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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.

**SUPPLEMENTAL BRIEF
OF PETITIONER FREEDOM FOUNDATION**

Sydney Phillips, WSBA #54295
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
SPhillips@freedomfoundation.com

Attorney for Petitioner, Freedom Foundation

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I. INTRODUCTION

Petitioner Freedom Foundation (“Foundation”) is the Appellant below and Defendant at the trial court. The Foundation is a Washington nonprofit organization, devoted to informing public employees about their legal rights regarding union membership and dues payment obligations. At issue here are requests for public records the Foundation submitted to the University of Washington (“UW”) for emails sent and received by UW employees on UW-owned servers. The Foundation asks this Court to reverse the Court of Appeals’ published decision, for reasons set forth below.

II. ISSUES PRESENTED FOR REVIEW

1. Whether this Court’s decision in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), redefined “Public Record” under RCW 42.56 to include only writings which were *created* within the scope of employment, and involve only matters within the scope of employment even if they are owned or retained by the state agency?

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

3. Whether a court may rely on an interested party’s descriptions of records, rather than on the agency’s determination, and not conduct an *in camera* review, when enjoining disclosure of documents the agency believed were public records?

III. STATEMENT OF THE CASE

The Foundation seeks reversal of the Court of Appeals' decision in *Service Employees International Union Local 925 v. The University of Washington and the Freedom Foundation*, 4 Wn.App.2d 605, 423 P.3d 849 (June 11, 2018).¹

In December 2015, the Foundation submitted a request under the Public Records Act ("PRA") to UW. The request asked UW to produce all emails or other records in possession of four UW employees containing terms relating to the Foundation's work. *Serv. Emp. Int'l Union Local 925*, 4 Wn.App.2d at 611. The UW Office of Public Records and Open Public Meetings ("OPR") first collected and reviewed responsive records stored on Professor Robert Wood's UW email account. OPR determined it would disclose the documents as public records (it "was unable to determine that the records were not public records"), scheduled a date to release them, and notified Professor Wood *Id.* Professor Wood in turn contacted SEIU 925, which brought the present lawsuit to prevent disclosure *Id.* at 612. The trial court relied on descriptions of the documents provided by SEIU 925 (rather than the determination by OPR) and did not conduct an *in camera* review. It determined that the records requested were not created "within the scope of the employee's employment and therefore were not public records" subject to disclosure. *Id.* at 613. The Court of Appeals affirmed, without any further document review.

¹ A copy of the published opinion is attached as an appendix.

The definition of public record has three (3) elements: 1) any writing, 2) containing information *relating to* the conduct of government or the performance of any governmental or proprietary function, 3) prepared, *owned*, used, or *retained by* any state or local agency. RCW 42.56.010(3) (emphasis added). No one has disputed the first element, so only the facts supporting the second and third elements are at issue.

As to the third element, it is undisputed that the records requested were owned and retained by the University of Washington, a state agency. Clerk's Papers (CP) 389. This single dispositive fact fully satisfies the statutory language of this element. However, Division One held that the records were exempt from disclosure under the third element, because even though they were owned and retained by the UW, they were not created "within the scope of employment." *Serv. Emp. Int'l Union Local 925*, 4 Wn.App.2d at 610. Division One had the benefit of only a meager factual record, and cites to no facts to support its claim these records were not created within the scope of Dr. Wood's employment. The facts suggest otherwise. The facts show that many of the emails sent by or to Professor Wood were sent during work hours. CP 220. The responsive records in this installment totaled 3,913 pages, *Serv. Emp. Int'l Union Local 925*, 4 Wn.App.2d at 612, indicating that at least some included his professional activities.²

² This many pages involved a significant amount of Professor Wood's time, for which the state's taxpayers compensate him; if all this communication was for his *personal* activities, surely that information should be subject to public disclosure and review.

There is little relevant information to evaluate the second element, that the records must relate to the conduct of government or Mr. Wood's performance of his governmental function. No evidence has been presented relating to the contents of the records. No party has asserted to any court that the records do not contain information related to the conduct of government. The Foundation was unable to present evidence concerning the contents because it was not permitted to see the records in question or do any discovery on the issue. CP 504, 543.

Division One and the trial court relied upon four (4) conclusory categories to evaluate whether the information at issue related to the conduct of government. Service Employee International Union Local 925 ("SEIU 925") refused to provide the relevant facts to the trial or appellate court, instead asserting all 3,913 pages fell into one of four categories. These categories were:

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

CP 321; CP 159-161.

These categories address the purported mindset or purpose of the drafter or recipient of the email, but not whether the content related to the

conduct of government or the performance of Dr. Wood’s government function, as required by RCW 42.56.010(3).

IV. ARGUMENT

A. Summary of Argument

The Court of Appeals erred by applying a “scope of employment” test to both the second and third elements of the definition of “public records.” Division One’s decision in this case substantially and drastically changed Washington State public records law.

This Court’s decision in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) does not, and cannot, summarily prevent disclosure under the PRA of public records that otherwise squarely meet the three (3) elements of a public record under RCW 42.56.010(3). Division One’s novel application of the “scope of employment” test to documents owned and retained by a state agency mischaracterizes the plain meaning of *Nissen* and RCW 42.56.010(3). Additionally, it is in direct conflict with *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016), *review denied*, 187 Wn.2d 1024 (2017), which correctly applied *Nissen*. The Division One Court of Appeals erred by requiring the use of a “scope of employment” test for records well within the plain meaning of RCW 42.56.010(3).

Division One further erred by accepting conclusory descriptions of documents, and relying on an interested party rather than the public agency without conducting an *in camera* review. Division One’s opinion undermines the PRA—the country’s most generous public records law.

