96262-6

No. 76630-9-I

IN THE WASHINGTON COURT OF APPEALS DIVISION I

FREEDOM FOUNDATION,
Appellant,

V.

UNIVERSITY OF WASHINGTON

And

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,

Respondents,

PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT

Hannah S Sells, WSBA #52692
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
HSells@freedomfoundation.com

Attorney for Petitioner Freedom Foundation

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I. IDENTITY OF PETITIONER

Freedom Foundation ("Foundation") is Appellant and Defendant at the trial Court. The Foundation is a Washington nonprofit organization devoted to informing public employees about their legal rights regarding union membership and dues payment obligations. At issue in this case are public records requests the Foundation submitted to the University of Washington ("UW") for emails sent and received by UW employees on UW-owned servers. The Foundation asks this Court to review the Court of Appeals' published decision set forth in Part II.

II. DECISIONS BELOW

The Foundation requests that this Court reconsider its decision filed on June 11, 2018, *see* Appendix A, Unpublished Opinion No. 76630-9-I ("the Opinion"), affirming the trial court's wrongful denial of the records requested by the Foundation in 2015. This Opinion was later published by the Court of Appeals in response to a motion by SEIU 925, Respondent. *See* Appendix B, Order Granting Motion to Publish.

III. ISSUES PRESENTED FOR REVIEW

The following issues merit Supreme Court review pursuant to RAP 13.4(b)(1), RAP 13.4(b)(2), and RAP 13.4(b)(4):

1. Whether this Court's decision in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) redefined "Public Record" under RCW 42.56 to only include

writings which were created in the scope of employment?

2. Whether a court may rely on conclusory descriptions of the content of records to determine whether the records contain information relating to the conduct of government?

3. Whether a court may rely on an interested party's conclusory descriptions of records, rather than relying on the agency's determination, is permissible under RCW 42.56?

IV. STATEMENT OF THE CASE

This Court's summary of the facts and procedural posture of this case, as presented in the Opinion, are predominately correct. In December 2015, the Foundation submitted a request under the Public Records Act ("PRA") to UW. The request asked UW to produce all emails or other records in possession of UW employees Amy Hagopian, Robert Woods, James Liner, or Aaron Katz that contain terms relating to the Foundation's work. Appendix A, p. 1-3. The UW Office of Public records collected and reviewed responsive records stored on Professor Robert Woods' UW email account first. The office "was unable to determine that the records were not public records" and scheduled a release of records, after notifying Professor Wood. Appendix A, p. 3. Professor Wood notified SEIU 925, which brought the present lawsuit to prevent disclosure. *Id*. The trial court, relying on descriptions provided by SEIU 925, found that the records requested were not created within the scope of employment and therefore were not public records.

Appendix A, p. 4. Division One of the Court of Appeals ("Div. I") affirmed. Appendix A, p. 1.

All these details included in Div. I's decision are correct, but they are not the full picture of the case nor are they sufficient to support withholding records owned by the state. This case revolves around the definition of a public record in the State of Washington. However, as Div. I's factual summary in the Opinion shows, Div. I did not have the necessary information to find that records were not subject to disclosure under the Public Records Act ("PRA"). The definition of public record has 3 elements: 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. RCW 42.56.010. No one has disputed the first element, so only the facts supporting the second and third elements are discussed below.

As to the second element, Div. I had only a meager factual record, and cites to no facts in the Opinion. However, the facts that were presented in the clerks papers are significant. First, the facts show that many of the emails sent by or to Professor Woods were sent during work hours. CP 220. This fact, coupled with the fact that the responsive records in this installment totaled 3912 pages, *Id*, seems to indicate that Professor Woods' time, for which the state pays, was split between his personal and professional activities.

The lack of relevant information to evaluate the second prong is not the fault of

the Court, but of the Appellee, Service Employees International Union Local 925 ("SEIU"). SEIU did not provide the relevant facts to the trial or appellate court. Div. I and the trial court relied upon 4 conclusory categories to evaluate whether or not the information at issue related to the conduct of government. These categories, created by a party which had already stated its desire to prevent disclosure, did not inform the court whether or not the records "contain information relating to the conduct of government," but rather informed the court about the purpose of the creator of the records. CP 321; RCW 42.56.010. The categories were:

1. Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925 ("**Category 1**");
2. Postings to the AAUP UW Chapter Listserver ("**Category 2**");
3. Personal emails and/or documents unrelated to any UW business ("**Category 3**");
4. Personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President unrelated to UW business ("**Category 4**");

CP 321; CP 159-161. These categories address the mindset or purpose of the drafter or recipient of the email, but not the content, as required by statute. No party has asserted to any court that the records do not contain information related to the conduct of government.

As to the third element, ownership by a state agency, the Opinion did not reference the single, dispositive fact in its summary of the case. The third prong of the definition is fully satisfied by the fact that the records requested were owned and retained by the University of Washington, a state agency. CP 389.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Introduction & Summary of Argument

Petitioner Foundation respectfully requests this Court review Div. I's Opinion because: it is in conflict with a decision of the Supreme court; it is in conflict with a published decision of the Court of Appeals and; the case involves an issue of substantial public interest that should be determined by the Supreme Court.

The Opinion is in conflict with this Court's Decision in *Nissen v. Pierce Cty*., 183 Wn.2d 863, 357 P.3d 45 (2015) ("*Nissen*") because the Opinion ignores the plain meaning of that case, counseling in favor of granting review under RAP 13.4(b)(1). The Opinion is in conflict with another appellate court decision, *West v. Vermillion*, 196 Wn. App 627, 641. 384 P.3d 634 (2016), which correctly applied *Nissen*. This also leads to review under RAP 13.4(b)(2). Finally, the Opinion's misapplication of *Nissen* drastically changed the state of public records law in Washington. The PRA is integral to Washington's focus on transparent governance and, therefore, review by this Court is appropriate under both RAP 13.4(b)(4).

B. *Nissen's* Scope of Employment Test is Irrelevant Where the Records in Question are Undisputedly in the State's Possession

The Supreme Court in *Nissen* employed a three-prong test, derived from RCW 42.56.010(3), to determine what a "public record" is. *Nissen*, 183 Wn.2d at 880-881. The *Nissen* Court made clear that the scope of employment test only addressed the third prong, which is not at issue here. Using the scope of

employment test to evaluate the second prong was error.

