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

Brian Green, Plaintiff, v. Pierce County, A Municipal Corporation Defendant.	COMPLAINT FOR DIS- CLOSURE UNDER THE PUBLIC RECORDS ACT Case number: 18:2-06266:34 Date: November 28, 2018
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(Filed Dec. 14, 2018)

Mr. Green, through his undersigned attorney, alleges as follows:

I. INTRODUCTION

* * *

II. PUBLIC RECORDS AT ISSUE

3. "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 2017." Ex. A.

III. JURISDICTION AND VENUE

* * *

IV. FACTUAL BACKGROUND

Unlawful Arrest

* * *

18. Mr. Green was then arrested by the Pierce County Sheriff's Office for criminal obstruction, a gross misdemeanor.

* * *

Public Records Act Request

21. On December 14, 2017, Mr. Green, identifying himself as a journalist, sent a PRA request to Pierce County through his briangreenband@tds.net email address to Pierce County Sheriff Public Records Officer at the governmental email address SHRpublicrecords@co.pierce.wa.us. Ex. A.
22. Mr. Green's request sought: "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 2017." Ex. A.
23. Mr. Green requested that his request be construed under the broadest possible terms of the Public Records Act.

24. The request for records under the Public Records Act was signed Brian Green (Plaintiffs name) and underneath that the title of “investigative journalist.” Ex. A.

Pierce County Response

25. On December 26, 2017, Pierce County employee Sue Stewart, an office assistant in the Public Disclosure Unit, responded to Mr. Green’s December 14, 2017 request made under the Public Records Act.

* * *

V. CAUSE OF ACTION – RCW 42.56.550(1)

DENIAL OF THE RIGHT TO INSPECT AND COPY

* * *

50. Pierce County violated Mr. Green’s statutory right to copy and inspect records under the Public Records Act when claimed a sham exemption of RCW 42.56.250(9) stating that Mr. Green was not news media pursuant to the statute as grounds to withhold responsive documents to Mr. Green’s request.
51. When Mr. Green made the Public Records Act request on December 14, 2017 he identified himself as an “investigative journalist.” Mr. Green clarified on December 28, 2017 that he was requesting the documents because he was “working on a story concerning the Pierce County Jail.” Then finally on January 04, 2018 Mr. Green further clarified that he was a

journalist for Libertys Champion, providing a link to the website for Pierce County to review.

52. Pursuant to the broad and expansive plain language of the statutes in RCW 42.56250(9) and RCW 5.68.010(5) Mr. Green is a member of the news media. Mr. Green is in the regular business of gathering news and disseminating information through his website Libertys Champion. Libertys Champion is available to the public. Mr. Green disseminates the news on the internet via Libertys Champion.

VI. REQUEST FOR RELIEF

Mr. Green requests that this Court grant the following relief:

53. A show cause order pursuant to RCW 42.56.550(1) why Pierce County denied Mr. Green an opportunity to inspect or copy the requested public record.
54. A show cause order pursuant to RCW 42.56.550(1) why Pierce County denied Mr. Green a withholding log identifying responsive records to Mr. Green's Public Records Act request that Pierce County was withholding.
55. An order requiring Pierce County to grant to Mr. Green the right to immediately copy or inspect the requested public record.
56. An order directing Pierce County to pay a daily statutory penalty to Mr. Green, not to exceed \$100, per page per day, as allowed by

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RCW 42.56.550(4) for each individual record withheld until Pierce County responds to each of the outstanding public records requests and provides all responsive documents. *Soter v. Cowles Pub. Co.*, 174 P. 3d 60, 78 (Wash. 2007) (stating “[f]or practical purposes, the law treats a failure to properly respond as a denial”).

57. All costs and reasonable attorney’s fees, pursuant to RCW 42.56.550(4), incurred in connection with prosecuting this legal action, if any, including all appeals.
58. Any other such relief this Court deems as equitable.

Dated this 28 day of November 2018.

Respectfully submitted,

The Law Office of
Joseph Thomas PLLC

/s/ Joseph Thomas
Joseph Thomas, WSBA # 49532

Exhibit A

* * *

Exhibit B

* * *

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Exhibit C

* * *

Exhibit D

From: SHRpublicrecords
Sent: Wednesday, January 3, 2018 12:44 PM
To: Brian
Subject: RE: Records Request

January 3, 2018

Mr. Green:

I received your response. As you know, I used RCW 42.56.250(9) as the reason why I did not provide photos or dates of birth for our Corrections staff. In this RCW is the reference to RCW 5.68.010(5), in which the term “news media” is defined. Please see it quoted below.

(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

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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.

You would need to provide information on who you are working for, since you do not identify that in your request.

Also, in 42.56.250(9), it states that “*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.*” Since you were an inmate in our jail during this time period of your request, there is a second reason why you do not qualify as “news media”.

Sincerely,
Sue Stewart
Office Assistant II, Public Disclosure Unit
Pierce County Sheriff’s Department
~~253-798-4291~~
~~SHRpublicrecords@co.pierce.wa.us~~

From: Brian [mailto:~~briangreenband@tds.net~~]
Sent: Thursday, December 28, 2017 1:13 PM
To: SHRpublicrecords <~~SHRpublicrecords@co.pierce.wa.us~~>
Subject: RE: Records Request

I believe your denial of records is in error. I am working on a story concerning the Pierce County Jail.

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Brian Green
Investigative Journalist

From: SHRpublicrecords
Sent: Tuesday, December 26, 2017 11:18 AM
To: Brian
Subject: RE: Records Request

December 26, 2017

Your request for public records re: Jail staff working 11/26/14 & 11/27/14 Our file #1712039

Mr. Green:

Your request for public records was received in our office 12/14/17. You requested:

Any and all records of official photos and/or birth date an 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. |

I am sending you 11 pages of records that are responsive to your request, via a secure email system called Filelocker. You will receive an email telling you when the file is in the system and how to retrieve it. Download and save the file before you try to open it. Please notify me as soon as possible if you can't download the file for any reason. The password is Tuesday26.

The records do not include the dates of birth or the official photos of our Corrections Staff. Per RCW 42.56.250(9), *photographs and dates of birth in the*

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personnel files of employees and workers of criminal justice agencies are exempt.

This is the final and definitive response. Your request is now closed.

If you have any questions, please contact me or the Sheriff's Public Record's Officer/OA3, Mark Carey, at 253-798-7769.

Sincerely,
Sue Stewart
Office Assistant II, Public Disclosure Unit
Pierce County Sheriff's Department
253-798-4291
SHRpublicrecords@co.pierce.wa.us

From: Brian [<mailto:briangreenband@tds.net>]
Sent: Thursday, December 14, 2017 3:45 PM
To: SHRpublicrecords <SHRpublicrecords@co.pierce.wa.us>
Subject: Records Request

From: Brian Green
To: Pierce County Sheriff's Office
Attention: Public Records Officer

This is a request for public records under Chapter 42.56 RCW, Public Records Act. None of the following request(s) for documents will be used for commercial purposes. Please make the following documents available for inspection / copying.

I am requesting:

1. Any, and all records of official photos and/or birth date and/or rank and/or position and/or

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badge number and/or date hired and/or ID
Badge for all detention center and/or jail per-
sonnel and /or deputies on duty November 26
& 27 2014.

Please construe this request in the broadest possible
terms under the Public Records Act.

Also, please retain and do not destroy all records or
documentation related to this request because it may
be used in current, future, or outside litigation.

Thank You,

Brian Green

Investigative Journalist

Exhibit E

From: Brian

Sent: Thursday, January 4, 2018 10:21 AM

To: SHRpublicrecords

Subject: RE: Records Request

I am writing to urge you to reconsider the denial of my
requests made under the Public Records Act.

First, you denied me because you said that I do not
meet the definition of “news media” as defined by
RCW 5.68.010(5). I am a journalist that primarily co-
vers local court cases on my Youtube channel. My
channel is called “Liberty’s Champion.” Here is a link
to my channel. [https://www.youtube.com/channel/
UCTjBAvhF0o9561-i7XKo6rA](https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA)

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I appear in many of the videos giving commentary on events. My channel has nearly 6,000 subscribers. My Youtube 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.

Second, you denied me under RCW 42.56.250(9). I am not sure if you read the statute correctly. The statute is written in the present tense, illustrated by the phrase "*persons in the custody of a criminal justice agency*" which you quoted in your email to me. I am not in the custody of a criminal justice agency.

Please let me know at your earliest possible convenience if you will reconsider.

Thank you for anticipated cooperation.

Brian Green
Investigative Journalist

From: SHRpublicrecords
Sent: Wednesday, January 3, 2018 12:44 PM
To: Brian
Subject: RE: Records Request

January 3, 2018

Mr. Green:

I received your response. As you know, I used RCW 42.56.250(9) as the reason why I did not provide photos or dates of birth for our Corrections staff. In this RCW is the reference to RCW 5.68.010(5), in which the term "news media" is defined. Please see it quoted below.

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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;

(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.

You would need to provide information on who you are working for, since you do not identify that in your request.

Also, in 42.56.250(9), it states that “*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.*” Since you were an inmate in our jail during

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this time period of your request, there is a second reason why you do not qualify as “news media”.

