

FILED
SUPREME COURT
STATE OF WASHINGTON
2/28/2019 2:57 PM
BY SUSAN L. CARLSON
CLERK

NO. 96262-6

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,

Respondents.

**RESPONDENT UNIVERSITY OF WASHINGTON'S
SUPPLEMENTAL BRIEF**

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I. INTRODUCTION

When Freedom Foundation requested certain records associated with four University of Washington faculty members, the University contacted the faculty members in order to assemble responsive records, reviewed the records for applicable statutory exemptions, and prepared the first installment for release. As authorized in RCW 42.56.540, the University notified the faculty member who provided the records included in the first installment that he could seek a court order enjoining release. Service Employees International Union 925 (SEIU 925), on behalf of the faculty member and itself, filed this action and obtained a permanent injunction barring release of almost the entire first installment of records to Freedom Foundation.¹

The superior court concluded that the records at issue in this appeal are not “public records” as defined in RCW 42.56.010(3), and the Court of Appeals affirmed. The only issue preserved for this Court’s review is whether the Court of Appeals erroneously applied the “scope of employment” test from *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), to the definition of “public record” in RCW 42.56.010(3).

¹ Approximately 100 pages were released; 3913 pages were ordered withheld and are at issue in this appeal. CP 692-97.

II. ISSUE PRESENTED

In *Nissen*, this Court applied the “scope of employment” test to determine whether the records at issue in that case fell within the definition of “public record” in RCW 42.56.010(3). Here, the Court of Appeals applied that test in a different way than in *Nissen*. Did the Court of Appeals erroneously apply the “scope of employment” test to the definition of “public record” in RCW 42.56.010(3)?

III. STATEMENT OF THE CASE

In late 2015, Freedom Foundation submitted a public record request to the University’s Office of Public Records and Open Public Meetings (OPR) requesting records that were sent or received by four faculty members and that contained specified terms (e.g., “Freedom Foundation,” “SEIU,” and “union”) or were sent to or received from email addresses ending in certain domains (e.g., @seiu925.org).² CP 39. The records at issue in this case are emails sent to or from one of those faculty members, Professor Robert Wood, that are maintained on the University’s email servers. These records are a subset of the records that are responsive to the record request.

² At the time of the request, SEIU 925 was conducting an organizing campaign among University faculty. *See, e.g.*, CP 96, 100. SEIU 925 has not been certified by the Public Employment Relations Commission as the exclusive representative of the University faculty for purposes of collective bargaining under RCW 41.76.

Upon receiving the request from Freedom Foundation, OPR compliance staff contacted the named faculty members and asked each of them to search for records responsive to the request. CP 219. Professor Wood forwarded a set of records to OPR, which reviewed them for applicable exemptions under the PRA. CP 219-20. OPR redacted some information under statutory exemptions related mainly to student privacy (those redactions are not at issue here) and prepared to release the first installment of records to Freedom Foundation. CP 220.

RCW 42.56.540 authorizes an agency to notify “persons named in the record or to whom a record specifically pertains” that the record has been requested. Because SEIU 925 and some of the named faculty members had notified OPR that they considered the emails to be personal and private to them, OPR notified Professor Wood of the opportunity to seek a court order to enjoin production of the requested emails, which otherwise were to be released on April 27, 2016. CP 46-47.

On April 25, 2016, SEIU 925 filed a motion for a temporary restraining order and a complaint seeking a declaratory judgment and permanent injunction on its own behalf and on behalf of Professor Wood. CP at 1-15. Based on a proposal by Freedom Foundation, the parties agreed to a delay to allow for a preliminary injunction hearing and briefing schedule. CP 62-64. Freedom Foundation agreed to waive any claims

against the University for penalties and attorney fees for the time period between the agreement and the hearing. CP at 62-64.

The superior court held hearings and issued a temporary restraining order in June 2016, followed by a preliminary injunction in September 2016. CP 267-70, 291-98. SEIU 925 then moved for summary judgment and for permanent injunction. In March 2017, following another hearing, the court granted both motions and permanently enjoined release of the emails in the first installment. CP at 686-97. The trial court concluded that, unlike the records in *Tiberino v. Spokane County*, 103 Wn. App. 680, 13 P.3d 1104 (2000), the records in this case, which the professor and the union had shown were personal, were not printed or otherwise “used” by the University and were not public records, despite the fact that they were on the University’s email server. CP 693-94.

Freedom Foundation appealed. The Court of Appeals affirmed, concluding that “under *Nissen*, for information to be a public record, an employee must prepare, own, use, or retain it within the scope of employment.” *Serv. Emps. Int’l Union Local 925 v. Univ. of Wash.*, 4 Wn. App. 2d 605, 621, 423 P.3d 849 (2018) (citing *Nissen*, 183 Wn.2d at 878-79). The Court of Appeals observed that “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 Wn. App. at 683-4, 688” *Id.* at 623. On that basis, the Court of Appeals held that, even though Professor Wood created and/or retained the email on servers owned and operated by the University, the court “must determine whether he created the records within his scope of employment” to determine whether they are “public records” under RCW 42.56.010(3). *Id.* at 619.

