierce County essentially argues that this court should determine what is newsworthy and what is not. But, it is not for courts in our country to decide what news is worthy. The free press protections in the First Amendment warn strongly against doing so. *See Branzburg*, 408 U.S. at 703-04 (discussing the First Amendment's unvarying protection of a variety of news gatherers, irrespective of their size or what information they

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[2] This material was "[a]ny 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 at 15.

convey). The First Amendment's free speech clause also prohibits, absent compelling state interest and narrowly tailored means, discrimination based on content of speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Any interpretation of RCW 5.68.010(5) that distinguishes between news gathering entities based on the content of their news or information must be avoided. *See Utter*, 182 Wn.2d at 434.

Therefore, I would affirm the trial court's ruling that Green and Libertys Champion YouTube channel satisfy the exception for PRA requests made by the news media. This would not enable everyone to access the information Green seeks, as the protections of RCW 42.56.250(8) apply when news media are not involved. Those whose personal information is sought receive notice, per RCW 42.56.250(12), and, in certain situations, have the opportunity to seek an injunction against the release of the information sought (though whether such an injunction could be granted in this instance is not at issue here). RCW 42.56.540; *see Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 796, 418 P.3d 102 (2018) (providing the injunction standard). Perhaps most importantly, however, this interpretation follows the intent of the legislature. If the legislature wanted to prevent the release of this information, it is well within their power to draft a bill that would do so. But the law as it stands requires the release of this information due to Libertys Champion's status as news media.

CONCLUSION

I would hold that Libertys Champion is "news media" under RCW 5.68.010(5)(a) and, therefore, satisfies the requirements of RCW 42.56.250(8), entitling Green to the documents and information he requested. I would therefore affirm the trial court's decision and remand for further proceedings in line with this opinion.

I respectfully dissent.

/s/ Whitener, J.

/s/ Gordon McCloud, J.
Gordon McCloud, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRIAN GREEN, Respondent, v. PIERCE COUNTY, a municipal corporation, Petitioner.	No. 53289-1-II RULING GRANTING REVIEW (Filed Jul. 3, 2019)

Pierce County seeks discretionary review of the trial court's Order on Merits, Stay, and Certification Under RAP 2.3(b)(4) (Order on Merits), which denied Pierce County's motion to compel and concluded that Brian Green and his YouTube[1] channel, Liberty's Champion, constitute "news media" for purposes of the Public Records Act (PRA) under RCW 5.68.010(5) and RCW 42.56.250. Concluding that discretionary review under RAP 2.3(b)(4) is appropriate based on the trial court's certification, this court grants review.

FACTS

In November 26, 2014, Green entered the Pierce-County City Building. As he passed through security,

[1] YouTube is an internet based video-sharing website where users upload, share and view video content.

he asked the individuals operating the security checkpoint what law authorized operation of the security checkpoint. The interaction escalated, and at some point, Green began recording. Green alleges a Sheriff's deputy subsequently pushed him to the floor. Green was arrested and charged with criminal obstruction, a gross misdemeanor. The charges were later dismissed.

In December 2017, Green submitted a PRA request to the Pierce County Sheriff's Office via e-mail and signed the request as an "[i]nvestigative [j]ournalist." Mot. for Disc. Rev., Appendix at 415. He requested:

> 2. 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.

Mot. for Disc. Rev., Appendix at 417.

Pierce County responded with some records, but maintained that photographs and dates of birth of corrections staff were exempt under RCW 42.56.250(9) for all requestors other than news media. Green responded that he believed he was included in the definition of news media because he had created and operated a YouTube channel, Liberty's Champion. Green describes Liberty's Champion as:

> Liberty's Champion and 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 though Liberty's Champion, which is publicly available (free of charge) to any person with an internet connection. Liberty's Champion and Mr. Green uses its editorial skills in not only selecting stories to cover, but also in writing the commentary used in its editorials uploaded and featured on Liberty's Champion.

Mot. for Disc. Rev., Appendix at 415. Liberty's Champion describes itself as "Exposing Corruption, Educating the People." Mot. for Disc. Rev., Appendix at 415. It has over 12,000 subscribers.

Pierce County maintained Green was not "news media" and did not produce the remainder of the requested records. Green then sued Pierce County under the PRA.

Pierce County filed a motion to compel seeking information regarding the monetization of Liberty's Champion. The trial court trifurcated the case to determine: first, the definition of "news media" under RCW 5.68.010(5); second, whether additional discovery was needed to determine whether Green fell within that definition; and third, whether Pierce County violated the PRA and if so, what penalty and attorney fee award should be made. The trial court found RCW 5.68.010(5)'s definition of "news media" to be unambiguous, and concluded based its plain language, that Liberty's Champion fell within that definition. It

deconstructed the question of whether Liberty's Champion was "news media" into three inquiries. First, is Liberty's Champion an "entity"? RCW 5.68.010(5)(a). Second, is Liberty's Champion in the "regular business of news gathering and disseminating news or information to the public"? RCW 5.68.010(5)(a). Third, in making the request, was Green acting as an "agent" of Liberty's Champion? RCW 5.68.010(5)(b). The trial court answered all three questions in the affirmative and found Pierce County violated the PRA by refusing to provide the Sheriff's Office employees' photographs and birthdates to Green.

