



January 2023

Now What? Post-Janus Privacy Rights for Unionized California Public Employees in the Digital Age

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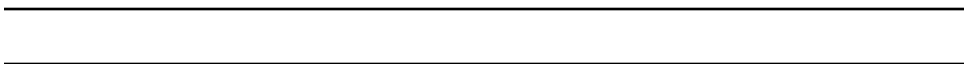
Recommended Citation

Jade Wolansky, *Now What? Post-Janus Privacy Rights for Unionized California Public Employees in the Digital Age*, 53 U. PAC. L. REV. 677 (2022).

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UNIVERSITY OF THE PACIFIC LAW REVIEW



Now What? Post-*Janus* Privacy Rights for Unionized California Public Employees in the Digital Age

Jade Wolansky*

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2022; B.A. International Relations and Political Science, University of California, Davis, 2017. I would like to extend my thanks to Professor Jay Mootz, everyone on the editorial staff, and the Board of Editors for their guidance. I would also like to thank Kerianne Steele, shareholder at Weinberg, Roger & Rosenfeld and Thomas Gerhart, Deputy Legislative Counsel at the Office of Legislative Counsel for allowing me to interview them. Thank you Anne Giese, Chief Counsel at SEIU 1000, for all your mentorship. Finally, I dedicate this article to my mother for reading my endless revisions and my family.

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I. INTRODUCTION

In January 2020, Mike Yestramski, president of the Washington Federation of State Employees, testified about his doxing experience at a committee hearing for Washington state’s H.B. 1888.¹ Mr. Yestramski, a social worker, stated: “a parent of a patient became very upset with us” and “began threatening both myself and my family.”² Mr. Yestramski continued, “she went online and put our full names, our pictures” and “our date of birth.”³ He stated that the patient’s mother posted comments online urging her followers to visit him at work.⁴ In his testimony, Mr. Yestramski encouraged the Washington State Legislature to pass H.B. 1888.⁵ He said: “I don’t think that is something, as an employer, you should make easier to have that information.”⁶

In 2018, the Supreme Court held in *Janus v. AFSCME* that public workers could opt-out of mandatory union dues.⁷ Since *Janus*, third-party organizations are increasingly submitting public record requests and suing government agencies to obtain public employee information.⁸ *Janus* opened the floodgates to public

1. HB 1888, 66th Leg., Reg. Sess. (Wash. 2020) (showing that HB 1888 would exempt from public disclosure certain public employee data, including full birth date and payroll deductions); Protecting Employee Information from Public Disclosure: Hearing on HB 1888 Before the H. State Gov’t & Tribal Relations Comm., 2020 Leg., 66th Sess. (Wash. 2020) [hereinafter HB 1888 State Gov’t & Tribal Relations Hearing] (testimony of Mike Yestramski, President of the Wash. Fed’n of State Emps.); see *Dox*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dox> (last visited Feb. 12, 2022) (defining doxing as the practice of publicly identifying an individual or publishing an individual’s private information as a form of punishment or revenge).

2. HB 1888 State Gov’t & Tribal Relations Hearing, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Janus v. AFSCME*, 138 S. Ct. 2448, 2459 (2018).

8. *Compare* Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate at 1–2, *Freedom Found. v. Cal. Dep’t of Hum. Res.*, No. 34-2020-00278646 (showing that the Freedom Foundation recently sued the California Department of Human Resources for denying their public information request in May 2020), *and* Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate at 1–2, *Freedom Found. v. San Bernardino County*, No. CIVDS2014702 (2020) (establishing that the Freedom Foundation also sued San Bernardino County for denying their public information request in July 2020), *with* *WPEA v. Freedom Found.*, No. 95262-1, slip. op. at 28 (Wash. 2019) (determining that the Freedom Foundation won their public records lawsuit for public employee information in Washington state), *and* Opinion and Order on Motions for Summary Judgment at 4, *City of Portland v. Evergreen Freedom Found.*, No. 17CV47002 (dismissing the City of Portland’s lawsuit to block the Freedom Foundation’s access to city public employee information in Oregon). See generally Jason Dudash, *Freedom Foundation Launches New Campaign as Expansion Continues*, FREEDOM FOUND. (Apr. 8, 2020), <https://www.freedomfoundation.com/labor/freedom->

information requests and lawsuits by anti-union organizations that want to contact public employees to cancel their union dues.⁹

The Freedom Foundation, a conservative think tank, is leading this information request campaign in western states with a specific focus on Washington, Oregon, and California.¹⁰ It targets these states because they have some of the highest public union membership in the country.¹¹ The Freedom Foundation's goal is to contact union members at their homes and workplaces to discourage employees from paying union dues.¹² Ultimately, the Freedom Foundation wants to reduce the bargaining power and political influence of public-sector unions.¹³

Government agencies should be committed to public transparency.¹⁴ However, these agencies should not release public employees' personal information irresponsibly because that puts employee safety and privacy at risk.¹⁵ The Washington state Legislature passed H.B. 1888 to protect public employee

foundation-launches-new-campaign-as-expansion-continues/ (on file with the *University of the Pacific Law Review*) (indicating that the Freedom Foundation has focused on suing unions in Western states since the *Janus v. AFSCME* decision).

9. See Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFSCME* on Two-Year Anniversary Offers California Hope Amid the Chaos (July 9, 2020) (on file with the *University of the Pacific Law Review*) (explaining that the Freedom Foundation submitted over 450 public record requests to collect information on unionized public employees in California); Joseph O'Sullivan, *Washington Supreme Court Says State Employee Birth Dates Are Public Record*, SEATTLE TIMES (Oct. 24, 2019, 7:28 PM), <https://www.seattletimes.com/seattle-news/politics/washington-supreme-court-upholds-public-records-law-in-case-that-pitted-public-unions-and-a-conservative-group/> (on file with the *University of the Pacific Law Review*) ("The conservative Freedom Foundation has used public-records requests to obtain personal information about union members. The organization then uses that information to contact members and tell them they're not obligated to pay union dues.").

10. See Bloomberg, *Group Funded by Conservative Billionaires Launches Anti-Union Campaign Following Supreme Court Ruling*, L.A. TIMES (June 28, 2018), <https://www.latimes.com/business/la-fi-freedom-foundation-20180628-story.html> (on file with the *University of the Pacific Law Review*) (reporting that the Freedom Foundation receives funding from several conservative groups, including the Sarah Scaife Foundation, Donors Trust, Richard and Helen DeVos Foundation, and the State Policy Network); *Freedom Foundation*, FREEDOM FOUND., <https://www.freedomfoundation.com/> (last visited Mar. 20, 2022) (on file with the *University of the Pacific Law Review*) (stating that the Freedom Foundation has offices in Washington, Oregon, Ohio, Pennsylvania, and California).

11. See *News Release*, U.S. BUREAU OF LAB. STATS. (Jan. 20, 2022), <https://www.bls.gov/news.release/pdf/union2.pdf> (on file with the *University of the Pacific Law Review*) (reporting 15.9% of workers in California, 19% of workers in Washington, and 17.8% of workers in Oregon were union members in 2021; the national average is 10.3%).

12. See Bloomberg, *Group Funded by Conservative Billionaires Launches Anti-Union Campaign Following Supreme Court Ruling*, *supra* note 10 (describing how the Freedom Foundation intends to contact public workers to drop their membership after the *Janus v. AFSCME* case).

13. See Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFSCME* on Two-Year Anniversary Offers California Hope Amid the Chaos, *supra* note 9 (expressing the Freedom Foundation's goal to reduce union influence in politics and policy).

14. See Claudia Polsky, *Open Records, Shattered Labs: Ending Political Harassment of Public University Researchers*, 66 UCLA L. REV., 208, 220 (2019) (explaining that FOIA and state public records laws were enacted because of public suspicion after Watergate). See generally OPEN RECORDS LAWS: A STATE BY STATE REPORT, NATIONAL ASSOCIATION OF COUNTIES (2010) (listing each of the 50 states' public records law).

