

No. 76630-9-I

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

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SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,  
Respondent/Plaintiff,

v.

FREEDOM FOUNDATION,  
Appellant/Defendant,

and

UNIVERSITY OF WASHINGTON,  
Defendant below.

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**OPENING BRIEF OF APPELLANT FREEDOM FOUNDATION**

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## I. INTRODUCTION

Below, the Superior Court erred by granting three injunctions based on inapposite authority. Further, the Superior Court erred and exceeded its jurisdiction by granting a motion to stay the trial after these appellate proceedings began.

The appeal arises under the Public Records Act (“PRA”), which courts must construe broadly in favor of disclosure. RCW 42.56.030. The central issue is whether approximately 3,800 pages of government employee-emails (“UW e-mails”) housed on government servers qualify as “public records” under the PRA.

On June 6, 2016, the Superior Court acknowledged that granting Plaintiff Service Employee International Union Local 925 (“SEIU”)’s requested injunction would constitute reversible error, and then proceeded to enter a Temporary Restraining Order solely to delay adjudication of the matter. On August 5, 2016, the Superior Court granted a preliminary injunction based upon *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 357 P.3d 45 (2015), which the court later conceded was distinguishable because *Nissen* dealt with public records housed on public employees’ private devices, a factual anomaly not present here. Finally, on March 27, 2017, the Superior Court granted a permanent injunction based on *Tiberino v. Spokane Cty.*, 103 Wn. App. 680, 13 P.3d 1104 (2000), despite the parties’ agreement that

the instant e-mails are *not* purely personal, the key determination in *Tiberino*. At no point did the Superior Court pay heed to the Legislature's strong mandate to construe the definition of 'public records' broadly in favor of disclosure. *See* RCW 42.56.030. The series of injunctions wrongfully delayed the adjudication of the Foundation's rights to public records for over nine months. Finally, after Defendant Freedom Foundation ("Foundation") filed a Notice of Appeal and other appellate documents, the Superior Court granted SEIU's Motion to Stay the Trial despite the court's lack of jurisdiction. The Foundation appeals the aforementioned orders herewith.

## **II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

### **Assignments of Error**

The Superior Court erred by:

1. Granting SEIU's Motion for Summary Judgment and Permanent Injunction;
2. Granting SEIU's Motion for Preliminary Injunction;
3. Granting a *sua sponte* TRO;
4. Denying the Foundation's Combined Motion to Strike and Motion for Sanctions; Granting Petitioner's Motion to Change Trial Date/Stay Proceedings.

### **Issues Pertaining to Assignments of Error**

1. Did the Superior Court err by granting SEIU's Motion for Summary Judgment and Permanent Injunction when it predicated its ruling on *Tiberino v. Spokane Cty.*, 103 Wn. App. 680, 13 P.3d 1104 (2000), which is undisputedly inapposite because no party asserts that the records are purely personal?

2. Did the Superior Court err in granting SEIU's Motion for a Preliminary Injunction when it predicated its ruling on *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 357 P.3d 45 (2015), which is inapposite because no party asserts that the UW e-mails are stored on personal devices?

3. Did the Superior Court err in granting a *sua sponte* TRO when it failed to find that any of the requirements for a TRO were satisfied and entered the TRO solely to allow SEIU additional time to prepare its case?

4. Did the Superior Court err in denying the Foundation's Combined Motion to Strike and Motion for Sanctions and in granting SEIU's Motion to Change Trial Date/Stay Proceedings when it lacked jurisdiction?

### **III. STATEMENT OF THE CASE**

**1. The Foundation submits public records requests to promote government transparency and accountability.**

The Foundation is a non-profit organization that seeks to promote

individual liberty, free enterprise, limited accountable government, and government transparency. *See Appendix B* (Declaration of Maxford Nelsen). As part of its mission, the Foundation requests public records to ensure accountability and transparency among government employees using government-issued e-mail addresses. *Id.* Several unions—among them SEIU—have filed numerous frivolous lawsuits to prevent the disclosure of nonexempt public records to the Foundation. CP 361-362. This case is no different.

**2. The Foundation submitted a public records request to UW for e-mails pertaining to public-sector union organizing.**

On December 29, 2015, the Foundation submitted a public records request to the University of Washington (“UW”) for public records relating to four UW faculty members, including Professor Robert Wood. CP 39. The Foundation specifically sought records in Mr. Woods’ possession with specific labor-related terms, e-mails sent from entities associated with union organizing, and all e-mails sent to [aaup@u.washington.edu](mailto:aaup@u.washington.edu). CP 39.

The UW chapter of the American Association of University Professors (“AAUP”) operates an email listserver entitled “Faculty Issues and Concerns” and uses the UW email account [aaup@u.washington.edu](mailto:aaup@u.washington.edu). CP 100. 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." CP 100-101.

UW's Office of Public Records ("OPR") forwarded the Foundation's request to Professor Wood and asked him to provide the responsive records directly to OPR for review. CP 388. Professor Wood provided OPR with 3,913 pages of e-mails and attachments ("UW emails"). CP 389. OPR reviewed the 3,913 records and noted that "the vast majority of the emails are ostensibly sent to or from Professor Wood's UW email address, or to or from the AAUP listserver, which also has a UW email address." CP 389. OPR concluded that "it was not clear that the emails are unrelated to Professor Wood's position at the University, and/or that they did not relate to the functioning of the University as an agency." CP 389. Ultimately, OPR "was unable to determine that the records were *not* public records," applied what it believed to be appropriate PRA exemptions, and notified Professor Wood that UW would release the records pursuant to the PRA by April 26, 2016. CP 389.

**3. UW's Administrative Policy and Washington's Ethics Laws explicitly prohibit the use of state resources for personal support of an outside organization.**

UW explicitly prohibits its employees from using state resources, including UW email, to promote or support an outside organization. Its

Administrative Policy puts employees on notice of this prohibition:

University employees may not use state resources (including any person, money, or property) under their official control or direction or in their custody, for personal benefit or gain, or for the benefit or gain of any other individuals or outside organizations...

University resources, including facilities, computers, and equipment, may **not** be used for the following purposes:...Supporting, promoting, or soliciting for an outside organization or group unless otherwise provided by law and University Policy.

CP 653, 655 (emphasis in original). It further notifies employees that such use may violate Washington's Ethics Laws. CP 655, 657. UW also warns its employees that there is no expectation of privacy in communications on UW resources:

[E]mployees are reminded that there should be no expectation of privacy with regard to the use of University communication technologies (e.g., email, facsimile transmissions, voicemail, and websites visited). For example, communications resulting from University computers and equipment may be subject to disclosure under the Public Records Act...

CP 655. Despite the Administrative Policy's clear prohibitions, Professor Wood declared under oath on April 24, 2016 that "UW does not prohibit

personal use of UW email accounts.” CP 42. SEIU also claimed in its pleadings that “UW does not prohibit personal use of such email accounts.” CP 4.<sup>1</sup>

UW’s Administrative Policy comports with Washington’s ethics laws which explicitly prohibit the use of state resources for personal benefit:

(1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another. (2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.

RCW 42.52.160(1), (2). Washington’s Executive Ethics Board, the agency charged with enforcing Washington’s ethics laws, has repeatedly held that the use state resources for union organizing or other ways that benefits unions violates RCW 42.52.160.<sup>2</sup>

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<sup>1</sup> While Professor Wood and SEIU might have been referring to “de minimis” personal use of state email resources, it is undisputed that approximately 3,800 pages of e-mails is not a “de minimis” usage.

<sup>2</sup> 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](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](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](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](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*

**4. SEIU sought an injunction by arguing that the UW e-mails were not disclosable because it concerned a UW employee's use of state resources to personally support an outside organization.**

On April 25, 2016, SEIU filed this lawsuit, seeking to enjoin Professor Wood's UW e-mails on the basis associational standing because of Professor Wood's SEIU membership. CP 1-15, 20-21. SEIU's primary argument is that Professor Wood's use of state resources, resulting in approximately 3,800 pages of UW e-mails, "are completely outside the scope of [Professor Wood]'s job duties and responsibilities[,]" CP 89, and are thus do not qualify as 'public records' under Washington's Public Records Act ("PRA"). *See also* CP 7, 23. SEIU had Professor Wood declare under oath that his union-organizing and AAUP activities "are not part of my job duties and responsibilities as a Professor at UW." CP 101. SEIU's Organizing Director also declared under oath that the UW e-mails "do not relate to conduct and functioning of the government" and release of the e-

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*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](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...").

mails “would chill union organizing efforts, including the participation of SEIU 925 members and faculty in such efforts.” CP 35. Although SEIU claims to have standing through Professor Wood, its primary argument alleges that Professor Wood used state resources, to the tune of 3,800 e-mails, for his own personal benefit and support of AAUP and SEIU, which are not a part of his official duties—in other words, its primary argument for nondisclosure sets up Professor Wood for a massive *prima facie* ethics violation. *See* RCW 42.52.160.

**5. The Superior Court erroneously granted three injunctions.**

On May 18, 2016, SEIU filed a Motion for Preliminary Injunction seeking to enjoining the UW e-mails. CP 83-94. In its Motion, SEIU conceded that at least some of the records “clearly relate to UW business” and failed to specify what records it sought to enjoin. CP 85-86, 89-90.

On June 10, 2016, during oral arguments for SEIU’s Motion for a Preliminary Injunction, the Superior Court acknowledged that granting SEIU’s requested relief would constitute reversible error because some of the UW e-mails were undisputedly public and non-exempt. CP 464-465. Regardless, the court granted a *sua sponte* TRO enjoining the disclosure of all the UW e-mails until SEIU clarified which records it actually sought to enjoin. CP 267-270. The court also ordered UW to release the records SEIU did not dispute were public by July 6, 2016, and ordered SEIU to catalog

and describe with sufficient particularity SEIU's position as to the public and non-public status of all records in dispute. CP 269. On or around July 6, 2016, the Foundation received approximately 100 pages of e-mails and attachments pursuant to SEIU's subsequent categorization of undisputedly public records, thereby reducing the number of disputed records to approximately 3,800 pages.

On August 5, 2016, following a nearly two-month-long TRO, the court held a second preliminary injunction hearing. CP 498-568. During oral arguments, UW's counsel conceded that its policy states that all e-mails on the university's systems are public records. CP 519. UW's only exception was for de minimis use of entirely personal records, such as "Honey, I'm going to bring home the milk." CP 519. However, even then, UW's counsel conceded that "*if you know you have no expectation of privacy in your employer's e-mail, you don't put in there those things that are personal to you.*" CP 519 (emphasis added). Despite these admissions, the court entered an oral order granting SEIU's Motion for Preliminary Injunction, primarily relying on *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 357 P.3d 45 (2015):

And further case law in *Nissen* particularly specifies that within the scope of employment for purposes of the PRA, it's only when the job requires it, the employer directs it, or it further the employer's interest. Well, to the extent that union activity could arguably maybe be related to the conduct of government because maybe if they do unionize, it might affect union negotiations and pay rates and so forth,

well, the job doesn't require it. The employer certainly isn't directing it. And it doesn't further the employer's interest in any way, shape, or form. So, I'm left with the firm conviction that none of these documents in Category 2 through 5 can be categorized as public records.

CP 555-556. When the parties held a conference call to discuss the drafting of the written order, counsel for UW conceded that *Nissen* did not apply to this case. CP 492-496, 585-586, 600-603, 605-608.

On September 23, 2016, the Superior Court entered a written order that records are only public if they are created within the scope of employment, even if they are otherwise created on a public e-mail server and do not pertain to purely personal matters. CP 291-298.

On October 2, 2016, the Foundation filed a Motion for Reconsideration because *Nissen*'s 'scope of employment' test only applies to private devices, which are not at issue in this case. CP 299-312. The Court denied the Foundation's Motion without explanation and the parties proceeded to dispositive briefings. CP 313-314.

On February 24, 2017, SEIU filed a Motion for Permanent Injunction. CP 315-335. In its Motion and supporting declarations, SEIU split approximately 3,800 pages of UW e-mails into four categories:

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. It argued that all four categories were private. CP 159-161.

On March 23, 2017, seven months after the second injunction hearing, the parties met for a third time before the Superior Court. VRP 1, Mar. 24, 2017. During oral argument, the court now acknowledged that *Nissen* was distinguishable from this case. *Id.* at 95:24-96:4. Yet it still struggled with the application of the definition of ‘public records’ to UW e-mails. *Id.* at 95:14-20. It considered the matter over the weekend. *Id.*

The following Monday, March 27, 2017, the Superior Court entered a ruling granting SEIU’s Motion for Permanent Injunction, this time relying on *Tiberino v. Spokane Cty.*, 103 Wn. App. 680, 688 13 P.3d 1104 (2000) (holding that a county employee’s purely personal e-mails were public records because the county collected them in preparation for litigation over her termination, a proprietary function). CP 686-697. The Superior Court reasoned that:

the obvious inference derived from the *Tiberino* court’s analysis is that had the e-mails not been printed in preparation for litigation, the e-mails would not be related to a proprietary function, and, therefore, would not be a public record as defined by statute. Similar to the e-mails in *Tiberino*, the e-mails at issue in the case at bar, without more, do not relate to the conduct of government or proprietary

function. Accordingly, the e-mails are not public records as defined in RCW 42.56.010(3) and are not subject to disclosure.”

CP 693-694. The Superior Court’s order contained no reference to the undisputedly non-purely personal nature of the UW e-mails, which was a key fact in *Tiberino*.

**6. The Superior Court erroneously granted a motion to stay the trial after the appellate court had assumed jurisdiction.**

Also on March 27, 2017, the Foundation filed a notice of appeal for an appeal as a matter of right. **Appendix C** (Freedom Foundation’s Combined Motion to Strike and Motion for Sanctions and Supporting Declaration of Stephanie Olson) at Ex. A. Six days later, on April 3, 2017, SEIU filed a Motion to Change Trial Date and for Stay of Proceedings. **Appendix D** (SEIU’s Motion to Change Trial Date/Stay of Proceedings). The Foundation’s counsel repeatedly informed SEIU’s counsel that the Superior Court no longer possessed jurisdiction over the case, including staying a trial. **Appendix C** at Ex. C, D, E. Because SEIU persisted in filing its Motion, the Foundation was forced to file a Motion to Strike SEIU’s Motion. **Appendix C**. The Foundation also filed a Motion for Sanctions, seeking reasonable attorney fees for having to respond to a meritless motion where the court lacked jurisdiction. *Id.* The Superior Court denied the Foundation’s Motion and granted SEIU’s. The Foundation appeals

herewith.

#### IV. ARGUMENT

##### 1. **The Superior Court erroneously granted a permanent injunction.**

###### *a. Standard of review and burden of proof.*

SEIU carries the burden of proving that the UW e-mails should be enjoined from disclosure, and the standard of review is de novo. *Serv. Emps. Int'l Union Local 925 v. Freedom Found.*, 197 Wn. App. 203, 212, 389 P.3d 641 (2016); *Tiberino v. Spokane County*, 103 Wn. App. 680, 686, 13 P.3d 1104 (2000); *see also Hoggatt v. Flores*, 152 Wn. App. 862, 868, 218 P.3d 244 (2009). To obtain an injunction, the moving party must prove that: 1) it has a clear legal or equitable right; 2) there is 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. *Id.* The criteria must be examined through the lens of equity, including balancing the relative interests of the parties and, if appropriate, the interests of the public. *Id.* In a PRA case, a party seeking to enjoin the disclosure of public records must prove that 1) the record in question specifically pertains to that party; 2) an exemption applies, and 3) the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function. *SEIU Healthcare 775NW v. State, Dep't of Soc.*

*& Health Servs.*, 193 Wn. App. 377, 392, 377 P.3d 214 (2016); *see also* RCW 42.56.540 (“§ 540 standard”). This appeal concerns the threshold question of whether UW e-mails qualify as ‘public records’ under the PRA, which is dispositive of whether SEIU has a legal right in preventing disclosure.

Here, the Superior Court erroneously granted a permanent injunction for at least three reasons. **First**, SEIU lacks standing. **Second**, 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**, even if there was any ambiguity as to whether UW e-mails qualified as ‘public records,’ the PRA requires that ambiguities be construed in favor of disclosure. Because the Superior Court granted a permanent injunction despite well-established law precluding such relief, it should be reversed.

*b. SEIU lacks standing.*

The court erred in granting SEIU’s Motion for a Permanent Injunction because SEIU lacks associational standing. A party relying on associational standing cannot conduct litigation in a way that harms the interests of those it claims to represent. *See Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 342-43 (1977) (the purpose of associational standing is to allow an entity to seek relief *for its members’ benefit*); *Save a Valuable Env’t v.*

*City of Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978); *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 103 Wn. App. 764, 768, 14 P.3d 193 (2000) (only allowing associational standing if the claims do not require the participation of the association's individual members). Public employees who use state resources for private gain—including for union organizing—commit a prima facie violation of Washington's Ethics Statutes. RCW 42.52.160.<sup>3</sup>

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<sup>3</sup> See *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...”) See 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](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); *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](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](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](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](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 (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).

Here, SEIU claims to have standing in this case through associational standing. CP 318.<sup>4</sup> Yet its primary argument harms Professor Wood by rendering him liable for a serious ethics violation. It primarily argues that the UW e-mails are non-public records because Professor Wood extensively used state resources for his own personal benefit and in support and promotion of an outside organization. Washington’s Executive Ethics Board, the administrative agency charged with implementing ethics laws, has explicitly held that the use of state resources for a union’s benefit violates RCW 42.56.160.<sup>5</sup> Thus, SEIU’s own argument means that Professor Wood perpetrated a prima facie violation of Washington’s ethics statutes. *See supra* n. 4. SEIU may not assert associational standing to represent Professor Wood when its primary argument places its associate, Professor Wood, in legal jeopardy. *Cf. Hunt*, 432 U.S. at 342-43; *Int’l Ass’n of Firefighters, Local 1789*, 103 Wn. App. at 768. SEIU lacks associational

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<sup>4</sup> SEIU failed to argue below that it had standing in its own right, which should preclude it from doing so for the first time on appeal. RAP 2.3(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (“The general rule is that appellate courts will not consider issues raised for the first time on appeal.”). If SEIU now claims its own standing, it only has standing to seek an injunction for the records listed in Category 1.

<sup>5</sup> *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](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](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);

standing, and therefore the Superior Court erred in granting a permanent injunction in its favor.

*c. The UW e-mails qualify as 'public records' under Washington's PRA.*

The Superior Court also erred by ruling that the UW e-mails did not qualify as 'public records' under the PRA. *See* CP 693-94. In Washington, “[a] ‘public record,’ subject to disclosure under the Act includes [1] any writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics[.]” *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746, 958 P.2d 260 (1998); *see also* RCW 42.56.010(3). The parties do not dispute that the UW e-mails are writings that were prepared, owned, used or retained by UW; the sole issue is whether the UW e-mails relate to the conduct of government or the performance of any governmental or proprietary function.

Courts “broadly interpret the second element of the public record test to allow disclosure.” *Belenski v. Jefferson Cty.*, 187 Wn. App. 724, 734, 350 P.3d 689 (2015); *Johnson*, 135 Wn.2d at 746. Records existing on an agency’s server are presumptively public unless they are purely personal in nature. *See* 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.’”); *see also Belenski*, 187 Wn. App. at 734-38 (internet access logs generated by county-owned computers were public because they recorded government employees use of the internet); *Tiberino*, 103 Wn. App. at 687-88 (purely personal e-mails on a government server were public records because the county took additional steps of printed them for litigation over termination, a proprietary function). “This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government.” *Does v. King County*, 192 Wn. App. 10, 22, 366 P.3d 936 (2015) (citing *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 874, 357 P.3d 45 (2015)). The records need only *relate* to the conduct of government or the performance of any governmental or proprietary function; records need not show direct government action. *King Cty.*, 192 Wn. App. at 23 (“RCW 42.56.010(3) does not, by its plain language, limit the definition of ‘public record’ to those showing only direct government action (e.g., a filmed traffic stop), but rather uses broad language to capture information *relating* to the conduct of government or the performance of any governmental or proprietary function prepared.”) (emphasis in original) (internal brackets removed). The breadth in which courts have interpreted the term ‘public record’ is demonstrated by over

three decades of PRA jurisprudence. When presented with the threshold question of whether records at issue qualify as ‘public records,’ every Washington appellate court has held in the affirmative,<sup>6</sup> with the exception of one case that dealt with purely personal e-mails on private devices. *See Forbes v. City of Gold Bar*, 171 Wn. App. 857, 868, 288 P.3d 384 (2012).