The trial court also certified its order for immediate appellate review under RAP 2.3(b)(4):

> The Court certifies under RAP 2.3(b)(4) that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. The Court further notes that this Order involves issues of first impression in Washington. The Court additionally notes that discretionary, interlocutory appeal of this Order may be the only means Defendant has to obtain meaningful appellate review of this decision, because any further proceedings in this case at the trial court level will involve the turning over of the records in question. If this court is incorrect in its interpretation of RCW 42.56.250(9) and [RCM 5.68.010(5), the law enforcement officers protected by those

> provisions will be unable to regain those protections vis-a-vis Plaintiff—the Court could order that the records be returned but the relevant information will have already been revealed.

Mot. for Disc. Rev., Appendix at 426. The trial court stayed enforcement of the order until this court denies review or issues an opinion.

ANALYSIS

This court may grant discretionary review only when:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
>
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
>
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that

> immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Pierce County seeks review under RAP 2.3(b)(1), (2), and (4).

The exemption statute under the PRA, RCW 42.56.250, provides in pertinent part:

> The following employment and licensing information is exempt from public inspection and copying under this chapter:
>
> . . . .
>
> (9) 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 5.86.010(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 10.97.030[.]

RCW 42.56.250 (emphasis added).

RCW 5.68.010(5) states:

> (5) 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.

Pierce County argues that this court should grant discretionary review under RAP 2.3(b)(4) because the trial court's interpretation of RCW 5.68.010(5)'s applicability to Liberty's Champion and Green is a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. Green disagrees and argues this court should not grant review under RAP 2.3(b)(4) because there is no substantial ground for difference of opinion as to the interpretation of RCW 5.68.010(5).

This court concludes that immediate review of the trial court's order is appropriate under RAP 2.3(b)(4). Whether Liberty's Champion and Green are "news media" for the purposes of receiving pictures and birthdates of employees of criminal justice agencies, under RCW 5.68.010(5), is a matter of first impression, and a controlling question of law as to which there is substantial ground for a difference of opinion. "Courts traditionally will find that a substantial ground for difference of opinion exists where the circuits are in dispute on the question and the court of appeals of 'the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *Couch v. Telescope, Inc.* 611 F.3d 629, 633 (9th Cir. 2010) (quoting 3 FEDERAL PROCEDURE, LAWYERS EDITION § 3:212 (2010) (footnotes omitted)). Appellate resolution of that question of law will materially advance the ultimate termination of this litigation. Accordingly, this court grants discretionary review under RAP 2.3(b)(4).[2]

Green requests attorney fees under RAP 18.1 and RCW 42.56.550(4). His request is premature because he has not yet prevailed on appeal.

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[2] Because this court grants review under RAP 2.3(b)(4), it does address Pierce County's arguments regarding RAP 2.3(b)(1) and (2).

CONCLUSION

Pierce County has demonstrated that review under RAP 2.3(b)(4) is appropriate. Accordingly, it is hereby

ORDERED that Pierce County's motion for discretionary review is granted. The Clerk will issue a perfection schedule. The trial court's order remains stayed pending the issuance of the mandate of this appeal. Green's motion for sanctions against counsel for Pierce County is denied.

DATED this 3rd day of July, 2019.

/s/ Eric B. Schmidt
Eric B. Schmidt
Court Commissioner

cc: Frank Cornelius, Jr.
Joseph Thomas
Hon. Christopher Lanese

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRIAN GREEN, Respondent, v. PIERCE COUNTY, Petitioner.	No. 53289-1-II ORDER CERTIFYING APPEAL FOR TRANSFER (Filed Jul. 10, 2020)

Pierce County appeals the trial court's order that Brian Green, who hosts a YouTube channel regarding his claims of governmental corruption, could obtain through a public disclosure request, photographs and birthdates of law enforcement personnel, which are usually exempt from public disclosure under RCW 42.56.250(8), because his YouTube channel makes him "news media" under RCW 5.68.010(8) to whom the exemption does not apply. It also appeals from the trial court's refusal to allow it to engage in discovery as to whether the YouTube channel constitutes "news media" under RCW 5.68.010(8). Upon review of the briefing, this court concludes that this appeal is appropriate for certification for transfer to the Washington State Supreme Court. RAP 4.4. Accordingly, it is

ORDERED that this court certifies this appeal for direct review by the Washington State Supreme Court.

/s/ Sutton, A.C.J.
Sutton, A.C.J.