Sincerely,
Sue Stewart
Office Assistant II, Public Disclosure Unit
Pierce County Sheriff’s Department
253-798-4291
SHRpublicrecords@co.pierce.wa.us

Exhibit F

From: SHRpublicrecords
Sent: Monday, January 8, 2018 11:53 AM
To: Brian
Subject: RE: Records Request

January 8, 2018

Mr. Green:

I have re-read RCW5.68.010(5), defining “news media” and it does not appear that you fall under that definition.

(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,

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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

I am still unable to send you the information that I originally denied.

Your request is closed.

Sincerely,
Sue Stewart
Office Assistant II, Public Disclosure Unit
Pierce County Sheriff's Department
253-798-4291
SHRpublicrecords@co.pierce.wa.us

From: Brian [<mailto:briangreenband@tds.net>]
Sent: Thursday, January 04, 2018 10:22 AM
To: SHRpublicrecords <SHRpublicrecords@co.pierce.wa.us>
Subject: RE: Records Request

I am writing to urge you to reconsider the denial of my requests made under the Public Records Act.

First, you denied me because you said that I do not meet the definition of "news media" as defined by RCW 5.68.010(5). I am a journalist that primarily covers local court cases on my Youtube channel. My channel is called "Liberty's Champion." Here is a link

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to my channel. <https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA>

I appear in many of the videos giving commentary on events. My channel has nearly 6,000 subscribers. My Youtube 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.

Second, you denied me under RCW 42.56.250(9). I am not sure if you read the statute correctly. The statute is written in the present tense, illustrated by the phrase "*persons in the custody of a criminal justice agency*" which you quoted in your email to me. I am not in the custody of a criminal justice agency.

Please let me know at your earliest possible convenience if you will reconsider.

Thank you for anticipated cooperation.

Brian Green
Investigative Journalist

From: SHRpublicrecords
Sent: Wednesday, January 3, 2018 12:44 PM
To: Brian
Subject: RE: Records Request

January 3, 2018

Mr. Green:

I received your response. As you know, I used RCW 42.56.250(9) as the reason why I did not provide photos or dates of birth for our Corrections staff. In this RCW

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is the reference to RCW 5.68.010(5), in which the term “news media” is defined. Please see it quoted below.

(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.

You would need to provide information on who you are working for, since you do not identify that in your request.

Also, in 42.56.250(9), it states that “*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.*” Since you were an inmate in our jail during

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this time period of your request, there is a second reason why you do not qualify as “news media”.

Sincerely,
Sue Stewart
Office Assistant II, Public Disclosure Unit
Pierce County Sheriff’s Department
253-798-4291
SHRpublicrecords@co.pierce.wa.us

From: Brian [<mailto:briangreenband@tds.net>]
Sent: Thursday, December 28, 2017 1:13 PM
To: SHRpublicrecords <SHRpublicrecords@co.pierce.wa.us>
Subject: RE: Records Request

I believe your denial of records is in error. I am working on a story concerning the Pierce County Jail.

Brian Green
Investigative Journalist

From: SHRpublicrecords
Sent: Tuesday, December 26, 2017 11:18 AM
To: [Brian](#)
Subject: RE: Records Request

December 26, 2017

Your request for public records re: Jail staff working 11/26/14 & 11/27/14 Our file #1712039

Mr. Green:

Your request for public records was received in our office 12/14/17. You requested:

Any and all records of official photos and/or birth date and/or rank and/or position and/or

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**badge number and or date hired and/or ID
Badge for all detention center and/or jail per-
sonnel and/or deputies on duty November 26 &
27 2014. |**

I am sending you 11 pages of records that are responsive to your request, via a secure email system called Filelocker. You will receive an email telling you when the file is in the system and how to retrieve it. Download and save the file before you try to open it. Please notify me as soon as possible if you can't download the file for any reason. The password is Tuesday26.

The records do not include the dates of birth or the official photos of our Corrections Staff. Per RCW 42.56.250(9), *photographs and dates of birth in the personnel files of employees and workers of criminal justice agencies* are exempt.

This is the final and definitive response. Your request is now closed.

If you have any questions, please contact me or the Sheriff's Public Record's Officer/OA3, Mark Carey, at 253-798-7769.

Sincerely,
Sue Stewart
Office Assistant II, Public Disclosure Unit
Pierce County Sheriff's Department
253-798-4291
SHRpublicrecords@co.pierce.wa.us

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From: Brian [mailto:briangreenband@tds.net]
Sent: Thursday, December 14, 2017 3:45 PM
To: SHRpublicrecords <SHRpublicrecords@co.pierce.wa.us>
Subject: Records Request

From: Brian Green
To: Pierce County Sheriff's Office
Attention: Public Records Officer

This is a request for public records under Chapter 42.56 RCW, Public Records Act. None of the following request(s) for documents will be used for commercial purposes. Please make the following documents available for inspection / copying.

I am requesting:

1. 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.

Please construe this request in the broadest possible terms under the Public Records Act.

Also, please retain and do not destroy all records or documentation related to this request because it may be used in current, future, or outside litigation.

Thank You,
Brian Green
Investigative Journalist

**IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION II**

Pierce County, Petitioner, v. Brian Green, Respondent.	BRIAN GREEN'S DECLARATION Case number: 53289-1-II Date: June 10, 2019
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(Filed Jun. 10, 2019)

I, Brian Green, am over the age of 18, have personal knowledge of all the facts stated herein and declare as follows:

Background

* * *

Harmed By Mr. Cornelius' Misrepresentations

* * *

4. Mr. Cornelius repeatedly misrepresents what my argument is concerning the First Amendment. Mr. Cornelius incorrectly states that I am making a constitutional challenge to RCW 5.68.010(5). The record is abundantly clear that I am using the First Amendment to construe RCW 5.68.010(5) in a way that would not infringe upon the First Amendment's protections of the freedom of the press because if a statute can be construed constitutionally,

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Washington courts must give it that construction.

* * *

I, Brian Green, declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Onalaska, Washington this 10 day of June 2019.

/s/ Brian Green
Brian Green

**IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION II**

Pierce County, Petitioner, v. Brian Green, Respondent.	JOSEPH THOMAS' DECLARATION Case number: 53289-1-II Date: June 10, 2019
--	---

(Filed Jun. 10, 2019)

I, Joseph Thomas, am over the age of 18, have personal knowledge of all the facts stated herein and declare as follows:

1. I am the attorney of record for Respondent in this Court of Appeals. I was also the attorney of record for Respondents in the trial court.
2. Attached hereto as **Exhibit A** is true and correct copy of an email from Respondent's attorney Joseph Thomas (me) to Petitioner's attorney Frank Cornelius on June 04, 2019 at 4:59 PM.

I, Joseph Thomas, declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington this 10 day of June 2019.

/s/ Joseph Thomas
Joseph Thomas

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Exhibit A

Joseph Thomas

From: Joseph Thomas <joe@joethomas.org>
Sent: Tuesday, June 4, 2019 4:59 PM
To: 'Frank Cornelius'
Cc: 'Christina Woodcock'; 'Nadine Christian-Brittain'; 'briangreenband@tds.net'
Subject: RE: Green v. Pierce County
Attachments: 2019.03.20 Reply Merits Brief 2 (Merged) (Merged).pdf; 2019.05.28 Response to Motion for Discretionary Review – Filed.pdf

Frank,

I am writing to you to ask that Pierce County voluntarily withdraw its argument that Mr. Green is making a constitutional challenge any documents in the record, including the reply to the motion for discretionary review filed today with the Court of Appeals. This is a false statement of material fact. By making this fabrication you violating the court rules, as well as your professional duties.

In the reply to the motion for discretionary review, you state that Mr. Green is using the First Amendment as a vehicle to “compel disclosure of information, and a constitutional challenge would not be a basis to oppose discretionary review.” *See* Petr.’s Reply Disc. Review at 5.

This is a fabrication of Mr. Green’s arguments to persuade the Court of Appeals to grant discretionary review under false pretenses. Both parties are arguing

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what the proper construction of RCW 5.68.010(5) should be. Mr. Green is arguing that since RCW 5.68.010(5) “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). See Resp. Answer to Mot. Disc. Review at 6-8; see also Plf.’s Reply Merits Brief at 8-10. Both of these documents are attached for your convenience.

Please let me know if Pierce County will voluntarily withdraw its false and misleading argument by Thursday, June 06, 2019 at 12:00 PM. I hope that we can remedy this situation by ourselves because this fabrication cannot be allowed to persuade the Court of Appeals to grant discretionary review under false pretenses.

Very truly yours,

Joe

Cc: Brian Green

Joseph Thomas
Law Office of Joseph Thomas PLLC
5991 Rainier Ave. South, # B
Seattle, Washington 98118
Phone: (206) 390-8848
Website: <http://JoeThomas.org>

* * *

**IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION II**

Pierce County, Petitioner, v. Brian Green, Respondent.	RESPONDENT'S MOTION FOR SANCTIONS AGAINST MR. CORNELIUS PURSUANT TO RAP 18.9(A) Case number: 53289-1-II Date: June 10, 2019
--	--

(Filed Jun. 10, 2019)

I. IDENTITY OF THE MOVING PARTY

Respondent Brian Green, by and through Joseph Thomas, moves this Court of Appeals to personally sanction Petitioner's attorney Frank Cornelius for making several false statements about the record to this Court, pursuant to RAP 18.9. Mr. Green asks for the relief designated in Part II, below.