*Tiberino* and *Belenski* illustrate courts’ broad interpretation of ‘public records.’ In *Tiberino*, the court broadly construed ‘public records’ to include

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<sup>6</sup> *See West v. Vermillion*, 196 Wn. App. 627, 636-37, 384 P.3d 634 (2016) (city council members’ work-related e-mails on their personal e-mail accounts were public records); *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 877-880, 357 P.3d 45 (2015) (prosecutor’s work-related text messages on private cell phones were public records); *Belenski v. Jefferson Cty.*, 187 Wn. App. 724, 734-35, 350 P.3d 689, (2015) (county employees’ internet access logs were public records); *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 717, 354 P.3d 249 (2015) (records from functional equivalent of a government agency were public records); *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010) (metadata on government computers were public records); *Tiberino v. Spokane Cty.*, 103 Wn. App. 680, 687-88, 13 P.3d 1104 (2000) (purely personal e-mails on a government server were public records because the county printed e-mails for litigation over her termination, a proprietary function); *Concerned Ratepayers Ass’n v. Public Utility Dist. No. 1 of Clark Cty.*, 138 Wn.2d 950, 960-61, 983 P.2d 635 (1999) (technical documents used by the government and therefore public records); *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746, 958 P.2d 260 (1998) (records of money paid by Indian tribes into common fund related to government conduct because the state received money into common fund, which impacted state government); *Servais v. Port of Bellingham*, 127 Wn.2d 820, 828, 904 P.2d 1124 (1995) (research data prepared by consulting firm for purposes of planning Port related to government function and were public records); *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 324, 890 P.2d 544 (1995) (settlement agreement containing info about City’s termination of employee were public records); *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993) (prosecutor’s cross-examination documents were public records); *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 566, 618 P.2d 76 (1980) (patients’ medical records at state-owned facility were public records b/c public could learn about administration of health care services from the records). *See also Dragonslayer, Inc. v WA State Gambling Comm’n*, 139 Wn. App. 433, 445-46, 161 P.3d 428 (2007) (remanded for further inquiry into whether private party’s audited financial statements were related to government conduct).

purely personal e-mails that the government had gathered in preparation of litigation over an employee's termination. 103 Wn. App. 680, 687-88, 13 P.3d 1104 (2000). Tiberino was fired because she spent an inappropriate amount of work time and resources on personal matters. *Id.* at 684-85. A reporter requested copies of her work e-mails, many of which were purely personal and sent to and from her mother and sister. *Id.* Yet, realizing that it must broadly construe the definition of 'public records' in favor of disclosure, the court held that the e-mails were public because the government had collected them in anticipation of litigation. *Id.* at 687-88.

In *Belenski*, the court broadly construed 'public records' to include all of a county's internet access logs ("IALs"). 187 Wn. App. at 738. The county's IALs recorded all the internet activities of every county employee. *Id.* at 734. The *Belenski* court reasoned that county employees used the internet to obtain information to perform their work, and therefore the IALs contained information related to the conduct of government. *Id.* at 734-35. Importantly, the *Belenski* court specifically distinguished *Tiberino* because *Tiberino* only concerned purely personal e-mails:

But in *Tiberino*, it was undisputed that the e-mails were purely personal in nature even though they were generated by a government employee on a government computer. Here, in contrast, the County does not claim that any of the requested IALs are purely "personal" in nature. We therefore find *Tiberino* unhelpful on the issue of whether the requested IALs are public records.

*Id.* at 737-38.

Here, no party claims that the UW e-mails are purely personal in nature.

SEIU concedes as much by their own categorization:

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 Listserv (“**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. According to SEIU’s categorization, the UW e-mails contain information related to public-sector union organizing (**Category 1**) and public-sector faculty concerns with public-sector employment, which relates to unionizing efforts (**Categories 2 and 4**). *See also supra* Part III.2 (noting the AAUP UW Chapter Listserv titled “Faculty Issues and Concerns” and describing the mission and statement of AAUP). **Category 3** is non-descript, but since SEIU claims that *all* of the UW e-mails are personal and unrelated to UW business, it can only be assumed that Category 3 is similar to Categories 1, 2, and 4. At the very least, Category 3 cannot be considered to consist of purely personal e-mails because SEIU has never alleged as such. Further, in a largely unprecedented and unusual step, the Superior Court relied on the SEIU’s categorizations—the

interested party seeking the injunction, not the agency highly incentivized to provide accurate and non-biased categories—without relying on UW’s categorizations or conducting an in-camera review.<sup>7</sup>

Such categories are a far cry from the *Tiberino* e-mails, which were sent to family members about purely personal issues. *Tiberino*, 103 Wn. App. at 688. Because the UW e-mails are undisputedly not purely personal, *Tiberino* does not apply. Further, because the UW 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. *See* WAC 44-14-03001(2). SEIU failed to overcome this strong presumption. The UW e-mails squarely satisfy the broadly-construed definition of ‘public records’ for at least four reasons.

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<sup>7</sup> Under the PRA, the only categorizations that carry any weight are those of the agency. The PRA only allows agencies and courts—not biased third parties seeking an injunction—to determine if the PRA and its exemptions apply to specific records. *See* RCW 42.46.550(1) (“The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.”); RCW 42.56.210(3) (requiring agencies to include a statement of the specific exemptions when refusing to disclose records); *West v. Vermillion*, 196 Wn. App. 627, 637 n. 3, 384 P.3d 6343 (2016) (“We are mindful of the distinction between the terms ‘produce’ and ‘disclose,’ along with the variations of each word...term ‘produce’ only contemplates production to the city, **which then reviews the entire set of responsive records before deciding what will be disclosed to the requester.**”) (emphasis added). This comports with the PRA’s enforcement provisions, which only allow fines against an agency for refusing or delaying the disclosure of public records. *See* RCW 42.46.550(4); *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 386, 374 P.3d 63 (2016). Allowing a biased third party’s categorizations to replace agencies’ and courts’ strong PRA obligations contradicts the PRA’s explicit text and torpedoes the PRA’s weighty incentives placed on agencies to disclose records.

**First**, records containing information about faculty organizing and “Faculty Issues and Concerns” relate to the performance of a proprietary function of the government. Government employment is a proprietary function of government. *Tiberino*, 103 Wn. App. at 688; *Yakima Newspapers, Inc., v. City of Yakima*, 77 Wn. App. 319, 324, 890 P.2d 544 (1995). E-mails containing information related to concerns about public employment and efforts at labor organizing necessarily relate to government employment. *Id.* Any narrower construction would circumvent the PRA’s pro-disclosure intent and clear mandate. RCW 42.56.030; RCW 42.56.550(3). The UW e-mails contain information related to government employment, and therefore qualify as ‘public records’ under the PRA.

**Second**, records containing information relating to the provision of public education relate to government conduct. Provision of public education is a government function. RCW 28B.07.010 (“The legislature finds that the state has a vital interest in ensuring that higher education institutions are maintained in the state in sufficient numbers and located in such locations, as to be accessible to as many citizens as possible. Adequate educational opportunities are essential to the economic, intellectual, and social well-being of the state and its people.”). Public university faculty members’ efforts to organize relate to the provision of public education. Unionization of faculty may directly relate to faculty salaries, appointment,

promotion, evaluation, and tenure—topics obviously relating to the provision of public education. *See* RCW 41.76.010(2) (“Permissive subjects of bargaining include, but are not limited to, criteria and standards to be used for the appointment, promotion, evaluation, and tenure of faculty.”). Communications among faculty relating to and leading up to the certification of a union relate to the appointment, promotion, evaluation and tenure because those are the very issues that propel and guide the purported need for a union in the first place.

Faculty concerns and issues also relate to provision of public education. Indeed, the very mission of the UW chapter of AAUP seeks to influence and structure the provision of public education:

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.

CP 100-101 (internal quotations omitted) (emphasis added). In sworn testimony, *Professor Wood concedes that the UW e-mails inherently relate to the provision of public education, a government function*. Thus, the UW e-mails qualify as ‘public records’ under the PRA.

**Third**, records containing information about public-sector labor organizing relate to a proprietary function of the government. The Washington Legislature has expressly codified and encouraged the organization of public faculty by creating an entire Act to establish the parameters and rights of public faculty labor organization. Ch. 41.76 RCW; RCW 41.76.001(3). Before an election can be held to certify an exclusive bargaining representative, at least thirty percent of faculty members must demonstrate their support. That involves much coordination and communication from public faculty members before an election even happens. The UW e-mails document this coordination and communication and therefore relate to the proprietary function of the government regarding collective bargaining.

**Fourth**, records containing information that will necessary affect state budgets and financing relate to government conduct. Creating and adhering to state-funded budgets is a government function. Unlike private sector unions, public-sector unions' political advocacy, lobbying, campaign donations, and bargaining are directed at the employer they negotiate with during collective bargaining—the government. Even the U.S. Supreme Court has recognized the intricately intertwined relationship public-sector unions and the government:

In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. In the years since [*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)] as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home. *Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easier to see. Collective bargaining concerns the union's dealings with the employer; political advocacy and lobbying are directed at the government. *But in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.*

*Harris v. Quinn*, 134 S. Ct. 2618, 2632-33 (2014) (emphasis added). Once certified, a Union negotiates with the government in both its governmental and proprietary functions. The government must decide how to appropriate and apportion budgetary money and resources – governmental issues. The government, as employer, must also make personnel, staffing, and workplace condition decisions – proprietary issues. And the government must reach an agreement on these issues with a Union. RCW 41.76.050. Indeed, the very nature of public-sector unionization inherently relates to government conduct and functions. *Harris*, 134 S. Ct. at 2632-33.

Yet, despite the numerous reasons why the UW e-mails qualify as ‘public records’ under the PRA, the Superior Court ignored the e-mails’ actual content. This omission itself is baffling—the whole point of the

second element of the ‘public records’ definition is to evaluate the content of records at issue to determine if the records do, in fact, satisfy the second element. The Superior Court skipped the very analysis necessary to answer the question before it. Instead, it summarily held that the UW e-mails were not public records because they were not printed in preparation of litigation, like in *Tiberino*. CP 694. Of course, as previously discussed, *Tiberino* is entirely inapposite, because its holding was predicated on the key fact that Tiberino’s e-mails were purely personal.

The Superior Court’s holding also runs afoul of *Belenski* (which specifically limited *Tiberino*’s application to purely personal e-mails); *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010), *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 566, 618 P.2d 76 (1980), and every other Washington case for the last three decades in which appellate courts have found that the records at issue were public despite not being printed by the government in anticipation of litigation. *See supra* n. 6. Records that contain information about public-sector union organizing or public faculty issues and concerns clearly implicate government conduct and governmental proprietary functions. RCW 42.56.010(3). The Superior Court erred in holding otherwise.

*d. Even if it was ambiguous if UW e-mails qualified as public records, the PRA requires courts to construe ambiguities in favor of disclosure.*

It is clear that UW e-mails that are undisputedly not purely personal, but rather relate to public-sector union organizing and faculty issues, qualify as ‘public records’ under the PRA. However, even if this question was a close call, the Superior Court erred by not construing the definition of ‘public records’ to favor disclosure. 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.”) (quoting *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 127, 580 P.2d 246 (1978)). 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:

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.

RCW 42.56.030. *See also City of Federal Way v. Koenig*, 167 Wn.2d 341, 343, 217 P.3d 1172 (2009) (“Washington’s Public Records Act (PRA), chapter 42.56 RCW, gives the public access to the public records of state and local agencies, with the laudable goals of governmental transparency and accountability.”).<sup>8</sup> 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.

Here, the very fact that the Superior Court viewed the definition of ‘public record’ as ambiguous means it should have sided in favor of

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<sup>8</sup>*See also DeLong v. Parmelee*, 157 Wn. App. 119, 145, 236 P.3d 936 (2010) (“The PRA allows individuals to make informed decisions in their government...[a]nd the PRA’s declaration of policy states that full access to information concerning the conduct of government...must be assured as a fundamental and necessary precondition to the sound governance of a free society.”); *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 466, 229 P.3d 735 (2010) (“The PRA is a forceful reminder that agencies remain accountable to the people of the State of Washington.”).

disclosure. *PAWS II*, 125 Wn.2d at 251. The court repeatedly stated on the record that it was struggling with the definition of public records. VRP 95:12-96:97:24, March 24, 2017. But the "struggle" itself provided the answer. "Public record," like any other term in the statute, must be construed to favor disclosure. RCW 42.56.030. Courts have explicitly required a broad construction of the second element of the public records test. *Belenski*, 187 Wn. App. at 734; *Johnson*, 135 Wn.2d at 746. The PRA's robust and well-established policy is this: *close calls go to the rquestor*. The Superior Court ruled in the other direction, and erred in doing so.

**2. The Superior Court erroneously granted a preliminary injunction.**

*a. Standard of review and burden of proof*

SEIU carries the burden of proving that the UW e-mails should have been preliminarily enjoined from disclosure, and the standard of review for injunctions issued under the PRA is also de novo. *SEIU Healthcare 775NW v. State, Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 377 P.3d 214 (2016). At the preliminary injunction stage, SEIU must prove a likelihood of success on the merits. *Id.* at 392-93. Here, largely by the Superior Court's own admissions, and omissions, SEIU failed to prove a likelihood of success for both injunction issues on June 10, 2016 and August 5, 2016. The

erroneous injunction unjustly prolonged the release of public records for an additional *nine months* until the summary judgment hearing.

*b. The Superior Court erred in granting a second injunction because Nissen does not apply.*

The Superior Court erred on August 5, 2016 because it predicated its issuance of a preliminary injunction on an inapposite case. The Superior Court ruled that, in accordance with *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 357 P.3d 45 (2015), records must be created within the scope of employment to qualify as ‘public records’ under the PRA. CP 296. Because the UW e-mails were not created within the scope of Professor Wood’s employment (according to the Superior Court), the court reasoned that the UW e-mails were not public records. CP 296.

However, *Nissen* was quite clear that the ‘scope of employment’ test only applies to records on public employees’ *private e-mail accounts or devices*. *Id.* at 877; *see also Forbes v. City of Gold Bar*, 171 Wn. App. 857, 864, 288 P.3d 384 (2012), *rev denied*, 177 Wn.2d 1002, 300 P.3d 415 (2013) (“Because city officials used their private e-mail accounts to conduct city business, the city hired an [IT] person...to obtain the documents from various individual’s *private e-mail accounts*.”) (emphasis added). *Nissen* actually *extended* the PRA’s reach to public employees’ private devices,

and thus demonstrates how broadly courts are willing to read the PRA to favor disclosure. The ‘scope of employment’ limitation makes sense for individuals’ private devices because it prevents the government from delving into public employees’ purely personal accounts and devices, merely because they happen to work for the government.

Division II recently affirmed the ‘scope-of-employment’ test in *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). There, the court held that e-mails in a city council member’s personal e-mail account were capable of being public records. *Id.* at 637. It reasoned that “*Nissen* squarely addressed this argument and held that an agency’s employees or agents must search their own files, devices and accounts and produce any public records, including e-mails, to the employer agency that are responsive to the PRA request.” *Id.* at 636-37.

Here, *Nissen*’s scope-of-employment test does not apply because there are no private devices or accounts at issue. “[T]he vast majority of the emails are ostensibly sent to or from Professor Wood’s UW email address, or to or from the AAUP listserv, which also has a UW email address.” CP 389. The Superior Court later conceded that *Nissen* was distinguishable from this case and inapposite. VRP 95:23-96:4 (“If I could just kick back and rely on *Nissen* and not acknowledge the fact that we’re not talking about a State agency server there, I could go home and feel comfortable. But

you're right; it—it is distinguishable, and they even make points in there to say how it's distinguishable.”). The Superior Court's wrongful preliminary injunction delayed the adjudication of the Foundation's rights to public records by an additional seven months. Because *Nissen's* 'scope of employment' limitation does not apply to the UW e-mails, the Superior Court erred in granting SEIU's Motion for Preliminary Injunction on August 5, 2016 and its ruling should be reversed.

*c. The Superior Court erred in granting a sua sponte and standardless TRO.*

The Superior Court also erred in issuing a *sua sponte* TRO on June 10, 2016, because it failed to make any of the findings necessary to lawfully issue a TRO. In order to obtain a TRO, the moving party must show that it is likely to prove: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that threats complained of are either resulting in or will result in actual and substantial injury. *See SEIU Healthcare 775NW*, 193 Wn. App. at 392-93, *Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946 (1986)). “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*, 193 Wn. App. at 392-93. Thus, a courts’ power to grant a TRO is not inherent. A TRO may only issue if the movant satisfies the well-established requirements. *Id.*

Here, the Superior Court entered a *sua sponte* TRO after it noted that granting injunctive relief would be “reversible error.” CP 464-465. While the Court ordered UW to release the UW e-mails that were undisputedly public, it also enjoined the rest of the disputed records “through the next hearing and/or further order of the court[.]” CP 269. It essentially gave SEIU an injunction solely to provide it extra time to structure and strategize its case, after acknowledging that SEIU did not get it right the first time. This is beyond the court’s power in issuing TROs. *See SEIU Healthcare 775NW*, 193 Wn. App. at 392-93, *Federal Way Family Physicians, Inc.*, 106 Wn.2d at 265. Indeed, a standardless TRO, such as the June 10, 2016 TRO, negates the needs for any TRO standards, whatsoever. *Cf. id.* Under the Superior Court’s rational, any Superior Court can now issue a TRO regardless of the merits of the movant’s arguments and the TRO may extend indefinitely. This creates an automatic right to TROs as long as a party merely files a complaint. Standardless, and thus automatic, TROs substantially prejudice opposing parties, whose adjudication of rights is unnecessarily and unconstitutionally delayed for literally no good reason.

*See* WASH. CONST. ART. 1, § X (“Justice in all cases shall be administered openly, and without unnecessary delay.”); *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 16 P.3d 45 (2000) (discussing a civil litigant’s constitutional right to justice without unnecessary delay). The harm resulting from unnecessary delay is especially acute in PRA cases, where the Legislature intended a speedy resolution to ensure the disclosure of public records. *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 72, 261 P.3d 119 (2011); *Spokane Research & Defense Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 314 (2004), *rev’d on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) (“The purpose of the [PRA] is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.”). TRO standards justify the judicial delay inherent in TROs, but this court failed to rely or even mention any standards whatsoever. CP 267-270. Its TRO unnecessarily delayed the adjudication of the Foundation’s rights for two months, for no reason other than it would have been forced to deny SEIU’s relief without a TRO. The June 10, 2016 TRO should be reversed.

SEIU will likely argue that the delay was necessary because the UW e-mails would have been otherwise released. While SEIU submitted those exact arguments before the Superior Court, the Superior Court did not enter any findings of fact or conclusions of law in that regard. The order is what

is being appealed, not SEIU's arguments. Further, necessary delay is not a consideration in granting TROs—SEIU must prove that it is likely to succeed on the merits. It did not, according to the Superior Court's order. Any of SEIU's counter-arguments to this effect lacks merit.

**3. The Superior Court abused its discretion in denying the Foundation's Combined Motion to Strike and Motion for Sanctions, and granting SEIU's Change Trial Date/Stay Proceedings.**

Finally, the Superior Court erred in granting SEIU's Motion to Change Trial Date/Stay Proceedings and denying the Foundation's Combined Motion because it lacked jurisdiction to grant SEIU's requested relief in its Motion. A Superior Court's decision to issue or not issue a stay, strike certain pleadings or briefings, and award sanctions are typically reviewed under the abuse of discretion standard. *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 312, 202 P.3d 1024, 1027 (2009); *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008); *Idahosa v. King Cty.*, 113 Wn. App. 930, 935, 55 P.3d 657 (2002); *King v. Olympic Pipeline Co.*, 104 Wn. App. 388, 348 16 P.3d 45 (2000). A Superior Court abuses its discretion if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons. *King*, 104 Wn. App. at 348.

Courts lack jurisdiction over a case when the appellate court has accepted review, absent very limited circumstances. RAP 7.2(a). *See also*

*In re the Marriage of Hughes*, 128 Wn. App. 650, 654 n. 2, 116 P.3d 1042 (2005); *Pearl v. Greenele*, 76 Wn. App. 338, 342, 887 P.2d 405 (1994) (counterclaim for foreclosure of lien filed in Superior Court after appeal was filed was ineffective), *review denied*, 126 Wn.2d 1026, 896 P.2d 64 (1995). The limited circumstances allowing a Superior Court to retain jurisdiction are only when the issues involve: i) settlement of the record; ii) enforcement of Superior Court decision in civil cases; iii) attorney fees and litigation expenses on appeal; iv) post-judgment actions and actions to modify the decision; v) release of defendants in criminal cases; vi) questions relating to indigency; vii) supersedeas, stays and bonds of the Superior Court's order;<sup>9</sup> viii) attorney fees, costs and litigation expenses; ix) juvenile court decisions; x) perpetuation of testimony; and xi) multiple parties, claims, or counts. RAP 7.2(b)-(l). Notably, "getting a trial date stayed after a notice of appeal has been filed" is not one of the enumerated circumstances in RAP 7.2(a) allowing a Superior Court to exercise jurisdiction after a notice of appeal has been filed.

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<sup>9</sup> RAP 7.2(h) limits the Superior Court's authority to implement supersedeas, stays and bonds to RAP 8.1 and 8.4, CR 62(a), (b) and (h), and RCW 6.17.040—all of which only pertain to the enforcement of a judgment. RAP 8.1 only applies to entries of judgment: "This rule provides a means of delaying the enforcement of a Superior Court decision in a civil case in addition to the means provided in CR 62(a), (b), and (h)." RAP 8.4 only applies to bonds. CR 62 only applies to entries of judgment. ("RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT"). RCW 6.17.040 only applies to entries of judgment: "In addition to any stay of execution provided by court rule, stay of execution shall be allowed on judgments of the courts of this state for the following periods...."

