

No. 48522-2-II

(Thurston County Superior Court No. 14-2-02359-3)

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

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,
Appellant/Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, and FREEDOM FOUNDATION,
Respondents/Defendants,

APPELLANT SEIU LOCAL 925'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On April 27, 2016, this Court ordered Appellant SEIU Local 925 (“Local 925”) to file a supplemental brief discussing the effect of this Court’s published opinion, *SEIU Healthcare 775NW v. Department of Social & Health Services*, No. 46797-6-II, 2016 WL 1447304 (Wash. Ct. App. April 12, 2016)(“SEIU 775 Decision” or *SEIU Healthcare 775NW*) on each issue raised in this appeal.¹ The SEIU 775 Decision, like the present case, arose from a dispute over whether certain public records are subject to disclosure under Washington’s Public Records Act (PRA). The Division II opinion specifically addressed the consolidation of a preliminary injunction hearing with a hearing on the merits; the application of the PRA’s commercial purposes prohibition, RCW 42.56.070(9); and, the scope of the PRA’s personal information exemption under RCW 42.56.230(1). It also held that the Foundation was not entitled to attorney fees for dissolving a temporary restraining order. Local 925’s supplemental brief discusses the effect of the foregoing opinion on this pending appeal.²

¹ The SEIU 775 Decision involves the same state agency (DSHS) and the same requestor (Freedom Foundation) as the present case. However, it involves a different public records request and different appellants; SEIU Local 925 and SEIU Healthcare 775NW are separate labor organizations representing child care providers and homecare workers respectively.

² The instant appeal is currently set for oral argument on May 24, 2016.

II. ARGUMENT

A. “Commercial Purposes” Under the Public Records Act Encompasses Business Activity Intended to Generate Profits

The SEIU 775 Decision held that “commercial purposes” under the PRA “include[s] any business activity intended to generate profits.” Slip Op. * 11. This definition applies to nonprofit organizations, even though they, strictly speaking, may generate revenue and not profits. *Id.* (citing 1975 Op. Att’y Gen. No. 15).

The Court arrived at that definition, in part, by embracing the 1975 Attorney General Opinion’s (AGO) conclusion “that the term ‘commercial purpose’ is not limited to situations in which individuals are directly contacted or personally affected.” *Id.* (citing 1975 Op. Att’y Gen. No. 15). At the same time, in order for an activity to qualify as a commercial purpose, the requester must “intend[] to profit from the direct use of the list itself.” *Id.* In other words, it requires “that a requestor intend to use the list for direct profit...” *Id.* at 12. In so holding, the Court explained that when a “requester’s potential commercial benefit is remote and ephemeral,” the statute does not prohibit disclosure. *Id.* (quoting 1975 Op. Att’y Gen. No. 15 at 13).

SEIU Healthcare 775NW does not suggest, and should not be read to require, a simplistic or zero-sum analysis when evaluating whether a

commercial purpose is direct or indirect for purposes of RCW 42.56.070(9)'s prohibition. The SEIU 775 Decision does not hold or presume that a requester acts with a singular or exclusive purpose. Meaning, the presence of a non-commercial purpose does not preclude other equally important motivations for requesting records, including direct commercial benefit. In this case, one of Freedom Foundation's intended uses was undisputedly to contact Local 925's members to encourage them to cease supporting the Union, something *SEIU Healthcare 775NW* viewed as more political than commercial. However, the record makes clear that Freedom Foundation had other equally important motivations for requesting the records, including to economically benefit itself and to inflict economic injury on Local 925.

The case presented here is *not* comparable to the example cited in the SEIU 775 Decision – a newspaper requesting a list in order to help write a story that could result in selling more newspapers. *Id.* at *11. On the spectrum of direct versus indirect commercial benefit, the newspaper's interest in that situation is as indirect as can be imagined and is completely “remote and ephemeral.” As discussed in more detail, Freedom Foundation's purpose here was directly to increase its own revenue, and to decrease that of SEIU 925.