APPENDIX D

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

BRIAN GREEN, Plaintiff, vs. PIERCE COUNTY, a municipal corporation, Defendant.	No. 18-2-06266-34 ORDER ON MERITS, STAY, AND CERTIFICATION UNDER RAP 2.3(b)(4)

On March 1, 2019, this case came before the Court on Defendant's Motion to Compel. At that hearing, in order to efficiently manage the issues in this case, the Court ordered that this case be trifurcated. First, the Court would decide the appropriate definition of "news media" under RCW 5.68.010(5), and whether additional discovery was necessary to determine whether Plaintiff fell within that definition. Second, if necessary, additional discovery would occur and the Court would then determine whether Plaintiff was within the definition of "news media." Third, if the Court found a violation of the Public Records Act, the Court would determine the appropriate penalty and attorney's fee award.

The parties have submitted briefing and supporting materials in connection with the first stage described above. The Court (1) finds that additional discovery or development of the record is not necessary

to resolve this matter and (2) finds that Liberty's Champion and Plaintiff falls within the definition of "news media" under RCW 5.68.010(5), (3) finds that Defendant violated the Public Records Act, (4) certifies the issue for immediate, interlocutory appeal under RAP 2.3(b)(4), and (5) stays this action and enforcement of this Order until resolution of any interlocutory appeal of this Order.

I. MATERIAL CONSIDERED

The Court considered all materials filed in this matter that predate the date of this Order. In addition to the briefing and supporting materials submitted by the parties, this includes but is not limited to the Complaint and Plaintiff's Response to Pierce County's First Set of Discovery Requests. These materials were cited to by the parties in their briefing without objection from the other party and the Court concludes that it is appropriate to consider them in ruling on this matter.

II. BACKGROUND

A. The Dispute

On November 26, 2014, Mr. Green was accompanying a friend to the Pierce County-City Building. As Mr. Green passed through security, "Mr. Green asked the individuals operating the security checkpoint what law authorized the security checkpoint." The interaction was escalated to a Pierce County Sheriff's Deputy and Mr. Green began video recording. More verbal interactions ensued, culminating in, according to Mr.

Green, the Sheriff's Deputy "violently push[ing] Mr. Green causing him to fall back several paces as he fell to the floor." Mr. Green was subsequently arrested and charged with criminal obstruction, a gross misdemeanor. The charges were later dismissed. Complaint for Violation of the Public Records Act at ¶¶ 9-19.

On December 14, 2017, Mr. Green made the following public records request to the Pierce County Sherriff'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.

He signed the request as an "Investigative Journalist."

Pierce County responded and provided some records but indicated that dates of birth and official photos of Corrections Staff were exempt under RCW 42.56.250(9) for all requestors other than "news media." Correspondence ensued where Mr. Green explained that he believed he was included in the definition of "news media" because he had a YouTube channel called "Liberty's Champion" and he provided a brief description of it. Pierce County maintained that Mr. Green did not fall within the definition of "news media" and did not provide the records at issue. Mr. Green filed this lawsuit on December 14, 2018 as a result.

B. Liberty's Champion

Liberty's Champion is a YouTube Channel continuously operated by Mr. Green since 2013. As described by Mr. Green:

> Liberty's 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 Liberty's Champion, which is publicly available (free of charge) to any person with an intemet connection. Liberty's 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 Liberty's Champion.

Plaintiff's Response to Defendant's Interrogatory No. 2.

Liberty's Champion describes itself as "Exposing Corruption, Educating the People." 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 License to Kill: Badges Do Grant Extra Rights, and "Tierce County Deputy Assaults Disabled Black Man, Snatches His Cane, and Arrests Him for Obstruction." Plaintiff's Response to Defendant's Interrogatory No. 10.

Liberty's Champion has over 12,000 subscribers. Plaintiff's Response to Defendant's Interrogatory No. 2. As a sample period, during the roughly two months between November 12, 2018 and January 10, 2019, Liberty's champion uploaded 10 videos, or approximately one video per week. Plaintiff's Response to Defendant's Interrogatory No. 11. There is no indication in the record that the frequency of content on Liberty's Champion has materiality deviated from this rate over time.

While Defendant has provided information regarding how Liberty's Champion likely interacts with YouTube's monetization policies, the actual financial circumstances and monetization (if any) of Liberty's Champion are not included in the present record. As part of the ruling mentioned at the outset of this Order, the Court ruled that any discovery regarding such issues would be barred unless and until the Court ruled that such information were relevant to the resolution of this case.

C. Subsequent Events

On February 27, 2019, the day after Mr. Green filed his Response to Pierce County's Motion to Compel and the morning Pierce County's reply in support of that motion was due, Mr. Green made a public records request to the Pierce County Prosecutor's Office for:

> 1. Any and all of Frank Cornelius's cellular telephone records for any and all cellular telephones he uses to conduct his business

> including text messages from November 2018 to the present.
>
> 2. 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 Frank Cornelius.
>
> 3. Any and all complaints and or grievances involving or pertaining to Frank Cornelius.

He signed the request as an "Investigative Journalist." Mr. Cornelius is counsel for Defendant in this matter. Prior to the date of the request, the only connection between Mr. Green and Mr. Cornelius was this lawsuit. Declaration of Frank Cornelius, Ex. D.