Absent the limited circumstances enumerated in RAP 7.2(a), the appellate court retains jurisdiction and possesses broad discretion to issue orders that will “insure effective and equitable review.” *Stokes v. Bally’s Pacwest, Inc.*, 113 Wn. App. 442, 444, 54 P.3d 161 (2002) (granting appellant permission to renew its motion for summary judgment so Superior Court could consider effect of appellate opinion issued after Superior Court’s order denying summary judgment, from which review was sought), *review denied*, 149 Wn.2d 1007, 67 P.3d 1097 (2003). *See also* RAP 7.3 (granting appellate court authority “to perform all acts necessary or appropriate to secure the fair and orderly review of a case”); RAP 8.3 (granting the appellate court authority to “to issue orders...to insure effective and equitable review, including authority to grant injunctive or other relief to a party.”). Therefore, any issues the parties may have after a Superior Court has entered a final judgment must be addressed with the appellate court, absent the limited circumstances described in RAP 7.2. *Id.* This is why SEIU brought its Motion to Stay in the wrong court.

Review is accepted automatically upon the filing of a notice of appeal for orders that are reviewable as a matter of right. RAP 6.1. Final judgments, which include orders on summary judgment and *permanent injunction motions*, are reviewable as a matter of right. RAP 2.2. *See Greyhound Lines, Inc. v. City of Tacoma*, 81 Wn.2d 525, 527, 503 P.2d 117 (1972) (grant of

preliminary judgment is a final judgment subject to appellate review) (citations omitted). The RAPs firmly delineate when a Superior Court’s jurisdiction ends and when an appellate court’s jurisdiction begins to “keep a case from developing branches in the absence of an appropriate order of the Superior Court.” *Burton v. Clark County*, 91 Wn. App. 505, n.9, 958 P.2d 343 (1998), *review denied*, 137 Wn.2d 1015, 978 P.2d 1097 (1999) (noting that a simultaneously pending notice of appeal and motions before the lower tribunal violated RAP 7.2 and 8.3) (internal quotations omitted).

Here, the Superior Court should have stricken SEIU’s Motion because it no longer had jurisdiction over this case. This Court obtained full jurisdiction on March 27, 2016, when the Foundation filed a Notice of Appeal appealing this court’s Final Judgment—well before SEIU filed its currently-pending Motion. *See* RAP 7.2(a); RAP 6.1. None of the limited exemptions to the appellate court’s jurisdiction apply because 925’s Motion seeks to stay deadlines unrelated to enforcement of this Court’s Final Judgment. *See* RAP 7.2(b)-(1). Any remaining concerns 925 has about issues allegedly unaddressed by this Court’s Final Judgment must be addressed with the Court of Appeals. *See* RAP 7.3; 8.3. Even then, the issue that SEIU presents in its currently-pending Motion—that disclosure of e-mails would constitute a ULP—is rendered moot by the Superior Court’s order *permanently enjoining* the release of those records. In other words,

there was no longer a live case or controversy about the disclosure of the records because disclosure has been permanently enjoined—the order granting a permanent injunction was dispositive of the other issues. *See Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (“A case is moot if a court can no longer provide effective relief.”). Thus, SEIU’s motion was doubly frivolous because: 1) it was filed in the wrong court; and 2) it discusses an issue that the Superior Court’s final judgment had rendered moot. The Superior Court’s order granting SEIU’s Motion to Stay is void, and it should be reversed.

Further, a party violates Rule 11 when it files a motion not well-grounded in fact or warranted by existing law. *See* CR 11; *Biggs v. Vail*, 124 Wn.2d 193, 196-97, 876 P.2d 448 (1994). The test for CR 11 sanctions is “whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.” *Eller v. E. Sprague Motors & R.V.’s, Inc.*, 159 Wn. App. 180, 190, 244 P.3d 447 (2010). The purpose of CR 11 is to curb baseless filings. *Bryan v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). Here, SEIU proceeded to file its Motion for Change of Trial Date/Stay of Proceedings even though the Foundation had repeatedly informed it that the Superior Court lacked jurisdiction. **Appendix C** at Ex. C, D, E. The rules of appellate procedure make it eminently clear that SEIU should have sought its requested relief with this Court. SEIU’s persistence is a baseless

filing which CR 11 sought to curb, *Bryan*, 119 Wn.2d at 219, forcing the Foundation to needlessly expend time and resources in responding to a frivolous motion. It should be awarded reasonable attorney's fees for doing so, and the Superior Court abused its discretion in holding otherwise.

## V. CONCLUSION

For the foregoing reasons, the Foundation respectfully requests that this Court reverse the Superior Court's grant of summary judgment entered on March 27, 2017, the preliminary injunction ordered on August 5, 2016, the TRO entered on June 5, 2016, and SEIU's Motion for Change of Trial Date/Stay of Proceedings, and the denial of the Foundation's Combined Motion to Strike and Motion for Sanctions.

RESPECTFULLY SUBMITTED this day 26<sup>th</sup> day of July, 2017.

Attorneys for Appellant Freedom Foundation:

FREEDOM FOUNDATION



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solson@freedomfoundation.com

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on July 26, 2017, I filed with the Court by E-filing and I served by e-mail the foregoing document and this certificate of service on:

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Nancy Garland  
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**By e-mail:**  
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*Counsel for SEIU 925*

**By e-mail:**  
kkussmann@qwestoffice.net  
jmetzger@qwestoffice.net

Dated this 26<sup>th</sup> day of July, 2017, at Seattle, Washington.

  
\_\_\_\_\_  
Kirsten Nelsen

# **APPENDIX A**

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING**

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 925, a labor union,

Plaintiff,

v.

THE UNIVERSITY OF WASHINGTON, an  
agency of the State of Washington, and  
FREEDOM FOUNDATION, a non-profit  
organization,

Defendants.

**SUPPLEMENTAL DESIGNATION OF  
CLERK’S PAPERS ON APPEAL**

No. 16-2-09719-7 SEA

(Washington Court of Appeals Div. I  
No. 76630-9-1)

**[Clerk’s Action Required]**

**TO: TRANSCRIPT CLERK**

Pursuant to RAP 9.6(a), please prepare for transmittal to the Court of Appeals, Division I, Cause No. 16-2-09719-7 SEA (Washington Court of Appeals Div. I No. 76630-9-1), the clerk’s papers and exhibits listed below in accordance with the instant Supplemental Designation of Clerks Papers on Appeal. Appellant/Defendant Freedom Foundation (“Foundation”) understands that upon receipt of acceptable payment the Clerk will transmit the clerk’s papers to the appropriate court. The Foundation agrees to pay the amount owed within 14 days of receiving a

1 copy of the index, regardless of the status of appeal.

2 **I. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS**

3

<b>Document Sub No.</b>	<b>Docket Date</b>	<b>Docket Code</b>	<b>Docket Description</b>
25	05-25-2016	Declaration of Maxford Nelsen	Declaration of Maxford Nelsen in support of Defendant Freedom Foundation's Opposition to Plaintiff's Motion for Preliminary Injunction
108	04-03-2017	Motion to Change Trial Date /Pet	Petitioner's Motion to Change Trial Date and for Stay of Proceedings
103	04-03-2017	Declaration / Jacob Metzger	Declaration of Jacob Metzger in support of Petitioner's Motion to Change Trial Date and for Stay of Proceedings
113	04-07-2017	Motion /Defs	Defendant Freedom Foundation's Combined Motion to Strike and Motion for Sanctions
114	04-07-2017	Declaration of Stephanie Olson	Declaration of Stephanie Olson in support of Foundation's Combined Motion to Strike and Motions for Sanctions
115	04-07-2017	Declaration of Greg Overstreet	Declaration of Greg Overstreet in support of Foundation's Combined Motion to Strike and Motions for Sanctions
116	04-07-2017	Response /Freedom Foundation	Defendant Freedom Foundation's Response to Plaintiff 925's Motion to Change Trial Date and Stay of Proceedings
117	04-10-2017	Reply /Pet	Petitioner's Reply in Support of Plaintiff's Motion to Change Trial Date and For Stay of Proceedings
119	04-11-2017	Response /Pla	Plaintiff's Response to Defendant's Motion to Strike and Motions for Sanctions
121	04-11-2017	Declaration /Jacob Metzger	Declaration of Jacob Metzger in support of Plaintiff's Response to Defendant Freedom Foundation's Motion to Strike and Motion for Sanctions
125	04-12-2017	Reply /Freedom	Defendant Freedom Foundation's Reply in support of Combined Motion to Strike and Motion for Sanctions

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126	04-12-2017	Declaration /Stephanie Olson	Declaration of Stephanie Olson in support of Foundation's Reply in support of Combined Motion to Strike and Motion for Sanctions
127	04-17-2017	Order Denying Motion to Strike & For Sanctions	Order Denying Freedom Foundation's Combined Motion to Strike and Motion for Sanctions
128	04-17-2017	Order for Stay of Proceedings & Continue Trial Date	Order Granting Petitioner's Motion Change Trial Date/Stay Proceedings
131	04-28-2017	Notice of Appeal to Court of Appeal /Amended	Defendant Freedom Foundation's Amended Notice of Appeal

RESPECTFULLY SUBMITTED on June 26, 2017.



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1 **DECLARATION OF SERVICE**

2 I certify, under penalty of perjury under the laws of the State of Washington, that on June  
3 26, 2017, I e-filed a copy of this document with the King County Superior Court, which  
4 delivered a copy via e-service agreement to the following parties:

5 Robert Kosin  
6 Nancy Garland  
7 Washington Attorney General’s Office  
8 University of Washington Division  
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10 Seattle, Washington 98195-9475  
11 Phone: (206) 543-4150  
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13 *Attorney for University of Washington*

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20 Signed June 26, 2017, at Olympia, Washington.

21   
22 \_\_\_\_\_  
23 Stephanie Olson

# **APPENDIX B**

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**IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 925, a labor union,

Plaintiff,

v.

THE UNIVERSITY OF WASHINGTON, an  
agency of the State of Washington, and  
FREEDOM FOUNDATION, a non-profit  
organization,

Defendants.

No. 16-2-09719-7 SEA

**DECLARATION OF  
MAXFORD NELSEN  
IN SUPPORT OF DEFENDANT  
FREEDOM FOUNDATION'S  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

I, Maxford Nelsen, hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

- 1. I am over the age of 18, have personal knowledge of the facts set forth herein, and am competent to testify.
- 2. I am Labor Policy Director for the Freedom Foundation, a nonprofit Washington organization and Defendant in the above-captioned case.
- 3. The Freedom Foundation seeks to promote individual liberty, free enterprise, and limited accountable government. Part of its mission is to pursue governmental transparency and accountability.

1 4. On or about December 29, 2016, the Freedom Foundation submitted a public records  
2 request to the above-named State Defendant requesting the below-referenced records:

- 3 1. All documents, emails or other records created by, received by,  
4 or in the possession of University of Washington  
5 faculty/employees Amy Hagopian, Robert Wood, James Liner,  
6 or Aaron Katz that contain any of the following terms:  
7 a. Freedom Foundation (aka., "FF," "EFF," and "The  
8 Foundation")  
9 b. Northwest Accountability Project  
10 c. Right-to-work (aka., "right to work," "RTW," and "R2W")  
11 d. Friedrichs v. California Teachers Association (aka.,  
12 "Friedrichs v. CTA" and "Friedrichs")  
13 e. SEIU  
14 f. Union
2. All emails sent by University of Washington faculty/employees  
Amy Hagopian, Robert Wood, James Liner, or Aaron Katz to  
any email address ending in "[@seiu925.org](mailto:@seiu925.org)" or  
"[@uwfacultyforward.org](mailto:@uwfacultyforward.org)"
3. All emails received by University of Washington  
faculty/employees Amy Hagopian, Robert Wood, James Liner,  
or Aaron Katz from any email address ending in  
"[@seiu925.org](mailto:@seiu925.org)" or "[@uwfacultyforward.org](mailto:@uwfacultyforward.org)"
4. All emails sent from and received by the following email  
address: [aaup@u.washington.edu](mailto:aaup@u.washington.edu)

15 5. The Freedom Foundation's sole purpose for the requested records is to ensure  
16 governmental accountability and transparency. My understanding is that the PRA's very purpose  
17 is to ensure governmental accountability and transparency, from my reading of the PRA's text and  
18 cases that reference it.

19 6. With the instant records request, the Freedom Foundation seeks to ensure accountability  
20 and transparency among government employees using government-issued e-mail addresses.

21 7. The Freedom Foundation will not use any of the records for commercial purposes, and the  
22 records will never be sold to any third party.

23 8. The Freedom Foundation may make similar public records requests in the future so that it  
24

1 can further the purposes of the PRA by ensuring governmental accountability and transparency.

2 9. The Freedom Foundation is in no way controlled by the State. The Freedom Foundation  
3 does not exert any improper influence on the State's decisions to disclose public records pursuant  
4 to the PRA. In fact, the Governor of the State of Washington is on record denouncing the Freedom  
5 Foundation and emphasizing his ideological opposition to the Freedom Foundation's mission.  
6 Further, the Superior Court in Thurston County recently dismissed a frivolous lawsuit against the  
7 Freedom Foundation brought by the State of Washington.

8 10. Attached hereto as **Exhibit A** is a true and accurate copy of an article featuring Governor  
9 Inslee's remarks to the Washington Federation of State Employees, where the Governor stated:  
10 "We know the 'Freedom' Foundation is spending hundreds of thousands of dollars to try to strip  
11 people of their rights...I intend to be vigorous in fighting with you against those who want to  
12 diminish working people's rights in the State of Washington."

13 11. Attached hereto as **Exhibit B** is a true and accurate copy of the Order Granting the Freedom  
14 Foundation's Motion to Dismiss under CR 12(b)(6), dated May 13, 2016, for *State of Washington*  
15 *v. Freedom Foundation*, Case No. 15-2-01936-5, in Thurston County Superior Court.

16  
17 Dated this 24th day of May, 2016 at Olympia, WA.

18  
19   
20 MAXFORD NELSEN

# **Exhibit A**



# **Exhibit B**

The Honorable Gary Tabor  
Hearing Date: May 13, 2016

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

EVEREGREEN FREEDOM FOUNDATION  
d/b/a FREEDOM FOUNDATION,

Defendant

NO. 15-2-01936-5

(Proposed)

Order Granting Defendant's Motion to  
Dismiss

This matter came before the Court on May 13, 2016 on motion of Defendant Freedom Foundation for dismissal. The Court having considered the files and records herein and the briefing and argument of the parties, and the court having otherwise been fully advised in the

premises, ~~it is hereby:~~ *and the court having ruled as reflected in the attached transcript of the rulings, it is hereby*

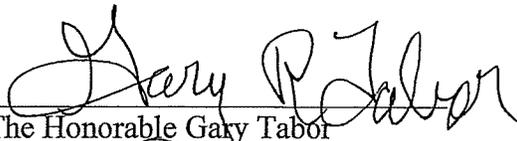
ORDERED, ADJUDGED and DECREED that Defendant's Motion to Dismiss is *under*

*CR 12(b) is*  
GRANTED.

(Proposed) Order GRANTING Defendant's  
Motion to Dismiss 1 of 2  
(State v. Freedom)

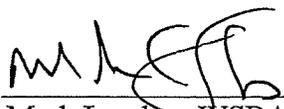
THE NORTH CREEK LAW FIRM  
12900 NE 180<sup>th</sup> Street, SUITE 235  
Bellevue, WASHINGTON 98011  
(425) 368-4238 - FACSIMILE (425) 489-2824

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4 Signed this 13<sup>th</sup> day of May, 2016.  
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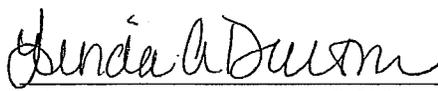
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7   
8 The Honorable Gary Tabor  
9 Thurston County Superior Court Judge  
10

11 Presented by:

12 THE NORTH CREEK LAW FIRM

13  
14 By   
15 Mark Lamb, WSBA No. 30134  
16 Attorney for Defendant

17 Approved as to form:

18  
19   
20 M. ~~\_\_\_\_\_~~ WSBA # 15467  
21 Attorneys for Plaintiff

22  
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25  
26 (Proposed) Order GRANTING Defendant's  
Motion to Dismiss 2 of 2  
(State v. Freedom)

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Bothell, WASHINGTON 98011  
(425) 368-4236 - FACSIMILE (425) 489-2824

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

---

STATE OF WASHINGTON	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
EVERGREEN FREEDOM FOUNDATION,	)	SUPERIOR COURT NO.
	)	15-2-01936-5
Defendant.	)	
	)	

---

RULING OF THE COURT

---

BE IT REMEMBERED that on May 13, 2016,  
the above-entitled and numbered cause came on for  
hearing before JUDGE GARY R. TABOR, Thurston County  
Superior Court, Olympia, Washington.

Pamela R. Jones, Official Court Reporter  
Certificate No. 2154  
Post Office Box 11012  
Olympia, WA 98508-0112  
(360)786-5571  
jonesp@co.thurston.wa.us

A P P E A R A N C E S

For the Plaintiff: LINDA DALTON  
Assistant Attorney General  
PO Box 40100  
Olympia, WA 98504-0100

For the Defendant: MARK LAMB  
Attorney at Law  
12900 NE 180th Street #235  
Bothell, WA 98011

1 May 13, 2016

Olympia, Washington

2

HON. GARY R. TABOR, Presiding

3

APPEARANCES:

4

For the Plaintiff, Linda Dalton, Assistant  
Attorney General; For the Defendant,  
Mark Lamb, Attorney at Law

5

Pamela R. Jones, Official Reporter

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\* \* \* \* \*

7

8

THE COURT: All right, counsel. I am going to

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issue my ruling on the pleadings and the arguments I

10

heard in this matter regarding whether or not this

11

Court will allow this matter to go forward or whether

12

I'm going to treat this as a 12(b)(6) or 12(b)(7)

13

motion or a summary judgment motion.

14

I've determined that 12(b)(6) appears to apply. I

15

am going to grant Evergreen Freedom Foundation's

16

motion to dismiss. My bases for doing so is I find

17

the statutes here to be ambiguous and vague, and I

18

had difficulty working through these and

19

understanding the position of the parties' because

20

there is not a clearly stated policy regarding this

21

kind of a situation which involves municipal courts.

22

I do not find that the State has sufficiently

23

established that this situation involved a ballot

24

measure that gave them the opportunity to require

25

that such be reported. And when I say "such," I'm

1 talking about legal services that were provided on a  
2 pro bono basis before the matter ever went to any  
3 kind of vote.

4 I believe that campaign finance regulations are  
5 important. It is clear that there has been a great  
6 deal of litigation over the last years in regard to  
7 campaign finance. It's an important topic for the  
8 people of this state and this court, and others like  
9 it are often involved in litigation involving  
10 campaign financing regulations; nevertheless, I  
11 believe that unless there is clear and unambiguous  
12 guidance in the statutes that people cannot be held  
13 to have violated those regulations. I'm simply not  
14 convinced that the statute means what the State says  
15 that it does in regard to this particular type of  
16 situation.

17 Now let me say several things that are dicta, and  
18 that is, because I've ruled in this regard we're not  
19 getting to the 12(b)(7) issue about whether or not  
20 the Court would have required other parties to be  
21 joined, but I'll tell you how I would have ruled on  
22 that. I would have denied that motion.

23 Perhaps the best analogy I can give is hearkening  
24 back to my almost 19 years as a deputy prosecutor. I  
25 believe that prosecuting attorneys or their offices

1 as part of the executive branch have choices to make  
2 that a court in the judicial branch does not step in  
3 or interfere with; that is the type of charges that  
4 are filed, who is charged, there can be a situation  
5 involving several people in which they choose to file  
6 against one person and not against others. While I  
7 understand the arguments that in this case, why treat  
8 some other folks differently, that's not really the  
9 issue in front of the Court. And so, as I said, I  
10 would have denied that.

11 I'll also tell you that while how another judge  
12 has ruled is always somewhat interesting to this  
13 Court, nothing that a superior court judge in another  
14 county does or for that matter in this county is  
15 binding on this Court. That's why we are independent  
16 as judges and we make determinations based on our  
17 best judgment. That might differ. Two judges with  
18 courtrooms side by side might rule differently in  
19 similar matters.

20 As far as precedent, this state makes clear that  
21 you may not cite a final decision as precedent unless  
22 there has been a reported decision. Some have  
23 complained about that but that's still the rule in  
24 this state. I do note that there is a move to have  
25 available unreported decisions by courts, that would

1 be the court of appeals, available to the public and  
2 that's a different thing than whether or not they can  
3 be cited as precedent.

4 There was one other thing I was going to mention.  
5 I'm just trying to get to that. Excuse me for just a  
6 moment as I try to pull that back in.

