

No. 76630-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,
Respondent/Plaintiff,

v.

FREEDOM FOUNDATION,
Appellant/Defendant,

and

UNIVERSITY OF WASHINGTON,
Defendant below.

**REPLY IN SUPPORT OF APPELLANT FREEDOM
FOUNDATION'S OPENING BRIEF**

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I. INTRODUCTION

Respondent Service Employees International Union Local 925 (“SEIU”) is simply wrong on numerous points of law in its Response Brief (“Response”).¹ The Foundation (“FF”) replies herewith.

II. ARGUMENTS IN REPLY

1. SEIU is wrong: the party seeking an injunction—which in this case is predicated on the allegation that the UW e-mails are not public—always bears the burden of proof.

SEIU’s argument that it “does *not* have the burden of proof on whether a document is a public record[,]” SEIU Resp. at 12 (emphasis in original), is wrong as a matter of law and is inconsistent. SEIU concedes that a plaintiff seeking to enjoin the release of records “must show [] a clear legal or equitable right” to obtain an injunction, and that the party seeking an injunction against disclosure “has a clear legal and equitable right to prevent the disclosure of documents at issue[] because they are not public records subject to PRA release.” SEIU Resp. at 12-13. A party’s obligation to prove a legal element necessary for an injunction is referred to as the burden of proof. If SEIU must show that it has a clear legal or equitable right to prevent disclosure because the records (“UW e-mails”) are not

¹ SEIU is the Respondent. Although it titled its response brief an “Opening Brief,” FF will refer to SEIU’s “Opening Brief” as the Response.

public, then it has the burden of proving that the UW e-mails are not public.²

It is that simple.

2. SEIU is wrong: conceding that a state employee utilized state resources for personal benefit is a per se violation of Washington’s ethics laws, which harms the violator’s interest.

SEIU’s standing counter-arguments are equally unavailing. It first erroneously argues that it “brought this action on its own behalf,” but, as FF previously discussed, SEIU has only ever claimed associational standing in this case. FF Br. at 17; CP 318. SEIU cannot levy a belated standing argument for the first time on appeal.³

Even if arguments could be made for the first time on appeal, SEIU lacks standing to seek an injunction for UW e-mails under Categories 2-4⁴ because those Categories do not specifically pertain to SEIU. *See* RCW 42.56.540 (injunction against disclosure “may be enjoined if, upon motion and affidavit by an agency or its representative or a *person who is named in*

² *See SEIU Healthcare 775NW v. Dep’t of Soc. & Health Servs.*, 193 Wn. App. 377, 393, 377 P.3d 214 (2016), *rev. denied*, 186 Wn.2d 1016, 380 P.3d 502 (2016).

³ *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

⁴ For the convenience of the Court, FF repeats SEIU’s categorization of UW e-mails initially discussed in FF’s opening brief:

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”).

the record or to whom the record specifically pertains ...) (emphasis added). SEIU’s vague and unspecified declaration stating that “some” of the AAUP e-mails “name and/or pertain to SEIU” does not provide any indication about the quantity of e-mails that may or may not pertain to SEIU, or how broadly SEIU defines “pertain.” CP 35, 97.⁵ SEIU’s declarations fail to meet the threshold requirement to obtain a third-party injunction under the PRA. RCW 42.56.540. Even if they did, SEIU concededly would only have standing to seek an injunction for “some” of the AAUP e-mails, and still not have standing to seek an injunction for Categories 3 and 4.

SEIU then argues that FF mischaracterized *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333 (1977), by implying that *Hunt* stands for the principle that a party asserting associational standing cannot harm the interests of those it claims to represent—but then concedes that “the Court [in *Hunt*] held that declaratory or injunctive relief necessarily benefits an association’s members” and that “*Hunt* supports associational standing here, where SEIU 925 seeks injunctive relief, which would benefit Professor Wood.” SEIU Resp. at 15-16. If the purpose of associational standing is to benefit (i.e., not harm) the non-present represented parties,

⁵ SEIU also referenced CP 104 in support of its independent standing argument, but Professor Wood’s declaration (CP 104) does not mention SEIU whatsoever.

see Hunt, 432 U.S. at 344, then the inverse is true: the party claiming associational standing cannot harm the interests (i.e., not benefit) of those it claims to represent. SEIU’s attempted fine-line distinctions are meaningless.