B. *Nissen*'s Scope of Employment Test Is Inapplicable to Records in the State's Possession.

Division One erred by applying the 'scope of employment' test as a fourth element which must be satisfied to prove a document is a public record RCW 42.56.010(3) because the 'scope of employment' test only applies when the public records are not retained/possessed by an agency. *Nissen v. Pierce County*, 183 Wn.2d 863, 878, 357 P.3d 45 (2015). The 'scope of employment' standard serves only to distinguish public records from private records when both kinds of records are possessed by a private party. The 'scope of employment' test is not a new fourth element which always must be satisfied to prove a document is a public record and, thus, subject to disclosure under the PRA. It only applies in the context of the third element, which requires that the record be prepared, owned, used, or retained by a government agency.

Division One erred by determining that the records at issue were not public records selectively quoting *Nissen* as a justification for its conclusion:

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

Nissen, 183 Wn.2d at 878-79 (citation omitted) (emphasis in original). Division One then creates a new legal requirement that "whether an agency employee's record is subject to disclosure hinges on if the record was

prepared, owned, used, or retained within the scope of employment.” *Serv. Emp. Int’l Union Local 925*, 4 Wn.App.2d at 619 (quoting *West v. Vermillion*, 196 Wn.App. 627, 641, 384 P.3d 634 (2016)).

Yet, Division One ignores the holding stated in *Nissen* and repeated in *West* where this Court said “[w]e hold that records an agency employee prepares, owns, uses, or retains on a **private** cellphone within the scope of employment can be a public record if they also meet the other requirements of RCW 42.56.010(3).” *Nissen*, 183 Wn.2d at 877 (emphasis added). *See also West*, 196 Wn.App. at 637. This language makes clear that the “scope of employment” test is necessary only when the records being sought **do not** clearly fall within the third requirement of the public records definition under RCW 42.56.010(3)—possession by a state agency.

Thus, this Court was not inventing a new element in the definition of public record which would *exclude* all records not created within the “scope of employment.” Rather, the “scope of employment” test *broadened* the definition of “public record” to those records which would otherwise constitute public records but which happen to be retained on private devices. Division One incorrectly applied the “scope of employment” test as a limiting test rather than a broadening one.

In fact, the ‘scope of employment’ test was imposed so that government employees and officials cannot simply get around the PRA by using personal cell phone or personal email addresses by way of avoiding the “prepared, owned, used, or retained” language of RCW 42.56.010(3).

Division One's citing to *West v. Vermillion*, 196 Wn.App. 627, 641, 384 P.3d 634 (2016) is similarly selective. *Serv. Emp. Int'l Union Local 925*, 4 Wn.App.2d at 619. In that case, the party opposing disclosure, the city and city council member Steve Vermillion argued that to be a public record, the record must be prepared, owned, used, or retained by an employee with the authority to act in an executive manner, rather than a legislative manner. However, the *West* court properly rejected that argument, clarifying that *Nissen*'s holding contained no such requirement: "Thus, whether a record is subject to disclosure hinges on if the record was prepared, owned, used, or retained "within the scope of employment," not if the record was prepared, owned, used, or retained within the scope of employment by the executive branch of the government." *West*, 196 Wn. App at 641.

In the context of private possession, the *Nissen* and *West* "scope of employment" test makes perfect sense. It makes no sense, though, if applied as a separate, fourth element to be satisfied when the third element obviously has already been satisfied by state agency ownership or retention of public records.

Private possession is not the case here, however. The records being sought by the Foundation are emails which directly meet the third element of RCW 42.56.010(3) because they are "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." These records are emails, which Division One agreed, that a "UW employee, Wood, created and/or retained on servers owned and operated by

UW, a state agency, through his use of UW e-mail accounts.” *Serv. Emp. Int’l Union Local 925*, 4 Wn.App.2d at 619. Division One used the exact language of “retained” that is used in the “public records” definition. RCW 42.56.010(3).

Yet, Division One confuses the holding in *Nissen* to require the court to determine whether the records were created within the scope of employment, despite Professor Wood having used the agency server, as accessed by UW’s OPR – a clear demonstration of a public record being prepared and retained by the agency. *Serv. Emp. Int’l Union Local 925*, 4 Wn.App.2d at 619.

C. The documents sought are public records.

Division One also applies the “scope of employment” test to analyze both the second element of “containing information relating to the conduct of government or the performance of any governmental or proprietary function” and the third element of “prepared, owned, used, or retained by any state or local agency,” conflating these two elements. However, *Nissen* clearly stated that each of these elements is to be examined independently, “*in turn.*” *Nissen*, 183 Wn.2d at 881. Examination in reverse order demonstrates why the “scope of employment” test is inappropriate in this context and that the emails are public records that need to be disclosed.

- a. The Requested Records Are Owned and Retained by A State Agency, the University of Washington.

The third element requires that the record be “prepared, owned, used or retained by any state or local agency.” RCW 42.56.010(3). As

acknowledged by Division One, this requirement is clearly satisfied because UW both owns and retains the requested records. Even Division One in its opinion acknowledged that the emails were “retained on servers owned and operated by UW, a state agency.” *Serv. Emp. Int’l Union Local 925*, 4 Wn.App.2d at 619. It is undisputed that the records in question here are, at all times, retained by UW, a state agency. Thus, unlike the different nature of the records being retained on a personal cell phone, as was the case in *Nissen*, the Court here is not required to determine whether the records were created within the scope of employment, to distinguish between public records and private records retained on a private device. *Nissen*, 183 Wn.2d at 873 (2015). The “scope of employment” test has no application when the public records are clearly retained by a government agency, as they are here.

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

The second element of the “public records” definition is that the record “contain[s] information relating to the conduct of government or the performance of any governmental or proprietary function.” RCW 42.56.010(3) (emphasis added). “This language casts a wide net.” *Nissen*, 183 Wn.2d at 880. This Court “broadly interprets this second element of the statutory definition.” *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746, 958 P.2d 260 (1998).