15. HB 1888 State Gov't & Tribal Relations Hearing, *supra* note 1.

information from public disclosure.¹⁶ Oregon attempted to pass enhanced protections for employee data through H.B. 2016.¹⁷ California should follow Oregon or Washington and amend its laws to protect public employees information against third-party organizations, such as the Freedom Foundation.¹⁸ California law already safeguards some public employee personal information.¹⁹ However, the state must be proactive and amend its Government Code to enhance those protections.²⁰

This Comment argues that California needs to amend its privacy laws to adequately protect public employees and their personal information.²¹ Part II provides an overview of labor law and unions.²² Part III discusses public records requests, legislation, and lawsuits in Washington, Oregon, and California.²³ Part IV argues protecting public employees is critical for California.²⁴ Part V explains how the proposed amendment can strengthen public employees' privacy rights in public records lawsuits.²⁵ Part VI proposes amendments to California's privacy laws for public employees.²⁶

II. THE CURRENT STATE OF PUBLIC UNIONS

Labor unions have been a driving force for higher wages and workplace benefits in the United States. Through the collective bargaining process, workers have won workplace protections still in effect today.²⁷ Section A discusses the

16. See HB 1888, *supra* note 1. (showing HB 1888 exempts from public disclosure certain personal data, including full birth date and identification of payroll deductions).

17. See HB 2016, 80th Leg. Assemb., Reg. Sess. (Or. 2019) (as introduced Mar. 11, 2019, but not enacted) (indicating Oregon's proposed law would create an unfair labor practice for disclosing public employee information to groups other than the employee's union).

18. See HB 1888, *supra* note 1 (using Washington's HB 1888 as an example of legislation to enhance protections for California workers); HB 2016, *supra* note 17 (using Oregon's legislation as another example California can use to create new laws that protect the privacy of California workers); Telephone Interview with Kerianne Steele, Shareholder, Weinberg, Roger & Rosenfeld (Dec. 15, 2020) (notes on file with the *University of the Pacific Law Review*) (suggesting California amend Government Code section 6254.3). See generally *Freedom Foundation*, *supra* note 10 (describing the Freedom Foundation's goals).

19. See CAL. GOV'T CODE § 6254.3 (West 2022) (showing California already exempts from public disclosure a public employee's birth date, home addresses, home telephone numbers, personal cell phone numbers, and personal email).

20. See Telephone Interview with Kerianne Steele, *supra* note 18.

21. Compare Telephone Interview with Kerianne Steele, *supra* note 18, and Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFCSME* on Two-Year Anniversary Offers California Hope Amid the Chaos, *supra* note 9.

22. *Infra* Part II.

23. *Infra* Part III.

24. *Infra* Part IV.

25. *Infra* Part V.

26. *Infra* Part VI.

27. See *id.* (showing labor unions pressured Congress to pass the Fair Labor Standards Act, which established the 8-hour workday and 40-hour workweek).

National Labor Relations Act (“NLRA”), which codified the right of workers to join a union and engage in collective bargaining.²⁸ Section B explains the impact of the *Janus v. AFSCME* decision on labor unions today.²⁹

A. *The National Labor Relations Act, Labor Unions and Collective Bargaining*

If a majority of employees in a workplace vote to form a union, then a union can represent them to negotiate the conditions of employment with an employer.³⁰ This process, known as “collective bargaining,” equalizes the inherent negotiating power imbalance between employees and employers.³¹ At the height of the labor movement in 1954, 28.3% of public and private workers nationwide were union members.³² However, since then, union membership has significantly declined.³³ In 2021, approximately 10.3% of public and private workers were unionized.³⁴ The Taft–Hartley Act of 1947 outlawed “closed shops,” which meant workers did not have to join the union to retain their job.³⁵ The Taft–Hartley Act created the free rider problem because employees who were not paying union membership dues would still benefit from union-negotiated wages and benefits.³⁶

28. *Infra* Section II.A.

29. *Infra* Section II.B.

30. National Labor Relations Act, 29 U.S.C.A. §§ 151–69 (West, Westlaw Edge through Pub. L.116-259); FRANCIS J. MOOTZ III, LETICIA M. SAUCEDO, & MICHAEL P. MASLANKA, *LEARNING EMPLOYMENT LAW* 29 (2019).

31. MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 30; *see Collective Bargaining*, AFL-CIO, <https://aflcio.org/what-unions-do/empower-workers/collective-bargaining> (last visited Jan. 10, 2021) (on file with the *University of the Pacific Law Review*) (“Collective bargaining is the process in which working people, through their unions, negotiate contracts with their employers to determine their terms of employment, including pay, benefits, hours, leave, job health and safety policies, ways to balance work and family, and more.”).

32. MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 31, at 30.

33. MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 31, at 30. *Compare* Quoc Trung Bui, *50 Years Of Shrinking Union Membership, in One Map*, NPR (Feb. 23, 2015), <https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map> (on file with the *University of the Pacific Law Review*) (showing 33% of workers in California, 44.5% of workers in Washington, and 38.9% of workers in Oregon were union members in 1964), *with News Release*, *supra* note 11 (indicating 15.9% of workers in California, 19% of workers in Washington, and 17.8% of workers in Oregon were union members in 2021).

34. *Id.*

35. Taft–Hartley Act, 29 U.S.C. §§ 141–197 (West, Westlaw Edge through Pub. L.116-259); *see Closed Shop*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/closed%20shop> (last visited Feb. 12, 2022) (“[A]n establishment in which the employer by agreement hires only union members in good standing.”).

36. Taft–Hartley Act, 29 U.S.C. §§ 141–197, *supra* note 36; *see* MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 31, at 30 (describing that the Taft–Hartley Act created a free rider problem by outlawing closed shops through state-by-state legislation, whereas the *Janus v. AFSCME* decision outlawed *closed shops* nationwide, allowing free riders to become problem for unions in every state).

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B. Union Membership, *Janus v. AFSCME*, and the Free Rider Problem

Although union membership has declined overall, the public sector has retained somewhat strong union membership.³⁷ In 2017, unions represented 34.4% of public employees nationwide.³⁸ The Civil Rights movement led to changes in labor law and an upsurge in public sector union membership.³⁹ In contrast, union membership in the private sector declined due to multiple factors.⁴⁰ Unionized companies were increasingly competing with foreign manufacturers that could provide cheaper non-unionized labor.⁴¹ However, President Ronald Reagan's challenge against the air traffic controller's strike in 1981 was a pivotal moment for both private and public unions.⁴² When the Professional Air Traffic Controllers Organization union members refused to come to work within 48 hours, President Reagan promptly fired over 11,000 air traffic controllers.⁴³ Afterwards, private sector employers quickly adopted President Reagan's hardline tactics to discourage union membership.⁴⁴

Today, public sector union membership is at risk of further decline due to the 2018 *Janus* decision.⁴⁵ In *Janus*, the Supreme Court overturned forty years of precedent that the Court established in *Abood v. Detroit Board of Education*.⁴⁶

37. MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 31, at 30; Quentin Fottrell, *Labor Union Membership Has the Biggest Impact on Public-Sector Workers*, MARKETWATCH (Dec. 7, 2018, 9:43 AM), <https://www.marketwatch.com/story/labor-union-membership-has-a-much-bigger-impact-on-public-than-private-workers-2018-12-04> (on file with the *University of the Pacific Law Review*) (“Historically, union jobs were concentrated among low-skilled men in private sector industries With the steady decline in private sector unionization and rising influence in the public sector, half of unionized workers are now in the public sector.”).

38. MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 31, at 30; see Julia Wolfe & John Schmitt, *A Profile of Union Workers in State and Local Government Key Facts About the Sector for Followers of Janus v. AFSCME Council 31*, ECON. POL’Y INST., <https://www.epi.org/publication/a-profile-of-union-workers-in-state-and-local-government-key-facts-about-the-sector-for-followers-of-janus-v-afscme-council-31/> (on file with the *University of the Pacific Law Review*) (showing that unions represented 61.2% of California, 57.3% of Oregon, and 60.1% of Washington state and local government workers in 2017).

39. Melvin W. Reder, *The Rise and Fall of Unions: The Public Sector and the Private*, 2 J. ECON. PERSPS., 89, 104 (1998).

40. See Caleb Crain, *State of the Unions – What Happened to America’s Labor Movement?*, NEW YORKER (Aug. 19, 2019), <https://www.newyorker.com/magazine/2019/08/26/state-of-the-unions> (on file with the *University of the Pacific Law Review*) (explaining that a combination of political animosity and changes in the American economy led to the decline in private sector unions).

41. *Id.*

42. See *When Reagan Broke the Unions*, NPR, <https://www.npr.org/transcripts/788002965> (Dec. 18, 2019) (on file with the *University of the Pacific Law Review*) (“What had happened in that moment of the strike was that Reagan flipped the narrative on strikebreaking. Strikers were no longer the sympathetic ones. Now they were selfish lawbreakers screwing over regular Americans He was able to convince a good chunk of the American public that strikebreaking was, in fact, something patriotic. And at the time, America seemed to be on his side.”).