SEIU also claims “this litigation is not being conducted in a way that harms the interests of Professor Wood.” SEIU Resp. at 16. As justification, it claims that SEIU’s exposure of Professor Wood to massive ethical violations is mere “conjecture and speculation at best” and that “[FF]’s characterization of the ethics laws is skewed and misses the complexities of RCW 42.52 et seq.” SEIU Resp. at 16, 17. Not so, for at least three reasons.

First, there are no “complexities” that dilute the plain meaning of RCW 42.52.160 (not § 120, the only section of ch. RCW 42.52 cited by SEIU (Resp. at 17)). RCW 42.52.160 clearly and unequivocally states:

No...state employee may employ or use any...property under the...employee's official control or direction, or in his or her official custody, for the private benefit or gain of the...employee, or another.

SEIU’s primary argument is that Professor Wood, a “state employee,” used his UW computer and UW e-mail account, “state property” under Professor Wood’s “official control or direction,” and in his “official custody,” for the private benefit or gain of himself, SEIU, and AAUP, an “employee” and “another” (i.e., Professor Wood’s personal use). *See* RCW 42.52.160.

Admitting to the elements of prohibited conduct qualifies as a per se violation of that prohibited conduct. In another example of SEIU discussing the “complexities” of Ch. 42.52 RCW, SEIU cites RCW 42.52.220 (SEIU Resp. at 17), but § 220 only concerns scientific research, which is inapplicable here. *See* RCW 42.52.220.

Second, SEIU attempts to soften the blow of its primary argument by suggesting that Professor Wood “merely received” an undetermined amount of UW e-mails, and that an undetermined amount were sent or received by Professor Wood’s non-UW e-mail address. SEIU Resp. at 17. Even if an undetermined amount of UW e-mails were purely personal—even though SEIU never argued that they were—and sent from Professor Wood’s private e-mail address using his UW computer, the existence of those e-mails are still public records.⁶ The UW e-mails should still be

⁶ *See Tiberino v. Spokane Cty.*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (the public interest favors disclosure of the amount of government time spent on personal matters); WAC 44-14-03001 (Attorney General’s non-binding Model Rules on Public Records) (“a record showing the existence of a purely personal e-mail sent by an agency employee on an agency computer would probably be a ‘public record,’ even if the contents of the e-mail itself were not.”). Further, the state Supreme Court and Division II of the Court of Appeals courts often follow the Attorney General’s Model Rules in PRA cases. *See, e.g., Doe v. Wash. State Patrol*, 185 Wn.2d 363, 380, 374 P.3d 63 (2016) (citing and applying Model Rules); *Burt v. Dept. of Corrections*, 168 Wn.2d 828, 835, n.4, 231 P.3d 191 (2010) (same); *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 153, 240 P.3d 1149 (2010) (same); *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 541, 199 P.3d 393 (2009) (same); *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 753-4, 174 P.3d 60 (2007) (same); *Gronquist v. Dept. of Licensing*, 175 Wn. App. 729, 744-7, 309 P.3d 538 (2013) (same); *Mitchell v. Dept. of Corrections*, 164 Wn. App. 597, 606-7, 277 P.3d 670 (2011) (same). *See also Mechling v. City of Monroe*, 152 Wn. App. 830, 849, 222 P.3d 808 (2009) (Model Rules are “useful guidance”).

disclosed with the non-public information exempted.⁷ Finally, SEIU's argument only addresses "some emails," leaving the remaining UW e-mails entirely unaddressed. And, because SEIU has the burden of proof, failing to address the remaining emails means they are disclosable.

Third, it is beyond illogical to argue that SEIU's lawsuit, which subjects Professor Wood to per se ethical violations, "would benefit Professor Wood." SEIU Resp. at 16. While Professor Wood might appreciate the non-disclosure of his public UW e-mails, it is not in his interest to be exposed to massive ethical violations. This should be obvious. SEIU predicates its success on appeal on subjecting its member to these per se violations, and therefore loses associational standing.

3. SEIU is wrong: the PRA specifically rejects attempts to narrow the definition of 'public records' proffered by SEIU's purported limitations.