In *Nissen,* as here, the first prong, that the requested information be a "writing," was not in dispute. *Id* at 881. After establishing this fact, the Supreme Court then clearly stated that it was going to examine the other two prongs independently. "The remaining two elements are discussed *in turn*." *Id* (emphasis added). The Opinion by Div. I conflates the two remaining prongs, leading to a wrong result.

a. The Records Requested Contain Information Relating to the Conduct of Government.

Because records need only refer to state action to satisfy this prong, the records at issue here are plainly related to the conduct of government. Div. I did not address the question of content, but rather merged this prong with the third prong. *See* App. A at 12-13. The Opinion dismisses any argument about content by merely saying that because the proffered arguments do not address the scope of employment, they are insufficient.

In contrast, the Supreme Court looked to the content of the records and said that, regardless of their "primary" topic, records that "contain any information that refers to or impacts the actions, processes, and functions of government" satisfy the second prong of relating to the conduct of government. *Nissen,* 183 Wn.2d at 880-881. In coming to that conclusion, *Nissen* pointed to another case in which an argument similar to the decision this Court articulated in the Opinion was raised and rejected. In *Confederated Tribes of Chehalis Reservation v. Johnson*, 135

Wn.2d 734, 958 P.2d 260 (1998), tribes who had reported information on their gaming income to a state agency, objected to disclosure of that information on the basis that it did not relate to the conduct of government, but rather solely to the conduct of the tribes. *Confederated Tribes*, 135 Wn.2d at 746. Based on the Opinion, Div. I would accept the Tribes' argument, reasoning that because the records sought are not records of state action, they do not contain information related to the conduct of the state. However, the Supreme Court in *Confederated Tribes* rejected this reasoning, stating that information that impacts government activity is related to the conduct of government, thus finding that records of tribal activity could be public records. *Id*. Likewise, in *Nissen*, the Court did not look to the purpose of the creators of a document or to the primary focus of a document, but rather asked if the "contain any information that refers to or impacts the actions" of government. *Nissen* 183 Wn.2d at 880-881. Here, as in *Confederated Tribes*, the records may not reflect state action, but they certainly impact it, if only by merit of the fact that so much professorial time is being spent on promoting an outside organization. Div. I's reasoning is in conflict with this Court's, which should lead this court to grant review.

b. The Records Requested are Owned and Retained by a Public Agency, the University of Washington.

UW "has as property" the records requested, satisfying the third prong of the definition of a public record. In *Nissen*, After evaluating the content of the

records, this Court asked whether the records at issue were "prepared, owned, used or retained by an agency." *Nissen*, 183 Wn.2d at 881 (quoting RCW 42.56.010(3)). This was a difficult question in *Nissen* because, unlike the present case, the records were not "owned" by the state. However, because any of the listed items in RCW 42.56.010(3) will satisfy the definition, this Court did not treat the lack of ownership as dispositive in *Nissen*.[1] Rather than ownership, the *Nissen* Court relied on preparation and use to find that, where a public employee creates records in the scope of employment on a private device, the state agency has, through its employee, "prepared" and "used" those records. *Nissen*, 183 Wn.2d at 882-883. Here, ownership is undisputed. All the records were owned by the state, on their tax-payer-funded server, making the scope of employment irrelevant.

The Opinion misapplies *Nissen* by applying a quote out of context in support its conclusion that all records, no matter where stored, must be created in the scope of employment to be public records. App. A at 11. However, the context of the quote, shows that the statement was made to refute one of the County's concerns regarding including records that are on private devices in the definition of "public record:"

Similarly unpersuasive is the County's warning that every "work-related" personal

[1] *See, e.g., West v. Thurston County*, 168 Wn. App 162. 257 P.3d 1200 (2012); *Dragonslayer, Inc v. Washington State Gambling Commission*, 139 Wn. App 433, 166 P.3d 428 (2007); *West v. Vermillion*, 196 Wn. App 627, 384 P.3d 634 (2016). Additionally, 42.56.030 states that the PRA shall be liberally construed to promote public policy. The liberal construction of the third prong of the definition of public record requires treating each listed method of interacting with data as independently sufficient for meeting the third prong of the test.

> communication is now a public record subject to disclosure. Traditional notions of principal-agency law alleviate this concern. For information to be a public record, an employee must prepare, own, use, or retain it within the scope of employment. An employee's communication is "within the scope of employment" only when the job requires it, the employer directs it, or it furthers the employer's interests.

Nissen, 183 Wn.2d at 878. Thus, this Court was not limiting the definition of public record to only records created within the scope of employment, but rather extending the definition of public records to those where the information is not "owned" by an agency, but was created within the scope of employment. A more useful quote for the third prong can be found on page 881 of *Nissen*: "Owned." To "own" a record means "to have or hold [it] as property." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1790 (2002)."

Div. I's reliance on *West v. Vermillion*, 196 Wn. App 627, 641. 384 P.3d 634 (2016) is similarly misplaced, as *West* was also rebutting a concern raised with the broad application of the PRA that *Nissen* endorsed. In that case, the party resisting disclosure attempted to argue that to be a public record, information must be prepared, owned, used or retained by an employee with the authority to act in an executive fashion. However, the *West* Court properly rejected that argument, clarifying that *Nissen*'s holding contained no such requirement: "Thus, whether a record is subject to disclosure hinges on if the record was prepared, owned, used, or retained "within the scope of employment," not if the record was prepared, owned, used, or retained within the scope of employment by the executive branch of the government." *West* 196 Wn. App at 641.

Both *West* and *Nissen* dealt with records that were not "owned" by the state directly.[2] Here, the facts are clear that all records were stored on University of Washington servers. The third prong of the definition of "public record" is satisfied, which should lead this court to reconsider and reverse its previous decision.

C. The Facts and Lack Thereof Militate in Favor of Disclosure.

The facts available to Div. I were woefully inadequate. This should have led that court to order disclosure. The limited facts show that records in all four categories are highly likely to refer to government actions. Furthermore, any shortcomings in the record show that SEIU has not met its burden of proving that the records should not be disclosed.