In *Nissen*, this Court looked to the record’s content and said that, regardless of their “primary” topic, records that “contain any information that refers to or impacts the actions, processes, and functions of

government” satisfy the second element of relating to the conduct of government. *Nissen*, 183 Wn.2d at 880-881. Division One did not take a systematic, *step-by-step*, approach to analyzing the second element, rather it subsumed this element with the third element, discussed *infra. Serv. Emp. Int’l Union Local 925*, 4 Wn.App.2d at 619-20. The Opinion dismisses, almost summarily, any argument or discussion regarding content by stating that the Foundation’s “four reasons” why the email relate to the conduct of the government are not within the scope of employment and therefore do not relate to the conduct of government. *Id.* This is a vastly different analysis than this Court’s discussion in *Nissen* relating to the conduct of the government.

In *Confederated Tribes*, this Court determined that the records of money paid by tribes into a common fund related to the conduct of government (rather than solely to the conduct of the tribes). *Confederated Tribes*, 135 Wn.2d at 746-49. Division One’s reasoning is based on the same argument this Court rejected in *Confederated Tribes*. Division One would seemingly accept the tribes’ argument, reasoning that because the records sought are not records of Washington governmental function, they do not contain information related to the conduct of the state. This argument was rejected in *Confederated Tribes*, however, which instead found that tribal contributions impacted state government and therefore the corresponding records were public records. *Id.* at 748.

This Court has consistently adopted similar broad interpretations of the second element. *See Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 566,

618 P.2d 76 (1980) (medical records of a patient treated at a public hospital were public records because they contained information of a public nature); *Servais v. Port of Bellingham*, 127 Wn.2d 820, 828, 904 P.2d 1124 (1995) (research data pertaining to cash flow prepared by an outside agency for the purpose of building a port was determined to be related to the conduct and performance of a governmental function). The second element of the “public record” definition is to be broadly interpreted and never before has it been necessary to apply a “scope of employment” test to determine whether a record relates to the conduct of the government.

Division One misapplies *Nissen* by applying a quote out of context in support of a faulty holding; specifically, that all records, no matter where stored, must be *created* in the scope of employment, rather than that they merely contain information relating to the conduct of government. *Serv. Emp. Int’l Union Local 925*, 4 Wn.App.2d at 618. This holding is wrong and, importantly, creates an exception to the PRA that completely swallows the PRA’s policy favoring disclosure. Rather, the “scope of employment” test is only relevant with respect to records retained on private devices. *Supra*, at 6-10.

Both *Nissen* and *West* dealt with records that were not owned or retained by the state directly. Here, the facts are clear that all records were stored on University of Washington servers. This satisfies the third element of the definition of a “public record,” thus demonstrating that the use of the “scope of employment” test is inapplicable. Division One wrongly required the record to be created within the scope of employment to satisfy the

second element of the “public record” definition. Under a correct application of *Nissen* Division One should have concluded that these emails were public records as defined by RCW 42.56.010(3).

D. The Court Should Not Accept Conclusory Descriptions of the Content of Records in Determining Whether a Record Is a “Public Record”

The Courts in Washington should not accept conclusory descriptions as to the contents of records to determine whether a record meets the public record definition. By way of analogy, Washington law clearly requires “...the specific exemption authorizing the withholding of the record (or part) **and** a brief explanation of how the exemption applies to the record withheld.” RCW 42.56.210(3) (emphasis added). The notion that a state agency must provide a brief explanation for an exemption yet does not have the same requirement to determine whether a record meets the initial “public record” threshold in the first place, is absurd. SEIU 925 provided four (4) “categories” as descriptors of the records they determined to be inapplicable to the definition of “public record” and therefore undisclosed.

Not even one of these categories provide any context to the reason, much less an explanation, why the record in question is believed not to be a “public record.” These categories simply informed the court of the purpose of these records to the creator, acknowledging the incorrectly applied ‘scope of employment’ test, rather than addressing the issue at hand – whether the records “contain information relating to the conduct of the government.” RCW 42.56.010(3).

Division Two has previously rejected similarly conclusory statements regarding government conduct when the description was provided by a private agency to the state about its own, private activities. *Dragonslayer, Inc. v. Washington State Gambling Com'n*, 139 Wn. App. 433, 445, 161 P.3d 428 (2007). In *Dragonslayer*, the appellate court determined that the trial court had made almost no factual findings regarding how the records were related to the government's conduct, and instead had relied on a conclusory declaration which provided no detail into the documents' use as part of the conduct of government. *Dragonslayer*, 139 Wn. App. At 445. Division Two specifically stated, “[t]hese findings should be based on specific determinations of the Commission’s use, rather than general assertions...” making it clear that conclusory descriptions are insufficient in making determinations about whether a record qualifies as a “public record.” *Id.* at 445-6 (emphasis added).

To allow such woefully inadequate descriptions is a drastic change to how the PRA has been applied in the past and raises an important issue of public policy – particularly where the State relies on descriptions created by a party with an interest in non-disclosure—to outweigh the public's access to records owned by the State. The palpable conflict of interest inherent in such a procedure amply demonstrates why conclusory descriptions cannot be accepted by Washington courts.

The lower courts' error becomes even clearer in light of the judicial mechanism which allows *in camera* review of the records in question, to determine whether the content of the record truly falls into the definition of

a public record. Simply put, the trial court did not have a factual basis to determine that these records did not relate to the conduct of the government and as such should have conducted the *in camera* review that was available to it. *See, e.g.*, CP 99-152; 155-158; 159-165; 166-184. As the record stands, however, the lower court did not conduct such a review, and its decision cannot stand on the facts that were before it.

E. The State Agency Is in the Best Position to Make a Determination Regarding the Release of a Public Record, Not an Interested Third Party.