In regards to the public nature of the UW e-mails, SEIU first argues that the lack of an actual—"as opposed to merely speculative"—relationship to government conduct or a governmental or proprietary function precludes a document from qualifying as a "public record" under the PRA. SEIU Resp. at 19. While this may be true, SEIU fails to articulate what it means by an "actual" versus "purely speculative" relationship to

⁷ See *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 327 P.3d 600 (2013) (agencies cannot withhold entire documents when some information within the record is disclosable, the non-disclosable information must be exempted).

government conduct. FF has already provided four ways in which the UW e-mails actually comport with the PRA's definition of "public records." FF Br. at 23-28.

SEIU also misstates the holdings of *Forbes v. City of Gold Bar*, 171 Wn. App. 866, 288 P.2d 382 (2012), *rev. denied*, 177 Wn.2d 1002 (2013), *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 357 P.3d 45 (2015), and *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). *Forbes'* holding is clearly limited to private e-mail accounts on private devices, and thus inapplicable here:

Because city officials used their *private e-mail accounts* to conduct city business, the city hired an independent information technology person, Michael Meyers, *to obtain the documents from the various individual's private e-mail accounts*. City officials thought that Meyers was downloading just those files which concerned city business. *However, Meyers downloaded their entire e-mail accounts for every city council member and then-Mayor Hill*. The downloads from the personal computers were placed in three categories: "conduct of business," "not conduct of business," and "redacted."

Forbes, 171 Wn. App. at 864 (emphasis added); *see also id.* at 869 n. 20 (referencing employees' personal computers). Although city e-mail servers were also searched, *Forbes'* holding was limited to the purely personal e-mails obtained from personal e-mail accounts. *See Forbes*, 171 Wn. App. at 868 (holding that "purely personal e-mails of those government officials are

not public records” and then relying on a case that dealt with public officials’ private e-mail accounts); *see also id.* at 864.

Nissen and *West* are also limited to the context of purely personal devices or accounts, as discussed in FF’s opening brief. *See* FF Br. at 32-34; *Nissen*, 183 Wn.2d at 879; *West*, 196 Wn. App. at 630. SEIU ignores *Nissen*’s and *West*’s clear holding by misleadingly quoting both cases but omits critical context. SEIU Resp. at 22. In contrast to the short snippets provided by SEIU, the full quote from *Nissen* states:

Agencies can act only through their employee-agents. With respect to an agency's obligations under the PRA, the acts of an employee in the scope of employment are necessarily acts of the “state and local agenc[ies]” under RCW 42.56.010(3). We therefore reject the County's argument that records related *to an employee's private cell phone* can never be public records as a matter of law. Instead, records an employee prepares, owns, uses, or retains within the scope of employment are public records if they meet all the requirements of RCW 42.56.010(3). *This inquiry is always case- and record-specific.*

Nissen, 183 Wn.2d at 879 (emphasis added). *See also West*, 196 Wn. App. at 630 (“We hold that it was proper for the superior court to require Vermillion to produce to the City e-mails in his *personal e-mail account* that met the definition of a public record under RCW 42.56.010(3)[.]”) (emphasis added). Misleading quotations cannot overcome clear holdings: *Nissen*’s and *West*’s scope-of-employment test is limited to records on private devices and in private accounts, and are thus inapplicable here.

SEIU also erroneously argues that the “magic words” of “purely personal” are unnecessary to conclude that records are non-public if stored on agency property, and that a holding otherwise “contravenes established statutory and case law authority.” SEIU Resp. at 27-28. Again, SEIU is wrong as a matter of law. It is well established that purely personal records do not qualify as public records, but everything else on agency property presumptively does. *See Forbes*, 171 Wn. App. at 868 (“The *purely* personal e-mails of those government officials are not public records.”) (emphasis added); *Belenski*, 187 Wn. App. at 737 (“But in *Tiberino*, it was undisputed that the e-mails was[sic] *purely personal* in nature even though they were generated by a government employee on a government computer.”) (emphasis added); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009) (“in *Tiberino*, the court upheld the redaction private e-mails of a ‘*purely* personal nature’) (emphasis added); WAC 44-14-03001(2) (“Almost all records held by an agency relate to the conduct of government; however, some do not. A *purely* personal record having absolutely no relation to the conduct of government is not a ‘public record.’”) (emphasis added). *Nissen* provided guidance about what qualifies as “purely personal”:

...employees do not generally act within the scope of employment when they *text their spouse* about working late or discuss their job on *social media*. Nor do they typically

act within the scope of employment by creating or keeping *records purely for private use, like a diary*. None of these examples would result in a public record “prepared, owned, used, or retained” by the employer agency in the usual case.