III. ANALYSIS

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

RCW 42.56.250 states:

> The following employment and licensing information is exempt from public inspection and copying under this chapter:
>
> (9) 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.

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). The definition of "new media" under this statute does not appear to have been previously addressed by any appellate authority in Washington.

Resolution of this issue requires answering three discrete questions. First, is Liberty's Champion an "entity"? Second, is Liberty's Champion "in the regular business of news gathering and disseminating news or information to the public"? Third, in making the request at issue, was Brian Green acting as an "agent" of Liberty's Champion?

The fundamental principles of statutory interpretation that govern this case are well established:

> Our fundamental goal in statutory interpretation is to discern and implement the legislature's intent. If a statute's meaning is plain on its face, we give effect to that plain meaning as an expression of legislative intent. We derive the plain meaning from the language of the statute and related statutes. When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise. However, when the statute is ambiguous or there are conflicting provisions, we may arrive at the legislature's intent by applying recognized principles of statutory construction.

O.S.T. ex rel. G.T. v. BlueShield, 181 Wn.2d 691, 696-97, 335 P.3d 416 (2014) (quotation marks and citations omitted).

B. Relevant Legislative Intent

Given that the "fundamental goal in statutory interpretation is to discern and implement the legislature's intent," *id.*, it warrants brief mention that the relevant legislative intent in this case is not as clear as it appears at first glance. To answer whether the Legislature intended for people such as Plaintiff to obtain photographs and birthdates of corrections deputies and staff, the Court must answer whether the Legislature intended for people such as Plaintiff 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.

B. "Entity"

The first point of conflict between the parties is whether Liberty's Champion is 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, or any entity. . . ." Both parties focus specifically on the word "entity" as the applicable term that is determinative in this case.

The statute does not define "entity." "To give undefined terms meaning, [courts] may look to dictionary definitions and related statutes." *LaCoursiere v. Camwest Development, Inc.*, 181 Wn.2d 734, 741-42, 339 P.3d 963 (2014). Both parties point to dictionaries to support their competing definitions of "entity."

Plaintiff points to the Merriam-Webster Online Dictionary's definition: "being, existence." Plaintiff argues that Liberty's Champion meets this definition because it "exists on its YouTube channel on the internet, [and] wherever Mr. Green and his associates identify themselves as acting on behalf of Liberty's Champion." In essence, Plaintiff defines "entity" as "something that conceptually exists."[1]

Defendant points to the Black's Law Dictionary definition: "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members." Defendant argues that Liberty's Champion does not meet this definition because it is neither a governmental entity nor does it have a corporate registration. In essence, Defendant defines "entity" as "a governmental unit or a corporation or limited liability company that has a corporate registration."[2] Defendant recognizes that its definition would exclude sole proprietorship and partnerships from the definition of "entity."

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[1] This is the Court's attempt to summarize Plaintiff's position. Plaintiff does not use this exact verbiage.

[2] This is the Court's attempt to summarize Defendant's position. Defendant does not use this exact verbiage.

The Court believes that the analysis of both parties is too narrow by focusing on a single word in isolation. Two canons of statutory construction are relevant here. "Under the doctrine of noscitur a sociis, the mearning 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 subjects. 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*, 93 Wn. App. 110, 117, 967 P.2d 14 (1998) (quotation marks and citations omitted).

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 that 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 the 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) ("An 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 this 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 such meaning to that expression. If the Legislature wanted to impose such a requirement, it could have, and would have, stated so explicitly. Accordingly, the Court rejects Defendant's argument that the term "entity" impose a corporate form requirement. The complete definition of "entity" and the Court's determination of whether Liberty's Champion falls within it, however, requires consideration of the words that follow it.

C. "In The Regular Business of News Gathering and Disseminating News"

The second point of conflict is whether Liberty's Champion is "in the regular business of news

gathering and disseminating news[.]" The statute does not define this phrase or the terms therein. Relying on dictionary definitions of "regular" and "business,"[3] Defendant argues: "A 'regular business' is a commercial enterprise carried on in a consistent standard practice. An activity that does not act to earn a financial profit is not a business, and the activity cannot be associated as in a regular business."[4] Thus, Defendant appears to argue that being "in the regular business of news gathering and disseminating news" requires financial transactions and a profit motive.

The Court disagrees. A single word in a statute should not be read in isolation, but rather considered in the context of the words that surround them. *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012). The expression "in the business of" is a common idiom that has its own meaning. The Merriam-Webster Online Dictionary defines it as "to have (something) as one's job or purpose." This definition, which does not require financial transactions or a profit motive, is consistent with this Court's common understanding of the expression.

The statute differs from this common expression by inserting the word "regular." The Merriam-Webster Online Dictionary defines "regular" as "recurring, attending, or functioning at fixed, uniform, or normal

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[3] The terms are not defined by the statute.