Notwithstanding the erroneous procedure employed here, the PRA contemplates agency determinations as to the public nature of records, in several contexts: the basis for judicial action, review of an agency denial, and in the appointment of a public records officer for all state and local agencies, to name a few. *See* RCW 42.56.550, 530, and 580.³ That is because state and local agencies are in the best position to make the determinations, for two primary reasons: (1) the government is better equipped to determine whether a record meets the three requirements of RCW 42.56.010(3), and (2) the only way there is judicial recourse under RCW 42.56.550, for failure to produce documents, is if the failure was on the part of a responsible agency. A private entity, with a personal goal to prevent disclosure, should not be permitted to act as the arbiter of both

³ “...the superior court in the county in which a record is maintained may require the responsible agency to show cause...,” RCW 42.56.550(1); “Whenever a state agency concludes that a public record is exempt from disclosure...,” RCW 42.56.530; “Each state and local agency shall appoint and publicly identify a public records officer whose responsibility is to serve as point of contact for members of the public in requesting disclosure of public records and to oversee the agency’s compliance with the public records disclosure requirements of this chapter.” RCW 42.56.580(1).

whether a record is a public record and whether it is subject to an exception to prevent disclosure.

The University of Washington, by handing off the evaluation of public records to the union, has barred the requestor and/or a potentially-injured affected party from seeking redress for a wrong determination. It has also disregarded the PRA's stated purpose of government transparency and government accountability. UW's OPR initially reviewed the records in question and were "unable to determine that the records were not public records." *Serv. Emp. Int'l Union Local 925*, 4 Wn.App.2d at 611 (emphasis in original). Yet, later UW and OPR abdicate their duty to make disclosure determinations by allowing the court to provide SEIU 925, an interested third party, the opportunity to "show by affidavit cataloging and describing with sufficient particularity as to the status of the records as public or not public records." *Id.* at 612. This result is untenable to the citizens of Washington and to the public policy behind the PRA.

Under RCW 42.56.550, how is an agency to be subject to judicial review, if the agency is not the one who made the determination to refuse disclosure of a specific public record or class of records? RCW 42.56.550 assumes that it must be the agency (likely through the public records officer) who makes the initial determination that the records in question are public records and subsequently makes the determinations on whether an exemption applies, because it is the agency that has peculiar expertise in these matters, and it is the agency that has a duty to the public to discharge the policies undergirding the PRA. Yet, this is not what happened here. UW

and OPR, as the state agency, through the public records officer conspicuously avoided the initial determination that the records were public records and then allowed a private, interested, third party to make its own determination and create categorical exemptions to disclosure. While the Foundation recognizes that interested parties have the right to seek an injunction or restraining order, it is for the court determine in that instance what is subject to disclosure and no longer in the hands of the agency. State actions of this sort are antithetical to the duty placed on state agencies by the Washington State Legislature, to place the transparency of public records at the highest level of priority.

F. The Court Should Award Petitioner Reasonable Attorneys Fees.

The Foundation respectfully asks this court to grant reasonable attorney fees on appeal. RCW 42.56.550(4) provides that “[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record [...] shall be awarded all costs including reasonable attorney fees.” RAP 18.1(a) allows a party to request to the Washington State Supreme Court the fees granted by the applicable law, in this case RCW 42.56.550(4).

V. CONCLUSION

Division One incorrectly applied *Nissen*, thereby creating a “scope of employment” test for both the second and third elements of RCW 42.56.010(3), and thereby substantially revising Washington state public records law. The PRA does not permit, nor should a Washington state court accept, an interested party’s conclusory descriptions of records instead of

the agency's determination, particularly without conducting an *in camera* review. As such, this Court should reverse the Division One Court of Appeals, require the release of the records, and award costs on appeal to the Foundation.

RESPECTFULLY SUBMITTED on February 28, 2019.



Sydney Phillips, WSBA # 54295
P.O. Box 552, Olympia, WA 98507
p.360.956.3482 | f. 360.352.1874
sphillips@freedomfoundation.com

Counsel for Petitioner Freedom Foundation

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on February 28, 2019, I e-filed with the Clerk the foregoing document and appendix and served the same by email upon the following:

Jacob Metzger, WBSA #39211
Kristen Kussmann, WBSA #30638
Douglas, Drachler, McKee &
Gilbrough
1904 Third Ave, Suite 1030
Seattle, WA 98101
Phone: 206.623.0900
Fax: 206.623.1432
jmetzger@qwestoffice.net
kkussmann@qwestoffice.net

Attorneys for SEIU 925

Nancy Garland, WSBA #43501
Attorney General's Office
University of Washington Division
4333 Brooklyn Ave. NE, 18th Floor
Seattle, WA 98195-9475
Phone: 206.543.4150
nancysg@uw.edu

Alan D. Copsey, WSBA #23305
Deputy Solicitor General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-010
Phone: 360.753.6200
alanc@atg.wa.gov

*Attorneys for University of
Washington*

Dated on February 28, 2019, at Olympia, Washington



Jennifer Matheson

No. 96262-6

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**APPENDIX TO SUPPLEMENTAL BRIEF
OF PETITIONER, FREEDOM FOUNDATION**

Sydney Phillips, WSBA #54295
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
SPhillips@freedomfoundation.com

Attorney for Petitioner, Freedom Foundation

APPENDIX PAGE NUMBERS	DESCRIPTION
APP: A-1-21	Published Opinion by Division I of the Court of Appeals in <i>Service Employees International Union Local 925 v. The University of Washington and the Freedom Foundation</i> , 4 Wash.App.2d 605, 423 P.3d 849 (2018)

RESPECTFULLY SUBMITTED on February 28, 2019.