II. STATEMENT OF RELIEF SOUGHT

Respondent Brian Green seeks relief from this Court of Appeals in the form of monetary sanctions against Petitioner's attorney Frank Cornelius in the amount of \$5,000.

III. FACTS RELEVANT TO THE MOTION

* * *

IV. EVIDENCE RELIED UPON

* * *

V. GROUNDS FOR RELIEF

A prosecutor must always remember that he or she does not conduct a vendetta when trying any case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided.

State v. Torres, 16 Wn. App. 254, 263 (1976).

Pierce County's attorney, Frank Cornelius, is impermissibly attempting to win this lawsuit through subterfuge when he repeatedly makes false statements of fact and law to this Court. Mr. Cornelius repeatedly mis-characterizes Respondent's First Amendment argument as a constitutional challenge to the statute, which can only be meant to persuade this Court to grant discretionary review under false pretenses. This Court must personally sanction Mr. Cornelius in the amount of \$5,000 for these deceptive tactics and omit his false statements from consideration.

This Court is permitted by RAP 18.9(a) to impose sanctions on an attorney who violates court rules. "RPC 3.3(a)(1) prohibits a lawyer from knowingly making 'a false statement of fact or law to a tribunal.'" *In re Welfare of RH*, 309 P. 3d 620, 625-26 (Wash Ct. App. 2013).

Mr. Cornelius falsely characterizes Respondent's First Amendment argument as a "constitutional challenge." See Pet'r Reply Mot. Discretionary Review at 5. In the reply to the motion for discretionary review, Mr. Cornelius states Respondent "pled no constitutional challenge in his Complaint to RCW 5.68.010, and his cause of action is under RCW 42.56.550." *Id.* at 2. This falsehood is repeated multiple times, but Mr. Cornelius does not even make an attempt to cite to the record where Mr. Green is making a constitutional challenge.

Since the trial court asked for briefing as to how RCW 5.68.010(5) should be construed, Respondent argued the statute should be construed in accordance with the First Amendment to the United States Constitution. APP 185-86. Mr. Cornelius made the same argument to the trial court that that Respondent "pled no constitutional challenge in his Complaint to RCW 5.68.010 and this argument should be struck." APP 256. In case there was any misunderstanding, Respondent clarified his argument is the statute must be construed in a constitutional manner. APP 333-34. Respondent even cited case law cited case law to support its argument: *City of Seattle v. Drew*, 70 Wn.2d 405, 408 (1967); *Martin v. Aleinikoff*, 63 Wn.2d 842, 850 (1964). APP 333.

Mr. Cornelius is not making a harmless mistake as to the nature of Respondent's argument. First, this is not a mistake because Mr. Cornelius fails to cite to the record where Respondent is making a constitutional challenge to the statute. Second, this is not a mistake because after Mr. Cornelius' attempted

confusion in the response merits brief at the trial court, Respondent clarified his argument in the reply merits brief, while citing published case law to substantiate his argument. Third, Mr. Cornelius made this argument again at the appellate level to this Court, Respondent's attorney told Mr. Cornelius this was a false representation and asked Mr. Cornelius to voluntarily withdraw the argument. Mr. Cornelius never responded to Respondent's attorney. This is calculated subterfuge meant improperly sway this Court to grant discretionary review. Mr. Cornelius has had every opportunity to modify or withdraw his argument an

* * *

* * * The evidence in the record clearly identifies Respondent's argument as "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." See Resp't. Resp. Mot. Discretionary Review at 7. While failing to cite to the record, Mr. Cornelius misrepresents Respondent's argument as a constitutional challenge. Mr. Cornelius misrepresents the record.

Mr. Cornelius violated his duty of candor to this tribunal by fundamentally misrepresenting the record, and should be sanctioned under RAP 18.9(a). This Court deserves advocates who make fair representations of opponent's arguments, not advocates who misrepresent the record to gain a tactical advantage.

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Respectfully submitted this 10 day of June 2019.

The Law Office of
Joseph Thomas PLLC

/s/ Joseph Thomas
Joseph Thomas, WSBA # 49532

Certificate of Service

I declare under penalty of perjury under the laws of the State of Washington that on the date specified below, I caused to be served a copy of the following documents via email through the Court of Appeals electronic portal:

- Brian Green's Motion for Sanctions Pursuant to RAP 18.9(a)
- Declaration of Brian Green
- Declaration of Joseph Thomas

To the following:

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

Dated this 10 day of June, 2019.

/s/ Joseph Thomas
Joseph Thomas WSBA # 49532

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NO. 53289-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

BRIAN GREEN, Plaintiff/Appellee

v.

PIERCE COUNTY, Defendant/Appellant

APPELLANT'S OPENING BRIEF

(Filed Nov. 1, 2019)

MARY E. ROBNETT
Prosecuting Attorney

By

DANIEL R. HAMILTON
Deputy Prosecuting Attorney
Attorneys for Defendant/
Appellant Pierce County

955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
PH: (253) 798-7746

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[1] I. INTRODUCTION

Because the Legislature found that “[i]nmates and other parties use [public record requests] to target and endanger individuals and families” of correctional officers, CP 290, RCW 42.56.250(8) was enacted to exempt from disclosure under the Public Records Act (“PRA”) the photographs and birthdate data contained in personnel files of law enforcement agency workers. Plaintiff Brian Green is such a prior inmate pursuing such a PRA request to obtain such statutorily protected records to use against *every* correctional employee who was working during *his* incarceration at the Pierce County Detention and Corrections Center (“PCDCC”).

Plaintiff claims those undisputed statutory protections do not apply to him because he is exempt “news media” since – like the vast majority of Americans – he has a social media account where he posts his opinions and where he “intend[s] to . . . convey[.]” the photographs and birthdates of his correctional workers “to a broad segment of the public. . . .” CP 107.¹ In short, the type of requester the statute was intended to protect

¹ This is not Plaintiff’s only effort to use the PRA to retaliate against public servants. For example, after the County sought to compel discovery to explore any factual basis for his “news media” claim, Plaintiff used the PRA to request again such things as photographs and birthdate information in law enforcement personnel files – but this time for *the Deputy Prosecutor defending the County* in this case before the trial court. *See* CP 443-45.

against now asks the Court to *sub silentio* repeal its protections against the very type of PRA abuse it was meant to prevent – i.e. retaliation against [2] targeted law enforcement workers by making their photographs and birthdates widely available and thus putting them and their families at risk.

Plaintiff seeks this status despite the fact that, at the time of his PRA request to the Pierce County Sheriff's Department ("Sheriff"), he made no showing to meet his burden of demonstrating the requirements of the narrow "news media" privilege applied to him.² He again failed to show he met the privilege after he filed suit and by the time of the merits hearing. Despite these failures and his refusal to provide answers to relevant and necessary discovery testing his claim of being "news media" and supporting other County defenses, the trial court erroneously denied the County's motion to compel discovery, summarily ruled Plaintiff is "news media," and held the County violated the PRA by protecting exempt records.

Because Legislative language and intent should be given meaning and enforced, especially when necessary to protect from harm those whom we expect to protect us, that Order should be reversed and this suit dismissed.

² The statute adopts the definition of "news media" given in the News Media Shield law RCW 5.68.010(5) which defines a "news media" privilege from compelled disclosure as limited to those who fall into one of three narrow categories – none of which apply here.

II. ASSIGNMENTS OF ERROR

1. In entering its April 5, 2019 Order, the trial court erred by ruling Brian Green – a prior inmate who “intend[s] to . . . convey[] . . . to a broad segment of the public” photographs and birthdates of the correctional [3] workers who were on duty during his incarceration – was privileged “news media” and that the County therefore wrongly withheld those otherwise protected personnel records from him. CP 415-29, 432-46.

2. In entering its April 5, 2019 Order the trial court abused its discretion by ruling without explanation “that additional discovery or development of the record is not necessary to resolve this matter” and denying the County’s Motion to Compel discovery. *See id.*; CP 432.

Issues Pertaining to Assignments of Error

1. Was it error to rule Plaintiff met his burden of proving his request for photographs and birthdates located in personnel files of a law enforcement agency came within the exception to the categorical protection of RCW 42.56.250(8) despite his failure to show that either he or his alleged YouTube account was “news media” under RCW 5.68.010(8)?

2. Was it error to deny the County’s Motion to Compel when the rules of civil procedure control discovery in a PRA action, the discovery sought was relevant to the subject matter as well as reasonably calculated to lead to the discovery of admissible

evidence, and its denial was prejudicial to the County's defense?

III. STATEMENT OF THE CASE

A. AFTER KILLINGS, LEGISLATURE PROTECTS LAW ENFORCEMENT WORKERS' PHOTOGRAPHS AND BIRTHDATES

In November 2009, four City of Lakewood Police officers were [4] targeted and shot to death at a Pierce County coffee shop. CP 301. It was later reported that many of the family and friends of the murderer helped him evade capture and that during that time the Lakewood Police Department had been barraged with information requests on officers and their families – including from members of the murderer's family. CP 290.