As explained above, the trial court relied on SEIU 925's conclusory categories, rather than the University of Washington's decision to disclose records, when asked to apply the law to the records at issue. The descriptions of each category, such as they are, all indicate that the records are likely to contain information that refers to or impacts the conduct of government, the standard set in *Nissen*. Additionally,

[2] The Opinion also makes a confusing reference to *Tiberino v. Spokane County*, 103 Wn. App 680, 13 P.3d 1104 (2000). Although it is unclear how this reference relates to the Court's ultimate conclusion, it is worth noting that the summary included in the Opinion is not quite accurate. The records in *Tiberino* were not public records because they were printed in preparation for litigation. Rather, the fact that they were printed in preparation for litigation over a state action showed that the records related to that state action. Essentially, *Tiberino* held that even highly personal emails, such as a woman's emails to her mother regarding a recent sexual assault, become "public records" when they impact the conduct of government and are owned by the government. *Tiberino*, 103 Wn. App. at 687-688. It is worth noting that no one suggested that Ms. Tiberino was acting within the scope of her employment by sending these emails on her state-issued email account. *Id.*

courts do not allow conclusory statements to substitute for factual allegations when deciding issues as weighty as the public's right to monitor the instruments it created.

a. All Four Categories Designated by SEIU 925 May Contain Public Records.

Taking each category in turn, the records all contain reference to government activity and are "owned" by the state, making them public records. CP 159-161.

As to the first category, faculty organizing emails are likely to discuss the reasons that are driving the faculty to organize. Whether this is discussion about short lunch breaks they are provided or the curriculum they are required to teach, it is still referencing the state action of providing education. As to the second category, the American Association of University Professors (AAUP) has a mission statement that provides a clear picture of the type of information that would be shared over the listserver that the tax payer, via UW, provides to AAUP, using public funds. The AAUP mission is " to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security and working conditions of all categories of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to develop the standards and procedures that maintain quality in education; to help the higher education community organize to make our goals a reality; and to ensure

higher education's contribution to the common good." CP 100-101. All these issues relate to the state as an employer and the state as an educator. Therefore, the information shared on the listserver almost certainly "refers" to the conduct of government, as required by RCW 42.56.010 and *Nissen*. As to the third category, if the records were "unrelated to any UW business," then at the very least the existence and time stamp of the emails would be disclosable as it would show the use of state resources for personal activity, in contravention of relevant ethics rules and constituting a betrayal of the public trust. CP 653, 655. RCW 42.52.160(1).[3]

[3] Washington's Executive Ethics Board, the agency charged with enforcing Washington's ethics laws, has repeatedly held that the use of state resources for union organizing or for other union purposes violates RCW 42.52.160. *See In re Renee Myers*, No. 2013-031 (EEB, Jan. 10, 2014), *available at* http://www.ethics.wa.gov/ENFORCEMENT/Results_of_Enforcement/2014/2013-031Stip.pdf (last visited June 26, 2017) (concluding that a public employee violated RCW 42.56.160 by using the state email system to conduct union business); *In re Dale Kramer*, No. 2013-029 (EEB, Jan. 10, 2014), *available at* http://www.ethics.wa.gov/ENFORCEMENT/Results_of_Enforcement/2014/2013-029Stip.pdf (last visited June 26, 2017) (concluding that a public employee violated RCW 42.56.160 by using the state email system to conduct union business); *In re* [redacted], No. 2003-024 (EEB, Sep. 9, 2005), *available at* http://www.ethics.wa.gov/ENFORCEMENT/Results_of_Enforcement/Website/2003-024%20Stip.pdf (last visited June 26, 2017) (issuing fine of $250 for *one* improper e-mail); Case No. 023, available at http://www.ethics.wa.gov/ENFORCEMENT/Results_of_Enforcement/Website/2003-023%20Final%20Order.pdf (last visited May 23, 2016). *See also Knudsen v. Wash. State Exec. Ethics Bd.*, 156 Wn. App. 852, 856, 235 P.3d 835 (2010) (holding that college teacher violated RCW 42.52.160 by sending an e-mail from the college computer to faculty members regarding union business); *also In re Steve Rogers*, No. 2013-032 (EEB, Dec. 16, 2013), *available at* http://www.ethics.wa.gov/ENFORCEMENT/Results_of_Enforcement/2014/2013-032Stip.pdf (last visited June 26, 2017) (concluding that a public employee violated RCW 42.52.160 by holding four union meetings in a government conference room); *Use of State Facilities to Conduct Union Business*, EEB Advisory Opinion 02-01A, *available at* http://www.ethics.wa.gov/ADVISORIES/opinions/2013%20Updated%20Opinions/updated%20Advop%2002-01A.htm (last visited June 26, 2017) ("Conduct that may indirectly conflict with the Ethics in Public Service Act includes, but is not limited to…a use of state resources for Union activities that are not related to the negotiation and administration of collective bargaining agreements, **such as Union organizing**, internal Union business, or advocating for a Union in a certification election…").

Additionally, describing the records as "personal" tells us nothing since the drafters, SEIU 925, assert that all 4 categories are personal and unrelated to University of Washington business. Finally, as to category 4, as previously explained, AAUP-related emails are highly likely to contain information referring to or impacting the conduct of government. To allow such woefully inadequate descriptions, created by a party with a stated interest in non-disclosure to outweigh the public's access to records owned by the state is a drastic change to PRA law and a substantial issue, which should lead this court to grant review.

b. Descriptions May Only Be Used in Lieu of In Camera Review Where Those Descriptions Are Sufficient for the Court to Make an Informed Choice.

Trial court rulings must be grounded in fact. Here, the trial court did not have sufficient factual basis to determine that the records did not contain information relating to the conduct of government. In fact, none of the numerous declarations submitted assert anything of the sort for categories 1, 2, and 4. *See, e.g.*, CP 99-152; 155-158;159-165; 166-184. The categories may very well contain exactly what SEIU claims they contain. However, just because they do contain one thing does not mean that they do not contain another.

This is the same kind of conclusory description Division II found unpersuasive in *Dragonslayer, Inc. v. Washington State Gambling Commission*, 139 Wn. App. 433, 445, 161 P.3d 428 (2007). In that case, Dragonslayer, Inc. challenged the disclosure of information it was required to provide to the state

describing its financial status. The challenge was based on the second prong of the definition of a public record. *Dragonslayer,* 139 Wn. App 433 at 445. The trial court had held that the records were related to the conduct of government based on a declaration asserting that the records were used by the state, but the records did not provide any more detail than that. Accordingly, the Court held that the declarant's conclusory statements were insufficient to show state action where a private agency provided information to the state about its own, private activities. *Id.*[4]

Similarly here, the trial court and Div I. did not have sufficient information to address the question of whether the records "contain information relating to the conduct of government." RCW 42.56.010.

c. Because the Party Resisting Disclosure Bears the Burden of Proof, Any Inadequacies in the Factual Description of the Records Requires that the Records Be Disclosed.