7 That was the fact that I heard in argument that  
8 there may be a case with similar issues in another  
9 court in this jurisdiction. You've already heard, I  
10 think you were all here when I talked about the first  
11 case that I called today, judicial economy. This  
12 Court does have the right to consolidate matters on  
13 similar issues and we regularly do that to just use  
14 our time wisely. And so when different matters are  
15 filed that may be similar, I would like to know that,  
16 and yet, I don't have any easy way of knowing that.  
17 I don't sit down and look at other judge's dockets on  
18 a regular basis to find out what's coming up. So if  
19 there is another similar case, I don't know whether  
20 the cases should have been consolidated or not. I'm  
21 not saying that they should or should not have been,  
22 but I would have liked the opportunity to know that  
23 and to see whether or not that was appropriate.  
24 Maybe it's already been decided, maybe it hasn't been  
25 decided yet, I don't know, but I guess that goes to

1           what I told you earlier about what another judge does  
2           doesn't control what I do.

3           I've called this as I see it, my understanding of  
4           the issues. I understand that this type of situation  
5           may have consequences in other regards, and that is  
6           one other thing I did want to mention now that I've  
7           gotten to that point, and that is that while there  
8           may be consequences when this Court rules in any  
9           case, that's not always even appropriate for me to  
10          consider. Whether or not that opens the floodgates  
11          to activities that the State feels are going to  
12          weaken public disclosure matters in campaign issues,  
13          I don't know. Sometimes parties tell me, well, Your  
14          Honor, if you do this it's going to result in  
15          millions of dollars' worth of damage to a party or  
16          it's going to cost millions of dollars. Often that's  
17          not something that I have any idea of as to how many  
18          issues may arise.

19          In any event, the final thing I wanted to say in  
20          dicta is that I note that this action was started by  
21          the Public Disclosure Commission because of a  
22          complaint. I note that the defendant in this case is  
23          complaining about others. I don't know and I'm not  
24          asking you to tell me why a complaint was not filed  
25          as to those others by someone. That could have

1 happened, and again, that's dicta I guess. I'm not  
2 fishing for cases to be filed, but I think that bears  
3 everyone's thought.

4 So, Mr. Lamb, do you have a proposed order that  
5 would grant --

6 MR. LAMB: I do, Your Honor.

7 THE COURT: -- your dismissal as you requested  
8 and as I ordered?

9 MR. LAMB: I do, Your Honor.

10 THE COURT: Would you show that to the  
11 opposing party?

12 MR. LAMB: I will, Your Honor.

13 THE COURT: Obviously, I'm not asking that you  
14 agree with my decision, only if that order correctly  
15 sets forth what my decision was.

16 MS. DALTON: It's a little abbreviated.

17 THE COURT: Do you want some time to work on  
18 that?

19 MS. DALTON: I think so. I think we have to  
20 outline the files that the Court considered. It's  
21 not in here.

22 THE COURT: I do in a summary judgment motion.  
23 I've treated it as a 12(b)(6) and I'm not sure that's  
24 required but I don't object to that. Clearly, we  
25 have a file that has different pleadings and if you

1 want to reference those, that's okay, but I don't  
2 think that's a requirement of the court rule.

3 MR. LAMB: I don't believe so either, Your  
4 Honor, but I have no objection to that.

5 THE COURT: So if you want to work on that,  
6 the only thing I want you to understand is I'm  
7 leaving Tuesday for three weeks, and I won't be here  
8 for three weeks, so you either need to get any  
9 proposed order to me before that time or it's going  
10 to be awhile.

11 MR. LAMB: I appreciate that, Your Honor. The  
12 only other than thing I would ask we would reserve  
13 the issue of fees under 42.17(a).

14 THE COURT: I've not addressed that at all so  
15 you can do as you choose to do in regard to  
16 requesting fees.

17 MR. LAMB: Thank you, Your Honor.

18 THE COURT: Anything else I need to address?  
19 Folks, I don't have a problem with writing in things,  
20 and so if the State wants to have what I've  
21 considered, you probably have those available to you.

22 MS. DALTON: I think what we might do is just  
23 get a copy of the transcript and attach the  
24 transcript would seem to go with this.

25 THE COURT: Okay. Whatever you choose.

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MR. LAMB: Thank you, Your Honor.

THE COURT: Are there any other matters that I need to call on the calendar this morning? We'll be in recess then.

(A recess was had.)

CERTIFICATE OF REPORTER

STATE OF WASHINGTON    )  
COUNTY OF THURSTON    )

I, PAMELA R. JONES, RMR, Official Reporter  
of the Superior Court of the State of Washington, in and  
for the County of Thurston, do hereby certify:

That I was authorized to and did  
stenographically report the foregoing proceedings held in  
the above-entitled matter, as designated by counsel to be  
included in the transcript, and that the transcript is a  
true and complete record of my stenographic notes.

Dated this the 13th day of May, 2016.

---

PAMELA R. JONES, RMR  
Official Court Reporter  
Certificate No. 2154

# APPENDIX C

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**SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY**

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 925, a labor union,

Plaintiff,

v.

THE UNIVERSITY OF WASHINGTON, an  
agency of the State of Washington, and  
FREEDOM FOUNDATION, a non-profit  
organization,

Defendants.

NO. 16-2-09719-7 SEA

**DEFENDANT FREEDOM  
FOUNDATION’S COMBINED MOTION  
TO STRIKE AND MOTION FOR  
SANCTIONS**

**I. INTRODUCTION**

Defendant Freedom Foundation (“Foundation”) respectfully requests that this Court strike Plaintiff Service Employee International Union Local 925 (“925”)’s Motion to Change Trial Date and for Stay of Proceedings (“Motion”).

In short, the Rules of Appellate Procedure (RAP 7.2 in particular) already address the type of issue 925 raises: what to do with lingering trial court orders (like a trial date) after a notice of



1 appeal has been filed? The short answer provided by the RAPs is that once a notice of appeal has  
2 been filed, the trial court's job is over and the appellate court's job begins. The appellate court is  
3 then in control; it has exclusive jurisdiction, and the trial court no longer does. If, and only if, the  
4 appellate court remands the matter back to the trial court, then, and only then, the trial court  
5 resumes jurisdiction and can set a new trial date. It simply is not necessary for a trial court to stay  
6 a trial date after a notice of appeal has been filed. Once the notice of appeal is filed, the trial date  
7 no longer matters because the case is on appeal and firmly under the exclusive jurisdiction of the  
8 appellate court.

9           The RAPs foresaw this issue and addressed it in RAP 7.2, but 925 wants to file a motion  
10 to do something that RAP 7.2 automatically does. To prevent this, the Court should grant this  
11 motion to strike 925's request for a stay of the trial date and— because 925 was told multiple times  
12 why RAP 7.2 made its motion completely unnecessary—this Court should award sanctions to  
13 compensate the Foundation for the considerable time and effort it took to respond to this  
14 completely unnecessary motion. Sanctions should also be imposed to deter 925 from filing similar  
15 motions in the future that waste the Court's and parties' time and resources.

16           To elaborate on the above, this Court no longer has jurisdiction over this case because the  
17 Foundation filed its Notice of Appeal regarding this Court's final judgment. RAP 7.2. Any order  
18 issued in response to 925's Motion would be void. *Sullivan v. Purvis*, 90 Wn. App. 456, 460  
19 (1998). 925's Motion must be stricken for lack of jurisdiction.

20           Moreover, 925 intentionally proceeded with the filing of its Motion while knowing that it  
21 was frivolous. The RAPs very firmly and very clearly establish that an appellate court obtains full  
22 jurisdiction over a case upon the filing of notice of appeal appealing a trial court's final judgment  
23 (absent very limited circumstances which do not apply here). In a good-faith effort to prevent the  
24

1 waste of everyone’s time and resources, the Foundation’s counsel:

- 2 • repeatedly informed 925’s counsel that this Court lacks jurisdiction,
- 3 • pointed 925’s counsel to the exact rule that precludes this Court’s jurisdiction,
- 4 • referred 925’s counsel to an experienced attorney who could verify that this Court
- 5 lacks jurisdiction, and
- 6 • put 925 on notice that the Foundation would be forced to seek sanctions for
- 7 responding to a meritless motion.

8 Yet 925 persisted and filed its currently-pending Motion. 925’s persistence demonstrates a  
9 complete disregard of this Court’s and the parties’ time and resources. The Foundation has been  
10 forced to expend significant resources by filing the instant motion. Thus, CR 11 sanctions are  
11 necessary.

## 12 II. STATEMENT OF FACTS

13 On February 24, 2017, 925 filed a Motion for Summary Judgment and Permanent  
14 Injunction. In its motion, 925 sought a judgment declaring that the 3,913 e-mails at issue did not  
15 qualify as “public records” under Washington’s Public Records Act (“PRA”). 925 also sought to  
16 permanently enjoin the release of those records.

17 On March 27, 2017, this Court granted 925’s Motion for Summary Judgment and  
18 Permanent Injunction (“Final Judgment”). The Court found that the e-mails at issue were did not  
19 qualify as “public records” under the PRA and thus enjoined the records from disclosure.  
20 Permanently. In other words, the 3,913 e-mails cannot be disclosed because of this Court’s final  
21 judgment. Again, this was a *permanent* injunction. That same day, the Foundation filed a Notice  
22 of Appeal. *See* Declaration of Stephanie Olson, **Ex. A**.

23 On March 31, 2017, 925’s counsel called the Foundation’s counsel to discuss the remaining  
24

1 trial deadlines for the case. *See* Olson Decl., ¶ 3. 925’s counsel wanted to stay the trial for the issue  
2 of whether disclosure of the records would constitute an Unfair Labor Practice (“ULP”) in  
3 violation of Washington’s collective bargaining laws. *See* Ch. 41.56 RCW. The Foundation’s  
4 counsel informed 925’s counsel that all remaining trial deadlines, and issues pertaining to  
5 disclosure of the e-mails, were rendered moot by this Court’s Final Judgment, which permanently  
6 enjoined the disclosure of the e-mails. *Id.* In other words, because the e-mails could no longer be  
7 disclosed pursuant to this Court’s Final Judgment, there was no more live case or controversy  
8 about whether the disclosure—again, which would no longer occur—could qualify as a ULP.  
9 Accordingly, the Foundation’s counsel told 925’s counsel that it would not stipulate to 925’s  
10 motions because they would be meritless. *Id.* 925 informed this Court that the “neither UW or  
11 Freedom Foundation opposes continuing the trial.” *Id.*, **Ex. B.** The Foundation’s counsel  
12 responded to 925 by informing 925’s counsel, again, that this Court lacked jurisdiction to consider  
13 any further motions. *Id.*, **Ex. C.** The Foundation’s counsel also pointed 925’s counsel to the exact  
14 rule that precluded the trial court’s jurisdiction, and informed 925’s counsel that the Foundation  
15 would be forced to respond to any motions filed by 925 based on lack of jurisdiction. *Id.* Later that  
16 day, the Foundation’s counsel told 925’s counsel, for a third time, that this Court lacked  
17 jurisdiction. *Id.*, **Ex. D.**

18           The following Monday, April 3, 2017, the Foundation’s counsel told 925’s counsel, for the  
19 fourth time, that this Court lacked jurisdiction. *Id.*, **Ex. E.** The Foundation suspected that that 925  
20 would persist, and so, in another good-faith effort to avoid wasting everyone’s time and resources,  
21 the Foundation’s counsel provided 925’s counsel with the name of an experienced Seattle attorney,  
22 who has previously represented 925 against the Foundation, who could verify that this Court  
23 lacked jurisdiction. *Id.* Finally, the Foundation’s counsel informed 925’s counsel that the  
24

1 Foundation would be forced to request sanctions if 925 persisted in filing a patently meritless  
2 motion which would force the Foundation to respond. *Id.* Yet 925 persisted and the Foundation is  
3 forced to respond herewith.

### 4 III. STATEMENT OF ISSUES

5 1. Does the trial court retain jurisdiction over a case after a notice of appeal has been filed,  
6 which appeals that trial court's final judgment, and no exceptions to RAP 7.2 apply?

7 2. Should sanctions be awarded when 925's Motion is patently meritless?

### 8 IV. EVIDENCE RELIED UPON

9 This motion is based upon the pleadings filed in the case and the supporting declarations,  
10 including the Declaration of Stephanie Olson filed herewith.

### 11 V. ARGUMENT

12 **A. A separate motion to strike is the vehicle to address the Court's jurisdiction.**

13 Motions to strike must be made in a separate motion, and not in a response to the alleged  
14 immaterial or impertinent pleading. *See* CR 12(f). This is why the Foundation is filing this separate  
15 motion and not merely responding to 925's Motion.

16 **B. The Court must strike 925's motion because the Court lacks jurisdiction.**

17 This Court must strike 925's Motion because it lacks jurisdiction and any order in response  
18 to 925's currently-pending Motion would be void. This Court has jurisdiction to consider the  
19 instant Combined Motion because a trial court has jurisdiction to determine its own jurisdiction.  
20 *See Ash v. Dep't of Labor & Indus.*, 173 Wn. App. 559, 562-3 (2013) ("Courts always have  
21 jurisdiction for the limited purpose of determining whether they have jurisdiction.") (citing *Griffith*  
22 *v. City of Bellevue*, 130 Wn.2d 189, 196, 922 P.2d 83 (1996)).

23 When a court lacks jurisdiction, an order granting or denying a party's motion is void and  
24

1 the underlying motion should be stricken. *See Skagit Surveyors and Engineers, LLC v. Friends of*  
2 *Skagit County*, 135 Wn.2d 542, 556 (1998) (“Lack of jurisdiction over the subject matter renders  
3 the superior court powerless to pass on the merits of the controversy brought before it.”); *Angelo*  
4 *Property Co., LP v. Hafiz*, 167 Wn. App. 789, 808 (2012) (“A judgment entered by a court lacking  
5 subject matter jurisdiction is void; and a party may challenge such judgment at any time.”);  
6 *Sullivan v. Purvis*, 90 Wn. App. 456, 460 (1998) (voiding a trial court order because the court  
7 lacked jurisdiction); *In re the Marriage of Hughes*, 128 Wn. App. 650, 654 n. 2 (2005) (striking a  
8 memorandum opinion filed by trial court after review was accepted because it was beyond the trial  
9 court’s authority under RAP 7.2(a)), *review denied*, 156 Wn.2d 1031 (2006); CR 12(f) (motions  
10 to strike permitted to strike immaterial or impertinent pleadings).

11 Trial courts lack jurisdiction over a case when the appellate court has accepted review,  
12 absent very limited circumstances. RAP 7.2(a). *See also In re the Marriage of Hughes*, 128 Wn.  
13 App. at n. 2; *Pearl v. Greenele*, 76 Wn. App. 338, 342 (1994) (counterclaim for foreclosure of lien  
14 filed in trial court after appeal was filed was ineffective), *review denied*, 126 Wn.2d 1026 (1995).  
15 The limited circumstances allowing a trial court to retain jurisdiction are only when the issues  
16 involve: i) settlement of the record; ii) enforcement of trial court decision in civil cases; iii) attorney  
17 fees and litigation expenses on appeal; iv) post-judgment actions and actions to modify the  
18 decision; v) release of defendants in criminal cases; vi) questions relating to indigency; vii)  
19 supersedeas, stays and bonds of the trial court’s order;<sup>1</sup> viii) attorney fees, costs and litigation  
20 expenses; ix) juvenile court decisions; x) perpetuation of testimony; and xi) multiple parties,

21 \_\_\_\_\_  
22 <sup>1</sup> RAP 7.2(h) limits the trial court’s authority to implement supersedeas, stays and bonds to RAP 8.1 and 8.4, CR  
23 62(a), (b) and (h), and RCW 6.17.040—all of which only pertain to the enforcement of a judgment. RAP 8.1 only  
24 applies to entries of judgment: “This rule provides a means of delaying the enforcement of a trial court decision in a  
civil case in addition to the means provided in CR 62(a), (b), and (h).” RAP 8.4 only applies to bonds. CR 62 only  
applies to entries of judgment. (“RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT”). RCW  
6.17.040 only applies to entries of judgment: “In addition to any stay of execution provided by court rule, stay of  
execution shall be allowed on judgments of the courts of this state for the following periods... .”

1 claims, or counts. RAP 7.2(b)-(l). The Court will note that “getting a trial date stayed after a notice  
2 of appeal has been filed” is not one of the enumerated circumstances in RAP 7.2(a) allowing a trial  
3 court to exercise jurisdiction after a notice of appeal has been filed.

4 Absent the limited circumstances enumerated in RAP 7.2(a), the appellate court retains  
5 jurisdiction and possesses broad discretion to issue orders that will “insure effective and equitable  
6 review.” *Stokes v. Bally’s Pacwest, Inc.*, 113 Wn. App. 442, 444 (2002) (granting appellant  
7 permission to renew its motion for summary judgment so trial court could consider effect of  
8 appellate opinion issued after trial court’s order denying summary judgment, from which review  
9 was sought), *review denied*, 149 Wn.2d 1007 (2003). *See also* RAP 7.3 (granting appellate court  
10 authority “to perform all acts necessary or appropriate to secure the fair and orderly review of a  
11 case”); RAP 8.3 (granting the appellate court authority to “to issue orders...to insure effective and  
12 equitable review, including authority to grant injunctive or other relief to a party.”). Therefore, any  
13 issues the parties may have after a trial court has entered a final judgment must be addressed with  
14 the appellate court, absent the limited circumstances described in RAP 7.2. *Id.* This is why the  
15 Foundation asserts that 925 is bringing it Motion in the wrong court.

16 Review is accepted automatically upon the filing of a notice of appeal for orders that are  
17 reviewable as a matter of right. RAP 6.1. Final judgments, which include orders on summary  
18 judgment and *permanent injunction motions*, are reviewable as a matter of right. RAP 2.2. *See*  
19 *Greyhound Lines, Inc. v. City of Tacoma*, 81 Wn.2d 525, 527 (1972) (grant of preliminary  
20 judgment is a final judgment subject to appellate review) (citations omitted). The RAPs firmly  
21 delineate when a trial court’s jurisdiction ends and when an appellate court’s jurisdiction begins  
22 to “keep a case from developing branches in the absence of an appropriate order of the trial court.”  
23 *Murton v. Clark County*, 91 Wn. App. 505, n.9 (1998), *review denied*, 137 Wn.2d 1015 (1999)

1 (noting that a simultaneously pending notice of appeal and motions before the lower tribunal  
2 violated RAP 7.2 and 8.3) (internal quotations omitted).

3 Here, this Court must strike 925’s Motion because it no longer has jurisdiction over this  
4 case. Division I of the Washington State Court of Appeals obtained full jurisdiction on March 27,  
5 2016, when the Foundation filed a Notice of Appeal appealing this court’s Final Judgment—well  
6 before 925 filed its currently-pending Motion. *See* RAP 7.2(a); RAP 6.1. None of the limited  
7 exemptions to the appellate court’s jurisdiction apply because 925’s Motion seeks to stay deadlines  
8 unrelated to enforcement of this Court’s Final Judgment. *See* RAP 7.2(b)-(l). Any remaining  
9 concerns 925 has about issues allegedly unaddressed by this Court’s Final Judgment must be  
10 addressed with the Court of Appeals. *See* RAP 7.3; 8.3. Even then, the issue that 925 presents in  
11 its currently-pending Motion—that disclosure of e-mails would constitute a ULP—is rendered  
12 moot by this Court’s order *permanently enjoining* the release of those records. In other words,  
13 there is no longer a live case or controversy about the disclosure of the records because disclosure  
14 has been permanently enjoined. *See Orwick v. City of Seattle*, 103 Wn.2d 249, 253 (1984) (“A case  
15 is moot if a court can no longer provide effective relief.”). Thus, 925’s currently-pending Motion  
16 is doubly frivolous because: 1) it was filed in the wrong court; and 2) it discusses an issue that this  
17 Court’s Final Judgment has rendered moot. Any order entered in response to 925’s currently-  
18 pending Motion would be void, and 925’s Motion must be stricken.

19 **C. Sanctions are necessary.**

20 The Foundation is entitled to reasonable attorneys’ fees as compensation for responding to  
21 a meritless motion. CR 11 permits reasonable attorney fees and costs incurred in responding to a  
22 motion that was not well-grounded in fact or warranted by existing law or good faith argument.  
23 CR 11. The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *See*

1 *Skimming v. Boxer*, 119 Wn. App. 748, 754 (2004) (citing *Biggs v. Vail*, 124 Wn.2d 193, 197  
2 (1994)); *Lee v. The Columbian*, 64 Wn. App. 534, 539 (1992) (sanctions under CR 11 were  
3 properly imposed where the attorney for the plaintiff did not research or investigate the viability  
4 of its filing until after filing and there clearly was no basis for such a claim). A filing is baseless if  
5 it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering  
6 existing law. *Skimming*, 119 Wn. App. at 754. The trial court should impose sanctions “when it is  
7 patently clear that a claim has absolutely no chance of success.” *Skimming*, 119 Wn. App. at 755  
8 (citing *In re Cooke*, 93 Wn. App. 526, 529 (1999)).

9 Here, 925’s entire Motion is patently frivolous. For the reasons discussed above, the RAPs  
10 clearly preclude this Court’s jurisdiction and any order resulting from 925’s Motion would be void.  
11 The Foundation wholeheartedly welcomes the spirit of collegial professionalism in which parties  
12 should cooperate to the extent possible to avoid filing meritless motions. That is exactly what the  
13 Foundation did here.