B. The Foundation Requested The Provider Records To Generate Financial Benefit Directly For Itself Which Constitutes A Commercial Purpose Prohibited Under The PRA

The evidence establishes that Freedom Foundation's intended use of the provider records has much more than a "remote and ephemeral" potential commercial benefit. The record reveals that the Foundation has a direct and ongoing commercial interest in requesting the providers' information.

The Foundation's use of the providers' information is inextricably tied up with its ongoing solicitation and fundraising efforts. One of the Foundation's central fundraising strategies is to publicize repeatedly any instance where it has obtained a list of providers from the State and subsequently used that list to harm SEIU by encouraging providers to cease their support of the Union. For example, in a 2015 fundraising letter CEO Tom McCabe boasted about obtaining a list of SEIU-represented child care providers and the organization's subsequent mail, email, and robo-call campaign, along with its planned door-to-door effort to encourage providers to cease supporting the Union:

Although this fight is still unfolding, **we have obtained a list of SEIU-affiliated child care providers, and we're finally getting the word out.** In fact we have conducted two physical mailings to members on the list, sent email blasts, and conducted robo-calls as well. This year, we're planning to do even more by producing radio, television, and social media ads, as well as additional mailings. We're

even planning a door-to-door contact program to reach SEIU members.

With your help, we'll bring an end to SEIU's coercive behavior...Please consider a gift of \$50, \$75, or even \$100 to help us prevail in this fight.

Declaration of Robert Lavitt in Support of Motion to Allow Additional Evidence ("Lavitt Dec.") at 39-40.³ (emphasis added). Elsewhere in that mailer in large font it states, "The SEIU already feels like it's under siege by the Freedom Foundation, and we're just a tiny fraction of their size. Just imagine what we can do if we even the playing field just a little bit. ...Yes, Tom, I want to help discredit and defund the union bosses!" *Id.*

The Foundation also produced a television ad celebrating its success in persuading SEIU-represented home care workers to cease supporting their union. Lavitt Dec. at 06. (April 28, 2016 email). An emailing referencing this ad asks, "Would you chip in a few bucks to help keep this commercial on the air longer, and help us to broadcast in other communities throughout the state?" and is followed by a link and a button inviting donations, stating "Yes, I'd like to help out!" Lavitt Dec. at 07.

The Foundation's April 2016 letter clearly demonstrates the direct and central role the list of providers plays in fundraising and generating

³ Concurrent with this Supplemental Brief, Local 925 has filed a Motion to Allow Additional Evidence, along with a supporting declaration of Robert Lavitt, and attached exhibits.

revenue for the organization. Lavitt Dec. at 12 (April 2016 FF fundraising letter). McCabe announces that the Foundation’s employees “have been going door to door **with our list of SEIU ‘members’** to let them know about their ability to opt out of having their money confiscated by SEIU.” Id. (emphasis added). According to the letter, to date Foundation canvassers “have personally visited 12,135 homes and spoken to 5,218 healthcare and childcare providers.” Id.

In a separate fundraising solicitation, McCabe described the PRA request at issue in the litigation that led to *SEIU Healthcare 775NW*:

Last year we made a request to the Washington state Department of Social and Health Services (DSHS) to **release the names of thousands of family healthcare providers** being paid with taxpayer dollars.

Lavitt Dec. at 47 (McCabe May 29, 2015 letter) (emphasis added). The mailer went on to make a solicitation seeking contributions to support Freedom Foundation's ongoing efforts to obtain and use lists like the one in dispute here:

Won’t you join...A contribution of \$50, \$100, \$150, \$500 or even as much as \$1,000 or more today will help us in our work to liberate our state’s workers and entrepreneurs from union tyranny...And because the Freedom Foundation is recognized by the IRS as a nonprofit 501(c)(3) organization, your contribution is tax-deductible to the fullest extent of the law.

Id. at 49, 51 (emphasis added)(with enclosure for making donations “to help the Freedom Foundation at this critical time!”). In an August 2014

fundraising email, McCabe states, “we’ve implemented our plan to defund the union machine, and we’re employing the same strategy the left does to wins its battles: legislate, educate, litigate and community activate.” It’s followed by a plea to “please donate so we can do in Washington State what Scott Walker and my friend did in Wisconsin.” CP 108-109.