[4] In a footnote, Defendant states that a "properly formed nonprofit may be a business." However, this statement is inconsistent with Defendant's proposed definition of business, and Defendant provides no argument to rectify the inconsistency.

intervals." The Court concludes that the inclusion of the term "regular" requires that the relevant conduct be recurring in nature. Putting this together, to be "in the regular business of' means to have something as one's job or purpose on a recurring basis. It requires a recurring history of having something as one's job or purpose—it cannot simply arise in a single moment of intent.

Regarding the final portion of this statutory provision, there does not appear to be any disagreement that the activity Liberty's Champion engages in constitutes "news gathering and disseminating news."

Putting these different provisions together, the Court finds that the statutory expression:

> 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, interne, or electronic distribution

means:

> anything similar to a newspaper, magazine, book publisher, news agency, wire service, radio or television station or network, or audio or audiovisual production company that, on a recurring basis, has as its job or purpose the gathering and dissemination of news.

The Liberty's Champion YouTube channel meets this definition. It has been in existence for several years, publishing videos on roughly a weekly basis (the same rate as many newspapers) and has as its purpose the gathering and dissemination of news. Thus, the Court finds that Liberty's Champion falls within the definition of "news media" as defined under RCW 5.68.010.

D. "Employee, Agent, or Independent Contractor"

Defendant argues that this does not conclude the inquiry, however, as Liberty's Champion is not a party to this suit and did not make the public records request in question. Instead, Mr. Green made the request and is the Plaintiff. Thus, RCW 5.68.010(5)(b) potentially applies, which includes within the definition of "news media":

> 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[.]

Black's Law Dictionary defines "agent" as "One who is authorized to act for or in place of another; a representative."

The Court disagrees. In a very real sense, Mr. Green ***is*** Liberty's Champion. He owns, administers, and manages it. The Court finds that any analysis under RCW 5.68.010(5)(b) is unnecessary in these

circumstances due to the identity between Mr. Green and Liberty's Champion. In the alternative, the Court finds that Mr. Green is an agent of Liberty's Champion and was acting within the scope of that agency when he made the public records request at issue.

Accordingly, the Court finds that Plaintiff qualifies as "news media" under RCW 42.56.250(9) and 5.68.010(5) and that Defendant violated the Public Records Act when it failed to turn over the records at issue in this case.[5]

E. "Bone Fide News Gathering"

Defendant does not explicitly raise the issue as an argument, but notes in a lengthy footnote that there are concerns in this case whether Plaintiff's records request actually constitutes "bone fide news gathering" (a requirement under RCW 5.68.010(5)(b). Defendant points to Plaintiff's own personal situation that gave rise to the request underlying this case, as well as allegedly personally motivated records requests made concerning Defendant's attorney. The implication is that the request in this case does not actually constitute "bone fide news gathering" but rather retaliation or some other bad faith conduct by Plaintiff in response to the events of November 26, 2014.

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[5] Both parties raise numerous other arguments. The Court finds them to be either without merit or moot given this conclusion.

Defendant did not formally raise this as an argument, but the Court will briefly address the issue. Given the nature of the news disseminated on Liberty's Champion, the Court cannot say that the request in this case was not made in good faith out of a desire to disseminate the records through Liberty's Champion in a manner consistent with other news it has disseminated. Further, the only test of good faith that is apparent to this Court is whether a good faith desire to gather news as at least ***a*** factor in the conduct at issue. It does not appear that the statute envisions splitting the hair of intent any finer than that in situations where news gathering may potentially be motivated by both personal agendas and a desire to gather and disseminate news. Nor does it appear that Defendant believes this is the case either, given that it did not formally raise this argument but rather referenced it in a footnote.

This tension, however, may be an issue that requires Legislative attention to more finely balance the competing interests of protecting news sources, protecting law enforcement, and allowing the news media access to information. The current definition of "news media" comes from 2007. While only 12 years ago, 2007 was a lifetime ago in terms of how the public consumes news. Newspapers and television have declined and YouTube, Twitter, and Facebook have risen. In the abstract, this may result in exponentially more entities qualifying as "news media" than anticipated by the Legislature in 2007. The Court makes no assessment regarding whether this change is positive or negative,

but the change could result in unintended consequences. However, the determination of whether any consequences are actually unintended, and whether any changes in the law are necessary as a result, is a job for the Legislature, not the courts. The relevant statutory language is unambiguous in this case, and the Court has applied it according to its plain language.

F. Stay and Certification for Appeal

The Court certifies under RAP 2.3(b)(4) that this order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. The Court further notes that this Order involves issues of first impression in Washington. The Court additionally notes that discretionary, interlocutory appeal of this Order may be the only means Defendant has to obtain meaningful appellate review of this decision, because any further proceedings in this ease at the trial court level will involve the turning over of the records in question. If this Court is incorrect in its interpretation of RCW 42.56.250(9) and 5.68.010(5), the law enforcement officers protected by those provisions will be unable to regain those protections vis-à-vis Plaintiff—the Court could order that the records be returned but the relevant information will have already been revealed.