14 The Foundation went to great lengths to assist 925 and prevent the filing of 925’s meritless  
15 motion. It sought to cooperate in good faith with 925 by informing 925—four times—that this  
16 Court lacked jurisdiction. It provided the name of one of 925’s own experienced attorneys for 925  
17 to consult with. It placed 925 on notice that it would be forced to seek sanctions for expending its  
18 own time and resources in responding. Yet 925 obstinately persisted and is currently asking this  
19 Court to grant an order that would be unequivocally void as a matter of law. It is not even close.

20 925’s conduct is the textbook scenario warranting sanctions under CR 11. Not awarding  
21 sanctions in cases as clear as this only encourages this type of conduct, which is exactly what CR  
22 11 intended to strongly deter. For these reasons, sanctions in the amount \$5,284, which consist  
23 solely of the Foundation’s reasonable attorneys’ fees for this motion, are necessary.

1 **VI. CONCLUSION**

2 For the foregoing reasons, the Foundation respectfully requests that this Court grant the  
3 Foundation’s Combined Motion to Strike and Motion for Sanctions. I certify that this Motion  
4 contains 3,019 words, in compliance with Local Civil Rules.

5  
6 RESPECTFULLY SUBMITTED on April 6, 2017

7   
8 Stephanie D. Olson, WSBA # 50100  
9 Greg Overstreet, WSBA #26682  
10 c/o Freedom Foundation  
11 P.O. Box 552, Olympia, WA 98507  
12 p. 360.956.3482. f. 360.352.1874  
13 SOLson@freedomfoundation.com  
14 GOverstreet@freedomfoundation.com

1 **DECLARATION OF SERVICE**

2 I certify, under penalty of perjury under the laws of the State of Washington, that on April  
3 6, 2017, I e-filed a copy of this document with the King County Superior Court, which delivered  
4 a copy via e-service agreement to the following parties:

5 Robert Kosin  
6 Washington Attorney General’s Office  
7 University of Washington Division  
8 4333 Brooklyn Avenue NE, 18<sup>th</sup> Floor  
9 Seattle, Washington 98195-9475  
10 Phone: (206) 543-4150  
11 E-mail: [rkosin@uw.edu](mailto:rkosin@uw.edu)  
12 *Attorney for Defendant the University of Washington*

**By e-mail:**  
[rkosin@uw.edu](mailto:rkosin@uw.edu)

10 Kristen Kussmann  
11 Jacob Metzger  
12 Douglas Drachler McKee & Gilbrough LLP  
13 1904 Third Ave., Suite 1030  
14 Seattle, Washington 98101  
15 206-623-0900, x229  
16 206-623-1432 (fax)  
17 E-mail: [kkussmann@qwestoffice.net](mailto:kkussmann@qwestoffice.net)  
18 *Attorneys for Plaintiff SEIU 925*

**By e-mail:**  
[kkussmann@qwestoffice.net](mailto:kkussmann@qwestoffice.net)  
[jmetzger@qwestoffice.net](mailto:jmetzger@qwestoffice.net)

16 Signed April 6, 2017, at Olympia, Washington.

17   
18 Kirsten Nelsen

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**IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY**

Service Employees International Union Local  
925,

Plaintiff,

v.

University of Washington and FREEDOM  
FOUNDATION, a Washington nonprofit  
organization

Defendants.

NO. 16-2-09719-7 SEA

**DECLARATION OF STEPHANIE OLSON  
IN SUPPORT OF FOUNDATION’S  
COMBINED MOTION TO STRIKE AND  
MOTION FOR SANCTIONS**

I, Stephanie Olson, hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am Litigation Counsel for Defendant Freedom Foundation, I make this declaration upon personal knowledge, and I am competent to testify to the matters contained herein.

**FOUNDATION FILED A NOTICE OF APPEAL**

2. On March 27, 2017, the Foundation filed a Notice of Appeal in this case. Attached as **Exhibit A** is a true and accurate copy of the Notice of Appeal.

DECLARATION OF STEPHANIE OLSON IN SUPPORT OF  
FOUNDATION’S COMBINED MOTION  
NO. 16-2-09719-7 SEA

1  
2 **FOUNDATION'S ATTEMPTS TO AVOID INCURRING ATTORNEYS' FEES**

3 3. On March 31, 2017, 925's counsel called me to discuss the remaining trial deadlines for  
4 the above-referenced case. After conferring with my colleagues, I informed 925's counsel that the  
5 remaining trial court deadlines were mooted by this Court's Final Judgment and that further actions  
6 could be addressed by the Court of Appeals. I further informed 925's counsel that the Foundation  
7 would not stipulate to any motions to the trial court because my client believed them to be  
8 meritless.

9 4. Attached as **Exhibit B** is a true and accurate copy of e-mail correspondence from 925's  
10 counsel, time-stamped at 2:07 p.m. on March 31, 2017, where 925's counsel informed the court  
11 that the Foundation did not oppose continuing the trial.

12 5. Attached as **Exhibit C** is a true and accurate copy of e-mail correspondence from the  
13 Foundation's counsel, time-stamped at 4:34 p.m. on March 31, 2017, where the Foundation's  
14 counsel informed 925's counsel, for the second time, that this Court lacked jurisdiction over any  
15 further pending motions, and citing the exact rule that precludes jurisdiction.

16 6. Attached as **Exhibit D** is a true and accurate copy of e-mail correspondence from the  
17 Foundation's counsel, time-stamped at 5:11 p.m. on March 31, 2017, where the Foundation's  
18 counsel informed 925's counsel, for the third time, that this Court lacked jurisdiction and that the  
19 Foundation would be forced to respond.

20 7. Attached as **Exhibit E** is a true and accurate copy of e-mail correspondence from the  
21 Foundation's counsel, time-stamped at 10:57 a.m. on April 3, 2017, where the Foundation's  
22 counsel informed 925's counsel, for the fourth time, that this Court lacked jurisdiction and that the  
23 Foundation would be forced to file sanctions for responding to a meritless motion.

1  
2 **FOUNDATION'S REASONABLE ATTORNEYS' FEES**

3 8. I am the in-house representative counsel in the above-captioned matter. In that capacity, I  
4 performed substantive litigation work, advised the client on litigation strategy and development,  
5 and facilitated all communications between the client and outside counsel.

6 9. From April 3, 2017, the date SEIU 925's filed its Motion to Change Trial Date and for Stay  
7 of Proceedings, to the date of filing this Declaration, I performed 12.75 hours of billable work on  
8 this case. Attached as **Exhibit F** is a true and accurate copy of my billing report for the  
9 Foundation's Combined Motion to Strike and Motion for Sanctions, which contains reasonable  
10 documentation of the work I performed.

11 10. I have been admitted to practice in Washington since September 2015 and have been an  
12 attorney in good standing with the Washington State Bar Association since that time.

13 11. I received my law degree in 2015 from the University of Washington School of Law in  
14 Seattle, Washington, where I graduated with Honors and in the top 20% of my class. During law  
15 school, I served as Symposium Editor for the *Harvard Journal of Law & Public Policy*, Articles  
16 Editor for the *Washington Journal of Law, Technology & Arts*, President of the Federalist Society,  
17 Co-President of the Christian Legal Society, staff writer to the American Bar Association's *Around*  
18 *the Circuit* blog, extern to Judge Ronald Leighton in the Western District of Washington, law clerk  
19 to the Washington State Attorney General's Criminal Litigation Unit, law clerk to the Washington  
20 Appellate Project, and participant in the Innocence Project Northwest.

21 12. I was selected in 2015 to serve as a Judge Advocate General ("JAG") for the United States  
22 Air Force.

23 13. In 2015, I began my employment with Freedom Foundation, representing the Foundation  
24

1 in litigation and providing entirely pro bono legal representation to individuals throughout  
2 Washington. Since September 2015, I have performed extensive representative work in more than  
3 36 lawsuits and quasi-litigation matters. The areas in which I primarily focus are constitutional  
4 law, civil rights law, open government law, and public disclosure law.

5 14. This case was filed under the Public Records Act (“PRA”), RCW 42.56. PRA litigation is  
6 complicated and nuanced, but my extensive work in the area has allowed me to develop an  
7 expertise in this area.

8 15. On February 28, 2017, I argued before Division II of the Washington Court of Appeals in  
9 a PRA case, *SEIU 7775 v. DSHS and Freedom Foundation*, Case No. 48881-7-II. There, SEIU  
10 775 was appealing from the trial court’s ruling in my client’s favor, where it held that  
11 Washington’s collective bargaining laws did not qualify as an “other statute” which exempted  
12 public records from disclosure.

13 16. On December 9, 2016, I represented the Foundation in a PRA case, *Freedom Foundation*  
14 *v. DSHS and SEIU 775*, Case No. 15-2-02352-34, where DSHS agreed to pay \$18,137 in fines and  
15 attorneys’ fees for wrongfully withholding records in violation of the PRA. There, DSHS agreed  
16 to pay attorneys’ fees at my billable rate of \$245/hour.

17 17. I have also assisted in numerous other PRA cases decided in my client’s favor, including  
18 *SEIU Local 925 v. Freedom Foundation*, 197 Wn. App. 203 (2016); *SEIU Healthcare 775 NW v.*  
19 *State, Dept. of Social and Health Services*, 193 Wn. App. 377 (2016), *review denied*, 186 Wn.2d  
20 1016; and *Washington Public Employees Assoc. v. State of Washington*, No. 49224-5-II.

21 18. I have researched, prepared, and submitted dozens of trial and appellate documents in cases  
22 before Washington Superior Courts, the Washington Court of Appeals, the Washington Supreme  
23 Court, and federal District Court. The nature of my work and the makeup of the Foundation’s legal

1 team has allowed me to gain a great deal of litigation experience and expertise in a very short  
2 amount of time.

3 19. The Freedom Foundation determines the hourly rate for its attorneys' services by reference  
4 to the rates prevailing in the relevant legal community for similar services by lawyers of reasonably  
5 comparable skill, experience, and reputation. *See Bowers v. Transamerica Title Ins. Co.*, 100  
6 Wn.2d 581, 597 (1983).

7 20. Based on my experience, skill, and reputation, the Freedom Foundation has determined  
8 that my hourly rate is \$245. Attached as **Exhibit G** is a true and accurate copy of the Stipulated  
9 Order in *Freedom Foundation v. DSHS and SEIU 775*, Case No. 15-2-02352-34, where the  
10 Washington Attorney General's Office agreed to pay \$15,937 in attorneys' fees to the Foundation,  
11 primarily stemming from my attorney's fees as lead counsel, at my billing rate of \$245 per hour.

12 21. I conducted a line-by-line review of each of my time entries in the above-captioned case  
13 (*see Exhibit F*) and eliminated or decreased entries to avoid unproductive, excessive, or redundant  
14 time reported. For example, I eliminated time for research on matters that were not pursued and  
15 for meetings with other in-house counsel where it might be plausibly argued that only one Freedom  
16 Foundation attorney could have accomplished the task alone.

17 22. The time I spent conferencing with my colleagues was crucial to the development and  
18 execution of the Foundation's litigation strategy.

19 23. As indicated by **Exhibit F**, I billed 12.75 hours on the on Combined Motion, the Motion  
20 to Shorten Time, and the supporting documents. Given the small size, the Foundation's limited  
21 personnel and resources, and the importance of a successful resolution for the Foundation, I believe  
22 that the hours expended on behalf of the Foundation in this litigation are of a reasonable amount.

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Dated this 6th day of April, 2017 at Olympia, WA.



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Stephanie D. Olson, WSBA # 50100  
c/o Freedom Foundation  
P.O. Box 552, Olympia, WA 98507  
p. 360.956.3482  
f. 360.352.1874  
[solson@freedomfoundation.com](mailto:solson@freedomfoundation.com)

**Declaration of Stephanie Olson in  
Support of Foundation's Combined  
Motion to Strike and Motion for  
Sanctions**

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**EXHIBIT A**

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**SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY**

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 925, a labor union,

Plaintiff,

v.

THE UNIVERSITY OF WASHINGTON, an  
agency of the State of Washington, and  
FREEDOM FOUNDATION, a non-profit  
organization,

Defendants.

NO. 16-2-09719-7 SEA

**DEFENDANT FREEDOM  
FOUNDATION'S NOTICE OF APPEAL**

Defendant Freedom Foundation seeks review by the Washington State Court of Appeals,  
Division I, of the attached orders entered in the above-captioned matter:

- Order Granting Temporary Restraining Order, entered June 10, 2016;
- Order Granting Petitioner's Motion for Preliminary Injunction, entered September 23, 2016;
- Order Denying Freedom Foundation's Motion for Reconsideration, entered October 12, 2016

- 1           • Order Granting Petitioner’s Motion for Summary Judgment and Permanent  
2           Injunction, entered March 27, 2017

3  
4 Submitted herewith is the filing fee and copies of the above-referenced orders.

5  
6 Plaintiff SEIU Local 925 is represented by:

7 Kristen Kussmann  
8 Jacob Metzger  
9 Douglas Drachler McKee & Gilbrough LLP  
10 1904 Third Ave., Suite 1030  
11 Seattle, Washington 98101  
12 206-623-0900, x229  
13 206-623-1432 (fax)  
14 *Attorney for SEIU 925*

15 Defendant University of Washington is represented by:

16 Robert Kosin  
17 Washington Attorney General’s Office  
18 University of Washington Division  
19 4333 Brooklyn Avenue NE, 18<sup>th</sup> Floor  
20 Seattle, Washington 98195-9475  
21 Phone: (206) 543-4150  
22 E-mail: [rkosin@uw.edu](mailto:rkosin@uw.edu)  
23 *Attorney for University of Washington*

24 RESPECTFULLY SUBMITTED on March 27, 2017



Stephanie D. Olson, WSBA # 50100  
c/o Freedom Foundation  
[SOlson@myfreedomfoundation.com](mailto:SOlson@myfreedomfoundation.com)

1 **DECLARATION OF SERVICE**

2 I certify, under penalty of perjury under the laws of the State of Washington, that on March  
3 27, 2017, I e-filed a copy of this document with the King County Superior Court, which delivered  
4 a copy via e-service agreement to the following parties:

5  
6 Robert Kosin  
7 Washington Attorney General’s Office  
8 University of Washington Division  
9 4333 Brooklyn Avenue NE, 18<sup>th</sup> Floor  
10 Seattle, Washington 98195-9475  
11 Phone: (206) 543-4150  
12 E-mail: [rkosin@uw.edu](mailto:rkosin@uw.edu)  
13 *Attorney for University of Washington*

By e-mail:  
[rkosin@uw.edu](mailto:rkosin@uw.edu)

11 Kristen Kussmann  
12 Douglas Drachler McKee & Gilbrough LLP  
13 1904 Third Ave., Suite 1030  
14 Seattle, Washington 98101  
15 206-623-0900, x229  
16 206-623-1432 (fax)  
17 *Attorney for SEIU 925*

By e-mail:  
[kkusmann@qwestoffice.net](mailto:kkusmann@qwestoffice.net)

18 Signed March 27, 2017, at Olympia, Washington.

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Stephanie Olson

THE HONORABLE JEFFREY RAMSDELL  
Hearing Date: June 10, 2016  
Hearing Time: 10:30 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 925, a labor union,

Petitioner,

v.

UNIVERSITY OF WASHINGTON, an  
agency of the State of Washington, and  
FREEDOM FOUNDATION, an organization

Respondents.

No. 16-2-09719-7 SEA

~~ORDER ON PETITIONER'S MOTION  
FOR PRELIMINARY INJUNCTION~~

GRANTING  
TEMPORARY  
RESTRAINING  
ORDER

Amn  
6/10/16

This matter came before the Court on the motion of Petitioner Service Employees International Union Local 925 (SEIU 925) for a preliminary injunction. The Court has reviewed the following documents and materials:

1. Petitioner Service Employees International Union Local 925's Complaint for Declaratory Judgment and Injunctive Relief;
2. Petitioner Service Employees International Union Local 925's Motion for a Temporary Restraining Order;
3. Declarations in Support of Petitioner's Motion for Temporary Restraining Order;
4. Defendant University of Washington's Answer;
5. Defendant Freedom Foundation's Answer;

~~ORDER ON PETITIONER'S MOTION FOR PRE-  
LIMINARY INJUNCTION~~

granting  
TRO

ATTORNEY GENERAL OF WASHINGTON  
University of Washington Division  
4333 Brooklyn Avenue NE, Floor 18  
P.O. Box 359475  
Seattle, Washington 98195-9475  
Phone (206) 543-4150 Fax (206) 543-0779

- 1 6. Petitioner Service Employees International Union Local 925's Motion for Preliminary
- 2 Injunction;
- 3 7. Declaration of Patricia Flores in Support of Petitioner's Motion for Preliminary Injunc-
- 4 tion;
- 5 8. Declaration of Michael Laslett in Support of Petitioner's Motion for Preliminary In-
- 6 junction;
- 7 9. Declaration of Brooke Lather in Support of Petitioner's Motion for Preliminary Injunc-
- 8 tion;
- 9 10. Defendant Freedom Foundation's Response to Plaintiff's Motion for a Preliminary In-
- 10 junction;
- 11 11. Declaration of Maxford Nelsen in Support of Defendant Freedom Foundation's Oppo-
- 12 sition to Plaintiff's Motion for Preliminary Injunction;
- 13 12. Declaration of Stephanie Olson in Support of Freedom Foundation's Opposition to
- 14 Plaintiff's Motion for Preliminary Injunction;
- 15 13. University of Washington Memorandum in Response to Petitioner's Motion for Pre-
- 16 liminary Injunction;
- 17 14. Declaration of Perry M. Tapper;
- 18 15. Petitioner's Reply in Support of Motion for Preliminary Injunction;
- 19 16. Second Declaration of Kristen Kussman in Support of Petitioner's Motion for Prelim-
- 20 inary Injunction;
- 21 17. Declaration of Stephanie Olson;
- 22 18. Third Declaration of Kristen Kussman in Support of Petitioner's Motion for Prelimi-
- 23 nary Injunction;

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~~ORDER ON PETITIONER'S MOTION FOR PRE-~~  
~~LIMINARY INJUNCTION~~  
*granting TRD*

1 And having considered the files of the record herein, and being fully advised in the prem-  
2 ises, this Court hereby finds and orders as follows:

3 The court enters a temporary  
4 restraining order (TRO) with respect  
5 to all records through the  
6 the next hearing and/or  
7 further order of the court  
8 except that records identified  
9 ~~by SEIU or Prof. Wood~~ as "public  
10 records" shall be released  
11 by July 11, 2016 at 5:00 p.m.  
12 And that SEIU shall on or  
13 before July 11, 2016 5:00 pm  
14 set a hearing before the  
15 court to show by affidavit  
16 cataloging and describing  
17 with sufficient particularity  
18 as to the status of the records  
19 as public or not public records.  
20 This order incorporates the  
21 court's oral ruling and hearing  
22 held on June 10, 2016 at 10:30.  
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Qmm  
6/11/16

granting  
TRO

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Dated this 10<sup>th</sup> day of June, 2016.

  
\_\_\_\_\_  
**JUDGE JEFFREY RAMSDELL**

Submitted by:  
**ROBERT W. FERGUSON**  
Washington Attorney General

s/Robert Kosin  
**ROBERT KOSIN, WSBA No. 28623**  
Assistant Attorney General

s/Nancy S. Garland  
**NANCY S. GARLAND, WSBA No. 43501**  
Assistant Attorney General

Attorneys for Defendant the University  
of Washington

The Honorable Jeffrey Ramsdell

**SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY**

SERVICE EMPLOYEES INTERNATIONAL )  
UNION LOCAL 925, a labor union )  
Petitioner, )

No. 16-2-09719-7 SEA

vs.

**ORDER GRANTING PETITIONER'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

THE UNIVERSITY OF WASHINGTON, an )  
agency of the State of Washington, and )  
FREEDOM FOUNDATION, an organization )  
Respondents. )

This matter came before the Court on the motion of Petitioner Service Employees International Union Local 925 (SEIU 925) for a preliminary injunction to enjoin defendant University of Washington (University or UW) from releasing certain records pursuant to a request made under the Washington Public Records Act, chapter 42.56 RCW (PRA) to the University by defendant Freedom Foundation. The Court heard oral argument on the matter on June 10, 2016, and August 5, 2016.