The party seeking to prevent disclosure bears the burden of proof, regardless of whether or not the court has yet to rule that the records at issue are public. *Tiberino v. Spokane County*, 103 Wn. App 680, 13 P.3d 1104 (2000). Additionally, the bare assertions used to describe the records at issue are not enough to overcome the strong presumption that records on agencies' servers are public. WAC 44-14-03001(2).

[4] Unlike *Dragonslayer*, the records here refer to the action of government. The records in *Dragonslayer* exclusively described private action. *Dragonslayer,* 139 Wn. App at 439.

The text of the PRA is clear that courts *must* liberally construe the PRA to favor disclosure. RCW 42.56.030. Indeed, the statute, in its entirety, provides:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

To fulfill this statutory purpose, courts are to liberally construe the PRA's disclosure provisions and narrowly construe its exemptions. *See, e.g., John Doe A. v. Wash. State Patrol*, 185 Wn. 2d 363, 371, 374 P.3d 63 (2016); *Kleven v. City of Des Moines*, 111 Wn.App. 284, 44 P.3d 887 (2002). Such liberal construction is to engender in all parties a semblance of fair and open government and to promote a complete disclosure of government records. *Confederated*, 135 Wn.2d 734.

The records at issue relate to public-sector union organizing and faculty issues, and qualify as 'public records' under the PRA. Even if this question were a close call, not construing the definition of 'public records' to favor disclosure is contradictory to the statute. The PRA requires that any ambiguities in the duties of agencies must be resolved in favor of access to public records. *Progressive Animal Welfare Soc. v. University of Washington* ("PAWS II"), 125 Wn.2d 243, 251, 884 P.2d 592 (1994) ("Washington's [PRA] is a strongly worded mandate for broad disclosure of public records"). The intent of the voters and the Legislature, the text

of the PRA, and the developed case law all mandate the broadest possible application of the PRA. The PRA explicitly demands that the Act be liberally construed to promote the enumerated policy of public control.

For emphasis, "the Legislature takes the trouble to repeat three times that exemptions under the Public Records Act should be construed narrowly." *PAWS II*, 125 Wn.2d at 260. When interpreting the PRA, "[c]ourts are to take into account the Act's policy that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." *PAWS II*, 125 Wn.2d at 251. As a term within the PRA, the definition of 'public records' must be broadly construed in favor of disclosure.

To the extent any ambiguity exists, this Court should have sided in favor of disclosure. *Paws II*, 125 Wn. 2d at 251. The Superior Court repeatedly stated that it had trouble with the term "public record." Therefore, following the statute, the mere existence of such ambiguity establishes a policy requiring disclosure. RCW 42.56.030. Courts have explicitly required a broad construction of the second element of the public records test. *Belenski v. Jefferson County*, 187 Wn. App. 724, 734, 350 P.3d 689 (2015), *rev'd in other parts*, 186 Wn.2d 452, 378 P.3d 176 (2016); *Confederated Tribes*, 135 Wn.2d at 746. The PRA's robust and well-established policy is this: close calls go to the requestor. Analysis to the contrary is, respectfully, in error.

D. Allowing the Agency to Hide Behind the Third Party's Objections, Rather Than Requiring the Agency to Make a Determination, Negates the Purpose of RCW 42.56.550.

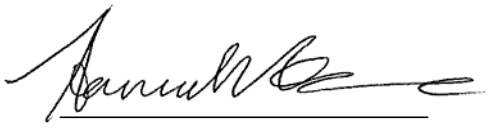
The PRA only contemplates agency determinations as the basis for judicial action and only provides recourse for requestors when an agency denies the requestor access to the records. RCW 42.56.550, 540. By refusing to decide that the records either were or were not public records, the University of Washington prevented either the requestor or a potentially-injured affected party from seeking redress for a wrong determination in court. Handing off the evaluation of public records to the party seeking to prevent disclosure is diametrically opposed to the PRAs purpose of transparency and accountability. How can the agency be held accountable if it is allowed to simply off-load its duty of determining whether or not to disclose a record to another party? Further, how is it good policy to allow the party seeking to prevent disclosure to craft the very language used by the trial court in scrutinizing whether the records are to be disclosed?

This Court should grant review and find that the reliance on a third party's determination of which records were and were not public was error. Because of the presumption in favor of disclosure, the Court should not remand, but rather should order disclosure of the records as the request was made three years ago, providing ample time for the factual burden to be born.

VI. CONCLUSION

For the foregoing reasons, this Court should grant review of the published opinion of the Court of Appeals. This Court should reverse the Court of Appeals and award costs on appeal to the Foundation.

RESPECTFULLY SUBMITTED on September 4, 2018.



Hannah S. Sells, WSBA 52692
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
HSells@freedomfoundation.com
Counsel for Petitioner

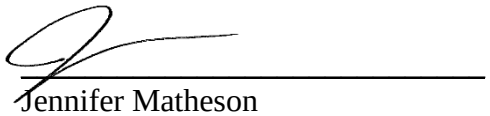
DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 4, 2018, I electronically filed with the Court the foregoing document and appendix and served the same by email upon the following:

Robert Kosin
Nancy Garland
Washington Attorney General's Office
University of Washington Division
4333 Brooklyn Avenue NE, 18th Floor
Seattle, Washington 98195-9475
Phone: (206) 543-4150
rkosin@uw.edu
nancysg@uw.edu
Counsel for University of Washington

Kristen Kussmann
Jacob Metzger
Douglas Drachler McKee & Gilbrough LLP
1904 Third Ave., Suite 1030
Seattle, Washington 98101
206-623-0900, x229
206-623-1432 (fax)
kkussmann@qwestoffice.net
jmetzger@qwestoffice.net
Counsel for SEIU 925

Dated: September 4, 2018 at Olympia, Washington.



Jennifer Matheson

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor organization, Respondent, v. THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, Respondent, FREEDOM FOUNDATION, an organization, Appellant.	)	No. 76630-9-I DIVISION ONE PUBLISHED OPINION FILED: June 11, 2018

APPELWICK, C.J. — The Freedom Foundation sent a PRA request to UW, seeking records associated with union organizing created by, received by, or in the possession of four named UW employees and specified e-mail addresses. SEIU 925 filed a complaint seeking to enjoin UW from releasing the records. The superior court concluded that the records at issue are not "public records" under the PRA, because they were not prepared, owned, used, or retained within the scope of employment. We affirm.