43. *Id.*

44. *Id.*

45. See *Janus v. AFSCME*, 138 S. Ct. at 2459 (allowing public employees to opt-out of union membership).

46. *Id.* at 2486 (citing *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)).

Abood required all public employees, including non-union members to pay a percentage of union dues—known as “fair share fees.”⁴⁷ Evidence from right-to-work states estimated that anywhere between 20% to 71% of public-sector workers would withdraw their union membership if given the choice.⁴⁸ Such a dramatic drop in union membership would weaken a union’s ability to negotiate effectively or even cause the end of public-sector unionism.⁴⁹

As more public employees opt-out of union membership, a free rider problem arises.⁵⁰ A union’s legal duty to fairly represent all employees creates an incentive for individuals to cancel their membership.⁵¹ Despite their non-member status, free riders receive union-negotiated benefits, including higher wages and better working conditions, without paying a monthly union fee.⁵² As the number of free riders increase, another problem arises: as more employees cancel their union membership, unions have less bargaining power to negotiate with employers for employee benefits.⁵³ The worse wages and conditions become, the more employees become dissatisfied with their union representation and cancel their membership.⁵⁴

C. The Union Difference

Unions still play a critical role in improving workers’ rights and benefits.⁵⁵ On average, a unionized worker earns 11.2% more in wages than a non-unionized peer with similar education, occupation, and experience.⁵⁶ A unionized worker is

47. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 262–63 (1977).

48. Aaron Tang, *Life After Janus*, 119 COLUMB. L. REV. 677, 679–80 (2019).

49. *Id.* (“The range of possible outcomes is thus vast: from the weakening of union influence to the end of public-sector unionism as we know it.”).

50. See *Free Ride*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/free%20ride> (last visited Feb. 12, 2022) (defining a free ride as “a benefit obtained at another’s expense or without the usual cost or effort”); MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 31, at 31 (explaining that the cyclical free rider problem occurs when more union members drop their dues and as a result, unions have fewer financial resources to negotiate with employers).

51. See Aaron Tang, *supra* note 49, at 688–89 (asserting that a union’s duty of fair and exclusive representation creates “an ‘incentive’ for employees ‘to become ‘free riders’” who ‘refuse to contribute,’” but still retain the benefits of a unionized workplace).

52. Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821, 1821 (2019) (“‘If the members of a large group rationally seek to maximize their personal welfare, they will not act to advance their common or group objectives’ absent either compulsion or incentives that will benefit the members apart from the group benefits As a result, large groups will not form effective organizations and all will be worse off.”).

53. See MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 31, at 31 (explaining that fewer dues-paying members will cause unions to have the fewer financial resources to negotiate with employers); Aaron Tang, *supra* note 49, at 689 n.56 (“Put another way, the collective action problem is that if enough employees do not pay dues, there will be no union-wage premium or other union negotiated benefit to ‘free ride’ on at all.”).

54. Elise Gould & Will Kimball, “*Right-to-Work*” States Still Have Lower Wages, ECON. POL’Y INST., (Apr. 22, 2015), <https://www.epi.org/publication/right-to-work-states-have-lower-wages/> (on file with the *University of the Pacific Law Review*) (asserting right to work states are associated with lower wages).

55. JOSH BIVENS, ET AL., ECON. POL’Y INST., *How Today’s Unions Help Working People* 7 (Aug. 24, 2017), <https://files.epi.org/pdf/133275.pdf> (on file with the *University of the Pacific Law Review*).

56. Press Release, Econ. Pol’y Inst., Union Workers Are Paid 11.2% More and Have Greater Access to

also more likely to have employer-provided health insurance.⁵⁷ Critically, unions have also served as an important vehicle to desegregate the workforce, particularly for women of color.⁵⁸ Although unions were historically divided by race and occupation, unions integrated the workforce by providing job opportunities for African Americans fleeing the Jim Crow South.⁵⁹ African Americans are heavily represented in public-sector union jobs.⁶⁰ Nearly 20% of African American adults work in government positions.⁶¹ Union members are more likely to engage in political activity.⁶² Despite declining union membership, unions still play a pivotal role in improving wages, enacting working protections, and diversifying the workplace.⁶³

III. PUBLIC RECORDS LAWS AND LAWSUITS IN WASHINGTON, OREGON, AND CALIFORNIA

Since the *Janus* case, the Freedom Foundation has filed public information requests targeting Washington, Oregon, and California.⁶⁴ In response, these states proposed legislation to enhance protections for public employee personal information.⁶⁵ Section A summarizes the Washington Supreme Court decision in *Washington Public Employees Association v. Freedom Foundation* and Washington’s rationale for enacting H.B. 1888.⁶⁶ Section B describes the Freedom Foundation’s recent public information requests in Oregon and H.B. 2016’s proposed language.⁶⁷ Section C discusses the California Public Records Act (“CPRA”) and the Freedom Foundation’s recent lawsuits against California Human Resources (“CalHR”) and San Bernardino County.⁶⁸

Health Insurance and Paid Sick Days than Their Nonunion Counterparts (Aug. 25, 2020) (on file with the *University of the Pacific Law Review*).

57. *Id.*

58. P.R. Lockhart, *The Supreme Court Just Hit Public Unions Hard. Workers of Color Have the Most to Lose*, VOX (June 27, 2018), <https://www.vox.com/policy-and-politics/2018/2/26/17053328/janus-afscme-decision-supreme-court-unions-minorities> (on file with the *University of the Pacific Law Review*).

59. *Id.*

60. *Id.*

61. *Id.*

62. Jasmine Kerrissey & Evan Schofer, *Union Membership and Political Participation in the United States*, 91 SOC. FORCES, no. 3, 895, 895 (Mar. 2013).

63. P.R. Lockhart, *supra* note 59 (arguing unions play a significant role in making wages and benefits more equal across racial and gender lines).

64. *Freedom Foundation, supra* note 10 (showing that the Freedom Foundation has offices in Washington, Oregon, Ohio, Pennsylvania, and California); Press Release, Freedom Found., *The Butterfly Effect of Janus v. AFCSME on Two-Year Anniversary Offers California Hope Amid the Chaos, supra* note 9.

65. HB 1888, *supra* note 1; HB 2016, *supra* note 17.

66. *Infra* Section IV.A.

67. *Infra* Section IV.B.

68. *Infra* Section IV.C.

A. *WPEA v. Freedom Foundation and H.B. 1888: Protecting Employee Information From Public Disclosure*

The Freedom Foundation began its quest for public employee information in Washington.⁶⁹ In 2016, the Freedom Foundation requested records for union-represented employees—including employees’ full names, birth dates, and work email addresses—from several Washington governmental agencies.⁷⁰ The agencies agreed to disclose full names, birth dates, and emails.⁷¹ Afterwards, the Washington Public Employees Association (“WPEA”) sued the State of Washington and the Freedom Foundation for disclosing the emails.⁷² The Washington Supreme Court held that names and birth dates are disclosable because that information was not explicitly exempt under Washington’s Public Records Act.⁷³ The court explained that the Legislature would need to pass a law if it wanted to create an exemption for Washington state public employee names and birth dates.⁷⁴

In response to *WPEA v. Freedom Foundation*, the Washington State Legislature passed H.B. 1888.⁷⁵ H.B. 1888 exempted day and month of birth from public disclosure under the Washington Public Records Act.⁷⁶ In addition, H.B. 1888 exempted payroll deductions.⁷⁷ The legislation also exempted photographs from general public records requests.⁷⁸ In addition, an employee may try to prevent the release of their information.⁷⁹

69. See Adam Ashton & West Venteicher, *Want Out of Your Union? Conservative Groups Are Recruiting California Public Workers for Lawsuits*, SACRAMENTO BEE (March 26, 2019), <https://www.sacbee.com/article228392109.html> (on file with the *University of the Pacific Law Review*) (reporting that the Freedom Foundation began its efforts to sue labor unions in Washington and later expanded to California).

70. *WPEA v. Freedom Found.*, *supra* note 8, at 3.

71. *Id.*

72. See *id.* (indicating that the Freedom Foundation argued that they did not violate privacy rights because an individual’s voter name, birth date, and residential address are already publicly available from the Washington Secretary of State).

73. *Id.* at 28.

74. See *id.* at 8 (“[W]e cannot judicially expand the PRA’s narrow exemptions beyond the boundaries set by the legislature, lest we step beyond our interpretive role and risk disrupting the balance of public policies the PRA reflects.”).

75. HB 1888, *supra* note 1.

76. See *id.* (showing HB 1888 created an exception for journalists, who may have access to a public employee’s full birth date and photographs).