Sydney Phillips, WSBA #54295
P.O. Box 552, Olympia, WA, 98507
p. 360.956.3482 | f. 360.352.1874
sphillips@freedomfoundation.com

Counsel for Petitioner Freedom Foundation

4 Wash.App.2d 605

Court of Appeals of Washington, Division 1.

SERVICE EMPLOYEES INTERNATIONAL UNION

LOCAL 925, a labor organization, Respondent,

v.

The UNIVERSITY OF WASHINGTON, an

agency of the State of Washington, Respondent,
Freedom Foundation, an organization, Appellant.

No. 76630-9-I

|
FILED: June 11, 2018

Synopsis

Background: Labor union brought action to enjoin university's proposed release under the Public Records Act (PRA) of employee emails relating to union organizing efforts by university faculty, and sought an order finding that the university committed an unfair labor practice. The Superior Court, King County, [Jeffrey M. Ramsdell, J.](#), permanently enjoined release of the records and stayed proceedings on the unfair labor practice claim. Requester appealed.

Holdings: The Court of Appeals, [Applewick, C.J.](#), held that:

union had associational standing to bring action on behalf of university employee to enjoin disclosure of emails;

emails were not public records subject to disclosure under the PRA;

staying proceedings did not violate rule barring a trial court from making a determination that would change a decision currently under review; and

motion to stay was not a baseless motion warranting Rule 11 sanctions.

Affirmed.

****852** Appeal from King County Superior Court, Docket No: 16-2-09719-7, Honorable [Jeffrey M. Ramsdell](#), Judge

Attorneys and Law Firms

Hannah Sarah Sells, Attorney at Law, 2403 Pacific Ave. SE, Olympia, WA, 98501-2065, for Appellant.

[Paul Drachler](#), [Kristen Laurel Kussmann](#), Douglas Drachler McKee & Gilbrough LLP, 1904 3rd Ave. Ste. 1030, Seattle, WA, 98101-1170, Robert W. Kosin, Washington State Attorney General University of Washington Division, 4333 Brooklyn Ave. NE, Seattle, WA, 98195-9475, [Nancy Sagor Garland](#), Office of the Attorney General, UW MS 359475, Seattle, WA, 98195-9475, for Respondent.

[Edward Earl Younglove III](#), Younglove & Coker, PLLC, P.O. Box 7846, 1800 Cooper Point Rd. SW # 16, Olympia, WA, 98507-7846, [Danielle Elizabeth Franco-Malone](#), [Laura Elizabeth Ewan](#), Schwerin Campbell Barnard Iglitzin & Lav, 18 W Mercer St. Ste. 400, Seattle, WA, 98119-3971, Michael James, Washington Education Association, 32032 Weyerhaeuser Way S, Federal Way, WA, 98001-9687, Marie Duarte, Attorney at Law, 14675 Interurban Ave. S Ste. 307, Tukwila, WA, 98168-4614, for Amicus Curiae on behalf of WFSE SEIU 775.

PUBLISHED OPINION

[Appelwick, C.J.](#)

***610 ¶ 1** The Freedom Foundation sent a PRA request to UW, seeking records associated with union organizing created by, received by, or in the possession of four named UW employees and specified e-mail addresses. SEIU 925 filed a complaint seeking to enjoin UW from releasing the records. The superior court concluded that the records at issue are not “public records” under the PRA, because they were not prepared, owned, used, or retained within the scope of employment. We affirm.

FACTS

The Parties

¶2 The Freedom Foundation (Foundation) is a non-profit organization that “seeks to promote individual liberty,

free enterprise, and limited accountable government.” “Part of its mission is to pursue governmental transparency and accountability.”

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

¶ 4 Service Employees International Union Local 925 (SEIU 925) is a labor organization representing public and private sector workers in Washington State. Purposes of SEIU ****853** 925 include organizing faculty at institutions of higher education in Washington State and providing representation as appropriate to its members and the individuals the union represents. SEIU 925 has worked with UW faculty in efforts to organize a union under chapter 41.76 ***611** RCW, which provides collective bargaining for faculty at public four year institutions of higher education.

The Foundation’s PRA Request

¶ 5 In December 2015, the Foundation submitted a request under the Public Records Act (PRA), chapter 42.56 RCW, to UW. It requested all documents, e-mails, or other records created by, received by, or in the possession of UW faculty/employees Amy Hagopian, Robert Woods, James Liner, or Aaron Katz that contained specified terms, including “Freedom Foundation,” “SEIU,” “Union,” and others. The request also sought e-mails sent to or received by the four named UW faculty members from the domain names “seiu925.org” and “uwfacultyforward.org.” And, it requested all e-mails sent from and received by aaup@u.washington.edu.¹ The Foundation’s stated purpose of the request was “to ensure accountability and transparency among government employees using government-issued e-mail addresses.”

¶ 6 After receiving the PRA request, the UW Office of Public Records and Open Public Meetings (OPR) asked the named professors for responsive records. Professor Robert Wood, one of the named faculty members in the Foundation’s request, sent records to OPR. OPR reviewed the records and “was unable to determine that the records were not public records.” OPR notified Wood that the records would be released, unless he sought a court order by April 26, 2018 preventing their release. The proposed release, ***612** records provided only by Wood, was 3913

pages of e-mails and attachments, the “vast majority” of which were e-mails sent to or from Wood’s UW e-mail address, or to or from the AAUP listserv e-mail account.