FACTS

The Parties

The Freedom Foundation (Foundation) is a non-profit organization that "seeks to promote individual liberty, free enterprise, and limited accountable government." "Part of its mission is to pursue governmental transparency and accountability."

The University of Washington (UW) is a public four year institution of higher education, an agency of the State of Washington, and has campuses in Tacoma, Bothell, and Seattle.

Service Employees International Union Local 925 (SEIU 925) is a labor organization representing public and private sector workers in Washington State. Purposes of SEIU 925 include organizing faculty at institutions of higher education in Washington State and providing representation as appropriate to its members and the individuals the union represents. SEIU 925 has worked with UW faculty in efforts to organize a union under chapter 41.76 RCW, which provides collective bargaining for faculty at public four year institutions of higher education.

The Foundation's PRA Request

In December 2015, the Foundation submitted a request under the Public Records Act (PRA), chapter 42.56 RCW, to UW. It requested all documents, e-mails, or other records created by, received by, or in the possession of UW faculty/employees Amy Hagopian, Robert Woods, James Liner, or Aaron Katz that contained specified terms, including "Freedom Foundation," "SEIU," "Union," and others. The request also sought e-mails sent to or received by the four named UW

faculty members from the domain names "seiu925.org" and "uwfacultyforward.org." And, it requested all e-mails sent from and received by aaup@u.washington.edu.[1] The Foundation's stated purpose of the request was "to ensure accountability and transparency among government employees using government-issued e-mail addresses."

After receiving the PRA request, the UW Office of Public Records and Open Public Meetings (OPR) asked the named professors for responsive records. Professor Robert Wood, one of the named faculty members in the Foundation's request, sent records to OPR. OPR reviewed the records and "was unable to determine that the records were not public records." OPR notified Wood that the records would be released, unless he sought a court order by April 26, 2018 preventing their release. The proposed release, records provided only by Wood, was 3913 pages of e-mails and attachments, the "vast majority" of which were e-mails sent to or from Wood's UW e-mail address, or to or from the AAUP listserver e-mail account.

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[1] The UW chapter of the national nonprofit organization, the American Association of University Professors (AAUP), uses the UW e-mail account, aaup@u.washington.edu. That account operates an e-mail "listserver" (distributes messages to an e-mail subscriber list) entitled "Faculty Issues and Concerns." The mission of the UW chapter of AAUP is " 'to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security and working conditions of all categories of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to develop the standards and procedures that maintain quality in education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good.' "

Complaint and Subsequent Procedural History

On April 25, 2016, SEIU 925 filed a complaint for declaratory judgment and injunctive relief, seeking to enjoin UW from releasing the records. On the same day, SEIU 925 also moved for a temporary restraining order (TRO) and preliminary injunction to enjoin UW from releasing the records to the Foundation. Based on a proposal by the Foundation, the parties agreed that SEIU 925 would not seek a TRO and instead would argue the case at a preliminary injunction hearing. The Foundation agreed not to seek disclosure of the requested records and agreed to waive claims against the University for penalties and attorney fees for the period until the hearing.

On June 10, 2016, the trial court held a hearing on SEIU 925's motion for a preliminary injunction and entered a TRO, enjoining the release of records, except those identified as "public records." The order also directed SEIU 925 on or before July 6 "to show by affidavit cataloging and describing with sufficient particularity as to the status of the records as public or not public records."

In compliance with the trial court's order, SEIU 925 catalogued the documents at issue, identifying 102 pages of public records, and placing the remaining records into categories. UW sent the 102 pages of identified public records to the Foundation.

On August 5, 2016, the trial court held a second preliminary injunction hearing. The court entered a preliminary injunction, finding the documents identified as nonpublic records were not "public records" subject to disclosure. In its written order filed on September 23, the trial court found that SEIU 925 had

standing to seek injunctive relief. Further, it found that the records at issue "were not created within the scope of the employee's employment and therefore are not public records." And, it found that SEIU 925 demonstrated a likelihood of success on the merits of their claims for injunctive relief:

> (1) [SEIU 925] has established a clear legal or equitable right to nondisclosure of those parts of [the records] that have not already been disclosed as public records because they contain personal and private emails [sic] unrelated to the scope of Professor Robert Wood's employment at UW and cannot be categorized as public records; (2) a well-grounded fear of immediate invasion of that right by the disclosure of those records, and that (3) the release of those records will result in immediate, actual and substantial injury to [SEIU 925].

On October 4, 2016, the Foundation filed a motion for reconsideration of the injunction. On October 12, the trial court denied the Foundation's motion.

On February 24, 2017, SEIU 925 filed a motion for summary judgment and permanent injunction. On March 27, 2017, the trial court entered a permanent injunction enjoining release of the documents at issue, finding that they were "not public records as defined in RCW 42.56.010(3) of the PRA."

On March 27, 2017, the Foundation appealed the order granting the TRO, the order granting SEIU's motion for preliminary injunction, the order denying Foundation's motion for reconsideration,[2] and the order granting SEIU's motion for summary judgment and permanent injunction. On April 3, 2017, SEIU filed a

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[2] The Foundation included the trial court's order denying its motion for reconsideration in its notice of appeal, but does not assign error and it does not address this issue in its brief. Therefore it is waived, and we do not address it. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (party waives assignment of error when it does not argue the issue in its opening brief).

motion to change trial date and for a stay of proceedings, pending the outcome of the appeal to this court. On April 7, 2017, the Foundation filed a combined motion to strike SEIU's motion and motion for sanctions, asserting that the trial court no longer had jurisdiction. The trial court denied the Foundation's motion to strike and for sanctions, and granted SEIU 925's motion to change trial date and for a stay of proceedings, staying the matter and continuing the trial until October 23. The Foundation amended its appeal, appealing the order denying its motion to strike and for sanctions and the order granting SEIU's motion to change trial date and stay proceedings.

DISCUSSION

The Foundation argues that the trial court erred in (1) granting a permanent injunction, (2) granting a preliminary injunction, and (3) granting a TRO. It also argues that the trial court abused its discretion in granting SEIU's 925 motion to change trial date and stay proceedings and denying its motion to strike and motion for sanctions.

I. The PRA

The PRA mandates the broad disclosure of public records. Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 431, 327 P.3d 600 (2013). Under RCW 42.56.070(1), a government agency must disclose public records upon request unless the records fall within the specific exemptions of the PRA or other statute that exempts or prohibits disclosure of specific information or records. Ameriquest Mortg. Co. v. Office of Att'y Gen., 177 Wn.2d 467, 485-86, 300 P.3d 799 (2013). The exemptions in the PRA are intended to exempt from public

inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government. Id. at 486.