ORDER GRANTING PETITIONER'S MOTION  
FOR PRELIMINARY INJUNCTION - 1

Douglas, Drachler, McKee & Gilbrough  
1904 Third Ave., Suite 1030  
Seattle, WA 98101  
Phone: (206) 623-0900  
Fax: (206) 623-1432

**ORIGINAL**

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**I. PLEADINGS, DOCUMENTS AND MATERIALS**

The Court has reviewed the following pleadings, documents, and materials, and considered the oral argument of parties:

1. Petitioner's Complaint for Declaratory Judgment and Injunctive Relief to Enjoin the Disclosure of Non-Public Records, for Injunctive Relief Under RCW 42.56.540 (Public Records Act) and for Relief Under RCW 41.76 et seq. (Unfair Labor Practices) dated April 25, 2016;

2. Motion for Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue To Enjoin the Disclosure of Records dated April 25, 2016;

3. Proposed Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue dated April 24, 2016;

4. Declaration of Michael Laslett In Support of Petitioner's Motion for Temporary Restraining Order dated April 24, 2016;

5. Declaration of Kristen Kussmann In Support of Petitioner's Motion for Temporary Restraining Order dated April 24, 2016;

6. Declaration of Professor Robert Wood in Support of Petitioner's Motion for Temporary Restraining Order dated April 25, 2016;

7. Declaration of Stephanie Olson dated April 26, 2016;

8. Answer of Respondent University of Washington dated May 16, 2016;

9. Defendant Freedom Foundation's Answer dated May 16, 2016;

- 1           10.     Petitioner’s Motion for Preliminary Injunction dated May 18, 2016;
- 2           11.     Declaration of Patricia Flores in Support of Petitioner’s Motion for Preliminary
- 3 Injunction dated May 18, 2016;
- 4           12.     Declaration of William Dale in Support of Preliminary Injunction dated May 18,
- 5 2016;
- 6           13.     Declaration of Brooke Lather in Support of Petitioner’s Motion for Preliminary
- 7 Injunction dated May 18, 2016
- 8           14.     Declaration of Kristen Kussmann in Support of Petitioner’s Motion for
- 9 Preliminary Injunction dated May 18, 2016;
- 10           15.     Declaration of Michael Laslett in Support of Petitioner’s Motion for Preliminary
- 11 Injunction dated May 18, 2016;
- 12           16.     Declaration of Professor Robert Wood in Support of Petitioner’s Motion for
- 13 Preliminary Injunction dated May 16, 2016;
- 14           17.     Declaration of Brooke Lather in Support of Petitioner’s Motion for Preliminary
- 15 Injunction dated May 19, 2016;
- 16           18.     Proposed Order Granting Petitioner’s Motion for Preliminary Injunction dated
- 17 May 27, 2016;
- 18           19.     Defendant Freedom Foundation’s Response to Plaintiff’s Motion for a
- 19 Preliminary Injunction dated May 25, 2016;
- 20           20.     Declaration of Maxford Nelsen in Support of Defendant Freedom Foundation’s
- 21 Opposition to Plaintiff’s Motion for Preliminary Injunction dated May 24, 2016;
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1           21.     Declaration of Stephanie Olson in Support of Freedom Foundation's Opposition  
2 to Plaintiff's Motion for Preliminary Injunction dated May 25, 2016;

3           22.     University of Washington Memorandum in Response to Petitioner's Motion for  
4 Preliminary Injunction dated May 25, 2016;

5           23.     Declaration of Perry M. Tapper dated May 25, 2016;

6           24.     Petitioner's Reply in Support of Motion for Preliminary Injunction dated May 26,  
7 2016;

8           25.     Second Declaration of Kristen Kussmann in Support of Petitioner's Motion for  
9 Preliminary Injunction dated May 26, 2016;

10          26.     Declaration of Stephanie Olson dated May 27, 2016;

11          27.     Third Declaration of Kristen Kussmann in Support of Petitioner's Motion for  
12 Preliminary Injunction dated June 9, 2016;

13          28.     Order Granting Temporary Restraining Order dated June 10, 2016;

14          29.     Declaration of Jacob Metzger in Support of Petitioner's Motion for Preliminary  
15 Injunction, dated July 6, 2016.

16          30.     Declaration of Jacob Metzger in Support of Petitioner's Motion for Preliminary  
17 Injunction dated July 28, 2016;

18          31.     Declaration of Keenan Layton in Support of Petitioner's Motion for Preliminary  
19 Injunction dated July 28, 2016;

20          32.     Declaration of William Dale in Support of Petitioner's Motion for Preliminary  
21 Injunction dated signed July 28, 2016;

1           33.     Declaration of Brooke Lather in Support of Petitioner's Motion for Preliminary  
2 Injunction dated July 28, 2016;

3           34.     Defendant Freedom Foundation's Response to Plaintiff's Motion and Request for  
4 Sanctions dated August 3, 2016;

5           35.     Fourth Declaration of Stephanie Olson in Support of Freedom Foundation's  
6 Response to Plaintiff's Motion for Preliminary Injunction dated August 3, 2016;

7           36.     Petitioner's Second Reply in Support of Motion for Preliminary Injunction dated  
8 August 4, 2016;

9           37.     Third Declaration of Jacob Metzger in Support of Petitioner's Motion for  
10 Preliminary Injunction, dated August 12, 2016; and

11           38.     Fourth Declaration of Jacob Metzger in Support of Petitioner's Motion for  
12 Preliminary Injunction, dated September 12, 2016.

13  
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16                           **II.     FINDINGS AND CONCLUSIONS**

17           1.     This Court has jurisdiction over the subject matter and the parties and venue is  
18 proper in King County, Washington.

19           2.     SEIU 925 has standing in this matter to seek injunctive relief under chapter 42.56  
20 RCW as a party to whom public records held by a public agency may pertain and under chapter  
21 7.40 RCW as a party whose rights may be threatened by the release to the public of non-public  
22 records. The records at issue in this matter consist of 3913 pages of records, which are numbered  
23 000001-003913, consisting of emails retained by the University of Washington on its email  
24  
25

1 system. The University of Washington is a state agency.

2 3. Documents are not created within the scope of employment if the job doesn't  
3 require it, the employer isn't directing it, and it doesn't further the employer's interest. Nissen v.  
4 Pierce County, 183 Wn.2d 863 (2015).

5 4. These records were not created within the scope of the employee's employment  
6 and therefore are not public records.

7 5. Petitioner has demonstrated a likelihood of success on the merits of their claims  
8 for injunctive relief that (1) Petitioner has established a clear legal or equitable right to  
9 nondisclosure of those parts of "PR-2015-00810 Stage 1 Release\_paginated.pdf" that have not  
10 already been disclosed as public records because they contain personal and private emails  
11 unrelated to the scope of Professor Robert Wood's employment at UW and cannot be  
12 categorized as public records; (2) a well-grounded fear of immediate invasion of that right by the  
13 disclosure of those records, and that (3) the release of those records will result in immediate,  
14 actual and substantial injury to Petitioner.  
15

16 6. Accordingly, those parts of "PR-2015-00810 Stage 1 Release\_paginated.pdf" that  
17 the court finds are not public records subject to disclosure under the Public Records Act, RCW  
18 42.56 et seq., include document numbers: 000001-000006; 000014; 000023-000089; 000093-  
19 000096; 000103-000138; 000141-001431; 001434-001461; 001463-001567; 001570-001962;  
20 001964-001998; 2004; 002009-002012; 002016-002017; 002023-002044; 002049-002061;  
21 002063; 002065-002082; 002088-002530; 002532-003083; 003085-003337; 003341-003414;  
22 003418-003419; 003424-003427; 003436-003490; 003501-003913.  
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1 7. This Order incorporates the Court's oral ruling on August 5, 2016.

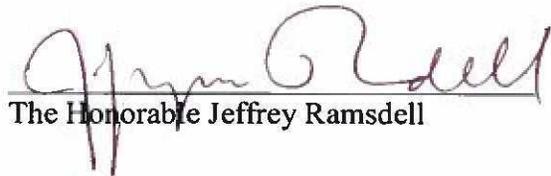
2 **III. ORDER**

3 NOW, THEREFORE, it is hereby **ORDERED AND DECREED THAT:**

4 1. Petitioner's Motion for a Preliminary Injunction is **GRANTED**; Defendant  
5 University of Washington, and its agents, servants, and employees, are enjoined from disclosing  
6 those parts of "PR-2015-00810 Stage 1 Release\_paginated.pdf" that the court finds are not public  
7 records subject to disclosure under the RCW 7.40 et seq., which include document numbers:  
8 000001-000006; 000014; 000023-000089; 000093-000096; 000103-000138; 000141-001431;  
9 001434-001461; 001463-001567; 001570-001962; 001964-001998; 2004; 002009-002012;  
10 002016-002017; 002023-002044; 002049-002061; 002063; 002065-002082; 002088-002530;  
11 002532-003083; 003085-003337; 003341-003414; 003418-003419; 003424-003427; 003436-  
12 003490; 003501-003913.

13  
14  
15 2. The Preliminary Injunction shall remain in full force and effect pending further  
16 order of the Court.

17 DONE IN OPEN COURT THIS 23<sup>rd</sup> day of September, 2016.

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20   
21 The Honorable Jeffrey Ramsdell

22  
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26  
27 ORDER GRANTING PETITIONER'S MOTION  
FOR PRELIMINARY INJUNCTION - 7

Douglas, Drachler, McKee & Gilbrough  
1904 Third Ave., Suite 1030  
Seattle, WA 98101  
Phone: (206) 623-0900  
Fax: (206) 623-1432

1 Presented by:

2 DOUGLAS, DRACHLER, MCKEE & GILBROUGH

3  
4  
5 

---

Jacob Metzger, WSBA #39211  
6 Kristen Kussmann, WSBA #30638  
7 1904 Third Ave, Suite 1030  
8 Seattle, WA 98101  
9 Phone: (206) 623-0900

10 Attorneys for Petitioner SEIU 925

11 Copies received:

12 ROBERT W. FERGUSON  
13 Attorney General

14  
15  
16 

---

Robert W. Kosin, WSBA #28623  
17 Nancy S. Garland, WSBA #43501  
18 Assistant Attorneys General  
19 Washington Attorney General's Office  
20 University of Washington Division  
21 4333 Brooklyn Avenue NE, 18th Floor  
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26 Attorneys for Defendant  
27 University of Washington

28 

---

Stephanie Olson, WSBA #50100  
c/o Freedom Foundation  
P.O. Box 552  
Olympia, WA 98507  
Phone: (360) 956-3482  
Email:  
[solson@myfreedomfoundation.com](mailto:solson@myfreedomfoundation.com)

29 ORDER GRANTING PETITIONER'S MOTION  
30 FOR PRELIMINARY INJUNCTION - 8

Douglas, Drachler, McKee & Gilbrough  
1904 Third Ave., Suite 1030  
Seattle, WA 98101  
Phone: (206) 623-0900  
Fax: (206) 623-1432

Counsel for FF  
shall promptly mail a copy of this  
order to all other counsel/parties

HON. JEFFREY RAMSDELL

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**IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 925, a labor union

Petitioner,

vs.

THE UNIVERSITY OF WASHINGTON, an  
agency of the State of Washington, and  
FREEDOM FOUNDATION, an organization  
Respondents.

No. 16-2-09719-7 SEA

~~PROPOSED~~ ORDER <sup>Denying</sup> GRANTING  
DEFENDANT FREEDOM  
FOUNDATION'S MOTION FOR  
RECONSIDERATION

gmr  
10/2/16

This matter came before the Court on Defendant Freedom Foundation's Motion for Reconsideration. The Court has reviewed the following documents and materials:

1. Foundation's Motion for Reconsideration and supporting declarations and exhibits;
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_

ORDER GRANTING FOUNDATION'S MOTION  
FOR RECONSIDERATION  
No. 16-2-09719-7 SEA

**ORIGINAL**



PO Box 552 Olympia, WA 98507 | 360.956.3482  
myFreedomFoundation.com  
JAbernathy@myFreedomFoundation.com  
DDowhirst@myFreedomFoundation.com

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The Court hereby <sup>Denies</sup> GRANTS the Foundation's Motion for Reconsideration for just cause.

JKC  
10/12/16

IT IS SO ORDERED this 12<sup>th</sup> day of October, 2016.

  
The Honorable Jeffrey Ramsdell

*Presented by:*

STEPHANIE D. OLSON, WSBA #50100  
Freedom Foundation  
PO Box 552  
Olympia, WA 98507  
360.956.3482  
[solson@myfreedomfoundation.com](mailto:solson@myfreedomfoundation.com)

The Honorable Jeffrey Ramsdell  
Noted for hearing on March 24, 2017 at 2:00pm  
With Oral Argument

**SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY**

SERVICE EMPLOYEES INTERNATIONAL )  
UNION LOCAL 925, a labor union )

Petitioner,

vs.

THE UNIVERSITY OF WASHINGTON, an )  
agency of the State of Washington, and )  
FREEDOM FOUNDATION, an organization )

Respondents.

No. 16-2-09719-7 SEA

~~PROPOSED ORDER GRANTING~~  
**PETITIONER'S MOTION FOR**  
**SUMMARY JUDGMENT AND**  
**PERMANENT INJUNCTION**

*ymr*  
*3/27/17*

This matter came before the Court on the motion of Petitioner Service Employees International Union Local 925 (SEIU 925) for summary judgment and permanent injunction to enjoin defendant University of Washington (University or UW) from releasing certain records pursuant to a request made under the Washington Public Records Act, chapter 42.56 RCW

PROPOSED ORDER GRANTING  
PETITIONER'S MOTION  
FOR SUMMARY JUDGMENT AND  
PERMANENT INJUNCTION - 1

Douglas, Drachler, McKee & Gilbrough  
1904 Third Ave., Suite 1030  
Seattle, WA 98101  
Phone: (206) 623-0900  
Fax: (206) 623-1432

1 (PRA) to the University by defendant Freedom Foundation. The Court heard oral argument on  
2 the matter on March 24, 2017.

3 **I. PLEADINGS, DOCUMENTS AND MATERIALS**

4 The Court has reviewed the following pleadings, documents, and materials, and  
5 considered the oral argument of parties:  
6

7 1. Petitioner's Complaint for Declaratory Judgment and Injunctive Relief to Enjoin  
8 the Disclosure of Non-Public Records, for Injunctive Relief Under RCW 42.56.540 (Public  
9 Records Act) and for Relief Under RCW 41.76 et seq. (Unfair Labor Practices) dated April 25,  
10 2016;

11 1. Motion for Temporary Restraining Order and Order to Show Cause Why a  
12 Preliminary Injunction Should Not Issue To Enjoin the Disclosure of Records dated April 25,  
13 2016;

14 1. Proposed Temporary Restraining Order and Order to Show Cause Why a  
15 Preliminary Injunction Should Not Issue dated April 24, 2016;

16 1. Declaration of Michael Laslett In Support of Petitioner's Motion for Temporary  
17 Restraining Order dated April 24, 2016;

18 1. Declaration of Kristen Kussmann In Support of Petitioner's Motion for  
19 Temporary Restraining Order dated April 24, 2016;

20 1. Declaration of Professor Robert Wood in Support of Petitioner's Motion for  
21 Temporary Restraining Order dated April 25, 2016;

22  
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24  
25 PROPOSED ORDER GRANTING  
26 PETITIONER'S MOTION  
27 FOR SUMMARY JUDGMENT AND  
28 PERMANENT INJUNCTION - 2

Douglas, Drachler, McKee & Gilbrough  
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Seattle, WA 98101  
Phone: (206) 623-0900  
Fax: (206) 623-1432

1. Declaration of Stephanie Olson dated April 26, 2016;

1. Answer of Respondent University of Washington dated May 16, 2016;

1. Defendant Freedom Foundation's Answer dated May 16, 2016;

1. Petitioner's Motion for Preliminary Injunction dated May 18, 2016;

1. Declaration of Patricia Flores in Support of Petitioner's Motion for Preliminary Injunction dated May 18, 2016;

1. Declaration of William Dale in Support of Preliminary Injunction dated May 18, 2016;

1. Declaration of Brooke Lather in Support of Petitioner's Motion for Preliminary Injunction dated May 18, 2016

1. Declaration of Kristen Kussmann in Support of Petitioner's Motion for Preliminary Injunction dated May 18, 2016;

1. Declaration of Michael Laslett in Support of Petitioner's Motion for Preliminary Injunction dated May 18, 2016;

1. Declaration of Professor Robert Wood in Support of Petitioner's Motion for Preliminary Injunction dated May 16, 2016;

1. Declaration of Brooke Lather in Support of Petitioner's Motion for Preliminary Injunction dated May 19, 2016;

1. Proposed Order Granting Petitioner's Motion for Preliminary Injunction dated May 27, 2016;

1           1.       Defendant Freedom Foundation's Response to Plaintiff's Motion for a  
2 Preliminary Injunction dated May 25, 2016;

3           1.       Declaration of Maxford Nelsen in Support of Defendant Freedom Foundation's  
4 Opposition to Plaintiff's Motion for Preliminary Injunction dated May 24, 2016;

5           1.       Declaration of Stephanie Olson in Support of Freedom Foundation's Opposition  
6 to Plaintiff's Motion for Preliminary Injunction dated May 25, 2016;

7           1.       University of Washington Memorandum in Response to Petitioner's Motion for  
8 Preliminary Injunction dated May 25, 2016;

9           1.       Declaration of Perry M. Tapper dated May 25, 2016;

10           1.       Petitioner's Reply in Support of Motion for Preliminary Injunction dated May 26,  
11 2016;

12           1.       Second Declaration of Kristen Kussmann in Support of Petitioner's Motion for  
13 Preliminary Injunction dated May 26, 2016;

14           1.       Declaration of Stephanie Olson dated May 27, 2016;

15           1.       Third Declaration of Kristen Kussmann in Support of Petitioner's Motion for  
16 Preliminary Injunction dated June 9, 2016;

17           1.       Order Granting Temporary Restraining Order dated June 10, 2016;

18           1.       Declaration of Jacob Metzger in Support of Petitioner's Motion for Preliminary  
19 Injunction, dated July 6, 2016.

20           1.       Declaration of Jacob Metzger in Support of Petitioner's Motion for Preliminary  
21 Injunction, dated July 6, 2016.

1 Injunction dated July 28, 2016;

- 2 1. Declaration of Keenan Layton in Support of Petitioner's Motion for Preliminary

3 Injunction dated July 28, 2016;

- 4 1. Declaration of William Dale in Support of Petitioner's Motion for Preliminary

5 Injunction dated signed July 28, 2016;

- 6 1. Declaration of Brooke Lather in Support of Petitioner's Motion for Preliminary

7 Injunction dated July 28, 2016;

- 8 1. Defendant Freedom Foundation's Response to Plaintiff's Motion and Request for

9 Sanctions dated August 3, 2016;

- 10 1. Fourth Declaration of Stephanie Olson in Support of Freedom Foundation's

11 Response to Plaintiff's Motion for Preliminary Injunction dated August 3, 2016;

- 12 36. Petitioner's Second Reply in Support of Motion for Preliminary Injunction dated

13 August 4, 2016;

- 14 36. Third Declaration of Jacob Metzger in Support of Petitioner's Motion for

15 Preliminary Injunction, dated August 12, 2016; and

- 16 36. Fourth Declaration of Jacob Metzger in Support of Petitioner's Motion for

17 Preliminary Injunction, dated September 12, 2016.

- 18 36. Order Granting Petitioner's Motion for Preliminary Injunction dated September

19 23, 2016.

- 20 36. Defendant Freedom Foundation's Motion for Reconsideration dated October 3,

21 PROPOSED ORDER GRANTING  
22 PETITIONER'S MOTION  
23 FOR SUMMARY JUDGMENT AND  
24 PERMANENT INJUNCTION - 5

25 Douglas, Drachler, McKee & Gilbrough  
26 1904 Third Ave., Suite 1030  
27 Seattle, WA 98101  
28 Phone: (206) 623-0900  
Fax: (206) 623-1432

1 2016.

2 36. Declaration of David Dewhirst in Support of Defendant Freedom Foundations  
3 Motion for Reconsideration dated October 3, 2016.

4 36. Petitioner's Motion for Summary Judgment and Permanent Injunction dated  
5 February 24, 2017.

6 36. Declaration of Kristen Kussmann in Support of Petitioner's Motion for Summary  
7 Judgment and Permanent Injunction dated February 24, 2017.

8 44. Defendant Freedom Foundation's Response to Petitioner's Motion for Summary  
9 Judgment and Permanent Injunction dated March 13, 2017.

10 45. Declaration of Stephanie Olson in Support of Defendant Freedom Foundation's  
11 Response to Petitioner's Motion for Summary Judgment and Permanent Injunction dated March  
12 13, 2017.

13 46. University of Washington's Response to Petitioner's Motion for Summary  
14 Judgment and Permanent Injunction dated March 13, 2017.

15 47. Declaration of Robert Kosin dated March 13, 2017.

16 48. Petitioner's Reply in Support of Motion for Summary Judgment and Permanent  
17 Injunction dated March 20, 2017.

18 49. Declaration of Jacob Metzger in Support of Petitioner's Reply dated March 20,  
19 2017.

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II. FINDINGS AND CONCLUSIONS

1. This Court has jurisdiction over the subject matter and the parties and venue is proper in King County, Washington.

2. SEIU 925 has standing in this matter to seek injunctive relief under The 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 records at issue in this matter consist of 3913 pages of records, which are numbered 000001-003913, consisting of emails retained by the University of Washington on its email system. The University of Washington is a state agency. *The records are writings as defined in RCW 42.56.010(4).*

*gmc  
3/27/17*

3. Those parts of "PR-2015-00810 Stage 1 Release\_paginated.pdf" that have not already been disclosed are not public records under the PRA.

3. Petitioner has demonstrated (1) a clear legal and equitable right to nondisclosure of those parts of "PR-2015-00810 Stage 1 Release\_paginated.pdf" that have not already been disclosed as a public record because they are not public records *as defined in RCW 42.56.010(3) of* ~~under~~ the PRA and do not contain information relating to the conduct of government or the performance of any governmental or proprietary function; (2) a well-grounded fear of immediate invasion of that right by the disclosure of the records, and that (3) the release of those records will result in actual and substantial injury to Petitioner.