Complaint and Subsequent Procedural History

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

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

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

¶ 10 On August 5, 2016, the trial court held a second preliminary injunction hearing. The court entered a preliminary injunction, finding the documents identified as nonpublic records were not “public records” subject to disclosure. In its written order filed on September ****854** 23, the trial court found that SEIU 925 had standing to seek injunctive relief. Further, it found that the records at issue ***613** “were not created within the scope of the employee’s employment and therefore are not public records.” And, it found that SEIU 925 demonstrated a likelihood of success on the merits of their claims for injunctive relief:

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

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

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

¶ 13 On March 27, 2017, the Foundation appealed the order granting the TRO, the order granting SEIU's motion for preliminary injunction, the order denying Foundation's motion for reconsideration,² and the order granting SEIU's motion for summary judgment and permanent injunction. On April 3, 2017, SEIU filed a motion to change trial date and for a stay of proceedings, pending the outcome of the appeal to this court. On April 7, 2017, the Foundation filed a combined motion to strike SEIU's *614 motion and motion for sanctions, asserting that the trial court no longer had jurisdiction. The trial court denied the Foundation's motion to strike and for sanctions, and granted SEIU 925's motion to change trial date and for a stay of proceedings, staying the matter and continuing the trial until October 23. The Foundation amended its appeal, appealing the order denying its motion to strike and for sanctions and the

order granting SEIU's motion to change trial date and stay proceedings.

DISCUSSION

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

I. The PRA

¶ 15 The PRA mandates the broad disclosure of public records. [Resident Action Council v. Seattle Hous. Auth.](#), 177 Wash.2d 417, 431, 327 P.3d 600 (2013). Under [RCW 42.56.070\(1\)](#), a government agency must disclose public records upon request unless the records fall within the specific exemptions of the PRA or other statute that exempts or prohibits disclosure of specific information or records. [Ameriquet Mortg. Co. v. Office of Att'y Gen.](#), 177 Wash.2d 467, 485-86, 300 P.3d 799 (2013). The exemptions in the PRA are intended to exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government. [Id.](#) at 486, 300 P.3d 799.

¶ 16 The party seeking to prevent disclosure bears the burden of establishing that an exemption applies. [Id.](#) if it is a party besides an agency that is seeking to prevent disclosure, then that party must seek an injunction. [Id.](#) at 487, 300 P.3d 799; *615 [RCW 42.56.540](#). In such a case, the party must **855 prove (1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function. [Ameriquet](#), 177 Wash.2d at 487, 300 P.3d 799. Courts construe exemptions narrowly to allow the PRA's purpose of open government to prevail where possible. [Id.](#); [RCW 42.56.030](#).

¶ 17 This court reviews challenges to an agency action under the PRA de novo. [RCW 42.56.550\(3\)](#); [Resident Action Council](#), 177 Wash.2d at 428, 327 P.3d 600.

Appellate courts stand in the shoes of the trial court when reviewing declarations, memoranda of law, and other documentary evidence. [Ameriquet](#), 177 Wash.2d at 478, 300 P.3d 799.

A. Permanent Injunction

¶ 18 The Foundation argues that the trial court erroneously granted a permanent injunction for three reasons. First, it argues that SEIU 925 lacks standing. Second, it asserts that the UW e-mails qualify as public records, because the e-mails “clearly relate to the conduct of government and the performance of governmental and proprietary functions.” Third, it claims that, if there was any ambiguity as to whether the e-mails qualified as public records, the PRA requires that ambiguities be construed in favor of disclosure.

1. Standing

¶ 19 The Foundation asserts that SEIU 925 lacks standing, because it relies on associational standing through Wood, but at the same time its primary argument harms Wood and places him in legal jeopardy. Citing [Hunt v. Wash. State Apple Adver. Comm’n](#), 432 U.S. 333, 342-43, 97 S.Ct. 2434, 53 L.Ed. 2d 383 (1977), [Save a Valuable Env’t v. City of Bothell](#), 89 Wash.2d 862, 867, 576 P.2d 401 (1978), and *616 [Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports](#), 103 Wash. App. 764, 768, 14 P.3d 193 (2000) ([Firefighters I](#)), [aff’d by](#), 146 Wash.2d 207, 45 P.3d 186, 50 P.3d 618 (2002) ([Firefighters II](#)), it argues that a party relying on associational standing “cannot conduct litigation in a way that harms the interests of those it claims to represent.”

¶ 20 None of these cases stand for that principle. In [Hunt](#), the United States Supreme Court held that the Washington Apple Advertising Commission had standing to challenge a North Carolina statute regulating the labeling of apples. 432 U.S. at 335, 345, 97 S.Ct. 2434. In doing so the Court recognized,

An association has standing to bring suit on behalf of its members when:
(a) its members would otherwise have standing to sue in their own right; (b) the interests it

seeks to protect are germane to the organization’s purpose; and
(c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

[Id.](#) at 343, 97 S.Ct. 2434. The Court focused on the harm the North Carolina statute caused the apple growers, and not on any potential harm from litigation. [Id.](#) at 343-44, 97 S.Ct. 2434. Similarly in [Save](#), our Supreme Court held that a nonprofit corporation or association has standing where it shows that one or more of its members are specifically injured by a government action. 89 Wash.2d at 867, 576 P.2d 401. And, the court in [Firefighters II](#) used the same test for associational standing recognized in [Hunt](#). 146 Wash.2d at 213-14, 45 P.3d 186, 50 P.3d 618. On the third factor, the court stated, “Monetary damages are distinguishable from injunctive relief, in that injunctive relief generally benefits every member of an employee association equally whereas the amount of monetary damages an employee suffers may vary from employee to employee.” [Id.](#) at 214, 45 P.3d 186, 50 P.3d 618.

¶ 21 Under the test for associational standing, SEIU 925 has standing to bring this action on behalf of Wood. First, Wood would have standing to sue in his own right, as many of the documents at issue are his own records. Second, SEIU 925 seeks to protect records germane to its purpose of organizing *617 faculty for the purposes of collective bargaining. Third, the claim asserted does not require Wood’s participation, as UW acknowledged. Moreover, as the court observed **856 in [Firefighters II](#), the injunction would benefit all of SEIU 925’s members that would be potentially affected by the disclosure of records.

