NO. 96262-6

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

And

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,

Respondents.

RESPONDENT UNIVERSITY OF WASHINGTON'S ANSWER TO APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Respondent-Defendant University of Washington ("University" or "UW") submits this Response to Appellant-Defendant Freedom Foundation's Petition for Discretionary Review in this Public Records Act Case. Throughout this case, the University has remained ready to release the records in question. The University found no statutory basis to withhold the records, and therefore prepared them for release consistent with its obligations under the Public Records Act ("PRA"). Respondent-Plaintiff SEIU 925 obtained an injunction that was affirmed by the Court of Appeals, which held the records in question were not public records.

In *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), this Court applied the "scope of employment" test to determine whether the records at issue in that case fell within the definition of "public record" in RCW 42.56.010(3). Here, the Court of Appeals applied the "scope of employment" test in a different way than in *Nissen*, arguably extending *Nissen*. An extension of precedent does not necessarily create a conflict under RAP 13.4(b)(1), (2). If this Court believes that extension of case law raises an issue of statewide importance under RAP 13.4(b)(4) and accepts review on that basis, it should limit review to that single question: "whether the Court of Appeals erroneously applied the "scope of employment" test

to the definition of "public record" in RCW 42.56.010(3)." The Freedom Foundation has failed to properly preserve any other issue for review.

II. STATEMENT OF ISSUES

Whether under RAP 13.4(b)(4) the Court of Appeals' extension of the *Nissen* "scope of employment" test to the definition of "public record" in RCW 42.56.010(3) raises an issue of statewide importance that should be determined by the Supreme Court.

III. STATEMENT OF THE CASE

The records at issue in this case are emails sent to or from University Professor Robert Wood that include certain keywords or are from certain email addresses. These records are a subset or "stage" of records responsive to a public records request from the Freedom Foundation to the University. The records are maintained on the University's email servers.

In late 2015, the Freedom Foundation submitted a request under the PRA to the University for records sent or received by four members of the University faculty (including Professor Wood) that contained specific terms, including "Freedom Foundation," "SEIU," and "[u]nion, among others. CP at 39. The Foundation's request also sought emails that were sent or received from certain email addresses or domains (e.g., @seiu925.org). CP at 39. At the time of the request, SEIU 925 was a labor union conducting

a campaign to organize faculty on the University campuses.[1] *See, e.g.*, CP at 96, 100.

On receiving the request, staff from the University's Office of Public Records and Open Public Meetings ("OPR") contacted the named faculty members and asked each of them to search for records responsive to the request. CP at 219. Professor Wood forwarded a set of records to OPR, which began to review the records for applicable exemptions under the PRA. CP at 219-220. The University was unable to find a basis to determine the records requested by the Foundation fell outside the definition of "public record" in RCW 42.56.010(3). CP at 220. Accordingly, the University prepared the records for release as "stage 1" of the response to the Freedom Foundation's request. As SEIU 925 and some of the faculty members had already notified the University that they considered the emails to be personal and private to them, the University provided Professor Wood with written notice of the opportunity to seek injunctive relief, as allowed by RCW 42.56.540. CP at 46-7.

On April 12, 2016, the University notified Professor Wood that, unless a court order enjoining release was provided to OPR by April 26, 2016, the records would be released on April 27, 2016. CP 120-21.

[1] SEIU 925 has not been certified by the Public Employment Relations Commission as the exclusive representative of the University faculty for purposes of collective bargaining under RCW 41.76.

Professor Wood contacted the University for a copy of the records and was provided a CD with copies of the records UW had queued for release. CP at 43, 220. All of the records in "stage 1" of the response are records provided by Professor Wood to OPR. CP at 220. SEIU 925 filed a motion for a temporary restraining order and a complaint seeking a declaratory judgment and permanent injunction on its own behalf and on behalf of Professor Wood. CP at 1-15.

The SEIU 925's complaint also alleged unfair labor practice charges against the University for using the RCW 42.56.540 notice procedure, claiming that by not withholding the records the University unlawfully interfered with its organizing campaign.[2] CP at 10-11.