Nissen, 183 Wn.2d at 879 (emphasis added).⁸

Here, the UW e-mails are not communications between Professor Wood and his immediate family. *See Tiberino*, 103 Wn. App. at 684. They are not communications with any romantic partners, postings to social media, or diary entries. *Nissen*, 183 Wn.2d at 879. Instead, the e-mails pertain to Professor Wood’s formal leadership and organized efforts in unionizing public-sector employees and discussions of public-sector faculty (i.e., work-related) issues. *See* FF Br. at 22-28. That is not the type of “purely” personal content contemplated by *Nissen* or *Tiberino* or the Attorney General’s Model Rules.

For the very first time in this case, SEIU attempts to describe Category 3 as “purely personal” or wholly unrelated to any possible connection to government conduct or a government or proprietary function. SEIU Resp. at 26-27. SEIU’s post-hoc appellate briefing is not the proper procedure for labeling documents as purely personal. Instead, Professor Wood or SEIU should have submitted an affidavit to the trial court

⁸ *See also Tiberino v. Spokane Cty.*, 103 Wn. App. 680, 684, 13 P.3d 1104 (2000) (“The ‘sent’ mail folder revealed that approximately 214 e-mail messages had been sent. Of those messages, 200 were sent via the Internet to Ms. Tiberino’s sister or mother.”).

describing with sufficient particularity how Category 3 was purely personal. *Nissen*, 183 Wn.2d at 886 (“Where an employee withholds personal records from the employer, he or she must submit an affidavit *with facts sufficient to show the information is not a “public record” under the PRA. So long as the affidavits give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive...*”) (emphasis added). Conclusory labels of “personal emails and/or documents unrelated to any UW business” does not suffice—especially for the first time on appeal, without a factual record to support it. Such labels are merely an unhelpful regurgitation of SEIU’s primary argument, not “facts.” At this late stage, FF is precluded from responding to or evaluating the personal nature of the Category 3 e-mails without more facts. Moreover, this Court has no satisfactory factual record to evaluate.

SEIU also claims that because the Attorney General’s Model Rules are advisory only and nonbinding and therefore that they cannot “trump” the PRA’s definition of a public record. *See* SEIU Resp. at 27. FF is not claiming the Model Rules “trump” a statute. SEIU misunderstands the nature and purpose of the Model Rules, which were intended to—and actually do—supplement the PRA with best practices, instead of “trumping” or in any way contradicting it. *See Forbes*, 171 Wn. App. at 863 (“[T]he legislature directed the attorney general to adopt advisory model

rules on public records compliance setting forth the ‘best practices’ for compliance with the PRA[.]’). Perhaps this is why the Supreme Court and this Court routinely cite and apply the Model Rules. *See infra* n. 6.

SEIU’s reliance on cases from other jurisdictions is also misplaced. Washington courts decline to follow holdings from other jurisdictions when those holdings contradict the PRA, including out-of-state holdings that interpret the federal Freedom of Information Act (“FOIA”).⁹ FOIA defines “public records” more narrowly than Washington’s PRA. Under FOIA:

For requested materials to qualify as “agency records,” two requirements must be satisfied: (i) an agency must either create or obtain the requested materials, and (ii) the agency must be in control of the requested materials at the time the FOIA request is made. The control requirement accords with *Kissinger*’s teaching that the term ‘agency records’ is not so broad as to include personal materials in an employee’s possession, even though the materials may be physically located at the agency. Case law makes clear that the statute does not sweep into FOIA’s reach personal papers that may “relate to” an employee’s work...but which the individual does not rely upon to perform his or her duties.

Grand Cent. Partnership, Inc. v. Cuomo, 166 F.3d 473, 480 (2d Cir. 1999).

But Washington’s PRA defines “public records” to include records that employees do not rely on to perform their duties. *See Belenski*, 187 Wn. App. at 738 (holding that internet access logs were public because it

⁹ *See Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 717, 261 P.3d 119 (2011) (rejecting FOIA interpretations regarding the PRA and discovery).

documented employees' online access, even though the agency "virtually ignored" the records until receiving a PRA request).