Acting on the recommendations of the Governor's task force on the Lakewood Police murders, the Legislature took testimony and concluded that: "The public disclosure process, specifically background information and photographs, in the hands of an inmate is used as a weapon to get back" at correctional staff. *Id.* Legislation was found necessary because both "[i]nmates *and other parties*³ use [requests] to target and endanger

³ The Legislature in an earlier session already had protected against PRA requests for "any nonexempt public record *by persons serving criminal sentences* in state, local, or privately operated correctional facilities." See RCW 42.56.565 (2009) (emphasis added).

individuals and families.” *Id.* (emphasis added).⁴ Specifically, the Legislature noted “the name and date-of-birth” are “the two necessary identifiers” that allow requestors “to match . . . criminal justice employees” with other databases. CP 291. Indeed, the Washington Supreme Court later “acknowledg[ed] that there are legitimate concerns about the misappropriation of [5] birth dates” because “disclosing birth dates with corresponding employee names may allow PRA requesters or others to obtain residential addresses and to potentially access financial information, retirement accounts, health care records or other employee records.” *See Washington Pub. Employees Ass’n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 2019 WL 5444797, at *3, 5 (Wash. Oct. 24, 2019).⁵ This same risk exists from release of officer photographs. Levit and Rosch, *The Cybersleuth’s Guide to the*

⁴ Indeed, this Court has found: “Such disclosure to the public would not be voluntary or within the employees’ control” but once in “the public domain, these employees would potentially be subject to an ongoing risk of identity theft and other harms from the disclosure of this personal information, such as their . . . personal telephone numbers.” *See Washington Pub. Employees Ass’n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 1 Wn.App.2d 225, 404 P.3d 111 (2017), *overruled on other grounds*, 2019 WL 5444797 (Wash. Oct. 24, 2019).

⁵ Though the majority of that Court confirmed “DSHS *correctly* regarded RCW 42.56-.250[8] as *applicable*” to “employees working at the” Juvenile Rehabilitation Administration which served “high-risk youth who are committed to . . . custody by county juvenile courts,” the Court held it was “not applicable to the remaining *state employees outside of this DSHS classification*” because “this court cannot interpret the PRA to imply broad exemptions *that have not been expressly delineated.*” (emphasis added). *Id.* at 10, 21-22.

Internet: Internet For Lawyers, 407-08 (2017) (Google’s “Search by Images” allows use of a person’s photograph alone to “practically create[] a dossier of [the subject], using images instead of text.”)

Thus, on March 31, 2010, RCW 42.56.250 was amended in pertinent part to protect both “[p]hotos and month and year of birth in the personnel files of employees and workers of criminal justice agencies.” Because the statute arose in response to the murders of police, its purpose “is all about officer safety.” Senate Bill Report, E2SHB 1317, 61st Legislature, 2010 Reg. Sess; CP 288-291. However, the Legislature noted it was “easier for the *newspaper industry* to purchase records than for employees [6] to defend requests in court systems,” and expressed its desire that “*Newspapers* shall have access to photographs and the full date of birth of criminal justice agency employees.” *Id.* (emphasis added). The statute therefore provides a narrow exception to these protections for “news media, as defined in RCW 5.68.010(5), [to] have access to the photographs and full date of birth.” *See id.*; RCW 42.56.250(8) (emphasis added).

This “news media” definition incorporated into the PRA statute was from a separate “Shield Law” that set out when “compulsory process may compel the news media to testify, produce, or otherwise disclose” certain information. *See* RCW 5.68.010(5). Its definition for that privilege narrowly limits “news media” to one of three separate distinct categories: *i.e.* a) 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* that is in the *regular business* of news gathering and disseminating news or information to the public by any means;” b) any “employee, agent, or independent contractor of any *entity*” previously listed “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) “[a]ny parent, subsidiary, or affiliate of the *entities*” listed in the other two subsections. *Id.* (emphasis added).

[7] B. PRIOR INMATE TARGETS HIS CORRECTIONAL WORKERS WITH PRA REQUEST

On November 26, 2014, Plaintiff Brian Green was arrested for obstructing a law enforcement officer at the County-City Building and incarcerated at the PCDCC for approximately 24 hours (November 26 through 27, 2014). CP 234.⁶ On December 14, 2017, Mr. Green made a Public Record request to the Sheriff’s Department targeting its correctional staff and deputies who had been working at the time of his incarceration. CP 6, 15. His request was personal to him as it sought information related only to the 24 hours of *his* prior PCDCC incarceration. CP 4-6.

⁶ Criminal charges were filed, but later dismissed without prejudice. CP 234-35.

Specifically, Plaintiff sought from the Sheriff:

Any and all records of official photos and/or birth date and/or rank and/or position and/or badge number and/or hired and/or ID Badge for all detention center and/or jail personnel and/or deputies on duty November 26 & 27 2014.

CP 7, 15. Though the signature line on his request gave himself the title “Investigative Journalist,” his request indicated that “[n]one of the following request(s) for documents will be used for commercial purposes.” CP 15. Indeed, the request was made from Mr. Green’s personal email for his musical band, briangreenband@tds.net, and gave no indication of any association with a news media entity or whether use of the title “Investigative Journalist” carried any significance related to the request. CP 6-15.

[8] A Sheriff’s Public Disclosure Unit Assistant (“PDU”) timely responded to the request, and on December 26, 2017, provided 11 pages of responsive records with a cover letter notifying Plaintiff: “The records do not include the dates of birth or the official photos of our Corrections Staff. Per RCW 42.56.250(9)⁷, *photographs and dates of birth in personnel files of employees and workers of criminal justice agencies are exempt.*” CP 7, 17 (emphasis in original). The notice further advised him that it was

⁷ RCW 42.56.250 was amended by HB 2020 effective July 28, 2019; subsection (8) was formerly subsection (9).

the final definitive response and that his request was closed. *Id.*

On December 28, 2017, Mr. Green emailed the PDUA: “I am working on a story concerning the Pierce County Jail.” CP 20. Though Plaintiff signed the email again using the title “Investigative Journalist,” its address again was from his music band’s email account, and lacked any indication of any association with a news media entity. *Id.* On January 3, 2017, the PDUA again responded that the withheld items were protected under RCW 42.56.250(8) and specifically explained the statute incorporates the definition of “news media” in RCW 5.68.010(5). CP 23. She further quoted the applicable statutory sections and requested information concerning the entity for which Plaintiff was working as a “Investigative Journalist” because that information had not been provided. *Id.*

[9] On January 4, 2018, Plaintiff responded by asserting the following:

- “I am a journalist that primarily covers local court cases on my Youtube [sic] channel. My channel is called ‘Liberty’s Champion.’”⁸
- Provided the website link to the “Libertys Champion” YouTube account.

⁸ The website account actually is entitled “Libertys” Champion – without an apostrophe “s.” See <https://www.youtube.com/channel/UCTjBAvhF0o9561-i7XKo6rA>.

- “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.”

CP 27 (emphasis added). Though Plaintiff called the account “My channel” and “My Youtube [sic] channel,” he did not at that time claim to own it and provided: 1) no documentation or proof of any ownership of the social media account, 2) no physical address for “Libertys Champion,” and 3) no assertion this social media account was any type of “entity” as expressly required by the statute. *Id.*⁹ He also did not claim that he himself was “news media” under any of the definitions of RCW 5.68.010(5).

Upon receipt of these representations, the PDUA independently reviewed the cited YouTube account

⁹ If this was Plaintiff’s social media account, he would be among the 80% of Americans who have at least one such account. As of August 2019, “79 percent of the population in the United States had a social networking profile,” see “Percentage of U.S. population with a social media profile from 2008 to 2019,” and YouTube had “1.9 billion” separate accounts. See “Percentage of U.S. population with a social media profile from 2008 to 2019,” <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/>. Internet users “in 2018 had an average of 8.5 social media accounts.” See “Average number of social media accounts per internet user from 2013 to 2018,” <https://www.statista.com/statistics/788084/number-of-social-media-accounts/>.

and conducted a Google search for any [10] information regarding Plaintiff as a “journalist.”¹⁰ *See* CP 198; 245-246. The only information found did not involve journalism but was a website devoted to Plaintiff’s musical band. *Id.* Accordingly, on January 8, 2018, the PDUA responded to explain she had again reviewed RCW 5.68.010 defining “news media” and that it did not appear he came within it. CP 30. 245-46. The PDUA advised Plaintiff she was still unable to send the protected information and still considered his request closed. *Id.*

C. PRIOR INMATE SUES PIERCE COUNTY TO OBTAIN PROTECTED LAW ENFORCEMENT WORKERS’ RECORDS

On November 28, 2018, Plaintiff served the instant suit on the County, and then filed it with the Court on December 14, 2018. CP 1, 3, 286. Mr. Green is the only named Plaintiff. CP 1, 3. On January 8, 2019, the County timely filed its Answer which, among other defenses, asserted:

2.3 The Plaintiff lacks capacity to sue, either individually or in a representative capacity.

¹⁰ It is undisputed the account in question showed no distinguishing characteristics identifying it as a news entity, and that the site looks like many other YouTube accounts that also do not claim to be news media entities. CP 305. It is undisputed the account’s “HOME” page does not list Plaintiff as a journalist and that its “ABOUT” page neither states the account is a news media entity nor identifies Plaintiff as its “owner.” CP 308.

2.4 At the time of request, Plaintiff failed to establish valid exception to the claimed exemption and sought no further clarification of the denial.