To assist in the Court of Appeals' determination of whether to grant any Motion for Discretionary Review

that may be made by Defendant, the Court stays enforcement of this Order and stays this case until (a) Defendant notifies the Court that it is not seeking immediate review of this Order, (b) the Court of Appeals declines to immediately review this Order, or (c) the Court of Appeals issues an Opinion in this matter after having accepted review of this Order.

IV. CONCLUSION

The plain and unambiguous language of 42.56.250(9) and 5.68.010(5) includes Liberty's Champion and Plaintiff within the definition of "news media." Accordingly, the Court finds that Defendant has violated the Public Records Act. Additionally, this Court certifies this Order for immediate review under RAP 2.3(a)(4) and stays this action and enforcement of this Order until resolution of any interlocutory appeal of this Order.

Dated: April 5, 2019 /s/ Chris Lanese
Judge Chris Lanese

APPENDIX E

**IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY**

Brian Green, Plaintiff, v. Pierce County, A Municipal Corporation Defendant.	**PLAINTIFF'S OPENING BRIEF THAT LIBERTYS CHAMPION AND BRIAN GREEN ARE NEWS MEDIA** Case number: 18-2-06266-34 Date: March 04, 2019

Joseph Thomas
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* * *

IV. Argument

* * *

5. The construction of RCW 5.68.010(5) cannot infringe upon the First Amendment's protections of the 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.

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 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* 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.

* * *

APPENDIX F

No. 53289-1-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

Pierce County,

Petitioner,

v.

Brian Green,

Respondent.

RESPONSE TO MOTION
FOR DISCRETIONARY REVIEW

(Filed May 28, 2019)

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* * *

II. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. This motion for discretionary appeal should be denied because there is not a substantial ground for a difference of opinion as to the construction of RCW 5.68.010(5)

* * *

3. There is not substantial ground for a difference of opinion when Pierce County does not contest Mr. Green's arguments – including the First Amendment

* * *

Pierce County did not respond to Mr. Green's argument that RCW 5.68.010(5) must be construed in a way that would not 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. U.S. Const. amend. I.

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. *See 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. S*ee 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).

This Court is bound by the United States Constitution – even if Pierce County is dead set on avoiding it. Any construction of RCW 5.68.010(5) that uses a restrictive definition of the media, as Pierce County

argues, and since it is "reasonably capable of a constitutional construction, it must be given that construction." *City of Seattle v. Drew*, 70 Wn.2d 405, 408 (1967); *Martin v. Aleinikoff*, 63 Wn.2d 842, 850 (1964).

APPENDIX G

No. 53289-1

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

PIERCE COUNTY,

Appellant,

v.

BRIAN GREEN

Respondent.

RESPONDENT'S RESPONSE BRIEF

(Filed Dec. 23, 2019)

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* * *

III. ARGUMENT

* * *

B. Overview of Construction of RCW 5.68.010(5)

* * *

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. Popper*, 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.

* * *

APPENDIX H

No. 53289-1

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

PIERCE COUNTY,

Appellant,

v.

BRIAN GREEN

Respondent.

RESPONDENT'S RESPONSE TO AMICUS CURIAE MEMORANDUM OF ALLIED DAILY NEWSPAPERS OF WASHINGTON

(Filed Feb. 27, 2020)

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* * *

II. ARGUMENT

A. Bona Fide News Gathering Under RCW 5.68.010 Absolutely Hinges On Intent

* * *

5. Consideration Of Business Status In the Definition Of News Media Violates The First Amendment

Any attempt to define news media with an economic/business test would run afoul of the constitutional protections of the Freedom of Press by creating two different classes of the press. It is unconstitutional to create different tiers of press, as it would create a chilling effect on the free flow of information to the public.

"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. The Freedom of the Press is a fundamental right. *Lovell v. City of Griffin*, 303 US 444, 450 (1938). While the First Amendment does not provide a definition of the press, the United States Supreme Court explained in 1938 that:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

Lovell, 303 US at 452; *accord Thornhill v. Alabama*, 310 US 88, 101-02 (1940) (explaining the freedom "of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."). "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 905 (2010).

The First Amendment is a paramount consideration when this Court construes RCW 5.68.010(5), as it is bound by the canon of construction that if a statute is "reasonably capable of a constitutional construction, it must be given that construction." *City of Seattle v. Drew*, 70 Wn.2d 405, 408 (1967); *Martin v. Aleinikoff*, 63 Wn.2d 842, 850 (1964) (stating "if a statute is subject to two interpretations, one rendering it constitutional and the other unconstitutional, the legislature will be presumed to have intended a meaning consistent with the constitutionality of its enactment").

It is uncontested that "[c]ompelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems." *Zerilli v. Smith*, 656 F. 2d 705, 710 (D.C. Cir. 1981). This is because "[t]he reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public." *Branzburg v. Hayes*, 408 US 665, 725 (1972) (Stewart, J., dissenting) (internal citations and quotation marks omitted). Courts have long understood

"[t]he free press has been a might catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings." *Estes v. Texas*, 381 US 532, 539 (1965).