SEIU's reliance on *NLRB v. Gallant*, 26 F.3d 168 (D.C. Cir. 1994) is also unpersuasive because the records in that case were personally created by the employee to keep her job, and the court relied on FOIA's more limited definition of 'public records.' *See id.* at 172. Here, wholesale efforts at unionizing the largest university faculty in Washington are more significant, and public, than particularized letters and faxes by one employee to keep her job.

SEIU's reliance on *Howell Educ. Ass'n v. Howell Bd. of Educ.*, 287 Mich. App. 228, 789 N.W.2d 495 (2011) is also misplaced because Michigan's public records laws limit "public records" to records retained in the performance of an official function. *Id.* at 236 ("[M]ere possession of a record by a public body" does not render the record a public document. Rather, the use or retention of the document must be "in the performance of an official function."); M.C.L. § 15.232(e) ("Public record does not include computer software"). As discussed above, Washington's PRA broadly defines "public records" to include any record that relates to government conduct or the performance of any governmental or proprietary function that is used, retained, or evaluated by the government. UW agrees that the PRA broadly construes the definition of public records because its policy

notifies every employee that the records created on UW computers, using UW e-mails, could be disclosed pursuant to a public records request. FF Br. at 6-7. In contrast, the employees in *Howell* were not informed that their e-mails could be disclosed to the public. *Id.*, 287 Mich. App. at 241 (“the use policy...in no way indicates that users’ e-mail may be viewed by any member of the public who simply asks for it.”). SEIU’s out-of-state cases are inapposite.

Finally, SEIU is wrong as a matter of law that the statutory definition of “public records” is limited to the factual scenarios in which courts have previously found records to be “public” under the PRA. SEIU Resp. at 30-33. In fact, the opposite is true: Washington courts consistently and broadly apply the PRA’s definition of “public records” to new factual scenarios. *See* FF’s Br. at 20 n. 6. For example, “RCW 42.56.010(3) does not, by its plain language, limit the definition of ‘public record’ to those showing only direct government action...but rather uses broad language to capture information *relating* to the conduct of government or the performance of any governmental or proprietary function prepared.” *Does v. King County*, 192 Wn. App. 10, 366 P.3d 936 (2015) (emphasis in original) (internal brackets removed).¹⁰ Cases of first impressions do not negate the

¹⁰ SEIU also misstates *Does*’ holding in arguing that “*Does* mandates that where a record does not show government action, the government must actually use the record for it to be a ‘public record.’” SEIU Resp. at 30 n. 14. *Does* mandated no such thing; instead, *Does*

application of the PRA, especially given the PRA’s strong mandate to broadly construe “public records,” and specifically, the government conduct or proprietary or government function prong. *See O’Neill v. City of Shoreline*, 170 Wn.2d 138, 141, 240 P.3d 1149 (2010) (in a matter of first impression, holding that metadata constituted a public record).

4. SEIU is wrong: FF provided ample justification on how the UW e-mails related to the conduct of government or a governmental or proprietary function.

SEIU advances a number of erroneous arguments in attempting to counteract FF’s four reasons why the UW e-mails are public records. SEIU first cites *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993) in support of its argument that “public records” do not include every conceivable piece of information related to government employment. SEIU Resp. at 34. Yet the question is not whether every piece of information remotely related to government employment is a public record; one of the questions in this case is whether the information relates to the government’s proprietary role as an employer. *See Tiberino*, 103 Wn. App. at 688 (the government’s termination of a public employee was government proprietary function); *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 324, 890 P.2d 544 (1995) (“The document sought by the Herald contains information

held the government’s use of records was *sufficient* for a finding of “public records,” it did not find that it was a *necessary* alternative. *Does*, 192 Wn. App. at 22-23.

about the City's termination of an employee, *i.e.*, conduct in its proprietary capacity”); *Dawson*, 120 Wn.2d at 845 (public employee evaluations were public records, but not verification requests that included information about an employee’s salary). Here, UW e-mails that directly discuss issues related to the government’s provision of faculty employment, discussed in a group forum, relate to the government’s proprietary role as an employer more so than individualized bits of employee information that are usually kept confidential as between employees.¹¹

5. SEIU is wrong: the PRA clearly requires that courts construe any ambiguities in favor of disclosure.

SEIU’s arguments regarding the PRA’s construction are also wrong as a matter of law. The PRA’s robust pro-disclosure mandate, which requires courts to broadly construe all of the PRA’s provisions—including