2.5 Plaintiff's claim(s) is/are barred by the statute of limitations.

CP 43. On January 9, 2019, the day after filing its Answer, the County served Plaintiff with its First Set of Discovery Requests. CP 82. The [11] County's discovery concerned the statutory definition of "news media" as being limited to "entit[ies] . . . in the regular business of news gathering" and those who work for them, and was based on evidence the YouTube account is likely monetized and generating revenue, as well as sought information supportive of the County's other defenses. CP 86-117.¹¹

Thus, most of the County's discovery requests sought to explore the factual basis for the claim "Libertys Champion" was "news media" and that Plaintiff was associated with it. * * * Nevertheless, when he did respond, Plaintiff refused to answer many of the County's discovery requests by untimely objecting on the ground of relevance and – among other things – on his assertion "Libertys Champion" is not commercial. CP 89-116. However, Plaintiff did assert he owned the account in question and claimed for the first time [12]

¹¹ The YouTube account at issue may be monetized and commercial because it shows advertisements on videos. CP 46-47, 57-58, 61-73, 238-41.

“Libertys Champion” was “not formally structured as *any type of business entity* listed in this interrogatory” but was a non-commercial “structure-less volunteer organization.” CP 89-92; 158-59 (emphasis added).

The County immediately moved to compel answers and in opposition Plaintiff declared he does not make any profit from his YouTube account. CP 159. Plaintiff did not deny his YouTube account generates revenue but for the first time asserted that “Libertys Champion” was a “not-for-profit organization.” CP 121, 123-24, 161. However, he had previously admitted there is no corporate registration – non-profit or otherwise – for “Libertys Champion.” *See* CP 089-90 (“Libertys Champion is structureless because it is not formally structured as any type of business entity. . . .”) Finally, Plaintiff attacked *ad hominem* the Deputy Prosecutor defending the County and claimed the discovery request for business and financial information for “Libertys Champion” account somehow was “nothing more than an attempt to punish me for bringing this lawsuit for exercising my statutory rights under the Public Records Act.” CP 159-161.

The day after Plaintiff filed his declaration and opposition to the County’s Motion to Compel, he made a new PRA request to the Pierce County Prosecutor’s Office now targeting the Deputy Prosecutor who was defending the County in this case and sought information related to him during the time period of Plaintiff’s PRA lawsuit. CP 295. Like his request for [13] personal records at issue that targeted correctional staff working at the time of his incarceration,

Plaintiff's request sought the *same personal information* as to the County's trial court defense counsel in this case – *i.e.* the latter's official photograph and date of birth information. *Id.*¹³ * * *

In response to Plaintiff's merits brief, the County argued: 1) Plaintiff did not establish at the time of the request or later that he was news media; 2) the YouTube account is not an entity that [14] can be news media; 3) Plaintiff cannot be an employee, agent, or independent contractor of himself or a non-entity

¹³ Though Plaintiff later withdrew his PRA request for the prosecutor's personnel records when the Deputy Prosecutor at issue and his Guild filed a RCW 42.56.565 action, when the Prosecutor and Guild then voluntarily dismissed their original action Plaintiff *refiled the same PRA requests* along with several others targeting both him *and his Guild*. See *Pierce County Prosecuting Attorney's Association, et al. v. Brian Green, et al.*, Pierce Cy Cause # 19-2-11698-1. Indeed, Plaintiff has continued throughout this litigation to misuse the legal process to target and harass the County's previous defense counsel in other ways as well. See Court of Appeals Division II record: Respondent's Motion for Sanction Against Mr. Cornelius Pursuant to RAP 18.9(A); Declarations by Joseph Thomas and Brian Green; Appellant's Response to Motion for Sanctions Pursuant to RAP 18.9(a); Declaration of Frank Cornelius in Opposition to Motion for Sanctions; Respondent's Reply to Motion for Sanctions Against Mr. Cornelius Pursuant to RAP 18.9(A); Second Declarations of Joseph Thomas and Brian Green; Respondent's Motion to Modify Commissioner Schmidt's July 3, 2019 ruling Denying Sanctions Against Mr. Cornelius; Declarations of Joseph Thomas and Brian Green; Appellant's Response to Motion to Modify Commissioner's Ruling Denying Sanctions; Declaration of Frank Cornelius in Opposition to Respondent's Motion to Modify Commissioner Schmidt's July 3, 2019 Ruling Denying Sanctions Against Mr. Cornelius. See ER 201 ("Judicial notice may be taken at any stage of the proceeding").

YouTube account; and 4) the Tradename Registration Act and PRA 1-year statute of limitations barred Plaintiff's claims because Plaintiff's YouTube account is likely monetized. CP 296-326. The County also argued Plaintiff's PRA request targeting defense counsel was intended to intimidate and that this pattern of using the PRA for personal retaliatory reasons showed the PRA request at issue was – like his others – not “bona fide” news gathering as required. CP 302.

After Plaintiff replied, the trial court struck the hearing and oral argument on the merits and issued a written order denying the County's ability to obtain discovery and finding Plaintiff's YouTube account and Plaintiff were both “news media.” CP 415-29; 432-46. The trial court thus held the County liable for withholding the records in violation of the PRA. *Id.* However, the trial Court conceded its “order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” *Id.* at 445.

Though Plaintiff opposed the granting of discretionary review, this Court's Commissioner Eric Schmidt granted the County's motion because: “Whether Liberty's Champion and Green are ‘news media’ for the purposes of receiving pictures and birthdates of employees of criminal justice [15] agencies, under RCW 5.68.010(5), is a matter of first impression, 14 and a controlling question of law as to which there is substantial ground for a difference of opinion.” *See* 7/3/19 Ruling Granting Review.

IV. ARGUMENT

* * *

[16] B. RCW 42.56.250(8) PROTECTS PHOTOGRAPHS AND BIRTH DATE DATA OF CRIMINAL JUSTICE AGENCY WORKERS

The PRA does not require disclosure where a public record falls within a statutory exemption. *Gendler v. Batiste*, 174 Wn.2d 244, 251, 274 P.3d 346 (2012) (citing RCW 42.56.070(1)). Since “in certain circumstances, information is exempted from public inspection,” a “records request is satisfied when an agency receives a public records request, identifies a legitimate exemption under the PRA *at that time*, and clearly notifies the requester that the request will be treated in accordance with that exemption.” *Gipson v. Snohomish Cy*, No. 96164-6, 2019 WL 5076603, *4, 9 (Wash. Oct. 10, 2019) (emphasis in original). In short: “An exempt record, like a nonexistent record, *is not available for inspection*, and an agency is *not obligated to produce it*.” *Id.* at *7 (emphasis added).

RCW 42.56.250(8) is such an exemption and unambiguously protects from disclosure: “Photographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies. . . .” Here it is undisputed the photographs and birthdates Plaintiff seeks from the personnel files of criminal justice agency workers and employees at the [17] PCDCC fall within this expressly delineated exemption. *See Washington Pub. Emps. Ass’n, supra.* at *7 (“DSHS *correctly* regarded RCW 42-.56.250[8] as

applicable” to protect birthdates of “employees working at the” Juvenile Rehabilitation Administration) (emphasis added). The *only* substantive question as to that protection is whether Plaintiff *at the time of the request met his burden* of proving he came within its narrow exception by being the limited type of “news media” that alone is granted access.

As to that issue, RCW 42.56.250(8) expressly states in pertinent part: “The news media, *as defined in RCW 5.68.010(5)*, shall have access to the photographs and full date of birth.” As shown below, neither the website account named “Libertys Champion” nor Plaintiff were shown at the time of the request – or later at the merits stage – to come within that definition and thus neither were entitled to protected employee records.

* * *

[19] Neither Plaintiff nor the social media account “Libertys Champion” were shown to meet those definitions.¹⁶

¹⁶ Apart from standards set by statute, “[t]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy” because the “Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (Rejecting claim “the public and the media have a First Amendment right to government information”).

2. Plaintiff Failed to Meet His Burden of Proving a “News Media” “Entity” Requested Disclosure of the Protected Employee Records

A requestor claiming the news media exception to the RCW 42.56.250 (8) categorical exemption has the burden of establishing that the shield law exception applies. *See Republic of Kazakhstan v. Does 1-100*, 192 Wn. App. 773, 781, 368 P.3d 524 (2016) (“[t]he burden of showing that [the news media shield law] privilege applies in any given situation rests entirely upon the entity asserting the privilege.”) (citing *Guillen v. Pierce County*, 144 Wn.2d 696, 716, 31 P.3d 628 (2001), reversed in part on other grounds, *Pierce County v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003)). *See e.g. also Resident Action Council*, 177 Wn.2d at 433 (where a record is exempt from disclosure the “burden shifts to the party seeking disclosure” to show the exception) (citing *Oliver v. Harbor-view Med. Ctr.*, 94 Wn.2d 559, 567-68, 618 P.2d 76 (1980)). For example, [20] the PRA recognizes its provisions can limit who may obtain public records and thereby make identification of the requestor necessary before disclosure is allowed. *See e.g.* RCW 42.56.080(2) (providing in relevant part that persons requesting records may be required to provide information “to establish whether inspection and copying would violate . . . other statute which exempts or prohibits disclosure of specific information or records to certain persons.”)¹⁷

¹⁷ Other statutes outside the PRA also may give certain access to records based on a requestor’s identity that might be otherwise exempt or not a public record. For example, an agency

Thus, without information at the time of the request that established Plaintiff was “news media” as defined in RCW 5.68.010(5), it would be improper and a violation of RCW 42.56.250(8) for the County to release photographs and month and year of birth in the personnel files of employees and workers of the Pierce County Sheriff.¹⁸ As shown below, the order at issue should be reversed because Plaintiff did not meet his burden to prove an exception to the protection applied to a YouTube account or him.

a. Plaintiff Did Not Meet His Burden to Show That Social Media Account “Libertys Champion” Was “News Media”

At the time of his request, Plaintiff claimed a YouTube account named [21] “Libertys Champion” supposedly met “the definition of RCW 5.68.010(5).” CP 27. However, “Brian Green” – not a website account “Libertys Champion” – is the *only* named Plaintiff. See CP 3 (Complaint). Thus, Plaintiff has no standing to assert a non-party’s supposed shield law privilege to obtain records protected under the PRA. See e.g., *Jevne v. Pass, LLC*, 3 Wash.App.2d 561, 567-68, 416 P.3d 1257

employee has the right under RCW 49.12 *et seq.* to inspect the employee’s own personnel file, but the identity of the employee requesting inspection must be known. See *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000) (discussing interaction between PRA and RCW 49.12 *et seq.*).