A November 2014 fundraising email from McCabe reports that, “we have implemented a plan to bankrupt SEIU, our state’s largest union.” CP 100. It then thanks contributors “for [their] continued support and investment...” CP 100. Another email solicitation for donations boasts a media headline that the Foundation “plans legal assault on labor.” CP 112 (June 2014 email). It offers a link so the recipient can contribute: “If you want to take down the union political machine... you can make a contribution right now.” *Id.*

The central role the Foundation’s anti-union message plays in its fundraising is illustrated in its November 10, 2014 fundraising letter, which contains a vitriolic anti-union call-to-arms: “We have to defeat and dismantle the union political machine once and for all...” CP 70. It boasts that the Foundation “has discovered the winning strategy against unions— but we need fellow patriots like you to sustain our efforts today, tomorrow, and the next day...A contribution of \$100, \$250, \$500,

\$1,000...or more today will help us in our work to liberate our state's workers and entrepreneurs from union tyranny." CP 75.

Each of these messages demonstrates the extent to which Freedom Foundation's aggressive anti-union efforts, and in particular, its use of lists obtained from the State, is part and parcel of its efforts to raise funds for itself. The Freedom Foundation has not just indirectly profited from the lists – like a newspaper which may use a list to aid in reporting – its use of the list plays an ongoing and central role in its fundraising campaign.

The Foundation's outreach also targets providers directly and encourages them to "opt out" of union membership. CP 115-116; CP 118. The Foundation's opt-out website does not provide a link to the Foundation's website, but does operate as a vehicle to future mailings and solicitations by the Foundation. The opt-out campaign is, stated simply, a means for the Foundation to increase its own revenues, and support for its own mission. Additionally, any provider who visits the Foundation's website will see a prominent link inviting donations. See CP 66, 79, 85.

These examples illustrate two related points: first, why economically injuring SEIU 925 will directly generate revenue or a financial benefit for the Foundation; and second, why the Foundation's obtaining the lists and contacting the providers may cause others to join the Foundation or donate money to the Foundation. Importantly, *SEIU*

Healthcare 775NW made clear “that the term ‘commercial purpose’ is not limited to situations in which individuals are directly contacted or personally affected.” Slip Op. at * 11.

The financial benefit to the Freedom Foundation is not attenuated or indirect. Like many organizations, the Foundation justifies its existence to its donors and supporters by touting actions it has taken to further the organization’s mission – here to “defund” and “bankrupt” public sector labor unions generally, and SEIU affiliated local unions in particular. Requesting provider lists, reaching out to providers, and repeatedly announcing those efforts to supporters and donors form the organization’s core fundraising cycle and indeed is the subject of its fundraising efforts.

C. Records That Reveal The Location Of Children Contain Personal Information And Are Exempt From Disclosure Under RCW 42.56.230(2)(a)(ii)⁴

Unlike the appellant in *SEIU Healthcare 775NW*, which argued that release of home care providers’ information would be “tantamount” to disclosing welfare recipients’ information (the latter of which is exempt from disclosure under the PRA), here, Local 925 has argued that the

⁴ *SEIU Healthcare 775NW* reads the PRA exemption for welfare recipients in RCW 42.56.230(1) narrowly and as applying only to personal information in files maintained for welfare recipients. Local 925 argued in its Opening and Reply briefs for a broader reading of what constitutes “in any files maintained for” welfare recipients. See, Appellant’s Reply/Cross-Response Brief at 18-20. Under Appellant’s view, the scope of what constitutes “in any files” applied to personal information that FFN providers handed over to the State. *SEIU Healthcare 775NW* appears to reject that perspective and forecloses this argument.

information set to be disclosed is necessarily also the personal information of a child. This is because the information set to be disclosed will contain the physical location where specific children receive care on a daily basis. See Appellant’s Opening Brief at 29-33. RCW 42.56.230(2)(a)(ii) exempts “personal information for a child enrolled in a public or nonprofit program serving or pertaining to children...including but not limited to early learning.” There is no privacy requirement. Thus, *SEIU Healthcare 775NW*’s holding does not disturb Local 925’s argument because in *SEIU Healthcare 775NW*, the Court held that “RCW 42.56.230(1) does not apply to the lists of individual providers,” whereas in this case, the cited exemption does apply directly to the lists of child care providers and their physical locations.