77. HB 1888, *supra* note 1. See generally Aaron Tang, *supra* note 49, at 698 (“[M]any government employers deduct union fee payments directly out of worker paychecks.”).

78. See HB 1888, *supra* note 1. (noting that although HB 1888 exempts photographs from the Washington Public Records Act, the legislation created a photograph exception for public records requests from newspapers and media).

79. See HB 1888, *supra* note 1 (“That the employee may seek to enjoin release of the records under RCW 42.56.540.”).

B. Recent Public Information Requests in Oregon and H.B. 2016

In 2017, the Freedom Foundation filed a lawsuit against the City of Portland to obtain public employee names for a union decertification campaign.⁸⁰ Decertification campaigns remove an employee's union as their bargaining representative.⁸¹ The Multnomah County District Attorney ordered the names released.⁸² In response, the City of Portland filed a lawsuit challenging the District Attorney's order.⁸³ In 2018, the judge dismissed the lawsuit and ordered the City of Portland to release the names.⁸⁴

In 2018, the Oregon Department of Administrative Services ("DAS") released large employee information databases twice.⁸⁵ The databases included employees' names, months, years of birth, and demographic information.⁸⁶ That same year, the Freedom Foundation requested homecare workers' birth dates from the Oregon Department of Human Services ("DHS").⁸⁷ DHS denied the request, and Oregon Attorney General Ellen F. Rosenblum affirmed DHS's decision.⁸⁸ Rosenblum argued that the Freedom Foundation should not have access to dates of birth to ascertain employees' home addresses.⁸⁹ She asserted that employees dates of birth are exempt under Oregon's public records law.⁹⁰ Rosenblum was concerned public information requestors could potentially misuse large datasets, which would leave employees vulnerable.⁹¹ She compared the public record requests to the Cambridge Analytica incident, where a data consulting firm improperly obtained tens of millions of Facebook user information to sell voter profiles for the presidential

80. See Complaint – (Declaratory and Injunctive Relief) at 2, Freedom Found. v. City of Portland, No. 17CV47399 (2017) (suing the City of Portland for employee information); *Decertification Election*, NAT'L LAB. REL. BD., <https://www.nlr.gov/about-nlr/b/rihts-we-protect/the-law/employees/decertification-election> (last visited Jan. 10, 2021) (on file with the *University of the Pacific Law Review*) ("Under certain circumstances, [members] can vote out or "decertify" [their] union, or replace it with a different union.").

81. *Decertification Election*, *supra* note 81.

82. Letter from Rod Underhill, Dist. Att'y, Multnomah County, Oregon, to Ben Straka, Freedom Found. and Heidi Brown, Senior Deputy City Att'y, Portland, Or. (Oct. 13, 2017) (notes on file with the *University of the Pacific Law Review*).

83. Press Release, Freedom Found., Judge Dismisses Portland's Lawsuit Against Freedom Foundation (Apr. 2018) (on file with the *University of the Pacific Law Review*).

84. See Opinion and Order on Motions for Summary Judgment, *City of Portland v. Evergreen Freedom Found.*, *supra* note 8.

85. Letter from Nik Blosser, Chief of Staff, Off. of Governor Kate Brown, to Kate Coba, Dir., Dep't of Admin. Serv. (June 20, 2018) (notes on file with the *University of the Pacific Law Review*).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See *id.* (arguing third-party requestors could misuse large datasets and put public employees at risk for identity theft and harassment).

election in 2016.⁹² The firm created a third-party application on Facebook that collected information from individual users and their Facebook friends.⁹³

Subsequently, the Oregon Legislative Assembly proposed H.B. 2016, which would have created a new unfair labor practice.⁹⁴ Specifically, H.B. 2016 would have charged Oregon agencies with an unfair labor practice if they disclosed an employee's personal information to any entity other than the employee's union.⁹⁵ Newspapers and the Freedom Foundation opposed the unfair labor practice provisions that would have enhanced protections for employees' personal data.⁹⁶ Ultimately, this provision of H.B. 2016 failed.⁹⁷

C. Public Records Laws and Recent Information Requests in California

The California state government employs approximately 234,000 workers.⁹⁸ At the local level, county governments employ approximately 388,000 public employees.⁹⁹ Since the *Janus* decision, union membership in California has decreased.¹⁰⁰ Third-party organizations, including the Freedom Foundation, are using public records requests to undermine union membership.¹⁰¹ Part 1 discusses the Freedom Foundation's recent public records requests in California.¹⁰² Part 2 reviews the CPRA and the types of public employee information the Act

92. Sam Meredith, *Facebook-Cambridge Analytica: A Timeline of the Data Hijacking Scandal*, CNBC (updated Apr. 10, 2018, 9:51 AM), <https://www.cnbc.com/2018/04/10/facebook-cambridge-analytica-a-timeline-of-the-data-hijacking-scandal.html> (on file with the *University of the Pacific Law Review*).

93. *Id.*

94. HB 2016, *supra* note 17; see *Legal Definition of Unfair Labor Practice*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/unfair%20labor%20practice> (last visited Feb. 24, 2022) (defining an unfair labor practice as "any of various acts by an employer or labor organization that violate a right or protection under applicable labor laws").

95. See HB 2016, *supra* note 17 ("It is an unfair labor practice for a public employer to do any of the following . . . [p]rovide to any private entity, other than the exclusive representative, any portion of personally identifiable information about the public employees within a bargaining unit that is exempt from disclosure, including but not limited to the following: (A) Home addresses or other personal mailing addresses; (B) Telephone numbers; (C) Electronic mail addresses; (D) Dates of birth; (E) Categories of employees within a bargaining unit, including an employee's membership status with the labor organization.").

96. Ted Sickinger, *Pro-Public Employee Union Bill Sails Through the Oregon Senate*, OREGONIAN (June 7, 2019) <https://www.oregonlive.com/news/2019/06/pro-public-employee-union-bill-sails-through-the-oregon-senate.html> (on file with the *University of the Pacific Law Review*); HB 2016 *supra* note 17.

97. HB 2016, *supra* note 17.

98. *State Employee Demographics*, CAL. STATE CONTROLLER, https://sco.ca.gov/ppsd_empinfo_demo.html (last visited Mar. 20, 2022) (on file with the *University of the Pacific Law Review*).

99. *Government Compensation in California*, BETTY T. YEE CALIFORNIA STATE CONTROLLER (last updated Mar. 18, 2022) (on file with the *University of the Pacific Law Review*) (showing that California had 387,906 county employees in 2020).

100. See *News Release*, *supra* note 11 (reporting that union membership in California decreased from 15.9% in 2021, down from 16.2% in 2021).

101. Press Release, Freedom Found., *Complaint Alleges State HR Office Declined Information Requests to Shield Unions* (May 12, 2020) (on file with the *University of the Pacific Law Review*).

102. *Infra* Subsection III.C.1.

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exempts.¹⁰³ Subsection 3 examines disclosable public employee information under the CPRA.¹⁰⁴

1. *The Freedom Foundation Sues the California Department of Human Resources and San Bernardino County*

In January 2020, the Freedom Foundation submitted a public records request to CalHR for public employee information.¹⁰⁵ The Freedom Foundation requested the total number of state employees for each month of 2018 and 2019.¹⁰⁶ In addition, the Freedom Foundation sought specific data pertaining to each of the state’s twenty-one bargaining units.¹⁰⁷ Specifically, the Freedom Foundation wanted the name of the union representing each bargaining unit.¹⁰⁸ They also requested the total number of represented employees who had union membership payroll deductions and the total amount of union dues.¹⁰⁹ CalHR refused the request arguing that the records sought were exempt from disclosure because they pertained to collective bargaining.¹¹⁰

Subsequently, the Freedom Foundation made a second request to CalHR that sought disaggregated information for every public employee.¹¹¹ The Freedom Foundation requested each employee’s full name, month and year of birth, job classification, employee identification number, hire date, salary, and full-time equivalent (“FTE”) status.¹¹² In addition, the Freedom Foundation requested public employees’ work emails, work addresses, and bargaining unit numbers.¹¹³ CalHR

103. *Infra* Subsection III.C.2.

104. *Infra* Subsection III.C.3.

105. Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. Cal. Dep’t of Hum. Res., *supra* note 8, at 4–6.; see *Bargaining / Contracts*, CAL. HUM. RES. (updated May 16, 2016), <https://www.calhr.ca.gov/state-hr-professionals/pages/bargaining-contracts.aspx> (on file with the *University of the Pacific Law Review*) (explaining that unions negotiate the California Department of Human Resources over working conditions and wages).

106. Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. Cal. Dep’t of Hum. Res., *supra* note 8, at 4.

107. Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. Cal. Dep’t of Hum. Res., *supra* note 8, at 4. See *generally Bargaining Units*, CAL. HUM. RES., <https://www.calhr.ca.gov/state-hr-professionals/Pages/bargaining-units.aspx> (last updated Feb. 28, 2017) (on file with the *University of the Pacific Law Review*) (describing California state government’s 21 bargaining units); *Bargaining / Contracts*, *supra* note 106 (explaining that California state public employees “are divided into 21 bargaining units” and that “[e]ach bargaining unit is represented by a union; in some cases the same union represents multiple units.”).

108. Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. Cal. Dep’t of Hum. Res., *supra* note 8, at 4.

109. *Id.* at 5.

110. *Id.*

111. *Id.* at 5–6.

112. *Id.*

113. *Id.*

again refused the public records request.¹¹⁴ The Freedom Foundation sued and demanded CalHR to show cause why it could not disclose the requested information.¹¹⁵ CalHR denied the second request based on the same reasoning and asserted the denial was justified because CalHR did not own the records the Freedom Foundation requested.¹¹⁶ In response, the Freedom Foundation replied, “[i]t doesn’t matter whether HR owns the records in dispute. They have to disclose anything ‘prepared, owned, used or retained by it.’”¹¹⁷

In March 2020, the Freedom Foundation submitted a separate request for public employee information to San Bernardino County.¹¹⁸ After San Bernardino County refused to disclose public employee contact information, the Freedom Foundation sued the county.¹¹⁹ The county argued the information fell under the public-interest exemption.¹²⁰ San Bernardino County explained that its refusal was based on the possibility that disclosure could put worker safety at risk.¹²¹ The Freedom Foundation countered that the information it requested was already publicly available and was not exempt because it did not include “personnel, medical, or private” employee files.¹²²

2. Non-Disclosable Information Under the California Public Records Act

Under the CPRA, a public record is any agency “writing” that is “prepared, owned, used, or retained” to conduct the public’s business.¹²³ The CPRA includes a presumption in favor of public access.¹²⁴ However, it contains approximately seventy-six disclosure exemptions.¹²⁵ An agency opposing disclosure has the

114. *Id.* at 6.

115. *Id.* at 6–7.

116. *Id.* at 6.

117. Press Release, Freedom Found., Complaint Alleges State HR Office Declined Information Requests to Shield Unions, *supra* note 102.

118. Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. San Bernardino County, *supra* note 8, at 4.

119. *Id.* at 1–2 (establishing that the Freedom Foundation also sued San Bernardino County for denying their public information request in July 2020).

120. *Id.* at 2.

121. *Id.* at 6.

122. *Id.* at 9.

123. California Public Records Act, CAL. GOV’T CODE §§ 6250–6270.7 (West 2022); see CAL. GOV’T CODE § 6252(e) (West 2022) (“[P]ublic records includes any ‘writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.’”).

124. See generally Maria Shanle, *ABC’s of Privacy and Public Records*, UC MERCED OFF. OF LEGAL AFFS. (June 2009), https://legalaffairs.ucmerced.edu/sites/legalaffairs.ucmerced.edu/files/documents/abcs_of_privacy_public_records_by_m_shanle.pdf (on file with the *University of the Pacific Law Review*) (providing overview of California’s public records law).

125. *The People’s Business, A Guide to the California Public Records Act*, LEAGUE OF CAL. CITIES 1, 6 (Apr. 2017), https://www.calcities.org/docs/default-source/advocacy/the-people-s-business-2017.pdf?sfvrsn=6671a8ea_1 (on file with the *University of the Pacific Law Review*).

burden of proving an exemption applies.¹²⁶ The exemptions reflect two recurring government interests: protecting employee privacy rights and the need for government efficiency and effectiveness.¹²⁷

The CPRA lists explicit exemptions that protect public employee data.¹²⁸ Specifically, California exempts birth dates, home addresses, home telephone numbers, personal cell phone numbers, and personal emails from CPRA disclosure.¹²⁹ In addition, California law states the government cannot disclose “personnel, medical, or similar files” because such disclosure is an unwarranted invasion of personal privacy.¹³⁰ Most importantly, the CPRA contains a broad catch-all exemption.¹³¹ A government agency may prevent disclosures if it can demonstrate that “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure.”¹³²

Further, the CPRA exempts information covered by the Ralph C. Dills Act and the Meyers-Milias-Brown Act.¹³³ The Dills Act, also known as the State Employer-Employee Relations Act of 1978, established collective bargaining for California state government employees.¹³⁴ The Meyers-Milias-Brown Act of 1968 established collective bargaining for California’s municipal, county, and local special district employers.¹³⁵ If the data does not already exist in the requesting party’s requested format, the California agency does not need to collect information for a public records request.¹³⁶ However, agencies must disclose information from an existing database if the information contained in the database does not fall under an exemption.¹³⁷

126. Alexandra B. Andreen, Comment, *The Cost of Sunshine the Threat of Public Employee Privacy*, 84 CHAP. L. REV. 869, 875 (2015).

127. *The People’s Business*, *supra* note 126, at 6.

128. See CAL. GOV’T CODE § 6254.3, *supra* note 19.

129. *Id.*

130. See *id.* (indicating that the CPRA does not require the disclosure of any of the following records . . . “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy”).

131. Alexandra B. Andreen, *supra* note 127, at 874; CAL. GOV’T CODE § 6255 (West 2022).

132. CAL. GOV’T CODE § 6255 (West 2022).

133. Meyers-Milias-Brown Act of 1968, CAL. GOV’T CODE §§ 3500–3511 (West 2022); State Employer-Employee Relations Act of 1978, CAL. GOV’T CODE §§ 3512–3524 (West 2022); see CAL. GOV’T CODE § 6254(p)(1) (West 2022) (indicating that the CPRA exempts from disclosure information “that reveal[s] a state agency’s deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters.”).

134. *Laws and Regulations*, CAL. PUB. EMP. RELS. BD., <https://perb.ca.gov/laws-and-regulations/> (last visited Jan. 10, 2021) (on file with the *University of the Pacific Law Review*).

135. *Laws and Regulations*, CAL. PUB. EMP. RELS. BD., <https://perb.ca.gov/laws-and-regulations/> (last visited Jan. 10, 2021) (on file with the *University of the Pacific Law Review*).

136. See *Sanders v. State Bar of Cal.*, 58 Cal. 4th 300, 305, 327 (Cal. 2013) (determining that the State Bar of California did not have to disclose bar passage rates and demographic statistics because the agency did not need to create a new record).

137. Maria Shanle, *supra* note 25.

3. *Non-Exempt Information Under the California Public Records Act*

Under the CPRA, agencies must disclose some information about public employees.¹³⁸ For example, a government agency must disclose information relating to public employee salaries.¹³⁹ In *IFTPE, Local 21 v. Superior Court of Alameda County*, the court determined that the public's interest in salary information outweighed individual privacy interests of public workers.¹⁴⁰ Third parties can also request work phone numbers and work email addresses.¹⁴¹

IV. SAFETY AND PUBLIC POLICY CONCERNS FOR DISCLOSING PUBLIC EMPLOYEE INFORMATION

The public should have a right to government transparency.¹⁴² However, revealing vast databases of public employee information can put public employees at risk for harassment and retaliation.¹⁴³ If California discloses public employee information without weighing the privacy interests of public workers, serious safety and public policy concerns arise.¹⁴⁴ Section A compares the CPRA's original purpose and the Freedom Foundation's current use of public records requests.¹⁴⁵ Section B discusses the potential misuse of personal information in the digital age.¹⁴⁶ Section C asserts California should adopt enhanced privacy legislation to hire and maintain a competitive public employee workforce.¹⁴⁷

A. *Distorting the Purpose of the California Public Records Act*

Legislators enacted the CPRA, the state equivalent of the Freedom of Information Act ("FOIA"), in 1968 with the purpose to ensure government accountability.¹⁴⁸ After the Watergate scandal, the public pressured governments to pass a government transparency law.¹⁴⁹ The California Legislature passed the CPRA with the purpose of "increasing freedom of information" and "to give

138. CAL. GOV'T CODE §§ 6250–6270.7 (West 2022).

139. *IFTPE, Local 21 v. Superior Ct. of Alameda Cnty.*, 42 Cal. 4th 319, 327 (Cal. 2007); *The People's Business*, *supra* note 126, at 49.

140. *IFTPE, Local 21*, 42 Cal. 4th at 327.

141. *The People's Business*, *supra* note 126, at 68; *see* CAL. GOV'T CODE § 6252(e) (West 2022).