¹⁸ The PRA protects an agency from state law liability to others for the release of records only if it exercises “good faith in attempting to comply with the provisions of this chapter.” See RCW 42.56.060.

(2018) (Plaintiff had no standing to assert rights of third party unincorporated association).

Further, at the time of the request Plaintiff did not show the account was either an “entity” nor one of the specifically listed legal business entities such as 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” under RCW 5.68.010(5)(a). Rather, at the time of request he identified it merely as “a news media *agency* that is in the regular business of gathering and disseminating news. . . .” CP 27. Only when Plaintiff filed suit, did he for the first time claim the account was an “*entity* that is in the *regular business* of *news gathering* and *disseminating* news or information to the public by any means” under that statute. CP 181-83 (emphasis added). However, the record proves otherwise.

* * *

[27] As is clearly apparent, Plaintiff’s definition of “entity” would be so broad in its application that it would have the absurd result of rendering both the RCW 42.56.250(8) PRA exemption and the RCW 5.68.010(5) Shield Law privilege meaningless because it would transform each of the billions of social media accounts, or any other type of abstract or intangible thing, into “news media.” Thus under Plaintiff’s reading nearly everyone with a social media account – *i.e.* 80% of Americans, *see* p. 9 fn. 7 *supra.* – would be entitled both to *compel disclosure* of law enforcement agency

personnel records that the Legislature intended RCW 42.56.250(8) to protect, *as well as resist* under the Shield Law *court compelled disclosure*. As a result, photographs and birthdates of law enforcement agency workers would be protected only from disclosure to the random 20% of Americans who just happen to have not yet gotten an easily available social media account. However, Courts “will not interpret a statute in a manner that leads to an absurd result.” *Hangartner v. City of Seattle*, 151 Wn. 2d 439, 448, 90 P.3d 26, 30 (2004). *See also Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007) (statutory “[c]onstrutions that would yield [28] ‘unlikely’ or ‘absurd’ results should be avoided”); *State v. Keller*, 143 Wn. 2d 267, 277, 19 P.3d 1030 (2001) (same).

* * *

[32] Requiring exempted “news media” to be a separately existing news business entity also is necessary for RCW 42.56.540 to operate. For law enforcement agency workers to protect their photographs and birthdate data by a separate action under that statute, they must serve notice on the requester. *See e.g. Burt v. Washington State Dep’t of Corr.*, 168 Wn.2d 828, 837, 231 P.3d 191 (2010) (inmate requester “should have been joined as a party and given notice and an opportunity to respond in writing to the request for the injunction” by employees); WAC 44–14–04003(12) (“requestor has an interest in any legal action to prevent the disclosure of the records he or she requested,” and “[i]f an injunctive action is filed, the third party or agency should name the requestor as a

party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene. “). However, legal existence is mandatory for service of process. *See Roth v. Drainage Imp. Dist. No. 5 of Clark Co.*, 64 Wn.2d 586, 590, 392 P.2d 1012 (1964) (drainage district that was overseen by the local [33] county could not be sued in its individual capacity because the drainage district had no separate existence outside of the local county); *see also Nolan v. Snohomish Co.*, 59 Wn.App. 876, 883, 802 P.2d 792 (1990), *rev. denied*, 116 Wn.2d 1020, 811 P.2d 219 (1991) (county council not a proper party because “in a legal action involving a county, the county itself is the only legal entity capable of suing and being sued” so it “follows that a county council is not a legal entity separate and apart from the county itself”); *Kain v. Grant County*, 47 Wn.App. 153, 734 P.2d 514 (1987) (service on county commissioners, rather than auditor, held insufficient); *Foot-hills Dev. Co. v. Clark Cy. Bd. Of Cy. Commis*, 46 Wn.App. 369, 377, 730 P.2d 1369 (1986) (board of county commissioners properly dismissed since it “is not a separate entity that has the capacity to be sued”).

Thus, if a news media “entity” requester can be an oxymoron “structureless organization” – or a single anonymous video blogger – another absurd result would be that correctional officers could not prevent disclosure of their records despite their clear statutory protection because there is no one and nothing upon whom notice of a suit can be served. However, because Plaintiff’s “reading of the statute is obviously nonsensical, this court must construe the statute’s ambiguity

in the way that makes the most sense in light of the legislative purpose embodied by the overall statutory scheme.” See e.g. *Snohomish Cty. Fire Prot. Dist. No. 1 v. Washington* [34] *State Boundary Review Bd. for Snohomish Cty.*, 121 Wn. App. 73, 79–80, 87 P.3d 1187 (2004), *aff’d*, 155 Wn.2d 70, 117 P.3d 348 (2005) (citing *Esparza v. Skyreach Equip., Inc.*, 103 Wn.App. 916, 938, 15 P.3d 188 (2000), *rev. denied* 144 Wn.2d 1004 (2001). See also *Gipson*, *supra.* at *4 (rejecting Plaintiff’s interpretation of a PRA statute because “[s]uch a reading of the PRA is unworkable,” while instead adopting the interpretation of the municipal defendant which “furthers public policy.”)

- b. Plaintiff Also Did Not Meet His Burden to Show He Himself Was a “News Media” “Entity” Under RCW 5.68.010(5)(a) or (5)(b)

Plaintiff also cannot assert *he personally* was exempted “news media” because, first of all: “With any request, the receiving agency determines any applicable exemptions *at the time* the request is received.” See *Gipson*, *supra.* *3 (emphasis in original). See also *Washington State Bar Ass’n, Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws* § 5.3, at 5–31 (2006) (the validity of an exemption is determined *at the time the request is made*) (emphasis added); *BIAW v. McCarthy*, 152 Wn. App. 720, 740, 218 P.3d 196 (2009) (PRA precludes destruction of a public record “[i]f a *public record request is made at a time* when such record exists”) (*quoting*

RCW 42.56.100) (emphasis added); *Gendler v. Batiste*, 158 Wn.App. 661, 673, 242 P.3d 947 (2010) (“no duty under the PRA . . . to . . . produce a record that does not [35] exist *at the time the request is made*”) (citing *Sperr v. City of Spokane*, 123 Wn.App. 132, 136-37, 96 P.3d 1012 (2004) and *Smith v. Okanogan County*, 100 Wn.App. 7, 13–14, 994 P.2d 857 (2000)) (emphasis added).

As a result, an agency’s response that concludes a PRA request comes within an exemption does not become retroactively invalid when circumstances justifying an exception to the exemption are disclosed *later in litigation*. See e.g. *Thomas v. Pierce Cty. Prosecuting Attorney’s Office*, 190 Wn. App. 1036, *9 (2015) (in PRA action “Plaintiffs never told the PCPAO *at the time they requested the documents* that they had a substantial need” so as to overcome the attorney work-product protection) (emphasis added); *Koenig v. Pierce Cty.*, 151 Wn. App. 221, 233, 211 P.3d 423, 429 (2009), *as amended* (July 20, 2009), *as amended on denial of reconsideration* (Oct. 26, 2009) (where the PRA “exemption is applicable, the office invoking it need not take steps to provide the documents unless the requester makes an affirmative showing” of the exception). Rather, a “records request is satisfied when an agency receives a public records request, identifies a legitimate exemption under the PRA *at that time*, and clearly notifies the requester that the request will be treated in accordance with that exemption.” *Gipson, supra*. *4 (“the determination of an exemption *at the time the*

request was made is treated like a record that does not exist.”) (emphasis in original).

[36] Here, prior to bringing this action, Plaintiff did not claim *he personally* was “news media” under RCW 5.68.010(5). CP 21. Rather, at the time he made the request, he did so by an *email from his email address for his musical band*, and simply signed his name under the self-given title of “Investigative Journalist.” CP 27.²¹ The undefined title of “Investigative Journalist” is not one of the three narrow categories of news media entities listed in RCW 5.68.010(5). Likewise, after his request was denied on the specific basis of the protections of RCW 42.56.250(8) and closed, he again did not claim to be “news media” but only alleged he was “working on a story concerning the Pierce County Jail.” CP 20. A self-described “investigative journalist” who is “working on a story” also is not listed in the statutory categories of news media entities. *See* RCW 5.68.010(5).