Local 925 does not rely upon the “linkage” argument in which the use of otherwise publicly available information enables the recipient “to obtain other personal information from various sources..” *SEIU Healthcare 775NW, supra* at 16, (quoting *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002)). In *Sheehan*, the requestor sought a list of police officer names. The County resisted and argued that one could use the names to track down the personal addresses (which were exempt from disclosure) from other sources. *Id.* at 15.

In the context of the personal information of children in the care of Family Friend and Neighbor (FFN) providers, the address of the provider discloses the child's physical location. There is no need to rely on "various sources" or engage in "linkage." Disclosing the FFN providers' address and location discloses the child's location when she or he is under the provider's care. This is the child's personal information.

D. Trial Court Correctly Issued a TRO To Enjoin DSHS from Disclosing Provider Lists

SEIU Healthcare 775NW, *supra*, supports Local 925's argument that the lower court committed no error when it granted a TRO preventing DSHS from disclosing provider records. In their cross appeal, the Freedom Foundation argues that the trial court erred when it granted Local 925 a TRO. The Foundation's argument confuses the elements of proof required for a TRO or a Preliminary Injunction, compared to those required for a Permanent Injunction. As was summarized by Division II in *SEIU Healthcare 775NW*:

In the context of RCW 42.56.540, a party seeking a TRO or preliminary injunction to prevent the disclosure of certain records must show *a likelihood that an exemption applies* and that the disclosure would clearly not be in the public interest and would substantially and irreparably damage any person or vital government functions.

SEIU Healthcare 775NW, *supra* at *5 (citing to emphasis added by Court). By contrast, in order to obtain permanent injunctive relief, a party must establish three elements:

(1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the act complained of will result in actual and substantial injury.

Id. (citing to *Huff v. Wyman*, 184 Wn.2d 643, 651, 361 P.3d 727 (2015); and *Nw. Gas Ass'n*, 141 Wash.App. at 115, 168 P.3d 443).

The Foundation's attempts to consolidate both standards is inapposite, and goes against established precedent. *See Ameriquest Mortgage Co. v. Office of Attorney General*, 177 Wn.2d 467,487, 300 P.3d 799 (party seeking preliminary injunction must only show a likelihood that an exemption applies). A TRO and Preliminary Injunction have a lower standard of proof, because they are both designed to preserve the status quo until a trial court can conduct a full trial on the merits. *McLean v. Smith*, 4 Wn.App. 394, 482 P.2d 798 (1971). Contrary to the FF's suggestion, the law is clear that the Court does not at the TRO stage need to resolve the merits of the issues for permanent injunctive relief. *Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141 Wn. App. 98, 116, 168 P.3d 443, 453 (2007). Therefore, *SEIU Healthcare 775NW* corroborates Local 925's argument that the trial court did not err by

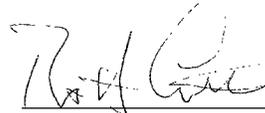
refusing to apply during the TRO hearing a heightened standard of proof required for a permanent injunction.

E. No Attorney Fees Should Be Awarded

The SEIU 775 Decision reinforces what Local 925 argued in its reply brief – that no attorney fees are appropriate in this situation where “a trial on the merits would ...have been fruitless had the trial court lifted the TRO.” *Slip Opinion* at *31. The exact same reasoning applies here and equitable principles do not justify awarding the Foundation its attorney fees in seeking to dissolve the trial court’s TRO.

RESPECTFULLY SUBMITTED this 9th day of May, 2016.

By:



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DECLARATION OF SERVICE

I, Genipher Owens, hereby declare under penalty of perjury under the laws of the State of Washington that on May 9, 2016, I caused the foregoing SEIU Local 925's Supplemental Brief to be filed with the Court of Appeals, Division II, via the Court of Appeals electronic filing system and a true and correct copy of the same to be sent via email and US First Class mail, per agreement of counsel, to the following:

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Transmittal Letter

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