The party seeking to prevent disclosure bears the burden of establishing that an exemption applies. Id. If it is a party besides an agency that is seeking to prevent disclosure, then that party must seek an injunction. Id. at 487; RCW 42.56.540. In such a case, the party must prove (1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function. Ameriquest, 177 Wn.2d at 487. Courts construe exemptions narrowly to allow the PRA's purpose of open government to prevail where possible. Id.; RCW 42.56.030.

This court reviews challenges to an agency action under the PRA de novo. RCW 42.56.550(3); Resident Action Council, 177 Wn.2d at 428. Appellate courts stand in the shoes of the trial court when reviewing declarations, memoranda of law, and other documentary evidence. Ameriquest, 177 Wn.2d at 478.

A. Permanent Injunction

The Foundation argues that the trial court erroneously granted a permanent injunction for three reasons. First, it argues that SEIU 925 lacks standing. Second, it asserts that the UW e-mails qualify as public records, because the e-mails "clearly relate to the conduct of government and the performance of governmental and proprietary functions." Third, it claims that, if there was any ambiguity as to

whether the e-mails qualified as public records, the PRA requires that ambiguities be construed in favor of disclosure.

1. Standing

The Foundation asserts that SEIU 925 lacks standing, because it relies on associational standing through Wood, but at the same time its primary argument harms Wood and places him in legal jeopardy. Citing Hunt v. Wash. State Apple Adver. Comm'n., 432 U.S. 333, 342-43, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), Save a Valuable Env't v. City of Bothell, 89 Wn.2d 862, 867, 576 P.2d 401 (1978), and Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 103 Wn. App. 764, 768, 14 P.3d 193 (2000) (Firefighters I), aff'd by, 146 Wn.2d 207, 45 P.3d 186, 50 P.3d 618 (2002) (Firefighters II), it argues that a party relying on associational standing "cannot conduct litigation in a way that harms the interests of those it claims to represent."

None of these cases stand for that principle. In Hunt, the United States Supreme Court held that the Washington Apple Advertising Commission had standing to challenge a North Carolina statute regulating the labeling of apples. 432 U.S. at 335, 345. In doing so the Court recognized,

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343. The Court focused on the harm the North Carolina statute caused the apple growers, and not on any potential harm from litigation. Id. at 343-44.

Similarly in Save, our Supreme Court held that a nonprofit corporation or association has standing where it shows that one or more of its members are specifically injured by a government action. 89 Wn.2d at 867. And, the court in Firefighters II used the same test for associational standing recognized in Hunt. 146 Wn.2d t 213-14. On the third factor, the court stated, "Monetary damages are distinguishable from injunctive relief, in that injunctive relief generally benefits every member of an employee association equally whereas the amount of monetary damages an employee suffers may vary from employee to employee." Id. at 214.

Under the test for associational standing, SEIU 925 has standing to bring this action on behalf of Wood. First, Wood would have standing to sue in his own right, as many of the documents at issue are his own records. Second, SEIU 925 seeks to protect records germane to its purpose of organizing faculty for the purposes of collective bargaining. Third, the claim asserted does not require Wood's participation, as UW acknowledged. Moreover, as the court observed in Firefighters II, the injunction would benefit all of SEIU 925's members that would be potentially affected by the disclosure of records.

SEIU 925 also brought this action on its own behalf. In its order granting the permanent injunction, the trial court concluded,

> SEIU 925 has standing in this matter to seek injunctive relief under [t]he PRA as a party to whom public records held by a public agency may pertain and under chapter 7.40 RCW as a party whose rights may be affected by the release to the public of non-public records.

The trial court did not err.

2. Public Records

The Foundation argues next that the trial court erred in ruling that the e-mails at issue did not qualify as public records under the PRA. It asserts that, because the e-mails are held by an agency and "not purely personal," a strong presumption exists that they relate to government conduct or a governmental or proprietary function. Citing RCW 42.56.010(3), the Foundation argues, "Records that contain information about public-sector union organizing or public faculty issues and concerns clearly implicate government conduct and governmental proprietary functions." The Foundation then gives "four reasons" why the e-mails relate to the conduct of government or the performance of any governmental or proprietary function, and therefore meet the definition of "public records."

Under the PRA, a " 'public record' includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010. The parties here dispute the second element: whether the e-mails "contain . . . information relating the conduct of government or the performance of any governmental or proprietary function." Id.

"Public record" is defined very broadly, encompassing virtually any record related to the conduct of government. Does v. King County, 192 Wn. App. 10, 22, 366 P.3d 936 (2015). This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government. Id. In Oliver v. Harborview Medical Center, 94 Wn.2d 559, 566, 618 P.2d 76 (1980),

the court held that medical records of a patient treated at a public hospital were public records. The court reasoned that the records contained information of a public nature, "i.e., administration of health care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs, all of which . . . relate to the performance of a governmental or proprietary function." Id. In Tiberino v. Spokane County, 103 Wn. App. 680, 687-88, 13 P.3d 1104 (2000), the court held that personal e-mails sent from Tiberino's county-owned computer were public records because the county printed the e-mails in preparation for litigation over her termination, a proprietary function.

In Nissen v. Pierce County, 183 Wn.2d 863, 869, 357 P.3d 45 (2015), our Supreme Court held that text messages sent and received by a public employee in the employee's official capacity are public records of the employer, even if the employee uses a private cell phone. Of particular relevance to our case, the Nissen court stated,

> For information to be a public record, an employee must prepare, own, use, or retain it within the scope of employment. An employee's communication is "within the scope of employment" only when the job requires it, the employer directs it, or it furthers the employer's interests. This limits the reach of the PRA to records related to the employee's public responsibilities.

Id. at 878-79 (quoting Greene v. St. Paul-Mercury Indem. Co., 51 Wn.2d 569, 573, 320 P.2d 311 (1958). Thus, whether an agency employee's record is subject to disclosure hinges on if the record was prepared, owned, used, or retained within the scope of employment. West v. Vermillion, 196 Wn. App. 627, 641, 384 P.3d 634 (2016).

The facts of this case contrast with those in Nissen, but the court's analysis is highly relevant to our inquiry. In Nissen, the records were communications sent and received on a private device, but were within the employee's scope of employment. 183 Wn.2d at 869. Here, the records at issue are predominantly e-mails that UW employee, Wood, created and/or retained on servers owned and operated by UW, a state agency, through his use of UW e-mail accounts. Although Wood used the agency's server, we must determine whether he created the records within his scope of employment.