Indeed, even when thereafter the County’s PDUA explained to him that RCW 5.68.010(5) defines “news media” and provided him verbatim the three specific categories of “news media” that are in that statute,

²¹ The County’s independent inquiries at the time also did not disclose the missing statutory requirements for “news media.” As previously noted, the County’s review of the cited YouTube account revealed no distinguishing characteristics identifying it as a news entity. CP 305, 308. A further Google search for information about Plaintiff as a “journalist” found nothing, while a general search of his name found only information on a web-site devoted to Plaintiff’s musical band and not to journalism or news. CP 198; 245-246.

Plaintiff's response *still* did not claim *he* was "news media" nor allege facts that would qualify *him* as such under RCW 5.68.010(5)(a)-(c). CP 27-28. [37] Instead, Plaintiff simply claimed "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." CP 27 (emphasis added). As for himself, Plaintiff claimed only he was "a journalist that primarily covers local court cases on my YouTube channel." He did not claim he was an "employee, agent, or independent contractor of" any "news media" entity – much less that he was seeking protected information about *his* jailors for "bona fide news gathering . . . while serving in that capacity." Compare *id.* with RCW 5.68.010(5)(b). He likewise did not claim he was the "owner" of the account – much less was in the actual statutory category of its "parent, subsidiary, or affiliate. . . ." *Id.* (5)(c).

It was only when he filed suit that Plaintiff for the first time *claimed* he personally met the definition of "news media" under RCW 5.68.010(5)(a)-(b). See CP 10. However, a plaintiff cannot wait until after suit is filed to *claim* he meets the exception to the statutory protection. Rather, to sue on a claim that disclosure of protected documents was required by an exception, a requester must have raised the claim of the exception at time of the request. See *e.g. Thomas*, 190 Wn.App. at *9 ("Plaintiffs never told the PCPAO at the time they requested the documents that they had a substantial need" and thus that they came within the exception to the work product protection) (emphasis

added); *Koenig*, 151 Wn.App. at 233 (where the [38] PRA “exemption is applicable, the office invoking it need not take steps to provide the documents unless the requester makes an affirmative showing” of the exception). To require anything less would impose strict liability on responders based on whether requesters chose to disclose operative facts or claims prior to the agency’s final PRA response.

* * *

[43] Here, the PRA request at issue is personal to Plaintiff and specifically targets correctional staff and jail deputies working at the time of *his* incarceration at the Pierce County Jail. CP 4-7. Plaintiff made no attempt either at the time of his request, or in his merits briefing, to prove he was [44] engaged in *bona fide* news gathering or that this highly personal PRA request was *bona fide* news gathering – rather than simply to share his personal stories and grievances on a social media site. Indeed, his pattern of using the PRA to retaliate against public employees for their role in his own perceived personal grievances – both before and after the instant PRA request²⁴ – rebut any claim his request is “bona fide news gathering.”

²⁴ For example, before his instant PRA request Plaintiff in *Green v. Lewis County*, 4 Wn. App.2d 1048 (2018), used the PRA to target his opponent in the Lewis County Sheriff’s election so as to obtain a questionnaire provided by the existing Sheriff to a newspaper reporter who Plaintiff alleged had written a series of “prejudicial media hit pieces” that reflected badly on Green during his campaign. Likewise, after the instant request, Plaintiff is now using the PRA to retaliate against the County’s trial court deputy prosecutor in this case as well as against the latter’s

* * *

[49] V. CONCLUSION

The record is undisputed that Plaintiff Brian Green is a prior inmate who is attempting to use the PRA to obtain protected photographs and birthdates of his prior correctional workers so he can make them widely available – and that his doing so would put those targeted law enforcement agency workers and their families at risk. The statutory language, history and policy of RCW 42.56.250(8) is equally clear that the Legislature intended to protect against just such attempts. The sole question as to the applicability of that statute that is raised by the trial court order is whether the narrow “news media” exception to that categorical protection will be [50] misinterpreted into meaninglessness by transforming each of the billions of social media users into “news media” so that the exception swallows up the Legislature’s intended rule.

Further, even under such a mistaken statutory reading, the record shows Plaintiff did not meet his burden of proving at the time of the request – or by the time of his merits submissions – that he met even this er- * * *

supporting Guild in order to obtain the same type of protected personnel records that are at issue here. *See supra.* p. 1 fn. 1, p. 13 fn. 13.

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DATED this 1st day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT'S OPENING BRIEF was electronically filed this 1st day of November, 2019, with the Clerk of the Court, and I delivered a true and accurate copy by electronic mail pursuant to the agreement of the parties of the following:

Joseph Thomas: joe@joethomas.org

s/ CHRISTINA WOODCOCK

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RCW 42.56.250
Employment and licensing.

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

- (1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;
- (2) All applications for public employment other than for vacancies in elective office, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;
- (3) Professional growth plans (PGPs) in educator license renewals submitted through the eCert system in the office of the superintendent of public instruction;
- (4) The following information held by any public agency in personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers of any public agency: Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a

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public agency. For purposes of this subsection, “employees” includes independent provider home care workers as defined in RCW 74.39A.240;

(5) Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed;

(6) Investigative records compiled by an employing agency in connection with an investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws or an employing agency’s internal policies prohibiting discrimination or harassment in employment. Records are exempt in their entirety while the investigation is active and ongoing. After the agency has notified the complaining employee of the outcome of the investigation, the records may be disclosed only if the names of complainants, other accusers, and witnesses are redacted, unless a complainant, other accuser, or witness has consented to the disclosure of his or her name. The employing agency must inform a complainant, other accuser, or witness that his or her name will be redacted from the investigation records unless he or she consents to disclosure;

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(7) Criminal history records checks for board staff finalist candidates conducted pursuant to RCW 43.33A.025;

(8) 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;

(9) The global positioning system data that would indicate the location of the residence of a public employee or volunteer using the global positioning system recording device; and

(10) Until the person reaches eighteen years of age, information, otherwise disclosable under chapter 29A.08 RCW, that relates to a future voter, except for the purpose of processing and delivering ballots.

RCW 5.68.010

Protection from compelled disclosure – Exceptions – Definition.

(1) Except as provided in subsection (2) of this section, no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce, or otherwise disclose:

(a) The identity of a source of any news or information or any information that would tend to identify the source where such source has a reasonable expectation of confidentiality; or

(b) Any news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public, including, but not limited to, any notes, outtakes, photographs, video or sound tapes, film, or other data of whatever sort in any medium now known or hereafter devised. This does not include physical evidence of a crime.

(2) A court may compel disclosure of the news or information described in subsection (1)(b) of this section if the court finds that the party seeking such news or information established by clear and convincing evidence:

(a)(i) In a criminal investigation or prosecution, based on information other than that information being sought, that there are reasonable grounds to believe that a crime has occurred; or

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(ii) In a civil action or proceeding, based on information other than that information being sought, that there is a prima facie cause of action; and

(b) In all matters, whether criminal or civil, that:

(i) The news or information is highly material and relevant;

(ii) The news or information is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto;

(iii) The party seeking such news or information has exhausted all reasonable and available means to obtain it from alternative sources; and

(iv) There is a compelling public interest in the disclosure. A court may consider whether or not the news or information was obtained from a confidential source in evaluating the public interest in disclosure.

(3) The protection from compelled disclosure contained in subsection (1) of this section also applies to any subpoena issued to, or other compulsory process against, a nonnews media party where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media for the purpose of discovering the identity of a source or obtaining news or information described in subsection (1) of this section. Whenever a subpoena is issued to, or other compulsory process is initiated against, a nonnews media party where such subpoena or process seeks information or communications on business

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transactions with the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard. In the event that the subpoena to, or other compulsory process against, the nonnews media party is in connection with a criminal investigation in which the news media is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena or compulsory process shall be given to the affected news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.

(4) Publication or dissemination by the news media of news or information described in subsection (1) of this section, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure that is contained in subsection (1) of this section. In the event that the fact of publication of news or information must be proved in any proceeding, that fact and the contents of the publication may be established by judicial notice.

(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

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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.

(6) In all matters adjudicated pursuant to this section, a court of competent jurisdiction may exercise its inherent powers to conduct all appropriate proceedings required in order to make necessary findings of fact and enter conclusions of law.

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NO. 53289-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BRIAN GREEN,

Respondent,

v.

PIERCE COUNTY,

Appellant.

AMICUS CURIAE MEMORANDUM OF
ALLIED DAILY NEWSPAPERS OF WASHINGTON

(Filed Feb. 6, 2020)

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* * *

I. INTRODUCTION

To maintain a free press, the courts cannot compel journalists to act as an investigative arm of litigants. As the D.C. Circuit Court of Appeals said in

Zerilli v. Smith, 656 F.2d 705, 711 (1981): “Without an unfettered press, citizens would be far less able to make informed political, social and economic choices.” That value is protected by Washington’s shield law recognizing a news media privilege not to testify about confidential sources and other information gathered in the news business. Allied Daily Newspapers of Washington worked for years to enact the shield law, RCW 5.68.010.