As part of its case in the trial court, SEIU 925 had various individuals review the records and categorize them into several non-exclusive categories. *See, e.g.*, CP 103, 122-152, 155-184. These categories included, for example: "Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925," and "personal emails and/or documents unrelated to any UW business."[3] No

[2] To avoid even the appearance of an unfair labor practice (unlawful surveillance), the University conscientiously isolated the records so they would not be reviewed by any person in management.

[3] In its declarations filed in the several hearings before the trial court, SEIU 925 categorized the emails more than once. SEIU 925 also acknowledged that approximately

party— including the Freedom Foundation—requested the trial court conduct an in camera review of the documents, though it was raised by the parties and the court at hearing. RP 20, 88.

Following the court's entry of a preliminary injunction, SEIU 925 moved for summary judgment, and the trial court later entered an order permanently enjoining release of specific identified responsive records. CP 686-697. The trial court concluded that, unlike the records in *Tiberino v. Spokane County*, 103 Wn. App. 680, 13 P.3d 1104 (2000), the records in this case, which the professor and the union had shown were personal, were not printed or otherwise "used" by the University and, despite the fact that they were on the UW's server, were not public records. CP 693-94.

The Freedom Foundation appealed. The Court of Appeals affirmed, reasoning that although Professor Wood created and/or retained the email on servers owned and operated by the UW, the court "must determine whether he created the records within his scope of employment." *Serv. Emp. Int'l Union Local 925 v. Univ. of Washington, et al.*, __ Wn. App. 2d __, 423 P.3d 849, 857 (2018). The Freedom Foundation's subsequent motion for reconsideration was denied, SEIU

100 pages of the responsive records were public records and dropped their challenges to those records, which the University has released to the requestor and are not at issue in this case.

925's motion to publish was granted and the Foundation filed the instant petition for discretionary review by the Supreme Court.

IV. CONSIDERATIONS GOVERNING REVIEW

A. The Public Records Act Generally

The Public Records Act "shall be liberally construed and its exemptions narrowly construed[.]" RCW 42.56.030. A "public record" is "[(1)] any writing [(2)] containing information relating to the conduct of government or the performance of any governmental or proprietary function [(3)] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). "All three elements of this three-prong test must be satisfied for a record to be a public record." *Dragonslayer, Inc. v. State Gambling Comm'n*, 139 Wn. App. 433, 444, 161 P.3d 428 (2007).

Courts have broadly interpreted the definition of public record. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010) ("'public record' is defined very broadly, encompassing virtually any record related to the conduct of government"). The definition is not limited to records that transact agency business but rather captures any records that relate to the conduct of government or the performance of any governmental or proprietary function. *Compare* RCW 42.56.010(3) *with* RCW 40.14.010.

Only prong (2) of the definition is at issue in this case: that is, whether the records relate to the conduct of government or the performance of any governmental or proprietary function. RCW 42.56.010(3). No party in this case disputes that the records at issue are writings, or that they are owned and/or maintained on the University's servers.

B. The Court of Appeals Decision Arguably Extends *Nissen* and *West v. Vermillion*, But It Is Not Necessarily in Conflict With Those Cases.

Freedom Foundation argues that review should be granted because the opinion is in conflict with *Nissen* and *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). *See, e.g.*, Petition at 5. An opinion that extends existing case law does not necessarily conflict with that existing case law and does not necessarily constitute a basis under RAP 13.4(b) for this Court to grant discretionary review.

The opinion in *Nissen* did not address the second prong of the definition of a public record in depth, as declarations from the County employee had already established that the records at issue were or may have been related to the conduct of government. *Nissen*, 183 Wn.2d at 871. Rather, after briefly reviewing cases that discuss the "conduct of government" prong, the *Nissen* court concluded that "these cases suggest records can qualify as public records if they contain any information that

refers to or impacts the actions, processes, and functions of government." *Id.* at 880-81.

In considering prong three of the definition, the *Nissen* decision applied a "scope of employment" test and related agency law concepts to analyze whether the records at issue had been "prepared, owned, used or maintained" by the agency. *Nissen*, 183 Wn.2d at 875-76; 878-79. Applying that test, the Court determined that certain text messages contained on an employee's personal phone were prepared, owned, used, or maintained by an agency and therefore met the definition of public record even though they were not located on an agency server. *Id.* at 877. The Court concluded that if the job requires it or the employer directs it, or if the employee is acting as an agent of the employer, then the records were prepared or used by the agency, and therefore are public records. *Id.* at 878.