The Foundation's "four reasons" for why the e-mails relate to the conduct of government or the performance of a governmental or proprietary function, and therefore meet the definition of "public records," are essentially one argument. First, it claims that the e-mails "necessarily relate to government employment" because they contain information "related to concerns about public employment and efforts at labor organizing." Second, it asserts that the public university faculty members' efforts to organize relate to the provision of public education, which is a government function. Third, it argues that "records containing information about public-sector labor organizing relate to a proprietary function of the government." Fourth, it states that records with information that will affect state budgets and financing relate to government conduct. These "four reasons" all fundamentally assert that employees' efforts to organize and address faculty concerns relate to a government function or conduct.

An employee's communication is within the scope of employment only when the job requires it, the employer directs it, or it furthers the employer's interests.

Nissen, 183 Wn.2d at 878-79. "[E]mployees are 'agent[s] employed by [an employer] to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the [employer]." Kamla v. Space Needle Corp., 147 Wn.2d 114, 119, 52 P.3d 472 (2002) (alterations in original) (quoting RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958)).

Actions undertaken within the scope of employment are those that the employer has the right to control. But, laws such as the Educational Employment Relations Act, chapter 41.59 RCW, and the Personnel System Reform Act of 2002, chapter 41.80 RCW, make it an unfair labor practice for employers to try to interfere with or control employees' union activities. E.g., RCW 41.59.140; RCW 41.80.110. UW is prohibited from controlling or directing employees' union activity. RCW 41.76.050(1)(a) ("It is an unfair labor practice for a an employer to[] interfere with, restrain, or coerce faculty members in the exercise of their rights guaranteed by this chapter."). Further, the employees' communications do not fall within the scope of their employment, even if in the future, these efforts affect appointment, promotion, evaluation, tenure, or state budgets, as the Foundation proposes. Documents relating to faculty organizing and addressing faculty concerns are not within the scope of employment, do not relate to the UW's conduct of government or the performance of government functions, and thus are not "public records" subject to disclosure.

3. Ambiguity

Finally, the Foundation argues that even if it was ambiguous that the e-mails qualified as public records, the trial court erred in not resolving the ambiguity in favor of disclosure. The text of the PRA and our case law is clear that courts are to liberally construe the PRA in favor of disclosure and narrowly construe its exemptions. RCW 42.56.030; see, e.g., John Doe A v. Wash. State Patrol, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). But, the PRA's definition of "public record" requires that the record relate to the conduct of government or the performance of a governmental or proprietary function. RCW 42.56.010. And, under Nissen, for information to be a public record, an employee must prepare, own, use, or retain it within the scope of employment. 183 Wn.2d at 878-79. That did not occur here.

The trial court did not err in concluding that the records at issue are not public records under the PRA. It did not err in granting SEIU 925's motion for a permanent injunction.

B. Preliminary Injunction

The Foundation next argues that the trial court erroneously granted a preliminary injunction on August 5, 2016. It argues that the trial court erred in relying on Nissen, asserting that the "scope of employment test" in that case only applies when records are on an employee's private devices or accounts.

In general, a party in a PRA case can obtain a TRO or a preliminary injunction before establishing a right to a permanent injunction. SEIU Healthcare 775NW v. Dep't of Soc. & Health Servs., 193 Wn. App. 377, 392, 377 P.3d 214, review denied, 186 Wn.2d 1016, 380 P.3d 502 (2016). A TRO and a preliminary

injunction both are designed to preserve the status quo until the trial court can conduct a full hearing on the merits. Id. At a preliminary injunction hearing, the trial court does not need to resolve the merits of the issues for permanent injunctive relief. Id. Instead, the trial court considers only the likelihood that the moving party ultimately will prevail at a trial on the merits. Id. at 392-93. One who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. Fed. Way Family Physicians, Inc. v. Tacoma Stands Up for Life, 106 Wn.2d 261, 265, 721 P.2d 946 (1986). This court reviews injunctions issued under the PRA de novo. SEIU Healthcare, 193 Wn. App. at 392.

Following the standard of a preliminary injunction, the trial court found that SEIU 925 "ha[d] demonstrated a likelihood of success on the merits of their claims for injunctive relief." In the order granting SEIU 925's motion for preliminary injunction, the trial court concluded that the records were not created within the scope of the employee's employment and therefore are not public records. The order further stated,

> (1) Petitioner has established a clear legal or equitable right to nondisclosure of those parts of [the records] that have not already been disclosed as public records because they contain personal and private emails [sic] unrelated to the scope of Professor Robert Wood's employment at UW and cannot be categorized as public records; (2) a well-grounded fear of immediate invasion of that right by the disclosure of those records, and that (3) the release of those records will result in immediate, actual and substantial injury to Petitioner.

The Foundation attacks the trial court's legal conclusion that the scope of employment test applies to the records at issue here. The Foundation asks this court to find that public records under the PRA do not have to be created within the scope of an employee's employment, as long as the records are on the public employer's device.

As the Foundation points out, Nissen extended the PRA's reach to employee's private devices. 183 Wn.2d at 877. The court stated,

> [W]e find nothing in the text or purpose of the PRA . . . that only work product made using agency property can be a public record. To the contrary, the PRA is explicit that information qualifies as a public record "regardless of [its] physical form or characteristics."

Id. (quoting RCW 42.56.010(3). But, the Nissen court did not expressly limit the scope of employment test to private devices. And, it does not follow logically under the Nissen analysis that communications on the employer's devices are necessarily always public records. Such an inference would conflict with the distinction drawn in Tiberino. See 103 Wn. App. at 683-4, 688 (personal e-mails were public records not because they were on employer's computer, but because the county printed the personal e-mails in preparation for litigation over Tiberino's termination because of her personal use of e-mail). The trial court did not err in granting a preliminary injunction.

C. Temporary Restraining Order

The Foundation also asserts that the trial court erred in granting a "sua sponte" temporary restraining order on June 10, 2016. It asserts that the trial court's TRO was "standardless."

One who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. Fed. Way Family Physicians, 106 Wn.2d at 265. To answer the question of whether a party has a clear right, the trial court must analyze the moving party's likelihood of prevailing on the merits. Id. In making this determination, the court does not adjudicate the ultimate rights of the parties in the lawsuit. Id.