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

SEIU 925 has standing in this matter to seek injunctive relief under [t]he PRA as a party to whom public records held by a public agency may pertain and under chapter 7.40

RCW as a party whose rights may be affected by the release to the public of non-public records.

The trial court did not err.

2. Public Records

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

¶ 24 Under the PRA, a “ ‘public record’ includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” *618 [RCW 42.56.010](#). The parties here dispute the second element: whether the e-mails “contain ... information relating the conduct of government or the performance of any governmental or proprietary function.” [Id.](#)

¶ 25 “Public record” is defined very broadly, encompassing virtually any record related to the conduct of government. [Does v. King County](#), 192 Wash. App. 10, 22, 366 P.3d 936 (2015). This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government. [Id.](#) In [Oliver v. Harborview Medical Center](#), 94 Wash.2d 559, 566, 618 P.2d 76 (1980), the court held that medical records of a patient treated at a public hospital were public records. The court reasoned that the records contained information of a public nature, “i.e., administration of health care services, facility availability,

use and care, methods of diagnosis, analysis, treatment and costs, all of which ... relate to the performance of a governmental or proprietary function.” [Id.](#) In [Tiberino v. Spokane County](#), 103 Wash. App. 680, 687-88, 13 P.3d 1104 (2000), the court held that personal e-mails sent from Tiberino’s county-owned computer were public records because the county printed the e-mails in preparation for litigation over her termination, a proprietary function.

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

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

*619 [Id.](#) at 878-79, 357 P.3d 45 (quoting [Greene v. St. Paul-Mercury Indem. Co.](#), 51 Wash.2d 569, 573, 320 P.2d 311 (1958)). Thus, whether an agency employee’s record is subject to disclosure hinges on if the record was prepared, owned, used, or retained within the scope of employment. [West v. Vermillion](#), 196 Wash. App. 627, 641, 384 P.3d 634 (2016).

¶ 27 The facts of this case contrast with those in [Nissen](#), but the court’s analysis is highly relevant to our inquiry. In [Nissen](#), the **857 records were communications sent and received on a private device, but were within the employee’s scope of employment. 183 Wash.2d at 869, 357 P.3d 45. Here, the records at issue are predominantly e-mails that UW employee, Wood, created and/or retained on servers owned and operated by UW, a state agency, through his use of UW e-mail accounts. Although Wood

used the agency's server, we must determine whether he created the records within his scope of employment.

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

¶ 29 An employee's communication is within the scope of employment only when the job requires it, the employer *620 directs it, or it furthers the employer's interests. [Nissen](#), 183 Wash.2d at 878-79, 357 P.3d 45. "[E]mployees are 'agent[s] employed by [an employer] to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the [employer].'" [Kamla v. Space Needle Corp.](#), 147 Wash.2d 114, 119, 52 P.3d 472 (2002) (alterations in original) (quoting [RESTATEMENT \(SECOND\) OF AGENCY § 2\(2\) \(1958\)](#)).

¶ 30 Actions undertaken within the scope of employment are those that the employer has the right to control. But, laws such as the Educational Employment Relations Act, chapter 41.59 RCW, and the Personnel System Reform Act of 2002, chapter 41.80 RCW, make it an unfair labor practice for employers to try to interfere with or control employees' union activities. *E.g.*, RCW41.59.140; RCW41.80.110. UW is prohibited from controlling or directing employees' union activity. [RCW 41.76.050\(1\) \(a\)](#) ("It is an unfair labor practice for a an employer to[] interfere with, restrain, or coerce faculty members in the exercise of their rights guaranteed by this chapter."). Further, the employees' communications do not fall within the scope of their employment, even if in the future,

these efforts affect appointment, promotion, evaluation, tenure, or state budgets, as the Foundation proposes. Documents relating to faculty organizing and addressing faculty concerns are not within the scope of employment, do not relate to the UW's conduct of government or the performance of government functions, and thus are not "public records" subject to disclosure.

3. Ambiguity

¶ 31 Finally, the Foundation argues that even if it was ambiguous that the e-mails qualified as public records, the trial court erred in not resolving the ambiguity in favor of disclosure. The text of the PRA and our case law is clear that courts are to liberally construe the PRA in favor of disclosure and narrowly construe its exemptions. *621 [RCW 42.56.030](#); *see, e.g., John Doe A v. Wash. State Patrol*, 185 Wash.2d 363, 371, 374 P.3d 63 (2016). But, the PRA's definition of "public record" requires that the record relate to the conduct of government or the performance of a governmental or proprietary function. [RCW 42.56.010](#). And, under [Nissen](#), for information to be a public record, an employee must prepare, own, use, or retain it within the scope of employment. [183 Wash.2d at 878-79, 357 P.3d 45](#). That did not occur here.

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

**858 B. Preliminary Injunction

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

¶ 34 In general, a party in a PRA case can obtain a TRO or a preliminary injunction before establishing a right to a permanent injunction. [SEIU Healthcare 775NW v. Dep't of Soc. & Health Servs.](#), 193 Wash. App. 377, 392, 377 P.3d 214, *review denied*, 186 Wash.2d 1016, 380 P.3d 502 (2016). A TRO and a preliminary injunction both are designed to preserve the status quo until the trial court can conduct a full hearing on the merits. [Id.](#) At a preliminary

injunction hearing, the trial court does not need to resolve the merits of the issues for permanent injunctive relief. [Id.](#) Instead, the trial court considers only the likelihood that the moving party ultimately will prevail at a trial on the merits. [Id.](#) at 392-93, 377 P.3d 214. One who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual *622 and substantial injury to him. [Fed. Way Family Physicians, Inc., v. Tacoma Stands Up for Life](#), 106 Wash.2d 261, 265, 721 P.2d 946 (1986). This court reviews injunctions issued under the PRA de novo. [SEIU Healthcare](#), 193 Wash. App. at 392, 377 P.3d 214.