142. *See* Claudia Polsky, *supra* note 14 (explaining that FOIA and state public records laws were enacted because of public suspicion after Watergate).

143. *See* Anna Maria Barry-Jester, *supra* note 168 (describing Ms. Hall's and Dr. Newel's fear of violence and harassment).

144. *Infra* Section V.A.–V.C.

145. *Infra* Section V.A.

146. *Infra* Section V.B.

147. *Infra* Section V.C.

148. Alexandra B. Andreen, *supra* note 127, at 873–74.

149. *See* Claudia Polsky, *supra* note 14 (explaining that FOIA and state public records laws were enacted because of public suspicion after Watergate).

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public access to information in possession of public agencies.”¹⁵⁰ The CPRA specifically states: “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”¹⁵¹

Underlying public records laws is the public’s right to monitor government expenditures to prevent corruption and fraud.¹⁵² For example, newspapers exposed government misappropriation of finances during the Hurricane Katrina and Rita relief efforts.¹⁵³ In California, public records requests can expose agency inefficiencies or abuses.¹⁵⁴

In contrast, the Freedom Foundation’s purpose for submitting public requests is vastly different from the original purpose of the CPRA.¹⁵⁵ The Freedom Foundation seeks to persuade public employees to drop their membership dues and ultimately reduce a union’s bargaining strength and political influence.¹⁵⁶ Although the public should have a right to government transparency, revealing personal public employee data is unnecessary to meet that goal.¹⁵⁷

B. The Weaponization of Personal Information in the Digital Age

Generous public records requests containing personal information potentially place California’s state public employees at a higher risk for harassment and identity theft.¹⁵⁸ Data is the new gold for cybercriminals.¹⁵⁹

Oregon government officials emphasized the risk of data leaks when the Freedom Foundation submitted an information request for public employee information.¹⁶⁰ Oregon Attorney General Rosenblum stated that potential misuse

150. Alexandra B. Andreen, *supra* note 127, at 874; *see* L.A. Police Dep’t v. Superior Ct., 135 Cal. Rptr. 575, 579 (Ct. App. 1977) (stating the government’s commitment to public access to public records).

151. CAL. GOV’T CODE § 6250 (West 2021).

152. Claudia Polsky, *supra* note 14, at 222 (2019).

153. *Id.*

154. *See id.* at 227 (2019) (discussing California’s collection agencies that victimized low-income residents).

155. *See* Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFCSME* on Two-Year Anniversary Offers California Hope Amid the Chaos, *supra* note 9 (indicating the Freedom Foundation’s goal to reduce union influence in politics and policy).

156. *Id.*

157. *Compare* Claudia Polsky, *supra* note 14 (explaining that FOIA and state public records laws were enacted because of public suspicion after Watergate), *and* Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFCSME* on Two-Year Anniversary Offers California Hope Amid the Chaos, *supra* note 9 (stating the Freedom Foundation’s goal to reduce union influence in politics and policy).

158. *Compare* HB 1888 State Gov’t & Tribal Relations Hearing, *supra* note 1, *with* Letter from Nik Blosser, *supra* note 86.

159. *See* Renee Johnson, *3 Biggest Data Breaches of the 21st Century per Number of Records*, THE TECH REP. (May 24, 2021), <https://techreport.com/cybersecurity/3474218/top-three-data-breaches/> (on file with the *University of the Pacific Law Review*) (explaining cybercriminals exploit databases that contain sensitive information, such as names, email addresses, phone numbers, for financial gain).

160. Letter from Nik Blosser, *supra* note 86.

of large datasets could leave employees vulnerable to identity theft.¹⁶¹ A data breach occurs when an unauthorized person or entity obtains confidential, sensitive, or protected information.¹⁶² In the Cambridge Analytica incident, the firm improperly harvested information on as many as 87 million Facebook users to create voter profiles for the 2016 presidential election.¹⁶³ Third parties submitting public records requests in California seeking large datasets with personal information can jeopardize public workers' safety due to the risk of data leaks.¹⁶⁴

In California, public health officials exemplify why the government should enhance protections for public workers.¹⁶⁵ Armed and angry protestors, frustrated with stay-at-home orders, are doxing and harassing public health officials during the COVID-19 pandemic.¹⁶⁶ Health Director Mimi Hall, a public health official for Santa Cruz County, fearfully leaves her workplace to her home.¹⁶⁷ Anonymous individuals send Dr. Gail Newel, a Santa Cruz public health official, violent and threatening warnings.¹⁶⁸ She received messages stating: “Look out; we’re coming for you” and letters stating her address and the names of her children.¹⁶⁹ To protect public health officials like Dr. Newel, California public health officials are now eligible to participate in a program to keep their home addresses confidential.¹⁷⁰ Although California law already protects home addresses from public records requests, the state needs to expand privacy protections for public employees.¹⁷¹ If the state provides third-party requesters, such as the Freedom Foundation, with large datasets with personal information on thousands of public workers, the state is exposing these workers.¹⁷²

161. *Id.*

162. *How Data Breaches Happen*, KASPERSKY, <https://www.kaspersky.com/resource-center/definitions/data-breach> (accessed June 9, 2021) (on file with the *University of the Pacific Law Review*).

163. Sam Meredith, *supra* note 93.

164. *See* Letter from Nik Blosser, *supra* note 86 (indicating concern that large public records requests containing public employee personal information creates a risk of identity theft).

165. Michelle M. Mello, Jeremy A. Greene, & Joshua M. Sharfstein, *Attacks on Public Health Officials During COVID-19*, JAMA NETWORK (Aug. 5, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2769291> (on file with the *University of the Pacific Law Review*).

166. *Id.*

167. Anna Maria Barry-Jester, *'We're Coming for You': For Public Health Officials, a Year of Threats and Menace*, KAISER HEALTH FOUND. (Apr. 25, 2021) <https://khn.org/news/article/public-health-officials-year-of-threats-menace-santa-cruz-california/> (on file with the *University of the Pacific Law Review*).

168. *Id.*

169. *Id.*

170. Cal. Executive Order N-80-20, *available at* <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-80-20-COVID-19-signed.pdf> (Sept. 23, 2020) (on file with the *University of the Pacific Law Review*).

171. CAL. GOV'T CODE § 6254.3 (West 2022).

172. *See* Letter from Nik Blosser, *supra* note 86 (indicating concern that large public records requests containing public employee personal information creates a risk of identity theft).

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Third-party organizations, such as the Freedom Foundation, seek union membership data to persuade employees to cancel their membership dues.¹⁷³ Their goal is to reduce the bargaining power and political influence of unions.¹⁷⁴ Data breaches containing union membership information not only contain critical identifying data, but also place employees at risk of workplace harassment.¹⁷⁵ Since unions serve as intermediaries for workplace disputes and negotiate working conditions, an employee's union membership status can subject the individual to discrimination and retaliation.¹⁷⁶

C. Retaining and Attracting New Hires to Maintain California's Public Employee Workforce

California should adequately protect the privacy interests of public workers to hire and retain a strong government workforce.¹⁷⁷ If California fails to protect the privacy interests of its employees by providing massive datasets containing private information, current and future employees may be discouraged from state service.¹⁷⁸ In 2020, California had approximately 31,000 state employee vacancies.¹⁷⁹ Unionized workplaces reduce workplace disputes by creating established grievance and negotiating procedures.¹⁸⁰ For many California public employees, a frequent draw to join public service is the stability, retirement, and

173. Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFCSME* on Two-Year Anniversary Offers California Hope Amid the Chaos, *supra* note 9 (showing the Freedom Foundation's goal to reduce union influence in politics and policy).

174. *Id.*

175. Compare Letter from Nik Blosser, *supra* note 86 (expressing concern that large public records requests containing public employee personal information creates a risk of identity theft), with State of California Decision of the Public Employment Relations Board at 4, *SEIU Local 721 v. County of San Bernardino*, PERB Decision No. 2556-M (2018) (serving as an example of workplace harassment due to union participation).

176. See *SEIU Local 721 v. County of San Bernardino*, PERB Decision No. 2556-M (Cal. Pub. Emp't Rel. Bd. 2018) (describing an incident where a county manager photographed employees when they met with their union representatives).

177. See generally West Venteicher, *With 31,000 Job Openings, California Government Ramps Up Recruitment in Tight Labor Market*, SACRAMENTO BEE (Feb. 5, 2020), <https://www.sacbee.com/news/politics-government/the-state-worker/article239972258.html> (on file with the *University of the Pacific Law Review*) (reporting on state government efforts to keep up in a competitive labor market).