¹¹ SEIU also proffers numerous other erroneous and easily rejected arguments. For example, SEIU claims that ch. 28B.07 RCW only applies to private non-profit higher education institutions because it references private non-profit entities. SEIU Resp. at 35-40. Yet SEIU fails to provide any evidence showing that a mere reference to a particular type of entity categorially limits the entirety of that Title to that particular entity, especially when the Legislature said that private nonprofit higher education institutions were a “necessary *part* of the state’s higher education resources,” RCW 28B.07.010 (emphasis added), and especially given how broadly the Legislature worded RCW 28B.07.010. Further, RCW 28B.15.005(2) specifically defines the University of Washington. SEIU also argues that UW e-mails that directly pertain to faculty unionization and other faculty issues does not affect the provision of public education. This argument simply does not pass the laugh test. Neither does SEIU’s purported likening of the purchase of a car and its impact on the state budget, to collective bargaining of the largest educational institution in Washington and its impact on the state budget. In the first instance, the State passively receives a relatively small tax. In the second instance, the State must affirmatively devote and organize millions of taxpayer dollars to satisfy the requirements and issues relating to collective bargaining.

the definition of public records—is the PRA’s most well-established rule. Indeed, “[t]he definitions of ‘agency’ and ‘public record’ are each comprehensive on their own and, when taken together, mean the PRA subjects virtually any record related to the conduct of government to public disclosure.” *Nissen*, 183 Wn.2d at 874. “This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government.” *Id.* See also *Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.3d 592 (1994) (“The [PRA]’s disclosure provisions must be liberally construed”). When courts require that the PRA’s definition of ‘public records’ must be construed in favor of disclosure, this means that any ambiguities regarding the PRA’s definition of “public records” must necessarily be construed in favor of disclosure. The Supreme Court has applied the PRA’s liberal construction in favor of disclosure when deciding whether a requested records was a “public record.” See *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746, 958 P.2d 260 (1998); *Oliver v. Harborview Medical Center*, 94 Wn.2d 559, 566, 618 P.2d 76 (1980).

There is no “extra” analytical step, as SEIU claims. SEIU Resp. at 40. The only “step” under the PRA is a broad construction of “public record” in favor of disclosure.

6. SEIU is wrong: parties may appeal TROs and preliminary injunctions when appealing a permanent injunction.

SEIU is wrong as a matter of law, again, when it argues that “[FF]’s appeal of [the orders granting a TRO and preliminary injunction] is not properly before his court” because it appealed the orders “far outside of the thirty-day period allowed in the rules[.]” SEIU Resp. 42. It is well established that “[a] party need not file a notice of appeal within 30 days of every appealable order or judgment but may instead await the final decision in the case.” *Franz v. Lance*, 119 Wn.2d 780, 781, 836 P.2d 832 (1992). “If a timely notice of appeal is filed from [a final] decision, the appellate court will review prior orders and judgments, even those which were immediately appealable, if they prejudicially affect the final judgment.” *Id.* A previous order prejudicially affects the final order if the final order would not have happened but for the prior orders. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). “[I]t makes no sense to mandate an immediate appeal from the earlier decision because to do so would only encourage multiple appeals.” *Franz*, 119 Wn.2d at 781. Appealing non-final decisions along with final decisions prevents the disfavored “piecemeal, multiple appeals” arising from discretionary review. *Right-Price Recreation, LLC*, 146 Wn.2d at 380.

Here, it is undisputed that the Superior Court’s *sua sponte* TRO and the preliminary injunction order prejudicially affected the final summary judgment order. SEIU repeatedly argued that the case would effectively end if the Superior Court did not grant a TRO or a preliminary injunction. *See* CP 27; CP 93-94; SEIU Resp. at 44 n. 20 (“given the exigent circumstances here—release of the records essentially mooting the case—a preliminary injunction was appropriate.”). The Superior Court’s final order would not have happened but for the seven-month delay implemented from the wrongfully-entered TRO and preliminary injunction. *See Franz*, 119 Wn.2d at 781.

