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No. 96262-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,

Petitioner,

v.

UNIVERSITY OF WASHINGTON

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,

Respondents.

**PETITIONER FREEDOM FOUNDATION'S ANSWER TO SEIU
STATE COUNCIL'S AMICUS BRIEF**

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PETITIONER FREEDOM FOUNDATION'S
ANSWER TO SEIU STATE COUNCIL'S AMICUS BRIEF
Case No. 92626-6

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I. INTRODUCTION

Most of the arguments presented in the Amicus Curiae brief filed by the Washington State Labor Council (“WSLC”); Washington Federation of State Employees (“WFSE”); SEIU Washington State Council, Washington Education Association (“WEA”); Teamsters Local 117 (“Local 117”); AFT Washington (“AFT”) (collectively, “Unions”); and King County, Washington (“King County”) (collectively, “Amici”) are repetitive of matters contained in the Respondent Service Employee International Union Local 925’s (“SEIU 925”) supplemental brief. However, the Amici have posited two (2) arguments which have not been addressed by any of the parties in the supplemental briefing. First, the Amici wrongly suggest that the Public Employee Collective Bargaining Act (“PECBA”) and the Personnel System Reform Act (“PSRA”) contain Public Records Act (“PRA”) exceptions for public records related to union organizing. *See* Brief of Amici (“Amici Brief”), at 6. Second, the Unions prematurely raise a constitutional issue regarding Washington State’s right to privacy that is not properly before the Court and would be inappropriate for the Court to decide. *Amicus Brief*, at 15. The Foundation will address both in turn; however, neither argument requires lengthy consideration.

II. ARGUMENT

A. **Statutory exemptions to the PRA must be explicit, and neither the PECBA nor the PSRA contain a PRA exception for public records related to union organizing, nor will UW commit a ULP by disclosing public records.¹**

i. Neither the PECBA nor the PSRA contain an explicit statutory exemption under the PRA.

The PRA requires agencies to make available all public records unless the record falls within the specific exemptions contained within the act, “or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). Statutory exemptions to the PRA must be explicit. *Doe v. Washington State Patrol*, 185 Wn.2d 363, 372, 374 P.3d 63 (2016); *SEIU 775 v. State Department of Social and Health Services*, 198 Wn. App. 745, 396 P.3d 369, *review den’d* 189 Wn.2d 1011 (2017). Washington State courts have already determined that the PECBA does not provide an “other statute” exemption under the PRA because the PECBA does not expressly prohibit or exempt the release of specific records or information, *see SEIU 775*, 198 Wn. App. at 747, and similarly, the PSRA also does not contain a PRA exemption for the matters at hand. *See* RCW 41.80.

¹ Amici contend that the documents at issue are not public records because employers lack the right to control or direct employees’ attempts to organize for collective bargaining and therefore those documents were not created within the scope of employment. Amicus Brief at 6-7. The Foundation will not repeat its arguments that *Nissen* does not require a finding that the records in question were made within the scope of employment to be a public record under the PRA, as the Foundation’s supplemental brief previously addressed this matter in great detail.

In *SEIU 775 v. DSHS*, the Freedom Foundation sought DSHS public records stating the times and location of contracting appointments and training presentations for individual providers. 198 Wn. App. at 747. SEIU 775 argued that the PECBA exempted disclosure under the PRA because DSHS’s disclosure of the records would constitute an unfair labor practice. *Id.* Division Two soundly rejected this line of argument, stating that the disclosure of the records would not be an unfair labor practice under the PECBA because it did not qualify under the “other statute” exemption of the PRA. *Id.*

ii. *UW is not interfering with employees collective bargaining rights by disclosing public records to a third party and therefore are not committing a ULP.*

Amici argue that the employer, here the University of Washington, is interfering with public employees’ union activities by allowing the disclosure of Professor Wood’s emails. Amicus Brief at 7. They posit that the disclosure of records subject to the PRA, which have the potential for a “chilling effect” upon public employees, cannot be disclosed due to interference with union organizing protections within the PECBA and the PSRA. Amicus Brief at 9. Additionally, Amici suggest that the records at issue are not subject to public disclosure because UW is precluded from “directing, controlling, monitoring, or asking questions about faculty members efforts to organize a union.” Amicus Brief at 11.

However, Amici’s desire for a statutory exemption cannot supplant this Court’s mandate that “courts will not find an ‘other statute’ exemption when a statute is not explicit.” *Doe v. Washington State Patrol*, 185 Wn.2d 363, 377, 374 P.3d 63 (2016). Even if disclosure under normal circumstances could potentially implicate an unfair labor charge, Division Two directly and thoroughly discussed this issue in *SEIU 775*, stating unambiguously that “[t]he PECBA does not explicitly exempt or prohibit the release of records or information *that would constitute an unfair labor practice.*” *SEIU 775*, 198 Wn. App. at 754-5 (emphasis added).

UW’s posture towards faculty members’ efforts to organize a union has no bearing on whether a third party can request this information as a manner of remaining informed. UW has not requested this information - the Foundation has. UW’s role would simply be compiling the information on behalf of an interested third party as it would be required to do with any public record. Regardless of whether it would be an unfair labor practice for UW to use the information to hinder union organizing, the PRA still requires UW to provide the Foundation with this information as no statutory exemptions exist that would preclude its production. Moreover, even if production of the records could be an unfair labor practice, which it could

not, the existence of an ULP cause of action would not *per se* squash the agency's requirement to comply with the PRA.²

Essentially Amici contend that UW will be faced with a Morton's fork of being sued either way. On the one hand if UW does not disclose the records to the Foundation it faces a suit under the PRA from the Foundation, and on the other hand if UW does disclose the records to the Foundation it faces a ULP from the unions. This however is a false dilemma.