*gmc  
3/27/17*

1 4. The dust having finally settled following the  
2 provision of excellent briefing and oral argument by  
3 all counsel involved, This Court's decision is predicated  
4 primarily on Tiberino v. Spokane Co. Prosecutor, 103 Wn App  
5 680 (2000). In that case, Mrs. Tiberino's first argument  
6 was that her e-mails were not "public records" as defined  
7 by statute because they did "not contain any information  
8 relating to the conduct of governmental or proprietary  
9 function." Tiberino, 103 Wn App at 687.

11 Rather than holding that the emails were public  
12 records simply because they were on a state agency's  
13 server, the Tiberino court held that the emails were  
14 public records because the "County printed the emails  
15 in preparation of litigation over her (Tiberino's) termination,  
16 a proprietary function." Tiberino, 103 Wn App at 688. The  
17 Court then proceeded to analyze whether these  
18 ~~some~~ emails, now deemed "public records," were  
19 subject to any exemptions.

22 The obvious inference derived from the  
23 Tiberino court's ~~analysis~~ analysis is that had the

Amr  
3/27/17

1 e-mails not been printed in preparation for litigation,  
2 the e-mails would not be related to a proprietary  
3 function ~~as~~ and, therefore, would not be a public  
4 record as defined by statute. Similar to the  
5 e-mails in Tiberino, the e-mails at issue in the  
6 case at bar, without more, do not relate to the  
7 conduct of government or proprietary function.  
8 Accordingly, the e-mails are not public records  
9 as defined in RCW 42.56.010(3) and are not  
10 subject to disclosure.  
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gmc  
3/27/17

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25 PROPOSED ORDER GRANTING  
26 PETITIONER'S MOTION  
27 FOR SUMMARY JUDGMENT AND  
28 PERMANENT INJUNCTION - ~~14~~ 8(a)  
0900

Douglas, Drachler, McKee & Gilbrough  
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Fax: (206) 623-1432

1  
2 **III. ORDER**

3 NOW, THEREFORE, it is hereby **ORDERED AND DECREED THAT:**

4 1. Petitioner's Motion for Permanent Injunction is **GRANTED**; Defendant  
5 University of Washington, and its agents, servants, and employees, are enjoined from disclosing  
6 those parts of "PR-2015-00810 Stage 1 Release\_paginated.pdf" that the court finds are not public  
7 records subject to disclosure under the RCW 7.40 et seq., which include document numbers:  
8 000001-000006; 000014; 000023-000089; 000093-000096; 000103-000138; 000141-001431;  
9 001434-001461; 001463-001567; 001570-001962; 001964-001998; 2004; 002009-002012;  
10 002016-002017; 002023-002044; 002049-002061; 002063; 002065-002082; 002088-002530;  
11 002532-003083; 003085-003337; 003341-003414; 003418-003419; 003424-003427; 003436-  
12 003490; 003501-003913.

13  
14  
15 2. The Permanent Injunction shall remain in full force and effect pending further  
16 order of the Court.

17  
18 3. *The decision rendered in this case is limited*  
19 *to the records currently at issue and the*  
20 *ruling should not be construed as an "advisory"*  
21 *ruling on other documents not before this*  
22 *court or other cases not at issue.*  
23

*June 3/27/17*

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7 DONE IN OPEN COURT THIS <sup>27<sup>th</sup></sup> ~~24<sup>th</sup>~~ day of March, 2017.

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10   
The Honorable Jeffrey Ramsdell

11 Presented by:

12 DOUGLAS, DRACHLER, MCKEE & GILBROUGH

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15 

---

  
16 Jacob Metzger, WSBA #39211  
17 Kristen Kussmann, WSBA #30638  
18 1904 Third Ave, Suite 1030  
19 Seattle, WA 98101  
20 Phone: (206) 623-0900

21 Attorneys for Petitioner SEIU 925

22 ROBERT W. FERGUSON  
23 Attorney General

24  
25 PROPOSED ORDER GRANTING  
26 PETITIONER'S MOTION  
27 FOR SUMMARY JUDGMENT AND  
28 PERMANENT INJUNCTION - 11  
0900

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Robert W. Kosin, WSBA #28623  
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Email: [nancysg@uw.edu](mailto:nancysg@uw.edu)

Attorneys for Defendant  
University of Washington

PROPOSED ORDER GRANTING  
PETITIONER'S MOTION  
FOR SUMMARY JUDGMENT AND  
PERMANENT INJUNCTION - 12  
0900

Stephanie Olson, WSBA #50100  
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[solson@myfreedomfoundation.com](mailto:solson@myfreedomfoundation.com)

Attorney for Freedom Foundation

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1904 Third Ave., Suite 1030  
Seattle, WA 98101  
Phone: (206) 623-  
Fax: (206) 623-1432

**Declaration of Stephanie Olson in  
Support of Foundation's Combined  
Motion to Strike and Motion for  
Sanctions**

---

**EXHIBIT B**

**Subject:** RE: SEIU 925 Proposed Order in 16-2-09719-7 SEA

**Date:** Friday, March 31, 2017 at 2:07:22 PM Pacific Daylight Time

**From:** Jacob Metzger

**To:** 'Court, Ramsdell'

**CC:** 'Rob Kosin', 'Nancy Garland', Greg Overstreet, Stephanie Olson, 'Kristen Kussmann'

Bailiff Parkin

The Court granted Petitioner SEIU 925's motion for Permanent Injunction in the above captioned case on 3/27/17. The parties believe Judge Ramsdell's Order to be dispositive as to the release of the records at issue. According to the case schedule, the parties have a trial date on 4/24/17 and a deadline for a joint Statement of trial readiness on Monday, 4/3/17.

SEIU 925 would like to continue the trial until after the Court of appeals has weighed in on Judge Ramsdell's Order, and neither UW or Freedom Foundation opposes continuing the trial. Does the court require a formal motion to continue the trial date?

Thank you,

Jacob Metzger

Douglas Drachler McKee & Gilbrough LLP

1904 Third Ave, Suite 1030

Seattle, WA 98101

206-623-0900 ext 234

206-623-1432 (fax)

jmetzger@qwestoffice.net

CONFIDENTIALITY NOTE: THIS E-MAIL TRANSMISSION AND ANY ATTACHMENTS MAY CONTAIN PRIVILEGED OR CONFIDENTIAL INFORMATION. IF YOU HAVE RECEIVED THIS EMAIL IN ERROR, PLEASE ADVISE US BY REPLY EMAIL AND DELETE THE MESSAGE AND ANY ATTACHMENTS WITHOUT COPYING OR DISCLOSING THE CONTENTS. THANK YOU

---

**From:** Court, Ramsdell [mailto:Ramsdell.Court@kingcounty.gov]

**Sent:** Monday, March 27, 2017 2:23 PM

**To:** Jacob Metzger

**Cc:** 'Rob Kosin'; 'Nancy Garland'; 'Greg Overstreet'; 'Stephanie Olson'; 'Kristen Kussmann'

**Subject:** RE: SEIU 925 Proposed Order in 16-2-09719-7 SEA

Good Afternoon,

Please see attached the signed order granting petitioner's motion for summary judgment and permanent injunction. The original will be filed with the clerk.

Thank you,

Rianne Rubright for

**Erica Parkin**

Bailiff to the Honorable Jeffrey Ramsdell

---

**From:** Jacob Metzger [<mailto:jmetzger@qwestoffice.net>]  
**Sent:** Friday, March 24, 2017 4:46 PM  
**To:** Court, Ramsdell <[Ramsdell.Court@kingcounty.gov](mailto:Ramsdell.Court@kingcounty.gov)>  
**Cc:** 'Jacob Metzger' <[jmetzger@qwestoffice.net](mailto:jmetzger@qwestoffice.net)>; 'Rob Kosin' <[rkosin@uw.edu](mailto:rkosin@uw.edu)>; 'Nancy Garland' <[nancysg@uw.edu](mailto:nancysg@uw.edu)>; 'Greg Overstreet' <[GOverstreet@myfreedomfoundation.com](mailto:GOverstreet@myfreedomfoundation.com)>; 'Stephanie Olson' <[SOlson@myfreedomfoundation.com](mailto:SOlson@myfreedomfoundation.com)>; 'Kristen Kussmann' <[kkussmann@qwestoffice.net](mailto:kkussmann@qwestoffice.net)>  
**Subject:** SEIU 925 Proposed Order in 16-2-09719-7 SEA

Please find a copy of SEIU 925's Proposed Order in the above referenced matter attached.

Jacob Metzger  
Douglas Drachler McKee & Gilbrough LLP  
1904 Third Ave, Suite 1030  
Seattle, WA 98101  
206-623-0900 ext 234  
206-623-1432 (fax)  
[jmetzger@qwestoffice.net](mailto:jmetzger@qwestoffice.net)

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**Declaration of Stephanie Olson in  
Support of Foundation's Combined  
Motion to Strike and Motion for  
Sanctions**

---

**EXHIBIT C**

**Subject:** Re: SEIU 925 Proposed Order in 16-2-09719-7 SEA

**Date:** Friday, March 31, 2017 at 4:34:19 PM Pacific Daylight Time

**From:** Stephanie Olson

**To:** Jacob Metzger

**CC:** Greg Overstreet, 'Kristen Kussmann'

Jacob,

I wanted to touch base regarding your e-mail to the Court. I apologize if I was unclear over the phone earlier today, but I believe I said that the Foundation would not stipulate to any motion filed by your client, and that the Foundation takes the position that the trial court no longer has jurisdiction over this matter. Upon further research, I am affirmed in this position. See RAP 7.2. Therefore, please inform the Court that the Foundation did not agree to not oppose your client's motion. Indeed, if your client chooses to proceed, we will be forced to file a quick response pointing to RAP 7.2 and inform the Court that it no longer has jurisdiction.

Thank you.

Best,

Stephanie

Stephanie Olson  
Litigation Counsel | Freedom Foundation  
[SOlson@freedomfoundation.com](mailto:SOlson@freedomfoundation.com)  
360.956.3482 | PO Box 552 Olympia, WA 98507  
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**From:** Jacob Metzger <jmetzger@qwestoffice.net>  
**Date:** Friday, March 31, 2017 at 2:07 PM  
**To:** "'Court, Ramsdell'" <Ramsdell.Court@kingcounty.gov>  
**Cc:** 'Rob Kosin' <rkosin@uw.edu>, 'Nancy Garland' <nancysg@uw.edu>, Greg Overstreet <GOverstreet@freedomfoundation.com>, Stephanie Olson <SOlson@freedomfoundation.com>, 'Kristen Kussmann' <kkussmann@qwestoffice.net>  
**Subject:** RE: SEIU 925 Proposed Order in 16-2-09719-7 SEA

Bailiff Parkin

The Court granted Petitioner SEIU 925's motion for Permanent Injunction in the above captioned case on 3/27/17. The parties believe Judge Ramsdell's Order to be dispositive as to the release of the records at issue. According to the case schedule, the parties have a trial date on 4/24/17 and a deadline for a joint Statement of trial readiness on Monday, 4/3/17.

SEIU 925 would like to continue the trial until after the Court of appeals has weighed in on Judge Ramsdell's Order, and neither UW or Freedom Foundation opposes continuing the trial. Does the court require a formal motion to continue the trial date?

Thank you,

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**From:** Court, Ramsdell [mailto:Ramsdell.Court@kingcounty.gov]  
**Sent:** Monday, March 27, 2017 2:23 PM  
**To:** Jacob Metzger  
**Cc:** 'Rob Kosin'; 'Nancy Garland'; 'Greg Overstreet'; 'Stephanie Olson'; 'Kristen Kussmann'  
**Subject:** RE: SEIU 925 Proposed Order in 16-2-09719-7 SEA

Good Afternoon,

Please see attached the signed order granting petitioner's motion for summary judgment and permanent injunction. The original will be filed with the clerk.

Thank you,

Rianne Rubright for

*Erica Parkin*

Bailiff to the Honorable Jeffrey Ramsdell

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**Cc:** 'Jacob Metzger' <jmetzger@qwestoffice.net>; 'Rob Kosin' <rkosin@uw.edu>; 'Nancy Garland' <nancysg@uw.edu>; 'Greg Overstreet' <GOverstreet@myfreedomfoundation.com>; 'Stephanie Olson' <SOlson@myfreedomfoundation.com>; 'Kristen Kussmann' <kkussmann@qwestoffice.net>  
**Subject:** SEIU 925 Proposed Order in 16-2-09719-7 SEA

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**Declaration of Stephanie Olson in  
Support of Foundation's Combined  
Motion to Strike and Motion for  
Sanctions**

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**EXHIBIT D**

**Subject:** Re: SEIU 925 Proposed Order in 16-2-09719-7 SEA

**Date:** Friday, March 31, 2017 at 5:11:22 PM Pacific Daylight Time

**From:** Stephanie Olson

**To:** Jacob Metzger

**CC:** Greg Overstreet, 'Kristen Kussmann'

Hi Jacob,

Thanks for the clarification. We will be opposing any motions with the trial court based on lack of jurisdiction, for the reasons I stated earlier.

I appreciate the call earlier and the cooperation in working this out. Have a good weekend!

Best,

Stephanie

Stephanie Olson

Litigation Counsel | Freedom Foundation

[SOlson@freedomfoundation.com](mailto:SOlson@freedomfoundation.com)

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**From:** Jacob Metzger <jmetzger@qwestoffice.net>

**Date:** Friday, March 31, 2017 at 5:03 PM

**To:** Stephanie Olson <SOlson@freedomfoundation.com>

**Cc:** Greg Overstreet <GOverstreet@freedomfoundation.com>, 'Kristen Kussmann' <kkussmann@qwestoffice.net>

**Subject:** RE: SEIU 925 Proposed Order in 16-2-09719-7 SEA

Stephanie,

RAP 7.2 doesn't appear to apply until the Court of Appeals has accepted review. I have not received any communication from the Court suggesting that it has accepted review. Did I miss it?

I stated in my email to the Court today that Freedom Foundation did not oppose continuing the trial from its current date i.e. not going to trial on April 24<sup>th</sup> and never said anything about an agreement by Freedom Foundation not to oppose a motion. I apologize if I mischaracterized your position when I wrote "and neither UW or Freedom Foundation opposes continuing the trial." If I misunderstood and Freedom Foundation does oppose continuing the trial date, please let me know and I'll correct the record with the court, otherwise, I don't think there's anything to correct.

I wrote to you this afternoon specifically to ensure that I did not mischaracterize the position of the parties in any motion I file. Based on your response, I won't include any characterization of Freedom Foundation's

position in any motion I file.

Thank you,

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**Sent:** Friday, March 31, 2017 4:34 PM  
**To:** Jacob Metzger  
**Cc:** Greg Overstreet; 'Kristen Kussmann'  
**Subject:** Re: SEIU 925 Proposed Order in 16-2-09719-7 SEA

Jacob,

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Thank you.

Best,

Stephanie

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**To:** "'Court, Ramsdell'" <[Ramsdell.Court@kingcounty.gov](mailto:Ramsdell.Court@kingcounty.gov)>

**Cc:** 'Rob Kosin' <[rkosin@uw.edu](mailto:rkosin@uw.edu)>, 'Nancy Garland' <[nancysg@uw.edu](mailto:nancysg@uw.edu)>, Greg Overstreet <[GOverstreet@freedomfoundation.com](mailto:GOverstreet@freedomfoundation.com)>, Stephanie Olson <[SOlson@freedomfoundation.com](mailto:SOlson@freedomfoundation.com)>, 'Kristen Kussmann' <[kkussmann@qwestoffice.net](mailto:kkussmann@qwestoffice.net)>  
**Subject:** RE: SEIU 925 Proposed Order in 16-2-09719-7 SEA

Bailiff Parkin

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**Cc:** 'Rob Kosin'; 'Nancy Garland'; 'Greg Overstreet'; 'Stephanie Olson'; 'Kristen Kussmann'  
**Subject:** RE: SEIU 925 Proposed Order in 16-2-09719-7 SEA

Good Afternoon,

Please see attached the signed order granting petitioner's motion for summary judgment and permanent injunction. The original will be filed with the clerk.

Thank you,

Rianne Rubright for

*Erica Parkin*

Bailiff to the Honorable Jeffrey Ramsdell

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**To:** Court, Ramsdell <[Ramsdell.Court@kingcounty.gov](mailto:Ramsdell.Court@kingcounty.gov)>

**Cc:** 'Jacob Metzger' <[jmetzger@qwestoffice.net](mailto:jmetzger@qwestoffice.net)>; 'Rob Kosin' <[rkosin@uw.edu](mailto:rkosin@uw.edu)>; 'Nancy Garland' <[nancysg@uw.edu](mailto:nancysg@uw.edu)>; 'Greg Overstreet' <[GOverstreet@myfreedomfoundation.com](mailto:GOverstreet@myfreedomfoundation.com)>; 'Stephanie Olson' <[SOlson@myfreedomfoundation.com](mailto:SOlson@myfreedomfoundation.com)>; 'Kristen Kussmann' <[kkussmann@qwestoffice.net](mailto:kkussmann@qwestoffice.net)>

**Subject:** SEIU 925 Proposed Order in 16-2-09719-7 SEA

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**Declaration of Stephanie Olson in  
Support of Foundation's Combined  
Motion to Strike and Motion for  
Sanctions**

---

**EXHIBIT E**

**Subject:** Re: SEIU 925 Proposed Order in 16-2-09719-7 SEA  
**Date:** Monday, April 3, 2017 at 10:57:13 AM Pacific Daylight Time  
**From:** Stephanie Olson  
**To:** Jacob Metzger  
**CC:** Greg Overstreet, 'Kristen Kussmann'

Jacob,

For appeals as a matter of right, the review is deemed to be automatically accepted. We are honestly telling you that any further trial activity is unnecessary at this point. If you'd like, you can consult with Rob Lavitt, as he's represented SEIU 925 against us in a number of other PRA lawsuits.

However, if we have to file anything in response to any of your client's motions, we will be forced to ask for sanctions because we believe any filing is unnecessary and a waste of the parties' and the court's time.

Best,

Stephanie

Stephanie Olson  
Litigation Counsel | Freedom Foundation  
[SOlson@freedomfoundation.com](mailto:SOlson@freedomfoundation.com)  
360.956.3482 | PO Box 552 Olympia, WA 98507  
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---

**From:** Jacob Metzger <jmetzger@qwestoffice.net>  
**Date:** Monday, April 3, 2017 at 10:49 AM  
**To:** Stephanie Olson <SOlson@freedomfoundation.com>  
**Cc:** Greg Overstreet <GOverstreet@freedomfoundation.com>, 'Kristen Kussmann' <kkussmann@qwestoffice.net>  
**Subject:** RE: SEIU 925 Proposed Order in 16-2-09719-7 SEA

Stephanie,

The Parties Joint Statement of Trial Readiness is due to the Court today. I can prepare it, but will you be able to review it this afternoon and then let me know whether or not you want to sign onto it or file your own? Of if you know that you won't be signing onto any trial readiness statement, please let me know that as well.

Thank you,

Jacob Metzger  
Douglas Drachler McKee & Gilbrough LLP  
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Seattle, WA 98101  
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**From:** Stephanie Olson [mailto:SOlson@freedomfoundation.com]  
**Sent:** Friday, March 31, 2017 5:11 PM  
**To:** Jacob Metzger  
**Cc:** Greg Overstreet; 'Kristen Kussmann'  
**Subject:** Re: SEIU 925 Proposed Order in 16-2-09719-7 SEA

Hi Jacob,

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I appreciate the call earlier and the cooperation in working this out. Have a good weekend!

Best,

Stephanie

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Stephanie,

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Foundation not to oppose a motion. I apologize if I mischaracterized your position when I wrote “and neither UW or Freedom Foundation opposes continuing the trial.” If I misunderstood and Freedom Foundation does oppose continuing the trial date, please let me know and I’ll correct the record with the court, otherwise, I don’t think there’s anything to correct.

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**Sent:** Friday, March 31, 2017 4:34 PM  
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Jacob,

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Thank you.

Best,

Stephanie

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Bailiff Parkin

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Good Afternoon,

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**Declaration of Stephanie Olson in  
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**EXHIBIT F**

# **Billable Hours Report**

**Freedom Foundation**

**Stephanie Olson**

**Hourly Rate: \$245**

***State of Washington v. Freedom Foundation***

**King Co. Superior Court, No. 16-2-09719-7 SEA**

<b><u>Date</u></b>	<b><u>Description</u></b>	<b><u>Time</u></b>	<b><u>Amount</u></b>
4/7/2017	Review 925's Motion to Change Trial Date and For Stay of Proceedings, Certificate of E-service, Notice of Hearing, Declaration of Jacob Metzger, and Joint Confirmation of Trial Readiness; file appropriately; discuss strategy with colleagues	1	\$245
4/4/2007	Research law and rules regarding subject matter jurisdiction and appellate procedure; Draft Foundation's Combined Motion to Strike and Motion for Sanctions and supporting documents and declarations; Correspond with colleagues regarding legal strategy	3.75	\$919
4/5/2007	Research law and rules regarding subject matter jurisdiction and appellate procedure; Draft Foundation's Combined Motion to Strike and Motion for Sanctions and supporting documents and declarations; Correspond with colleagues regarding legal strategy	4.75	\$1,164
4/6/2007	Motion for Sanctions and supporting documents and declarations; research law behind motions to short time;	3.5	\$858
<b>Totals:</b>		<b>12.75</b>	<b>\$3,124</b>

**s/Stephanie Olson**

Stephanie Olson

Litigation Counsel

**Declaration of Stephanie Olson in  
Support of Foundation's Combined  
Motion to Strike and Motion for  
Sanctions**

---

**EXHIBIT G**

1 DEXPEDITE  
D No Hearing Set  
2 0 Hearing is Set:  
Date: 12/9/2016  
3 Time: 9:00 PM  
Judge: Carol Murphy  
4  
5  
6

7 STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT  
8

9 FREEDOM FOUNDATION, a  
Washington nonprofit organization,  
10  
Plaintiff,  
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NO. 15-2-02352-34  
A:6R:EEB ORDER-  
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12 v.