This case is the first to interpret the shield law’s definition of news media. There is a danger of stretching the definition so far as to jeopardize the law’s continued existence. If the term “news media” includes everyone posting commentary online or self-identifying as journalists, the potential impact on the justice system is significant. Under RCW 5.68.010(2), a party in a criminal or civil case cannot get the news media’s notes, photos or other newsgathering information without showing clear and convincing evidence that the information is critical to the case and cannot be obtained elsewhere. This appropriately heavy burden applies even when confidential sources are not involved. Thus, when interpreting the scope of the media privilege, it is important to consider the potential “unintended consequences” that the trial court warned of. To ensure that the law remains workable, this Court should honor the legislative intent for the shield law to protect the business of bona fide news gathering.

II. INTEREST AND
IDENTITY OF AMICUS PARTY

Allied Daily Newspapers of Washington is a trade association representing 25 daily newspapers across the state. Its members could not function without an effective shield law preventing interference with news gathering. Sometimes the only way to uncover important information is to promise confidentiality to the source. The newspapers have an interest in maintaining the shield law so that such confidential sources remain possible, and so that the work product of journalists will be protected from unnecessary intrusion.

* * *

Also, virtually anyone could establish a subjective desire to disseminate “news” on social media as a partial or sole motivation for obtaining information. If such desire is enough to place relevant information beyond the reach of litigants, it will jeopardize the continued existence of the shield law. While Allied Daily Newspapers supports the broadest possible access to government records, extending the shield law to any self-proclaimed journalist is a risky way to accomplish that.³

* * *

³ Allied Daily Newspapers takes no position on Mr. Green’s right to access the requested records in this case.

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NO. 98768-8

WASHINGTON SUPREME COURT

BRIAN GREEN,

Respondent,

v.

PIERCE COUNTY,

Appellant.

AMICUS CURIAE MEMORANDUM OF
WASHINGTON STATE ASSOCIATION OF
BROADCASTERS, RADIO TELEVISION DIGITAL
NEWS ASSOCIATION AND WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION

(Filed Sep. 14, 2020)

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* * *

I. INTRODUCTION

This case is the first to interpret the definition of “news media” in Washington’s shield law, RCW 5.68.010. The definition is limited to entities in the regular business of news gathering, including television and radio stations, cable networks, newspapers, magazines and other periodicals, and the employees and agents of those entities. The trial court applied the shield law to a man obtaining public records related to his own arrest with the possible intention of criticizing the arrest on his YouTube channel. In doing so, the trial court warned of unintended consequences that may result if the shield law is invoked by every self-identified journalist who regularly puts “news” on the Internet.

The Washington State Association of Broadcasters, Radio Television Digital News Association and Washington Newspaper Publishers Association strongly support the right to freely publish information and to obtain government records. This Court’s challenge is to protect open government and First Amendment values without rendering the shield law so unworkable as to invite its demise. Broadcasters, newspapers and other media entities need a workable journalist’s privilege to prevent intrusion into their newsrooms and to maintain actual and perceived independence from the government. This Court should resolve this Public Records Act case by holding that records requesters are “news media” when requesting records in the scope of employment or reporting assignment by a qualifying media entity.

II. INTEREST AND IDENTITY OF AMICUS PARTIES

The Radio Television Digital News Association (RTDNA) is the world's largest professional organization devoted exclusively to broadcast and digital journalism. Founded as a grassroots organization in 1946, RTDNA's mission is to promote and protect responsible journalism. RTDNA defends the First Amendment rights of electronic journalists throughout the country, honors outstanding work in the profession through the Edward R. Murrow Awards and provides members with training to encourage ethical standards, newsroom leadership and industry innovation.

The Washington State Association of Broadcasters (WSAB), founded in 1935, represents over 250 commercial and public radio and television stations statewide. Among its many purposes is to protect and promote the interest of the broadcasting industry, including the ability of broadcast journalists to gather and disseminate information in a manner that is unimpeded by government or other influence.

The Washington Newspaper Publishers Association (WNPA) is an advocate for community newspapers, freedom of the press and open government. WNPA represents about 75 community newspapers in Washington state. It is the successor to the Washington Press Association, founded in 1887 by newspapers in Dayton, Ellensburg, Seattle, Tacoma, Yakima and Walla Walla.

RTDNA, WSAB and WNPA ("Amici") are interested in this case because, although it arises under

the Public Records Act, it is the first to interpret the definition of “news media” in the shield law. Amici need the shield law to maintain its integrity so that journalists can do their important work without government interference. The City of Seattle’s current effort to obtain unpublished videos of protesters from KING, KIRO, KOMO, KCPQ and The Seattle Times illustrates the importance of a strong shield law. Amici have an interest in ensuring that the laws are interpreted as the Legislature intended, without pitting open government interests against freedom of the press.

* * *

IV. ARGUMENT

The shield law is an evidence law. RCW 5.68.010. It prevents litigants and courts from compelling “the news media” to disclose sources or to produce information obtained in news gathering. RCW 5.68.010(1). In the 13 years since its adoption RCW 5.68.010 has rarely been litigated, and has resulted in only one published opinion, *Republic of Kazakhstan v. Doe*, 192 Wn.App. 773, 368 P.3d 524 (2016).

* * *

A. A YouTube Channel is not a Media Entity.

Under the trial court’s broad interpretation of “news media,” an individual person’s YouTube channel is a media entity and the person owning the channel is indistinguishable from that entity. CP 425. This

interpretation defies common sense and the statute's plain language.

1. A person invoking the shield law must have obtained the information at issue while serving as a media entity's employee, agent or contractor.

RCW 5.68.010(5) defines "news media" as:

(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.

Thus, only a media entity, a person who worked for that entity, or a related corporation may invoke the shield law. RCW 5.68.010(5).

Here, the shield law was invoked by a person (Brian Green) in order to obtain records under RCW 42.56.250(8), which is a “news media” exception to a disclosure exemption for certain records.¹ The case turns on the shield law’s definition of “news media” because, unfortunately, the Legislature required “news media” status to access the records at issue.² Thus, Mr. Green is entitled to the records only if he: 1) is a “person who is or has been an employee, agent, or independent contractor of a “newspaper, magazine or other periodical . . . or any entity that is in the regular business of news gathering and disseminating news or information to the public”; and 2) “is or has been engaged in bona fide news gathering for such entity”; and 3) made the records request “while serving in that capacity.” RCW 5.68.010(5)(a) and (b); RCW 42.56.250(8).

* * *

¹ Mr. Green identified himself as an investigative journalist when requesting photos and birth date records of the jail personnel and deputies on duty when he was arrested. Resp. Brief pp. 3-4. Mr. Green, not any YouTube entity, brought this action under the Public Records Act.

² Amici support Mr. Green’s right to scrutinize and criticize the government, and regret that this case will not change the Legislature’s policy to give the news media special access to records. Stretching the shield law to cover virtually any self-identified journalist is the wrong way to address this concern. The Legislature should amend the Public Records Act to treat requesters equally.

a. *YouTube is an open, shared platform.*

Courts have described YouTube as a wide-open platform for anyone agreeing to its terms. “‘YouTube’ is a social media platform for viewing and sharing videos.” *Watness v. City of Seattle*, 11 Wn. App. 2d 722, 728, 457 P.3d 1177 (2019). “YouTube is ‘the world’s largest forum in which the public may post and watch video-based content.’” *Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020). “Around 400 hours of video content are uploaded to the platform hourly. Indeed, ‘more video content has been uploaded’ to YouTube ‘than has been created by the major U.S. television networks in 30 years.’” *Id.* “YouTube invites the public to post video and other content on its platform and is ‘committed to fostering a community where everyone’s voice can be heard.’” *Id.*

Although it fosters public speech, YouTube is itself a private entity owned by Google. *Prager Univ.* at 996-997. Users must accept community guidelines and terms of service before posting videos, and “YouTube has reserved the right to remove or restrict content.” *Id.* at 995.

None of the news media entities listed in the shield law rely on platforms like YouTube to disseminate news. Rather, newspapers, magazines, book publishers, radio and TV stations, news agencies, wire services, cable networks and production companies have their own branded web sites, scheduled broadcasts and publications over which they have exclusive control. Thus, an individual’s video-sharing channel on

YouTube is not “similar to” a newspaper, TV station or other listed entity, and does not fit the definition of “news media.”³

As a New Jersey court explained in *J.O. v. Township of Bedminster*, 433 N.J. Super. 199, 214 (2013), a cell phone “can be used to record a kitten who refuses to leave a warm bath, producing a video seen by close to four million people on YouTube.” Although it could be argued that the person who took the video was protected by a New Jersey law restricting search and seizure of news gathering materials, “we are confident that the Legislature did not intend to provide protection above and beyond that provided by the Fourth Amendment to someone based upon the posting of a video of a wet kitten on the Internet.” *Id.*

* * *

V. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court.

* * *

³ While YouTube itself is an entity and might claim to be a media entity for purposes of the relevant statute, it has not done so, is not a party to this proceeding, and does not employ Mr. Green.

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Dated this 14th day of September 2020.

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By: s/ Katherine George

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 14, 2020, I served a copy of the foregoing memorandum and related Motion for Leave to File an Amicus Curiae Memorandum to registered parties via the Washington Supreme Court electronic filing system.

/s/ Katherine A. George

KATHERINE GEORGE