The "independent interference" standard for a ULP under RCW 41.56.140 is when an employer is "engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity." *City of Tacoma*, Decision 6793-A (PECB, 2000) (internal citations omitted). There is no evidence that UW as an employer is engaging in any behavior which could reasonably be perceived as a threat of reprisal or force or promise of benefit associated with the professor's union activity. No reasonable UW employee in similar circumstances would see UW's disclosure of requested public records as an

² The question of whether compliance with the PRA could be a defense to a PECBA action is not before the Court. The law is clear that, unless an "other statute" explicitly creates a PRA exemption, the broad disclosure provisions of the PRA control, and disclosure is required. *See supra*. As such, this Court need only determine whether the records at issue fall within the scope of the PRA, and need not resolve a (non-existent) conflict between the PRA and PECBA.

attempt to discourage protected activity. *King County*, Decision 6994-B (PECB, 2002).

Amici do not cite a single case which demonstrates that the disclosure of public records under the PRA would be a ULP. All of the cases, PERC decisions, and NLRB decisions to which Amici cite relate to an employer specifically interfering with, monitoring, or questioning an employee's interactions with their established union. *See generally, Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn. App. 541, 222 P.3d 1217 (2009); *Pub. Employees Relations Comm'n v. City of Vancouver*, 107 Wn. App. 697, 708, 33 P.3d 74 (2001); *City of Tacoma*, Decision 6793-A (PECB, 2000); *National Tel. Directory Corp.*, 319 NLRB 420, 421 (1995); and *Pacific Molasses Co. v. NLRB Regional Office # 15*, 577 F.2d 1172, 1182 (5th Cir. 1978).

Disclosing public records in response to an outside request does not create a threat that the UW internally is opposed to union activity, and therefore cannot be an unfair labor practice. Without any ULP, there cannot be a conflict between the PRA and PECBA.

Amici's citations to general provisions of the PECBA and PCRA do not satisfy the PRA's clear and specific requirement that statutory exemptions be explicit. This Court should reject Amici Curiae's attempt to rewrite the statute to fit their own ends.

B. Amici Curiae’s Invocation of Constitutional Privacy Rights is Both Premature and Unfounded.

While constitutional privacy concerns do sometimes prevent the disclosure of records under the PRA, constitutional privacy analysis only applies once records have been deemed “public records,” which is the primary issue before this Court. However, even if the issue of the right to privacy was properly before this Court, Amici Curiae’s nebulous reference to speculative personal information that *may* be contained in the thousands of pages of information set to be disclosed is insufficient to establish a constitutional injury.

“When possible, this court resolves disputes without reaching constitutional arguments.” *Sleasman v. City of Lacey*, 159 Wn.2d 639, 647, 151 P.3d 990 (2007). The Washington State constitution does not apply in determining whether a record is a “public record” under RCW 42.56.010(3). As such, this Court need not entertain a constitutional argument to address the issues before it.

The focus for this Court is on the threshold question of whether the documents in question are in fact “public records” under RCW 42.56.010(3), and more specifically whether the language in *Nissen* created a “scope of employment” requirement for records to be “public records.” The analysis of whether the disclosure of public records is in violation of

Washington State constitutional privacy rights does not logically come until there is a determination that the records are in fact “public records” subject to disclosure. The trial court on remand should have the opportunity first to determine whether to redact any private material, should a party actually make any such claim.

However, even if a discussion of potential privacy concerns were timely, *Amici Curiae* do not even contend that sensitive personal information is, in fact, at issue in any of the particular records sought here. *See Service Employees International Union Local 925 v. Freedom Foundation*, 197 Wn. App. 203, 222, 389 P.3d 641 (2016) (“*Private affairs are those that reveal intimate or discrete details of a person’s life.*”) They argue only that “[t]o the extent any of the thousands of pages set to be disclosed in this case contain sensitive personal information, Article I, Section 7 prevents their release.” *Amicus Brief*, at 19 (emphasis added). This is too speculative a basis to ask that this Court muddy a simple matter of statutory application, especially when the trial court has not developed the factual record to be able to adequately answer the question.

By way of contrast, SEIU 925’s motion for preliminary injunction argued that Professor Wood’s emails were not public records subject to disclosure and did not arise constitutional arguments related to privacy rights. CP 83-94. Instead, SEIU 925 argued “in the alternative” that the

records at issue were exempt. CP 90. Both the trial court and Division Two focused on whether the records themselves qualified as “public records,” and therefore there was no need for an analysis of constitutional privacy concerns or potential exemptions, particularly without an adequate trial court record to make a determination. CP 233-36, 296, 693; *see also Service Employees International Union Local 925 v. The University of Washington*, 4 Wn. App.2d 605, 423 P.3d 849 (2018). It would not be appropriate for this Court to make any determinations on those grounds.

This dispute presents no need for the Court to wade into the realm of constitutional questions; this Court can and should resolve the dispute that is actually before it, without reaching the constitutional arguments presented by Amici Curiae.

III. CONCLUSION

Neither the PECBA nor the PSRA provide an exemption under the PRA, and as such neither have any bearing on whether the records at issue are public records. Additionally, the University of Washington is not interfering with union organization or committing an unfair labor practice, as the PECBA does not apply to, or constrain the PRA. Nor is it necessary for this Court to address Amici Curiae’s arguments regarding constitutional privacy safeguards as that issue is neither before this Court, nor is it

applicable to the question of whether the records at issue are “public records.”

RESPECTFULLY SUBMITTED on April 30, 2019.



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