Further, for the reasons discussed above, SEIU is also wrong as a matter of law in arguing that it did not bear the burden in obtaining a preliminary injunction or a TRO, SEIU Resp. 42-43, that *Nissen* and *Forbes* somehow apply, and that the existence of the yet-undetermined amount and conclusory-described UW e-mails from Professor Wood’s personal e-mail account are not disclosable. SEIU Resp. at 44.

7. SEIU is wrong: a preliminary injunction solely predicated on an inapposite case—which the trial court later acknowledged as inapposite—and a standardless TRO do not “necessarily meet” the standards required for such injunctions.

SEIU also errs as a matter of law in arguing that the granting of a permanent injunction automatically renders all previously-entered

injunctions appropriate. SEIU Resp. at 44-45. The party seeking an injunction must still meet the threshold standards of temporary or preliminary injunctions, even if those injunctions present a lower threshold—and a permanent injunction entered on *entirely separate grounds* from prior injunctions does not mean that the moving party “necessarily met” the previously-unmet standards for earlier injunctions.

Here, SEIU does not dispute that the trial court predicated its preliminary injunction solely on *Nissen*, or that the trial court later acknowledged that *Nissen* was distinguishable from the UW e-mails at issue in this case.¹² SEIU also does not dispute that the trial court relied solely on *Tiberino*, and omitted any reference to *Nissen* whatsoever, in granting a permanent injunction. If the trial court itself could not find any reason to rely on a concededly inapposite case in granting a permanent injunction, that omission strongly indicates that that the court’s preliminary injunction order was “based on untenable grounds, [was] made for untenable reasons, or is manifestly unreasonable[.]” *Bellevue Farm Owners Ass’n v. Stevens*, 198 Wn. App. 464, 482, 394 P.3d 1018 (2017) (abuse of discretion standard).

¹² SEIU’s attempts to distance the trial court from the trial court’s own words are unpersuasive, *see* SEIU Resp. at 44 n. 21, especially upon a full reading of the verbatim report of proceedings, and especially considering that the trial court chose to ignore *Nissen* completely in granting a permanent injunction on the exact same issue previously addressed in the order granting the preliminary injunction.

SEIU appears to concede that the TRO was standardless by only arguing that “the fact that the trial court did not make certain findings in the TRO order does not mean the order was inappropriate to preserve the status quo until a hearing on the merits.” SEIU Resp. at 46. However, in the single case that SEIU relies on in support, the appellate court “refuse[d] to strike down the injunction simply because the trial court failed to state what to it seemed obvious.” *Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 266, 721 P.2d 946 (1986) (noting that “[g]iven the discussion in *Bering v. SHARE*, 106 Wash.2d 212, 721 P.2d 918 (1986), the respondents obviously had a clear legal or equitable right to free ingress and egress and preservation of the doctor-patient relationship.”). Here, the only thing that is obvious is the trial court’s concession that a temporary injunction would constitute “reversible error.” CP 464-465. Such a concession necessitates the conclusion that the TRO was indeed reversible error.

8. SEIU is wrong: RAP 7.2(l) does not apply to issues fully disposed of by a final order.

Finally, SEIU also errs as a matter of law in arguing that RAP 7.2(l) preserved the trial court’s jurisdiction for SEIU’s unfair labor practice (“ULP”) claim. SEIU Resp. at 48. RAP 7.2(l) only preserves a superior court’s jurisdiction for issues that remain ripe after a final ruling. A plain

reading of the RAPs reveals this axiomatic outcome:

If the trial court has entered a judgment *that may be appealed under rule 2.2(d)* in a case involving multiple parties, claims, or counts, the trial court retains full authority to act in the portion of the case that is not being reviewed by the appellate court.

RAP 7.2(1) (emphasis added). RAP 2.2(d) further states:

In any case with multiple parties or multiple claims for relief...an appeal may be taken from a final judgment *that does not dispose of all the claims or counts as to all the parties*, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay.