The Court of Appeals denied Freedom Foundation’s motion for reconsideration and granted SEIU 925’s motion to publish. This Court granted Freedom Foundation’s petition for discretionary review.

IV. ARGUMENT

A. Standard of Review

The proper interpretation of RCW 42.56.010(3) is a question of law, reviewed de novo. *Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 435, 359 P.3d 753 (2015).

B. The Only Issue Preserved in This Appeal Is Whether the Court of Appeals Erroneously Applied the “Scope of Employment” Test From *Nissen* to the Definition of “Public Record” in RCW 42.56.010(3)

Freedom Foundation’s petition for review raises issues regarding the trial court’s reliance on declarations from SEIU 925 describing the emails at issue, instead of reviewing the emails *in camera*. See Petition at 2 (Issues 2, 3), 11-17. These issues were either waived or not raised at the trial court,

or were not preserved on appeal. Thus, the only issue preserved for appeal is whether the Court of Appeals erroneously applied *Nissen's* “scope of employment” test to the definition of “public record” in RCW 42.56.010(3).

No party, including Freedom Foundation, asked the trial court to conduct an *in camera* review of the documents at issue. To be sure, there were references to *in camera* review—in Freedom Foundation’s brief responding to SEIU’s motion for summary judgment and permanent injunction (CP 349-50); in the University’s response brief to SEIU’s motion, in which the University specifically advised the trial court that the documents at issue were not in the record and offered to provide them to the court should it “wish to conduct an *in camera* review of its own accord or at the request of a party” (CP 641); and at the hearing on the motion where the trial court told the parties in open court that it was willing to conduct *in camera* review if requested (RP 20, 88). But none of these references to *in camera* review constituted a request for *in camera* review. Because there was no request by Freedom Foundation, and thus no denial of a request, Freedom Foundation cannot now claim the absence of *in camera* review by the trial court was error. *See Forbes v. City of Gold Bar*, 171 Wn. App. 857, 867, 288 P.3d 384 (2012) (trial court’s decision whether to review records *in camera* is reviewed for abuse of discretion), *review denied*, 177 Wn.2d 1002 (2013).

The University has no duty to request *in camera* review where it determines that the documents at issue should be released in response to a public record request. This Court has explained that *in camera* review is available but not mandated under the PRA—a trial court may “resolve disputes about the nature of a record ‘based solely on affidavits,’ RCW 42.56.550(3), without an *in camera* review [and] without searching for records itself[.]” *Nissen*, 183 Wn.2d at 885. And even in cases where the Court has found a need for *in camera* review,³ the only duty imposed on an agency has been to comply with the court order directing submission of the records. The Court has never imposed a duty on an agency to affirmatively request *in camera* review. Nor has the Court ever required *in camera* review to determine whether or not requested records are “public records” under RCW 42.56.010(3).

Freedom Foundation also argues that it was error to rely on declarations submitted by SEIU 925, because SEIU 925 is the party seeking to prevent release of the requested documents. But Freedom Foundation did not make that argument in the trial court. Not until its reply brief in the Court of Appeals (at pages 2-3) did Freedom Foundation mount an argument against the declarations, and even then it was only to allege that the

³ See, e.g., *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 808, 246 P.3d 768 (2011); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 615, 963 P.2d 869 (1998).

declarations were substantively inadequate to support an injunction. Freedom Foundation did not preserve any issue regarding the declarations. *See Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 528 n.6, 326 P.3d 688 (2014) (declining to address alleged PRA violation that was not argued in appellant’s opening brief); *West v. Thurston County*, 144 Wn. App. 573, 580, 183 P.3d 346 (2008) (declining to consider assertions of error made for the first time in a reply brief).

Finally, Freedom Foundation insinuates that the University shirked its duties under the PRA by “hid[ing] behind the third party’s objections.” Petition at 18. This is false. The University has never resisted production of the emails at issue. It is uncontested that the University found no basis for withholding those emails and would have released them absent the injunction secured by SEIU 925. The University stands ready to release them if the injunction is dissolved.

C. The Court of Appeals in This Case Arguably Extended *Nissen*, But That Extension Is Not Necessarily Error

A “public record” is “[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.” RCW 42.56.010(3). “All three elements of this three-prong test must be

satisfied for a record to be a public record.” *Dragonslayer, Inc. v. State Gambling Comm’n*, 139 Wn. App. 433, 444, 161 P.3d 428 (2007).

The Court in *Nissen* used a “scope of employment” test to determine whether records located on the private device of a public official could qualify as a public record. The county had argued that the records did not satisfy the third prong of the definition in RCW 42.56.010(3) because they were created and maintained on a private device, not on a device maintained by the county. This Court rejected the county’s argument, holding that a record prepared owned, used, or retained by an employee within the scope of employment could be a public record even if created or retained on a private device. *Nissen*, 183 Wn.2d at 875-79.

The Court of Appeals here applied that “scope of employment” test to determine whether the second prong of the definition was met. In doing so, the Court of Appeals arguably extended the holding in *Nissen*. This Court must determine whether the Court of Appeals reasonably applied *Nissen* in this case.