Subsequent cases, including *West v. Vermillion,* have applied *Nissen's* scope of employment test to determine whether records that are not owned or maintained on an agency's computer servers nevertheless are "prepared, owned, used, or retained" by the agency. However, the scope of employment test has not—prior to this case—been applied to the second prong, which focuses on the content of the record rather than the job duties of the preparer.

C. The Court of Appeals' Extension of *Nissen* May Warrant Review if the Court Determines It Is an Issue of Substantial Public Interest That Should be Determined by the Supreme Court.

Under RAP 13.4(b)(4), the Court may accept discretionary review "if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." There could be a basis for review under RAP 13.4(b)(4) if this Court believes Division I may have narrowed the definition of "public record" set forth in RCW 42.56.010(3) when it extended *Nissen's* "scope of employment" test. For the reasons set out in the next section, if the Court accepts review, review should be limited to the question of whether Division I erroneously applied the "scope of employment" test to the definition of "public record" in RCW 42.56.010(3).

D. The Court Should Decline to Accept Review of Issues That the Freedom Foundation Did Not Preserve at the Trial Court and/or in the Appeal Below.

The Freedom Foundation raises issues in its petition for review related to the appropriateness of SEIU 925 providing the declarations on which the trial court relied, the quality of those declarations, and the trial court's decision not to do an in camera review. *See generally* Petition at 11- 17. These issues were either waived or not raised at the trial court, or were not preserved on appeal.

The Freedom Foundation argues that the trial court should not have relied on SEIU 925's declarations characterizing the records at issue, and it

insinuates that the University shirked its duties under the PRA by "hid[ing] behind the third party's objections." The Freedom Foundation did not raise these issues at the Court of Appeals, and did not brief or argue them and consequently has failed to preserve them for review by this Court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Furthermore, the University has never resisted disclosure. It is uncontested that the University found no basis for withholding the requested records, proposed to release them to the Freedom Foundation, and would have released them absent the injunction secured by SEIU 925. To be clear, the University's intent to comply with the PRA is *the basis* for the SEIU 925's unfair labor practice charges against the University.[4]

Additionally, the trial court implicitly found that the descriptions provided by SEIU 925 were sufficient for it to determine that the records were "not public records." The trial court judge told the parties in open court that it was willing to conduct an in camera review, but the Freedom Foundation did not request it. RP 20, 88. The Freedom Foundation did not brief or argue in the Court of Appeals that the declarations were insufficient

[4] The unfair labor practice claim remains pending at the trial court. The University denies it committed unfair labor practices by collecting, reviewing and preparing to release the records sought by the Freedom Foundation. The University has met its obligations under both the PRA and public sector labor law.

or conclusory and this Court should not accept review of these arguments now.

Furthermore, whether to conduct in camera review always remains within the discretion of the trial court. *See, e.g., Forbes v. City of Gold Bar*, 171 Wn. App. 857, 867, 288 P.3d 384, 389 (2012). The Freedom Foundation has never argued that the trial court abused its discretion in failing to conduct in camera review and now fails to establish a basis for this Court to review the trial court's decision not to conduct in camera review.

The Supreme Court's criteria for accepting discretionary review do not include error correction. RAP 13.4. This court should consider only the issues that have been properly preserved and briefed and are supported by argument, citation to authority, and references to the record. *Cowiche Canyon*, 118 Wn.2d at 809.

V. CONCLUSION

The Court should decline to grant review under RAP 13.4(b)(1), (2), as there is no direct conflict with existing Supreme Court or Court of Appeals cases. Issues relating to in camera review, sufficiency of the declarations and who can write declarations have not been properly preserved for review by this Court. If the Court considers the question of whether the Court of Appeals erroneously applied the "scope of

employment" test to the definition of "public record" to be an issue of statewide importance under RAP 13.4(b)(4), review should be limited to that question.

RESPECTFULLY SUBMITTED this 26th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the law of the State of Washington that on October 26, 2018, I filed with the Supreme Court of the state of Washington by E-filing and I served by email the foregoing document and this certificate of service on:

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Dated this 26th day of October, 2018 at Seattle, Washington.

s/ Jennifer A. Lee
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UW DIVISION OF ATTORNEY GENERAL'S OFFICE

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