178. Interview with Thomas A. Gerhart, Editor-in-Chief, Univ. of the Pac., Univ. of the Pac. L. Rev. and Recs. Manager, Cal. High-Speed Rail Auth. (Oct. 15, 2020).

179. See West Venteicher, *supra* note 178 (indicating that a CalHR representative stated: "[t]he public sector definitely has a workforce recruiting issue in the long run. . .").

180. See Blaine Donais, *Why Professional Unions Make Good Conflict Management Partners*, <https://www.mediate.com/articles/donaisB1.cfm>, MEDIATE.COM (June 2006) (on file with the *University of the Pacific Law Review*) (listing the benefits of a unionized work environment: "[a] relatively well developed system for conflict management . . . unionization.").

health benefits that their unions negotiated.¹⁸¹ As more public workers retire, California must take measures to attract qualified public employees.¹⁸²

V. THE FREEDOM FOUNDATION'S LITIGATION STRATEGY AND THE CURRENT STATUS OF ITS LAWSUITS IN CALIFORNIA

A core focus for the Freedom Foundation's strategy is litigation.¹⁸³ The Freedom Foundation and other anti-union organizations take advantage of the time and resource disparity to pursue costly and time-intensive lawsuits.¹⁸⁴ While unions are preoccupied with negotiating contracts and governments managing state affairs, the Freedom Foundation has staff and resources entirely dedicated to reducing the bargaining and political power of unions.¹⁸⁵

Washington and Oregon are examples of the Freedom Foundation's litigation strategy.¹⁸⁶ In both states, the Freedom Foundation sued local governments for public employee information.¹⁸⁷ In Washington and Oregon, the Freedom Foundation prevailed in court.¹⁸⁸ However, public employees in Washington retaliated by passing H.B. 1888 and Oregon attempted to pass H.B. 2016.¹⁸⁹ California currently faces a similar dilemma because the Freedom Foundation has filed lawsuits against CalHR and San Bernardino County for public employee information.¹⁹⁰

181. West Venteicher, *supra* note 178.

182. *Id.*

183. See Jason Dudash, *supra* note 8 (explaining that the Freedom Foundation has focused on suing unions in Western states since the *Janus v. AFSCME* decision); Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFSCME* on Two-Year Anniversary Offers California Hope Amid the Chaos, *supra* note 9 (explaining that the Freedom Foundation submitted over 450 public record requests to collect information on unionized public employees in California).

184. Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFSCME* on Two-Year Anniversary Offers California Hope Amid the Chaos (July 9, 2020), *supra* note 9.

185. Compare *Join Our Team*, FREEDOM FOUND., <https://fp.freedomfoundation.com/join-our-team> (last visited Mar. 20, 2022) (on file with the *University of the Pacific Law Review*) (showing that the Freedom Foundation has 60 staff members dedicated to reducing the strength of unions), and Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFSCME* on Two-Year Anniversary Offers California Hope Amid the Chaos, *supra* note 9.

186. See *WPEA v. Freedom Found.*, slip op. at 28 (showing that the Freedom Foundation sued Washington for public employee information); Complaint – (Declaratory and Injunctive Relief), *Freedom Found. v. City of Portland*, *supra* note 81.

187. See *WPEA v. Freedom Found.*, slip op. at 28 (showing that the Freedom Foundation sued for public employee data); Opinion and Order on Motions for Summary Judgment, *supra* note 8, *Freedom Found. v. City of Portland*, (showing that the Freedom Foundation sued the City of Portland for public employee information).

188. See *WPEA v. Freedom Found.*, slip op. at 28 (concluding that the Freedom Foundation has access to Washington public employee information); Opinion and Order on Motions for Summary Judgment, *City of Portland v. Evergreen Freedom Found.*, *supra* note 8 (dismissing the City of Portland's lawsuit to prevent the Freedom Foundation's access to city public employee information).

189. See HB 1888, *supra* note 1 (proposing new protections for public employees in Washington); HB 2016, *supra* note 17 (attempting to create a new unfair labor practice to protect public employee information in Oregon).

190. See *Complaint, Freedom Found. v. Cal. Dep't Hum. Res.*, *supra* note 8, at 1–2 (showing that the

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In the CalHR lawsuit, the Freedom Foundation filed a motion for judgement on the pleadings and a petition for a writ of mandate.¹⁹¹ The Sacramento Superior Court tentatively granted the motion on October 8, 2021 and will hear the petition on April 8, 2022.¹⁹² In the San Bernardino County lawsuit, the San Bernardino Superior Court denied the Freedom Foundation's motion for judgement on the pleadings and scheduled the trial date for May 9, 2022.¹⁹³ An amendment to Government Code § 6254.3 or the Ralph C. Dills and Meyers-Milias-Brown Act can enhance protections for employees' privacy rights and help prevent costly and time-consuming lawsuits over employee personal information.¹⁹⁴

VI. LEGISLATIVE SOLUTIONS FOR CALIFORNIA

California needs to take a proactive approach to enhancing privacy rights for its state employees by amending its Government Code.¹⁹⁵ Massive datasets threaten the privacy and safety of public employees due to the risk of data leaks.¹⁹⁶ California should model legislation after Oregon's H.B. 2016 and Washington's H.B. 1888 to enhance privacy protections.¹⁹⁷

Freedom Foundation recently sued the California Department of Human Resources for denying their public information request in May 2020); Complaint, *Freedom Found. v. San Bernadino*, *supra* note 8, at 1–2 (establishing that the Freedom Foundation also sued San Bernardino County for denying their public information request in July 2020).

191. Notice of Motion and Motion Judgment on the Pleadings, Memorandum of Points and Authorities, at 1, *Freedom Foundation v. Cal. Dep't of Human Res.*, No. 34-2020-00278646 (2020); Notice of Final Hearing on Petition for Writ of Mandate and Opening Brief in Support of Same, at 1, *Freedom Foundation v. Cal. Dep't of Human Res.*, No. 34-2020-00278646 (2020).

192. *See* Tentative Ruling (Motion for Judgement on the Pleadings), at 8, *Freedom Foundation v. Cal. Dep't of Human Res.*, No. 34-2020-00278646 (2020) (indicating the Sacramento Superior Court ruled tentatively in favor of the Freedom Foundation on October 8, 2021); Declaration of Melissa Russell in Support of Defendant's Opposition to Complaint for Declaratory Relief and Verified Petition for Writ of Mandate, at 1, *Freedom Foundation v. Cal. Dep't of Human Res.*, No. 34-2020-00278646 (2020) (showing that the Sacramento Superior court will adjudicate the writ of mandate on April 8, 2022).

193. *See* Notice of Ruling Re: Plaintiff's Motion for Judgement on the Pleadings, at 1, *Freedom Found. v. San Bernardino County*, No. CIVDS2014702 (2020) (denying the Freedom Foundation's motion for judgement on the pleadings); Initial Trial Setting Conference Order, at 1, *Freedom Found. v. San Bernardino County*, No. CIVDS2014702 (2020) (setting trial date for May 9, 2022).

194. *See* Complaint, *Freedom Found. v. Cal. Dep't Hum. Res.*, *supra* note 8 (showing that the Freedom Foundation sued the California Department of Human Resources for public employee data); Complaint, *Freedom Found. v. San Bernadino*, *supra* note 8 (establishing that the Freedom Foundation also sued San Bernardino County for public employee information); CAL. GOV'T CODE § 6254.3 (West 2022); Meyers-Milias-Brown Act of 1968, CAL. GOV'T CODE §§ 3500–3511, *supra* note 134; State Employer-Employee Relations Act of 1978, CAL. GOV'T CODE §§ 3512–3524 (West 2022).

195. *See* CAL. GOV'T CODE § 6254.3 (West 2022).

196. *See* HB 1888 State Gov't & Tribal Relations Hearing, *supra* note 1. (recounting his doxing experience); Letter from Nik Blosser, *supra* note 86 (explaining the concern that large public records requests containing public employee personal information would place a large number of employees at risk of identity theft); Anna Maria Barry-Jester, *supra* note 168 (describing Ms. Hall's and Dr. Newel's fear that their personal information will expose them to violence and harassment).