1. Only the second prong of the three-part definition of a “public record” is at issue here

Only the second element of the definition of public record is at issue in this case: whether the emails relate to the conduct of government or the performance of any governmental or proprietary function. No party disputes

that the emails at issue in this case are writings, or that they were created and/or retained on the servers owned and operated by the University, a state agency.

2. In *Nissen*, the third prong of the “public record” definition was at issue

In *Nissen*, the Court was addressing a circumstance where the text messages at issue would have been public records had they been created using a government-issued phone. *Nissen*, 183 Wn2d at 875. The Court held that a record an agency employee “prepares, owns, uses, or retains on a private cell phone 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 Wn2d at 877 (emphasis added). The Court explained that when an agency employee acts within the scope of his or her employment, the employee’s actions are tantamount to the actions of the agency itself. *Id.* at 876. “If the PRA did not capture records individual employees prepare, own, use, or retain in the course of their jobs, the public would be without information about much of the daily operation of government.” *Id.* The Court then listed criteria for deciding when a particular employee communication is within the scope of employment. *Id.* at 878-79.

This case is factually distinguishable from *Nissen* because the emails at issue in this case reside on University servers, not on private

devices. The emails are “prepared, owned, used, or retained” by the University, and the third prong of RCW 42.56.010(3) is satisfied without any need to apply the scope of employment analysis set out in *Nissen*.

3. The Court of Appeals here used the scope of employment analysis to give meaning to the second prong of the “public record” definition

As explained above, the Court in *Nissen* did not use the scope of employment analysis to give meaning to the second prong in RCW 42.56.010(3) (“containing information relating to the conduct of government or the performance of any governmental or proprietary function”). Rather, it used the test to determine whether records located on the private device of a public official could qualify as a public record, where the county had argued the third prong was not met. Here, the requested emails are “writings” that reside on University servers, so the third prong is satisfied.

Until the Court of Appeals decision in this case, courts following *Nissen* have applied the scope of employment analysis only to determine whether records that are not “prepared, owned, used, or retained” on public devices could qualify as public records. For example, *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016), involved a public record request for communications received or posted through a personal website and associated email account run by a city council member. In that case, the

court summarized *Nissen* as having first applied the scope of employment analysis to determine whether records on a private device may qualify as public records, and *then* considering whether the records “relat[ed] to the conduct of government or the performance of any governmental or proprietary function.” *Id.* at 635 (citation omitted).

In *West v. City of Puyallup*, 2 Wn. App. 2d 586, 410 P.3d 1197 (2018), the Court of Appeals also applied the scope of employment analysis from *Nissen* under the third prong of RCW 42.56.010(3), not the second prong. *Id.* at 595-97. In addressing the second prong, that court instead relied on *Nissen*’s reference to “information that refers to or impacts the actions, processes, and functions of government.” *Id.* at 595 (quoting *Nissen*, 183 Wn.2d at 880-81).

However, as the Court of Appeals noted in this case, *Nissen* did not expressly limit the scope of employment test to records on private devices. *Serv. Emps. Int’l Union Local 925*, 4 Wn. App. 2d at 623. The Court of Appeals recognized that to give meaning to both the second and third prongs of the definition in RCW 42.56.010(3), there must be some kind of record “prepared, owned, used, or retained” on a government device that does *not* contain “information relating to the conduct of government or the performance of any governmental or proprietary function.” Said differently, if *every* record “prepared, owned, used, or retained” on a government device

is per se a public record, the second prong of RCW 42.56.010(3) would be rendered a nullity.

The Court of Appeals' solution here was to apply the scope of employment test from *Nissen* to determine whether records maintained on the University's email system and email servers contain information that relates to the conduct of government or the performance of any governmental or proprietary function. *Serv. Emps. Int'l Union Local 925*, 4 Wn. App. 2d at 620-21.

4. This case provides the Court an opportunity to clarify the second prong of the “public record” definition

Only the second prong of RCW 42.56.010(3) is at issue in this case: whether the requested emails contain “information relating to the conduct of government or the performance of any governmental or proprietary function.” If they do, then all three elements of the definition are satisfied, and the emails are public records, subject to disclosure and production under the Public Records Act unless otherwise exempt.

The question is how to give meaning to the second prong that is distinct from the third prong—how to define “information relating to the conduct of government or the performance of any governmental or proprietary function” in a way that does not simply encompass all records that are “prepared, owned, used, or retained” on government devices or

equipment. The Court of Appeals answered this question by applying the scope of employment test from *Nissen*, a test that “limits the reach of the PRA to records related to the employee’s public responsibilities.” *Nissen*, 183 Wn.2d at 879. This case provides the Court an opportunity to decide whether that is an appropriate limitation on the second prong of the “public record” definition.

V. CONCLUSION

There has never been an allegation in this case that the University of Washington impermissibly withheld any record requested under the Public Records Act. The only issue preserved for review by this Court is whether the Court of Appeals erroneously applied the “scope of employment” test from *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), in determining that the records at issue were not “public records” as defined in RCW 42.56.010(3).

RESPECTFULLY SUBMITTED this 28th day of February 2019.

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February 28, 2019 - 2:57 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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