On June 10, the trial court entered the TRO, enjoining the release of records, except those identified as "public records" and directed SEIU 925 to set a hearing on or before July 6, 2016. In its oral ruling, the court stated,

> I'm treating—I'm treating this as a temporary injunction rather than a full-blown preliminary injunction because I'm only granting the temporary relief to preserve the status quo so they can do the assessment of the documents. And so, I—I don't feel comfortable making those findings right now on this record alone.

The parties had stipulated to a TRO pending the hearing on the preliminary injunction. It was at that hearing the trial court entered the challenged TRO. The effect was the same as if a continuance was ordered by the trial court on its own motion. The purpose of the TRO was clear, to preserve the status quo while awaiting additional information it felt was necessary to resolution of the motion for the preliminary injunction. Preserving the status quo is an appropriate consideration where the decision of the court is delayed.

The Foundation argues this delay via TRO was impermissible under Fed. Way Family Physicians. There, the court refers to the trial court order

interchangeably as a preliminary injunction and a TRO. See Fed. Way Family Physicians, 106 Wn.2d at 267-68. The trial court failed to state in the preliminary injunction that respondents were likely to prevail on the merits. Id. at 265. However, the court did not strike the injunction and remand because the trial court made an incomplete order. Id. at 267. Instead, it did so because it found that there was not substantial evidence before the trial court for it to conclude that the respondents had a well-grounded fear of invasion of a legal right. See id. at 265-67. Here, this court must determine whether there was substantial evidence before the trial court when it entered the TRO.

Even assuming the TRO issued in Fed. Way Family Physicians is comparable to the TRO at issue here, the result is not the same. Before entering the TRO, the trial court reviewed declarations SEIU 925 filed in support of its motion for a temporary restraining order, including one from Wood, as well as declarations from Patricia Flores, Brooke Lather, and others. In his declaration, Wood refers to the union organizing in the documents. In their declarations, SEIU 925 organizers Patricia Flores and Brooke Lather put the e-mails into categories. Those categories include (1) those about union organizing, (2) postings to the AAUP UW chapter listserver, (3) e-mails between Wood and others not related to UW business, and (4) e-mails that mention SEIU 925 specifically. The trial court also reviewed declarations from the Freedom Foundation and Perry Tapper, a compliance officer in the OPR at UW.

Based on these declarations, there was substantial evidence for the trial court to conclude that SEIU 925 had a well-grounded fear of an invasion of its legal

right of nondisclosure of nonpublic records. It was reasonable for the court to conclude that the Foundation would not suffer harm as a result of a temporary delay in the release of any material that is subject to the PRA. While the trial court should have made a more complete order, any error in not doing so was harmless.

The trial court did not err in entering the TRO.

II. SEIU 925's Motion to Stay and the Foundation's Motion for Sanctions

Finally, the Foundation argues that the court abused its discretion in granting SEIU 925's motion to change trial date and stay proceedings, and in denying its motions to strike and for sanctions.

A. Motion to Change Trial Date and Stay Proceedings

The Foundation argues that the trial court no longer had jurisdiction to grant SEIU 925's motion to change trial date and stay proceedings, because the Foundation had already filed a notice of appeal, on March 27, 2016, of the permanent injunction.

A court's determination on a motion to stay proceedings is discretionary, and is reviewed only for abuse of discretion. King v. Olympic Pipeline Co., 104 Wn. App. 338, 348, 16 P.3d 45 (2000). A trial court does not abuse its discretion unless its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Eugster v. City of Spokane, 110 Wn. App. 212, 231, 39 P.3d 380 (2002).

RAP 7.2(a) provides that after review is accepted by the appellate court, a trial court has authority to act only to the extent provided in RAP 7.2, unless the appellate court limits or expands that authority as provided in RAP 8.3. RAP 7.2(e)

requires a party to seek the appellate court's permission before making a determination that would change a decision currently under review.

SEIU 925 states that, after the Foundation appealed the order entering the permanent injunction, it was under the impression that the trial scheduled to begin April 24, 2017 would go forward, "at least as to the [unfair labor practice] claims." With this understanding, SEIU 925 filed a motion on April 3, requesting that the trial court change the trial date or stay proceedings pending the outcome of this appeal.

In its initial complaint, in addition to injunctive relief, SEIU 925 also sought "an order finding that UW committed an unfair labor practice" in stating that it intended to release material from the identified records at issue. In its order granting a permanent injunction enjoining UW from release the nonpublic records, the trial court did not address SEIU 925's claim against UW. For purposes of the appeal, the order granting the injunction was final for one party, the Foundation, but it had not addressed the unfair labor practices claim against UW.[3]

RAP 7.2 and 8.3 are intended to keep a case from developing branches in the absence of an appropriate order of the appellate court. Burton v. Clark County, 91 Wn. App. 505, 513 n.9, 958 P.2d 343 (1998). The trial court's decision to stay was merely a procedural decision to preserve the posture of the case. On these facts, the trial court's stay of proceedings pending the outcome of this appeal did not run afoul of RAP 7.2.

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[3] That claim asserted a potential second basis for denial of the disclosure of the records sought. Even if the Foundation succeeded in this appeal, remand for consideration of the remaining claim would have been required.

B. Motions to Strike and to Impose Sanctions

The Foundation also asserts that the trial court abused its discretion in denying its motion for sanctions, because SEIU 925 filed its motion "even though the Foundation had repeatedly informed it that the Superior Court lacked jurisdiction."

CR 11 is intended to address filings not grounded in fact and not warranted by law, or filed for an improper purpose. Wood v. Battle Ground Sch. Dist., 107 Wn. App. 550, 574, 27 P.3d 1208 (2001). The decision to impose sanctions under CR 11 is vested within the sound discretion of the trial court. Eller v. E. Sprague Motors & R.V.'s, Inc., 159 Wn. App. 180, 189, 244 P.3d 447 (2010). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. Id.

After the court entered the permanent injunction, SEIU 925's spoke with the Foundation and UW about its understanding that the unfair labor practice claim was still intact, before filing its motion to change trial date. On this record, it does not appear that SEIU 925 filed a baseless motion.

The trial court did not abuse its discretion in denying the Foundation's motion for sanctions.

We affirm.

Appelwick, C.J.

WE CONCUR:

Cox, J.

FREEDOM FOUNDATION

September 04, 2018 - 4:31 PM

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Comments:

Sender Name: Kirsten Nelsen - Email: knelsen@freedomfoundation.com
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