13 WASHINGTON STATE  
DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES, an agency of the  
14 State of Washington and SEIU 775, a  
labor organization,  
15

Defendants.  
16

17 This matter having come before the Court on a Motion for Summary Judgment, and  
18 ~~the Plaintiff and Defendants, Department of Social and Health Services and SEIU 775, having~~  
19 ~~agreed that Summary Judgment is appropriate,~~ the Court hereby enters the following: *CM*  
*accepted the agreement of Freedom Foundation and the Department of Social and Health Services,*

FINDINGS OFFACT

- 20 1. On January 12, 2016, the Freedom Foundation ("FF") submitted a public records  
21 request to DSHS ("Jan 12 Request") and requested five categories of public records  
22 ("Requests 1-5").  
23 2. On January 20, 2016, DSHS informed FF that DSHS would need 30 work days, or until  
24 about March 3, 2016, to produce an installment of records responsive to FF's Jan 12  
25 Request.  
26

.Afttli,ED ORDER

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ATTORNEY GENERAL OF WASHINGTON  
Labor & Personnel Division  
7141 Cleanwater Drive SW  
POBox40145  
Olympia, WA 98504-0145  
(360) 664-4167

- 1 3. On January 27, 2016, DSHS informed SEIU 775 of FF's Jan 12 Request, and that  
2 DSHS planned to produce records responsive to FF's Jan 12 request on March 3, 2016  
3 absent a temporary restraining order or other demonstrated notice of its intent to seek  
4 an order restraining release.
- 5 4. On February 25, 2016, SEIU 775 requested an extension of the March 3, 2016 release  
6 date so that SEIU 775 could seek and possibly obtain an injunction to prevent the  
7 release of records relevant to FF's Jan 12 Request. DSHS requested and received a date  
8 by which the motion for preliminary injunction would be filed, which was March 11,  
9 2016.
- 10 5. On March 3, 2016, DSHS informed FF that it was extending the date of release of the  
11 records responsive to the Jan 12 Request to March 22, 2016 because SEIU 775 planned  
12 to seek an injunction pertaining to the records. DSHS did not indicate any other reason  
13 for the extended release date of the records responsive to FF's Jan 12 Request.
- 14 6. On March 11, 2016, SEIU 775 filed a Motion for Preliminary Injunction on March 11,  
15 2016 and noted a preliminary injunction hearing for March 18, 2016 at 9am. In its  
16 preliminary injunction, SEIU 775 sought to prevent the release of two out of the five  
17 categories of FF's Jan 12 request ("Requests 1 & 2"), leaving the release of the  
18 remaining three categories undisputed ("Requests 3-5").
- 19 7. On March 17, 2016, the Court notified all the parties that it was moving the time of  
20 SEIU 775's preliminary injunction hearing from 9:00 a.m. to 1:30 p.m. The attorney for  
21 SEIU 775 responded that she was unavailable at 1:30 p.m. and stated she would be  
22 available for a special setting on March 21 or March 22, 2016, but did not inquire  
23 further of the judicial assistant if a special set time would be available on March 21 or  
24 22. Instead, SEIU 775's attorney re-noted the preliminary injunction hearing to March  
25 25, 2016 at 9am.

26

1 8. On March 21, 2016, DSHS informed all the parties that it would not release the records  
2 until sometime after the re-noted preliminary injunction hearing on March 25, 2016.

3 9. On March 22, 2016, FF filed a Motion for TRO to prohibit DSHS from extending the  
4 date of release of the records. The motion was heard by Commissioner Zinn on that  
5 same date; she refused to enter a TRO.

6 10. On March 23, 2016, DSHS released the public records requested by FF that were never  
7 contested by SEID 775 (Requests 3-5), as the person handling the January request  
8 did not understand that Requests 3 - 5 were not disputed until notified after the March  
9 22, 2016 hearing.

10 11. On March 25, 2016, the Court denied SEID 775's Motion for a Preliminary Injunction,  
11 ruling that it was unlikely to prove that any PRA exemption applied. Nevertheless, the  
12 Court stayed the release of Requests 1-2 to preserve SEID 775's fruits of appeal.

13 12. On April 7, 2016, the Court of Appeals, Division II, issued a stay prohibiting the  
14 release of the records until the conclusion of the Court of Appeals matter.

15 Based on the above facts, the Court enters the following:

16 **CONCLUSION**

17 4. DSHS extended the release of records date originally set for March 3, 2016 two times -  
18 first to March 22, 2016 and then to March 25, 2016 - solely to allow SEID 775 the  
19 opportunity to obtain an injunction.

20 1 - For each extension, there was no court order in place preventing DSHS from releasing  
21 the records.

22 1§ 11-DSHS's failure to approve or deny the Jan 12 Request on the date it originally estimated  
23 it would, solely to allow a third party the opportunity to possibly obtain an injunction, agree that  
24 violates the PRA according to *Kitsap County Prosecuting Attorneys Guild v. Kitsap*  
25 *County*, 156 Wn. App. 110, 120; 231 P.3d 219 (2010). raise,

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1 **!lo.** The release of the records requested in Request 1 and 2 are within the jurisdiction of the  
2 Court of Appeals under Case No. 48881-7-II, which has stayed the release of the  
3 records pending the outcome of the COA matter.

4 Based upon the above the Court enters the following:

5 **AGREED ORDER**

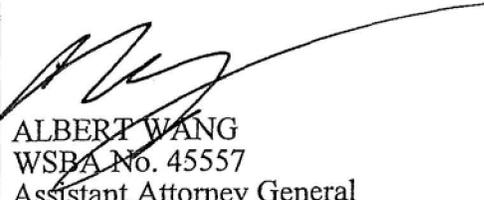
- 6 1. FF's Motion for Summary Judgment is GRANTED.
- 7 2. DSHS agrees pay to FF's attorneys' fees in the amount of \$15,937.
- 8 3. Without conceding that this penalty is reasonable under the test articulated in  
9 *Yousou.fian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010), DSHS  
10 agrees pay a penalty in the amount of \$2,200.00 for the time between March 3, 2016  
11 and March 25, 2016 (\$100 per day for 22 days).
- 12 4. By this agreed order of the parties all other issues in this case are hereby dismissed and  
13 this order fully resolves this case. The COA matter is unaffected by this Order.

14  
15 12/9/16

15 C a u - t r n I M M  
16 Thurston County Superior Court

17 Presented by:

18  
19 ROBERT W. FERGUSON  
Attorney General

20  
21   
22 ALBERT WANG  
23 WSBA No. 45557  
Assistant Attorney General

24 SUSAN SACKETT DANPULLO  
25 WSBA No. 24249  
Senior Counsel  
26

AGREED ORDER

f

ATTORNEY GENERAL OF WASHINGTON  
Labor & Personnel Division

Approved as to form:

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DMITRI IGLITZIN  
WSBA No. 17673

JENNIFER ROBBINS  
WSBA No. 40861  
Attorneys For SEIU



---

STEPHANIE OLSON  
WSBA No. 50100  
Attorneys for Freedom Foundation

AGREED ORDER

ATTORNEY GENERAL OF WASHINGTON  
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Olympia, WA 98504-0145  
(360) 664-4167

**Declaration of Stephanie Olson in  
Support of Foundation's Combined  
Motion to Strike and Motion for  
Sanctions**

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**EXHIBIT G**

1  EXPEDITE  
2  No Hearing Set  
3  Hearing is Set:  
4     Date: 12/9/2016  
5     Time: 9:00 PM  
6     Judge: Carol Murphy

7                                   **STATE OF WASHINGTON**  
8                                   **THURSTON COUNTY SUPERIOR COURT**

9 FREEDOM FOUNDATION, a  
10 Washington nonprofit organization,  
11                                   Plaintiff,

NO. 15-2-02352-34

~~AGREED ORDER~~  
~~[Proposed]~~ Stipulated Order

12 v.

13 WASHINGTON STATE  
14 DEPARTMENT OF SOCIAL AND  
15 HEALTH SERVICES, an agency of the  
16 State of Washington and SEIU 775, a  
17 labor organization,

18                                   Defendants.

19           This matter having come before the Court on a Motion for Summary Judgment, and  
20 ~~the Plaintiff and Defendants, Department of Social and Health Services and SEIU 775, having~~  
21 ~~agreed that Summary Judgment is appropriate,~~ *accepted the agreement of Freedom Foundation and the Department*  
22 *of Social and Health Services,* the Court hereby enters the following:

23                                   **FINDINGS OF FACT**

- 24           1. On January 12, 2016, the Freedom Foundation ("FF") submitted a public records  
25           request to DSHS ("Jan 12 Request") and requested five categories of public records  
26           ("Requests 1-5").
2. On January 20, 2016, DSHS informed FF that DSHS would need 30 work days, or until  
          about March 3, 2016, to produce an installment of records responsive to FF's Jan 12  
          Request.

~~AGREED ORDER~~

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- 1 3. On January 27, 2016, DSHS informed SEIU 775 of FF's Jan 12 Request, and that  
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23 further of the judicial assistant if a special set time would be available on March 21 or  
24 22. Instead, SEIU 775's attorney re-noted the preliminary injunction hearing to March  
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- 3 9. On March 22, 2016, FF filed a Motion for TRO to prohibit DSHS from extending the  
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- 6 10. On March 23, 2016, DSHS released the public records requested by FF that were never  
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 9 22, 2016 hearing.
- 10 11. On March 25, 2016, the Court denied SEIU 775's Motion for a Preliminary Injunction,  
 11 ruling that it was unlikely to prove that any PRA exemption applied. Nevertheless, the  
 12 Court stayed the release of Requests 1-2 to preserve SEIU 775's fruits of appeal.
- 13 12. On April 7, 2016, the Court of Appeals, Division II, issued a stay prohibiting the  
 14 release of the records until the conclusion of the Court of Appeals matter.

15 Based on the above facts, the Court enters the following:

16 ~~CONCLUSIONS OF LAW~~

17 13. 4. DSHS extended the release of records date originally set for March 3, 2016 two times –  
 18 first to March 22, 2016 and then to March 25, 2016 - solely to allow SEIU 775 the  
 19 opportunity to obtain an injunction.

20 14. 2. For each extension, there was no court order in place preventing DSHS from releasing  
 21 the records.

22 15. 3. DSHS's failure to approve or deny the Jan 12 Request on the date it originally estimated  
 23 it would, solely to allow a third party the opportunity to possibly obtain an injunction,  
 24 violates the PRA according to *Kitsap County Prosecuting Attorneys Guild v. Kitsap*  
 25 *County*, 156 Wn. App. 110, 120; 231 P.3d 219 (2010).  
 26 *Freedom Foundation and the Department of Social and Health Services agree that*  
*in the context of this case,*

CMM

1 16. ~~3~~ The release of the records requested in Request 1 and 2 are within the jurisdiction of the  
2 Court of Appeals under Case No. 48881-7-II, which has stayed the release of the  
3 records pending the outcome of the COA matter.

4 Based upon the above the Court enters the following:

5 AGREED ORDER

- 6 1. FF's Motion for Summary Judgment is GRANTED.
- 7 2. DSHS agrees pay to FF's attorneys' fees in the amount of \$15,937.
- 8 3. Without conceding that this penalty is reasonable under the test articulated in  
9 *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010), DSHS  
10 agrees pay a penalty in the amount of \$2,200.00 for the time between March 3, 2016  
11 and March 25, 2016 (\$100 per day for 22 days).
- 12 4. By this agreed order of the parties all other issues in this case are hereby dismissed and  
13 this order fully resolves this case. The COA matter is unaffected by this Order.

14  
15 12/9/16

15 *Carol Murphy*  
16 Judge Carol Murphy  
Thurston County Superior Court

17 Presented by:

18  
19 ROBERT W. FERGUSON  
Attorney General

20  
21 *[Signature]*  
22 ALBERT WANG  
WSBA No. 45557  
23 Assistant Attorney General

24 SUSAN SACKETT DANPULLO  
25 WSBA No. 24249  
26 Senior Counsel

AGREED ORDER

4

ATTORNEY GENERAL OF WASHINGTON  
Labor & Personnel Division  
7141 Cleanwater Drive SW  
PO Box 40145  
Olympia, WA 98504-0145  
(360) 664-4167

Approved as to form:

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DMITRI IGLITZIN  
WSBA No. 17673

JENNIFER ROBBINS  
WSBA No. 40861  
Attorneys For SEIU



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STEPHANIE OLSON  
WSBA No. 50100  
Attorneys for Freedom Foundation

# **APPENDIX D**

The Honorable Jeffrey Ramsdell  
Noted for Hearing on April 11, 2017

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**SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY**

SERVICE EMPLOYEES INTERNATIONAL )  
UNION LOCAL 925, a labor union )

Petitioner,

vs.

THE UNIVERSITY OF WASHINGTON, an )  
agency of the State of Washington, and )  
FREEDOM FOUNDATION, an organization )

Respondents.

No. 16-2-09719-7 SEA

**PETITIONER’S MOTION TO CHANGE  
TRIAL DATE AND FOR STAY OF  
PROCEEDINGS**

PETITIONER’S MOTION TO CHANGE  
TRIAL DATE AND FOR STAY  
OF PROCEEDINGS - 1

Douglas Drachler McKee & Gilbrough  
1904 Third Ave., Suite 1030  
Seattle, WA 99101-1170  
Phone: (206) 623-0900  
Fax: (206) 623-1432

1 **I. RELIEF REQUESTED**

2 Service Employees International Union Local 925 (“SEIU 925” or “Union”) respectfully  
3 requests that the April 24, 2017 trial date be changed and continued and proceedings in this  
4 matter stayed until such time as the Washington State Court of Appeals issues a ruling on the  
5 Freedom Foundation’s appeal of this Court’s March 27, 2017 Order Granting Summary  
6 Judgment and Permanent Injunction.  
7

8 **II. STATEMENT OF FACTS**

9 On April 25, 2016, SEIU 925 filed a Complaint, Summons, Motion for a Temporary  
10 Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue, and  
11 supporting documents, to enjoin release of “PR-2015-00810 Stage 1 Release\_paginated.pdf”.  
12 Comp. for Decl. Judgment and Injunctive Relief. SEIU 925’s Complaint included four causes of  
13 action: (1) declaratory judgment that the records at issue are not public records and cannot  
14 otherwise be disclosed under the Public Records Act, (2) injunctive relief pursuant to RCW 7.40  
15 et seq. enjoining the release of the records at issue because they are not public records, (3)  
16 injunctive relief pursuant to RCW 42.56.540 because the records at issue are not public records,  
17 but in the alternative, the records are exempt or prohibited from disclosure pursuant to the Public  
18 Records Act, and (4) a finding that release of the records at issue related to Union organizing by  
19 the University of Washington (UW) is an unfair labor practice (ULP) pursuant to RCW  
20 41.76.050(1)(a) and (b). *Id.* at 8-12.  
21  
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26 PETITIONER’S MOTION TO CHANGE  
27 TRIAL DATE AND FOR STAY  
28 OF PROCEEDINGS - 2

Douglas Drachler McKee & Gilbrough  
1904 Third Ave., Suite 1030  
Seattle, WA 99101-1170  
Phone: (206) 623-0900  
Fax: (206) 623-1432

1 On June 10, 2016, this Court granted a temporary restraining order enjoining UW from  
2 releasing “PR-2015-00810 Stage 1 Release\_paginated.pdf.” On August 6, 2016, the Court heard  
3 oral argument and granted Petitioner’s motion for preliminary injunction, finding that those parts  
4 of “PR-2015-00810 Stage 1 Release\_paginated.pdf” not already released to Freedom Foundation  
5 are not public records subject to disclosure. Order Granting Motion for Preliminary Injunction  
6 (9/23/2016). On March 27, 2017, this Court granted SEIU 925’s motion for Summary Judgment  
7 and Permanent Injunction, enjoining UW from releasing those parts of “PR-2015-00810 Stage 1  
8 Release\_paginated.pdf” not already released to Freedom Foundation because they are not “public  
9 records as defined in RCW 42.56.010(3).”  
10

11 On March 27, 2017, the Freedom Foundation filed a Notice of Appeal of the Permanent  
12 Injunction Order. The case schedule in this matter sets a trial date of April 24, 2017. Because this  
13 Court has already permanently enjoined release of the records at issue in this case because they  
14 are not public records, the only remaining cause of action to be tried is Petitioner’s fourth cause  
15 of action alleging unfair labor practice pursuant to RCW 41.76.050(1)(a) and (b).  
16

17 UW does not object to continuing or staying the trial date. Metzger Declaration in  
18 Support of Motion to Change Trial Date.  
19

### 20 **III. ARGUMENT**

21 Circumstances support changing the trial date and staying proceedings. First, UW and  
22 SEIU 925 – the key parties to the ULP charge – agree that the trial date should be continued or  
23 stayed until after a decision from the Washington State Court of Appeals. Second, judicial  
24

25  
26 PETITIONER’S MOTION TO CHANGE  
27 TRIAL DATE AND FOR STAY  
28 OF PROCEEDINGS - 3

Douglas Drachler McKee & Gilbrough  
1904 Third Ave., Suite 1030  
Seattle, WA 99101-1170  
Phone: (206) 623-0900  
Fax: (206) 623-1432

1 economy supports changing the trial date or staying proceedings, as this Court has already  
2 enjoined release of the records at issue as non-public records pursuant to RCW 42.56.010(3).  
3 Thus, at this point, the only remaining issue for trial is whether release of the records constitutes  
4 an unfair labor practice pursuant to RCW 41.76.050(1)(a) and (b). If this motion were granted,  
5 the trial date would be re-set after the Court of Appeals issues a decision on the Freedom  
6 Foundation's appeal. If the Washington Court of Appeals affirms the Order for Summary  
7 Judgment and Permanent Injunction, the records at issue will not be released. Even if the Court  
8 of Appeals does not affirm this Court's Order for Permanent Injunction, none of the parties to  
9 this litigation will be harmed by delaying the ULP trial. Thus, the desires of the parties and  
10 judicial efficiency support continuing the April 24, 2017 trial date and staying proceedings until  
11 the Court of Appeals issues a ruling on the Freedom Foundation's appeal.  
12  
13

14 For the foregoing reasons, SEIU 925 respectfully requests that the Court grant its Motion  
15 for Change of Trial Date and Stay of Proceedings.

16 RESPECTFULLY SUBMITTED this 3rd day of April, 2017.

17 DOUGLAS DRACHLER MCKEE & GILBROUGH

18 /s/ Jacob Metzger

19 Jacob Metzger, WSBA #39211

20 Kristen Kussmann, WSBA#30638,

21 1904 Third Ave., Ste. 1030

22 Seattle, WA 98101

23 Phone: (206) 623-0900, Fax: (206) 623-1432

24 [kkussmann@qwestoffice.net](mailto:kkussmann@qwestoffice.net)

25 [jmetzger@qwestoffice.net](mailto:jmetzger@qwestoffice.net)

26 *Attorneys for Petitioner SEIU 925*

27 PETITIONER'S MOTION TO CHANGE  
28 TRIAL DATE AND FOR STAY  
OF PROCEEDINGS - 4

Douglas Drachler McKee & Gilbrough  
1904 Third Ave., Suite 1030  
Seattle, WA 99101-1170  
Phone: (206) 623-0900  
Fax: (206) 623-1432

# FREEDOM FOUNDATION

June 26, 2017 - 4:44 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 76630-9  
**Appellate Court Case Title:** Freedom Foundation, Appellant v. Service Employees International Union Local 925, Respondents  
**Superior Court Case Number:** 16-2-09719-7

### The following documents have been uploaded:

- 766309\_Briefs\_20170626164244D1439518\_8340.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was UW e-mail brief and Appendix FINAL.pdf*

### A copy of the uploaded files will be sent to:

- kkussmann@qwestoffice.net
- nancysg@uw.edu
- pdrachler@qwestoffice.net
- rkosin@uw.edu

### Comments:

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

**Filing on Behalf of:** Stephanie Diane Olson - Email: solson@myfreedomfoundation.com (Alternate Email: )

Address:  
P.O. Box 552  
Olympia, WA, 98507  
Phone: (360) 956-3482

**Note: The Filing Id is 20170626164244D1439518**