RAP 2.2(d) (emphasis added). Thus, RAP 7.2(1) only applies to judgments appealable under RAP 2.2(d), and RAP 2.2(d) only applies to final judgments that do not dispose of all the claims or counts. The inverse is necessarily true: if a final judgment disposes of all the claims, RAP 2.2(d) and RAP 7.2(1) do not apply and the trial court lacks jurisdiction. Trial courts abuse their discretion when ruling on issues when they lack jurisdiction.¹³

Here, the trial court clearly lacked jurisdiction to grant SEIU's Motion to Change Trial Date and For Stay of Proceedings ("Motion") because its previously granted final judgment disposed of all of SEIU's

¹³ See *In re Marriage of Kim*, 179 Wn. App. 232, 240, 317 P.3d 555 (2014) ("A court abuses its discretion where the court applies an incorrect standard...or the facts do not meet the requirements of the correct standard.").

claims. The final judgment permanently enjoined the release of the UW e-mails. CP 694. Without the release of UW e-mails, there was not even the potential of a ULP predicated upon the release of UW e-mails. Any further ruling from the trial court regarding SEIU's ULP claim would be moot, and thus advisory and non-binding.¹⁴

SEIU unpersuasively attempts to distance itself from the trial court's lack of jurisdiction.¹⁵ SEIU claims that it was "under the impression that, if the trial, scheduled to begin April 24, was not changed or stayed, it would go forward, at least as to the ULP claims." SEIU Resp. at 47. Not so. A complete reading of the RAPs and the permanent injunction order should have unequivocally rejected SEIU's "impressions" prior to the filing of its Motion. *See* RAP 7.2(l); RAP 2.2(d); CP 694. SEIU should have consulted the rules to see if its "impressions" were valid.

But even more, FF took several steps to avoid SEIU's filing of its meritless Motion. In a good-faith effort to prevent the waste of everyone's

¹⁴ *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001) ("Where the four justiciability factors are not met, the court steps into the prohibited area of advisory opinions.") (internal quotations omitted). The trial court clearly abused its discretion in granting SEIU's Motion when it lacked jurisdiction.

¹⁵ A quick example demonstrates SEIU's fallacious reasoning. Like SEIU's ULP claim, the trial court's permanent injunction order also omitted any reference to SEIU's various PRA exemption arguments raised in its Complaint and subsequent briefings. CP 8-12; CP 686-697. Under SEIU's argument, the PRA exemptions were also presumably still "ripe" for the trial that SEIU sought to stay. Curiously, SEIU ignored the apparently unresolved PRA exemptions in its Motion—likely because it is even more obvious that the trial court's permanent injunction order rendered moot any possible PRA exemptions. For the very same reason, the permanent injunction order rendered moot SEIU's ULP claims.

time and resources, FF's counsel:

- repeatedly informed SEIU's counsel that the trial court lacked jurisdiction,
- pointed SEIU's counsel to the exact rules that precluded the trial court's jurisdiction,
- referred SEIU's counsel to an experienced attorney who had previously represented SEIU and could verify that the trial court lacked jurisdiction, and
- put SEIU on notice that FF would be forced to seek sanctions for responding to a meritless motion.

FF Br. at App. C, Decl. of Stephanie Olson. The only impression that SEIU could have had, especially given FF's numerous citations to the law and other experienced counsel, was that its Motion would be patently meritless. SEIU also never "risked sanctions for not appearing at trial," SEIU Resp. at 49, because the trial court's local rules obviously do not apply to cases where the trial court lacks jurisdiction.

Equally unpersuasive are SEIU's arguments regarding sanctions. For purposes of imposing sanctions under CR 11, the reasonableness of attorney's inquiry into factual or legal basis of a claim is evaluated under objective standards; it is not sufficient that attorney personally believed, after exhaustive research, that claim was meritorious.¹⁶ Thus, SEIU counsel's subjective attempts to "conduct[] legal research, sp[eak] with counsel for UW and FF, and contact[] the trial court judge's bailiff, all in

¹⁶ *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1258, review denied, 121 Wn.2d 1018, 854 P.2d 41 (1992).

connection with the filing of its motion,” SEIU Resp. at 49, does not bestow merit on an objectively-meritless motion. Had SEIU fully read the rules that FF repeatedly pointed it too, it would have understood that no amount of legal research would counteract the rules’ plain reading. SEIU’s Motion was meritless, and the trial court abused its discretion in ruling otherwise. In compliance with the civil rules, and in the interests of fairness, FF should be awarded reasonable fees for being forced to respond to a meritless motion in the trial court.

III. CONCLUSION

For the foregoing reasons, FF respectfully requests that this Court reverse each injunction entered below, and reverse the trial court’s order on SEIU’s Motion and the denial of FF’s Combined Motion to Strike and Motion for Sanctions.

RESPECTFULLY SUBMITTED this day 18th day of August, 2017.

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