This argument that business status is a consideration is nothing more than a conclusion which does not explain how the business test would operate. *West v. Thurston County*, 168 Wn.App. 162, 195 (2012) (stating the party did not cite to any "authority to support this argument, we do not further consider it."); *Joy v. Department of Labor and Industries*, 170 Wn.App. 614, 629 (2012) (stating "[w]e do not consider Joy's conclusory vested rights argument in her opening brief that was unsupported by citation to authority."). The argument does not provide any definitions for the undefined statutory terms. Since the argument does not include a standard to determine what is and is not a business, or even attempt to define the undefined statutory terms, it is nothing more than passing treatment of the issue and this court should decline to consider the argument. However, even if the argument is considered it still fails for the following reasons.

a. It Violates The First Amendment To Create Two Tiers of News Media

It is an affront and violates the First Amendment of the United States Constitution to create two tiers of news media. This Court will be creating two tiers of

news media if it construes RCW 5.68.010(5) to include a business/economic test: 1. The preferred tier with a restrictive definition of news media under RCW 5.68.010(5) which includes the business/economic test; and 2. The secondary tier with a broader definition of news media under the First Amendment.[9]

Here Amicus Allied Daily Newspapers of Washington argues the "plain language of the shield law indicate that a 'news media' entity must be a business." *See* Allied Daily Newspapers of Washington Amicus Br. at 11-12. This means that under the theory advanced by Allied Daily Newspapers of Washington there would be a business/economic test in the definition of RCW 5.68.010(5), when determining if there is protection from subpoenas.

Constitutionally, there is only one press in regard to the First Amendment. *Lovell v. City of Griffin*, 303 US 444, 452 (1938) (defining freedom of the press); *accord Thornhill v. Alabama*, 310 US 88, 101-02 (1940). It is well-established that under First Amendment jurisprudence that the definition of the press (sometimes referred to in case law as news media) is broad and expansive.[10] "The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]." *Time, Inc. v. Hill*, 385 US 374,

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[9] For example, a business/economic test under RCW 5.68.010(5) would exclude student journalists at high schools and universities that do not meet the business/economic test.

[10] For a more in-depth analysis of this point refer to pages 20-23 in Respondent's Response Brief filed with this Court on December 23, 2019.

388 (1967) (quoting *Winters v. New York*, 333 US 507, 510 (1948)). The reason for this is because our founding fathers intended there to only be one freedom of the press. There is no distinction regarding whether the press is paid or unpaid in order to receive the constitutional protections. *See e.g. Lovell*, 303 US at 452.

Creating a two-tiered system of protection for the press will cause a chilling effect for the press that will stifle expression and speech of the lesser protected press. "Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill v. Alabama*, 310 US 88, 95 (1940); *see also Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 891 (2010) (stating "[s]ubstantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored."); *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 906 (2010) (explaining "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.").

If this Court construes RCW 5.68.010(5) to include a business/economic test it will have a chilling effect on all news media that does not meet the construed statutory standard. This construction of the statute will likely violate the First Amendment as it will be designating means of speech that should be preferred or disfavored.

b. It Violates The First Amendment To Force News Media To Enter A Pay-For-Play Scheme To Receive The Protections Of RCW 5.68.010

It violates the First Amendment to force news media to enter into a pay-for-play scheme to receive the protections of RCW 5.68.010.

Here Amicus Allied Daily Newspapers of Washington is arguing for a business test to determine who is news media under RCW 5.68.010. The amicus brief only identifies the business test derives from RCW 5.68.010(5)(a) which refers to "any entity in the regular business of gathering and disseminating news" and RCW 5.68.010(5)(b) which refers to "an employee, agent, or independent contractor." *See* Allied Daily Newspapers of Washington Amicus Br. at 12.

Requiring news media to meet any type of a business/economic test is nothing more than a pay-to-play scheme in violation of the First Amendment. Only the institutional press would be able to overcome this vague business/economic test and the United States Supreme Court has already ruled that institutional press does not have any constitutional privilege beyond those of other speakers. *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 906 (2010).

In *Lovell v. City of Griffin* the court decided whether an ordinance requiring permission from the government in order to distribute pamphlets and magazines violated the First Amendment of the United States Constitution. *Lovell*, 303 US at 447-48. The

Lovell court invalided the ordinance because it violated the First Amendment protections of the "freedom of the press by subjecting it to license and censorship." *Id.* at 451. It explained the freedom of the press protects against licenses and censorship:

> Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his Appeal for the Liberty of Unlicensed Printing. And the liberty of the press became initially a right to publish without a license what formerly could be published only with one.

Lovell v. City of Griffin, 303 US 444, 451 (1938) (internal quotation marks omitted). Requiring a business test for news media protections in Washington is a licensing standard that violates the constitutional protections of the freedom of the press. The Washington government regulates businesses in the state, through the Revised Code of Washington. Chapter 19.80 RCW creates a mandatory statutory duty for any persons conducting business in the state to register that trade name with the state government. RCW 19.80.010; WAC 458-02-300 (requiring fees to register business trade names).