197. *See* HB 1888, *supra* note 1 (proposing new protections for public employees in Washington); HB

California can learn from Oregon's H.B. 2016 to create an unfair labor practice for disclosing identifiable employee personal information to third-party organizations.¹⁹⁸ An unfair labor practice allows a union to sue an employer for labor law violations.¹⁹⁹ Oregon's H.B. 2016 proposed creating an unfair labor practice when a public employer provides to any private entity, other than an employee's union representative, any identifiable information that is exempt.²⁰⁰ Oregon's H.B. 2016 wanted to exempt sensitive information, such as bargaining unit and union membership data.²⁰¹ If California created a new unfair labor practice, unions can attempt to hold California government employers liable for disclosing identifiable public employee personal information.²⁰² Specifically, California should create a new unfair labor practice by amending the Ralph C. Dills Act and the Meyers-Milias-Brown Act.²⁰³ Currently, the CPRA already exempts information covered by these Acts.²⁰⁴ California should expand the data privacy rights of public employees by amending the Ralph C. Dills Act and the Meyers-Milias-Brown Act.²⁰⁵

Alternatively, California can model an amendment to its Government Code based on Washington state's H.B. 1888 to protect public employee information.²⁰⁶ H.B. 1888 serves as an example of legislation that specifically protects public employee information pertaining to an employee's union membership status by protecting information relating to payroll deductions and photographs.²⁰⁷

2016, *supra* note 17 (attempting to create a new unfair labor practice to safeguard public employee information in Oregon).

198. See HB 2016, *supra* note 17 (proposing the following language: "It is an unfair labor practice for a public employer to do any of the following . . . [p]rovide to any private entity, other than the exclusive representative, any portion of personally identifiable information about the public employees within a bargaining unit that is exempt from disclosure, including but not limited to the following: (A) Home addresses or other personal mailing addresses; (B) Telephone numbers; (C) Electronic mail addresses; (D) Dates of birth; Categories of employees within a bargaining unit, including an employee's membership status with the labor organization.").

199. See *Unfair Labor Practice (ULPs)*, CORNELL L. SCH. LEGAL INFO. INST., (last visited Mar. 20, 2022), [https://www.law.cornell.edu/wex/unfair_labor_practices_\(ulps\)](https://www.law.cornell.edu/wex/unfair_labor_practices_(ulps)) (on file with the *University of the Pacific Law Review*) ("When an employer interferes with employee rights to organize, form, join, or assist a labor organization, the employer has violated the [National Labor Relations Act].").

200. HB 2016, *supra* note 17.

201. *Id.*

202. See HB 2016, *supra* note 17 (attempting to create a new unfair labor practice); *PERB Functions*, CAL. PUB. EMP. REL. BD., <https://perb.ca.gov/about/perb-functions/> (last visited Apr. 25, 2021) (on file with the *University of the Pacific Law Review*) (stating PERB is responsible for adjudicating unfair labor practice charges against employers).

203. Meyers-Milias-Brown Act of 1968, CAL. GOV'T CODE §§ 3500–3511 (West 2022); State Employer-Employee Relations Act of 1978, CAL. GOV'T CODE §§ 3512–3524 (West 2022).

204. CAL. GOV'T CODE § 6253.2(d) (West 2022) ("This section does not alter the rights of parties under the Meyers-Milias-Brown Act (Chapter 10 (commencing with Section 3500) of Division 4) or any other labor relations law.").

205. See Meyers-Milias-Brown Act of 1968, CAL. GOV'T CODE §§ 3500–3511 (West 2022); State Employer-Employee Relations Act of 1978, CAL. GOV'T CODE §§ 3512–3524 (West 2022).

206. See HB 1888, *supra* note 1 (providing an example of legislation California can use to pass new laws that enhance privacy protections for California public workers).

207. HB 1888, *supra* note 1.

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California can also enhance its privacy protections for public workers by amending Government Code § 6254.3.²⁰⁸ Currently, Government Code § 6254.3 already safeguards home addresses, home telephone numbers, personal cell phone numbers, and birth dates.²⁰⁹ The California Legislature should strengthen Government Code § 6254.3 by adding language that protects work location addresses, bargaining unit assignments, payroll deductions, dates of hire, and photographs.²¹⁰

Work location addresses are particularly important because public employees can be harassed at their workplace.²¹¹ As demonstrated by Mr. Yestramski's testimony in support of H.B. 1888, Ms. Hall's fear of harassment at her workplace, and Dr. Newel's doxing experience, work location is critical information that the state should safeguard.²¹²

In addition, protecting bargaining unit assignments, payroll deductions, and dates of hire will prevent third-party groups from obtaining critical identifying information.²¹³ If large datasets containing public employee union information was leaked in a data breach, these employees are at risk of workplace harassment and retaliation.²¹⁴

California should learn from Washington's H.B. 1888 and extend the amendment to photographs to prevent potential misuse from public records requests.²¹⁵ Photographs are critical because they link a public employee's physical appearance to their personal information.²¹⁶

208. CAL. GOV'T CODE § 6254.3 (West 2022).

209. *Id.*

210. *Id.*

211. *Compare* HB 1888 State Gov't & Tribal Relations Hearing, *supra* note 1 (explaining his doxing experience), *with* Anna Maria Barry-Jester, *supra* note 168 (describing Ms. Hall's and Dr. Newel's fear of harassment).

212. *Compare* HB 1888 State Gov't & Tribal Relations Hearing, *supra* note 1 (showing why Mr. Yestramski strongly supported protecting his personal information from public records requests), *with* Anna Maria Barry-Jester, *supra* note 168 (describing Ms. Hall and Dr. Newel's concern about their personal information).

213. *See* Aaron Tang, *supra* note 49, at 698 (“[M]any government employers deduct union fee payments directly out of worker paychecks.”).

214. *Compare* Letter from Nik Blosser, *supra* note 86 (explaining his concern with public records requests with critical identifying information), *with* *SEIU Local 721 v. County of San Bernardino*, PERB Decision No. 2556-M (Cal. Pub. Emp't Rel. Bd. 2018) (serving as an example of workplace harassment due to union participation).

215. *See* HB 1888, *supra* note 1 (exempting photographs from public records requests in Washington).

216. *See generally* Dr. Sarah Monazam Erfani, *Blocking AI to Keep Your Personal Data Your Own*, UNIV. OF MELBOURNE (June 10, 2021), <https://pursuit.unimelb.edu.au/articles/blocking-ai-to-keep-your-personal-data-your-own> (on file with the *University of the Pacific Law Review*) (explaining why photographs constitute critical data that unauthorized entities can harvest and exploit).

VII. CONCLUSION

Employees who choose public service should not be required to sacrifice their right to privacy and safety.²¹⁷ Since *Janus v. AFSCME*, anti-union organizations such as the Freedom Foundation are increasingly seeking personal information datasets from Washington, Oregon, and California.²¹⁸ California agencies sharing vast datasets of information to third parties create an unreasonable risk for data leaks.²¹⁹ In the digital age, third-party organizations can weaponize personal information.²²⁰ California should learn from Oregon's H.B. 2016 and Washington's H.B. 1888 to amend its Government Code.²²¹ In doing so, California will enhance the privacy of state public employees by safeguarding their personal information.²²² California can avoid costly lawsuits seeking to obtain personal information with more powerful legislation that protects the privacy of public workers.²²³

217. See Anna Maria Barry-Jester, *supra* note 168. (explaining Ms. Hall's and Dr. Newel's fear of violence and harassment).

218. See generally Jason Dudash, *supra* note 8 (showing that the Freedom Foundation has focused on suing unions in Western states since the *Janus v. AFSCME* decision); Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFSCME* on Two-Year Anniversary Offers California Hope Amid the Chaos (July 9, 2020), *supra* note 9.

219. See Letter from Nik Blosser, *supra* note 86 (explaining the risks associated with disclosing large datasets).

220. See *id.* (asserting large datasets disclosures threaten the safety of public employees).

221. Compare HB 1888, *supra* note 1, and HB 2016, *supra* note 17, with CAL. GOV'T CODE § 6254.3 (West 2022), and Meyers-Milias-Brown Act of 1968, CAL. GOV'T CODE §§ 3500–3511 (West 2022), and State Employer-Employee Relations Act of 1978, CAL. GOV'T CODE §§ 3512–3524 (West 2022).

222. See Letter from Nik Blosser, *supra* note 86 (arguing why large datasets disclosures threaten the safety of public employees); HB 1888 State Gov't & Tribal Relations Hearing, *supra* note 1 (testifying about his experience when a patient's family member doxed him).

223. See *Complaint, Freedom Found. v. Cal. Dep't Hum. Res.*, *supra* note 8 (showing that the Freedom Foundation sued the California Department of Human Resources for public employee data); *Complaint, Freedom Found. v. San Bernardino County*, *supra* note 8, at 1–2 (establishing that the Freedom Foundation also sued San Bernardino County for public employee information); CAL. GOV'T CODE § 6254.3 (West 2022).