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

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

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

¶ 37 As the Foundation points out, [Nissen](#) extended the PRA’s reach to employee’s private devices. 183 Wash.2d at 877, 357 P.3d 45. The court stated,

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

*623 [Id.](#) (quoting [RCW 42.56.010\(3\)](#)). But, the [Nissen](#) court did not expressly limit the scope of employment test to private devices. And, it does not follow logically under the [Nissen](#) analysis that communications on the employer’s devices are necessarily always public records. Such an inference would conflict with the distinction drawn in [Tiberino](#). See 103 Wash. App. at 683-4, 688, 13 P.3d 1104 (personal e-mails were public records not because they were on employer’s computer, but because the county printed the personal e-mails in preparation for litigation over Tiberino’s termination because of her personal use of e-mail). The trial court did not err in granting a preliminary injunction.

C. Temporary Restraining Order

¶ 38 The Foundation also asserts that the trial court erred in granting a “sua sponte” temporary restraining order on June 10, **859 2016. It asserts that the trial court’s TRO was “standardless.”

¶ 39 One who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. [Fed. Way Family Physicians](#), 106 Wash.2d at 265, 721 P.2d 946. To answer the question of whether a party has a clear right, the trial court must analyze the moving party’s likelihood of prevailing on the merits. [Id.](#) In making this determination, the court does not adjudicate the ultimate rights of the parties in the lawsuit. [Id.](#)

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

I'm treating—I'm treating this as a temporary injunction rather than a full-blown preliminary injunction because I'm only granting the temporary relief to preserve the status quo so they can do the assessment of the documents. And so, I—I don't *624 feel comfortable making those findings right now on this record alone.

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

¶ 41 The Foundation argues this delay via TRO was impermissible under [Fed. Way Family Physicians](#). There, the court refers to the trial court order interchangeably as a preliminary injunction and a TRO. See [Fed. Way Family Physicians](#), 106 Wash.2d at 267-68, 721 P.2d 946. The trial court failed to state in the preliminary injunction that respondents were likely to prevail on the merits. [Id.](#) at 265, 721 P.2d 946. However, the court did not strike the injunction and remand because the trial court made an incomplete order. [Id.](#) at 267, 721 P.2d 946. Instead, it did so because it found that there was not substantial evidence before the trial court for it to conclude that the respondents had a well-grounded fear of invasion of a legal right. See [id.](#) at 265-67, 721 P.2d 946. Here, this court must determine whether there was substantial evidence before the trial court when it entered the TRO.

¶ 42 Even assuming the TRO issued in [Fed. Way Family Physicians](#) is comparable to the TRO at issue here, the result is not the same. Before entering the TRO, the trial court reviewed declarations SEIU 925 filed in support of its motion for a temporary restraining order, including one from Wood, as well as declarations from Patricia Flores, Brooke Lather, and others. In his declaration,

Wood refers to the union organizing in the documents. In their declarations, SEIU 925 organizers Patricia Flores and Brooke Lather put the e-mails into categories. Those categories include (1) those about union organizing, (2) postings to the AAUP UW chapter *625 listserver, (3) e-mails between Wood and others not related to UW business, and (4) e-mails that mention SEIU 925 specifically. The trial court also reviewed declarations from the Freedom Foundation and Perry Tapper, a compliance officer in the OPR at UW.

¶ 43 Based on these declarations, there was substantial evidence for the trial court to conclude that SEIU 925 had a well-grounded fear of an invasion of its legal right of nondisclosure of nonpublic records. It was reasonable for the court to conclude that the Foundation would not suffer harm as a result of a temporary delay in the release of any material that is subject to the PRA. While the trial court should have made a more complete order, any error in not doing so was harmless. The trial court did not err in entering the TRO.

II. [SEIU 925's Motion to Stay and the Foundation's Motion for Sanctions](#)

¶ 44 Finally, the Foundation argues that the court abused its discretion in granting **860 SEIU 925's motion to change trial date and stay proceedings, and in denying its motions to strike and for sanctions.

A. [Motion to Change Trial Date and Stay Proceedings](#)

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

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

*626 ¶ 47 [RAP 7.2\(a\)](#) provides that after review is accepted by the appellate court, a trial court has authority to act only to the extent provided in [RAP 7.2](#), unless

the appellate court limits or expands that authority as provided in [RAP 8.3](#). [RAP 7.2\(e\)](#) requires a party to seek the appellate court's permission before making a determination that would change a decision currently under review.

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

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

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

***627 B. Motions to Strike and to Impose Sanctions**

Footnotes

- 1 The UW chapter of the national nonprofit organization, the American Association of University Professors (AAUP), uses the UW e-mail account, aaup@u.washington.edu. That account operates an e-mail "listserver" (distributes messages to an e-mail subscriber list) entitled "Faculty Issues and Concerns." The mission of the UW chapter of AAUP is "to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security and working conditions of all categories of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to develop the standards and procedures that maintain quality in education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good.' "
- 2 The Foundation included the trial court's order denying its motion for reconsideration in its notice of appeal, but does not assign error and it does not address this issue in its brief. Therefore it is waived, and we do not address it. See [Cowiche](#)

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

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

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

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

¶ 55 We affirm.

WE CONCUR:

[Verellen, J.](#)

[Cox, J.](#)

All Citations

4 Wash.App.2d 605, 423 P.3d 849, 357 Ed. Law Rep. 372

[Canyon Conservancy v. Bosley](#). 118 Wash.2d 801, 809, 828 P.2d 549 (1992) (party waives assignment of error when it does not argue the issue in its opening brief).

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

FREEDOM FOUNDATION

February 28, 2019 - 2:43 PM

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Appellate Court Case Title: Freedom Foundation v. Service Employees International Union Local 925
Superior Court Case Number: 16-2-09719-7

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