Here, if RCW 5.68.010 is construed as requiring news media to be businesses, it will be an

unconstitutional restraint upon the First Amendment to the United States Constitution. Using a business economic test is nothing more than a pay-to-play scheme to gain

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APPENDIX I

No. 98768-8

THE SUPREME COURT
FOR THE STATE OF WASHINGTON

PIERCE COUNTY,

Appellant,

v.

BRIAN GREEN

Respondent.

RESPONDENT'S RESPONSE TO AMICUS CURIAE MEMORANDUM OF WASHINGTON STATE ASSOCIATION OF BROADCASTERS, RADIO TELEVISION DIGITAL NEWS ASSOCIATION AND WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION

(Filed Oct. 9, 2020)

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* * *

I. INTRODUCTION

* * *

In *arguendo*, even if there is some abuse, it must be tolerated because the news media privilege protects news media's First Amendment rights. *Time, Inc. v. Hill*, 385 US 374, 388-89 (1967) (quoting 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.)) (stating "[a]s James Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' ").

This Court should use the First Amendment as the North Star when construing RCW 5.68.010(5), and disregard any claims the *sky will fall* because of a broad construction of the statute.

* * *

III. ARGUMENT

A. A YouTube Channel ***IS*** a News Media Entity for the Purposes of RCW 5.68.010(5)

* * *

3. Libetys Champion ***is*** an entity within the scope of RCW 5.68.010(5)

* * *

b. A YouTube Channel ***is*** a newspaper for the purposes of RCW 5.68.010(5)

* * *

Second, the argument that Libertys Champion and Mr. Green are not newspapers fails because RCW 5.68.010(5) must be construed in accordance with the protections of the freedom of the press enshrined in the

First Amendment to the United States Constitution, since both touch upon the same subject matter – protecting the press. *Vashon Island Committee for Self-Government v. State Boundary Review Bd. King Cnty.*, 127 Wn.2d 759, 771 (1995) (explaining "[s]tatutes touching upon the same subject are to be interpreted harmoniously."); Wash. Const. art. 1, § 2 ("The Constitution of the United States is the supreme law of the land."). The First Amendment to the United States Constitution guarantees protections for the the freedom of the press. U.S. Const. amend. I; *New York Times Co. v. United States*, 403 US 713, 717 (1971) (stating "[t]he press was protected so that it could bare the secrets of government and inform the people."). The purpose RCW 5.68.010 is to protect news media from subpoenas and other compulsory process. *See* RCW 5.68.010. The First Amendment to the United States Constitution needs to be considered when construing RCW 5.68.010 to ensure there are not obvious problems with infringement upon the First Amendment. *Zerilli v. Smith*, 656 F. 2d 705, 710 (D.C. Cir. 1981) (explaining "[c]ompelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems."); *c.f. City of Seattle v. Drew*, 70 Wn.2d 405, 408 (1967) (stating that if a statute is "reasonably capable of a constitutional construction, it must be given that construction."). Consequently, this Court must construe the statute in accordance with the First Amendment, if possible, as the Washington Constitution recognizes the United States Constitution is controlling. Amicus WSAB, WNPA, and RTDNA agrees the statute must be construed in accordance with the First Amendment to the United States

Constitution. *See* WSAB, WNPA and RTDNA Amicus Br. at 1 (stating "[t]his Court's challenge is to protect open government and First Amendment values without rendering the shield law so unworkable as to invite its demise."). But Amicus does not challenge any of Mr. Green's citations to the First Amendment which stand for the proposition that there is no difference between traditional press and any new and emerging press. *See e.g. 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").[5] Because both the First Amendment's freedom of press and RCW 5.68.010 offer protections to the press from the government, the definitions of press must be harmonized between the two. Amicus WSAB, WNPA and RTDNA does not contest Mr. Green's argument that the First Amendment's protections of freedom of the press require a broad construction of the definition of news media in RCW 5.68.010(5).

* * *

[5] For a more detailed analysis of how the First Amendment impacts the construction of RCW 5.68.010(5): *see* Respondent's Response Br. at 20-23, dated December 23, 2019; *see also* Respondent's Response Br. to Amicus Curiae Memorandum of Allied Daily Newspapers of Washington, at 13-20, dated February 27, 2020.

APPENDIX J

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of 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.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rev. Code Wash. § 5.68.010(5)

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.

Rev. Code Wash. § 10.97.030(5)

"Criminal justice agency" means: (a) A court; or (b) a government agency which performs the administration of criminal justice pursuant to a statute or executive order and which allocates a substantial part of its annual budget to the administration of criminal justice.

Rev. Code Wash. § 42.56.070(1)

Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

Rev. Code Wash. § 42.56.250. Employment and licensing

The following employment and licensing information is exempt from public inspection and copying under this chapter:

* * *

(8) Photographs and month and year of birth in the personnel files of employees or volunteers of a public agency, including 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;

* * *