

SEIU and Freedom Foundation Continue Legal Battle Over "Affected" Third Party Status

Legal Alert
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In the latest installment of a series of cases involving the nonprofit organization Freedom Foundation, the Department of Social and Health Services (“DSHS”) secured itself a win in the Washington Court of Appeals, Division II. Among other findings, the court upheld the trial court’s conclusion that DSHS did not violate the Public Records Act (“PRA”) when it first produced the requested records to the SEIU Training Partnership—a third party DSHS determined was likely to be “affected by the request.” [*Freedom Found. v. Wash. Dep’t of Soc. and Health Servs.*](#)

The Freedom Foundation submitted a public records request to DSHS in April 2017, seeking records relating to the training of individual at-home care providers who supply personal care services to functionally disabled individuals. DSHS responded that it would not be able to produce any documents until about June 13, citing a busy workload processing other PRA requests and the difficulty of locating and assembling the Foundation’s requested records, which were located in three regional and fourteen area offices. DSHS then informed SEIU—the union representing the individual providers—and the SEIU Training Partnership of the Foundation’s PRA request. The Training Partnership responded by requesting from DSHS the same records that the Foundation had requested. DSHS produced the records to the Training Partnership in installments on May 12 and June 9, but it did not produce those same records to the Foundation until July 11. When the Foundation learned of the earlier production to the Training Program, it sued, alleging that DSHS had violated the PRA by (1) providing an unreasonable time estimate for the production of records; (2) distinguishing between requesters; (3) failing to provide the fullest and timeliest assistance; and (4) delaying the release of records.

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The trial court dismissed the Foundation's claims against DSHS, and, in a published opinion, the Court of Appeals affirmed. The appellate court first determined that DSHS's estimate of the time needed to respond to the PRA request was reasonable. In addition to the 60 PRA requests already being processed, DSHS had received 79 other PRA requests on the same day the Foundation submitted its request. In finding DSHS's 30-day estimate reasonable, the court also took into account the fact that the records would need to be gathered from multiple different offices before they could be produced.

Second, the court held that DSHS did not violate the PRA by treating the Foundation differently than the Training Partnership with regard to the timing of production. While the PRA does not generally allow for distinguishing between requesters, former RCW 42.56.520 allows an agency to delay production of requested records in order to provide third parties "affected by the request" an opportunity to seek an injunction. Agencies have wide discretion to decide who affected parties are, and DSHS did not abuse its discretion when it concluded that the Training Partnership was an affected party for purposes of the Foundation's request. And because the Training Partnership was an affected party, it was not similarly situated to the Foundation even though both entities sought the same records. The court therefore held that DSHS did not violate the PRA by first producing to the Training Partnership.

Finally, the court rejected the Foundation's arguments that DSHS delayed the document production and failed to provide the fullest and most timely assistance in responding to the request. While the court reaffirmed that agencies cannot use an estimated date of production as an excuse to withhold records that are no longer exempt from disclosure, it noted that the requested records in this case were not available for production to the Foundation on June 9 because the deadline for seeking an injunction was extended and the Training Partnership had not yet had an opportunity to review. Under the circumstances, the court found the delay in production was not unreasonable.

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