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SUPREME COURT  
STATE OF WASHINGTON  
4/30/2019 3:33 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 96262-6

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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FREEDOM FOUNDATION,

*Appellant,*

v.

UNIVERSITY OF WASHINGTON,

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,

*Respondents.*

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**UNIVERSITY OF WASHINGTON'S ANSWER  
TO BRIEF OF UNION AMICI CURIAE**

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## I. INTRODUCTION

The email records at issue in this case are maintained on the University of Washington's electronic servers. In order to comply with the Public Records Act (PRA), RCW 42.56, when the University received the PRA request for these records, the University had to identify and assemble the records that were potentially responsive to the request. At the same time, to avoid the appearance of an unfair labor practice, the University conscientiously isolated the records so they would not be reviewed by any person in management. When the University found no basis for withholding the responsive records, it notified the affected faculty to give them an opportunity to seek an injunction against release. The University has in good faith attempted to comply with the mandates of the PRA, and has done nothing with the records that could be considered an unfair labor practice, or a violation of the PRA or any other statute.

The University files this answer to the Brief Of *Amicus Curiae* Of SEIU State Council [et al.] (collectively, Amici), to explain that Amici's proposed analysis could inadvertently exclude from the PRA records that are of legitimate concern to the public.

## II. ARGUMENT

### A. **Records Created Outside an Employee's "Scope of Employment" Nevertheless May Be Related to the Conduct of Government**

A "public record" under the Public Records Act 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). That definition did not change after *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). *Nissen* applied a scope of employment test to determine whether records found on a public employee’s private device, rather than the agency’s files, nevertheless could meet the third prong under RCW 42.56.010(3). *Id.* at 882-83.

Because the records at issue here were located on University email servers, the University had no reason to apply the “scope of employment” from *Nissen*. Accordingly, the University takes no position now as to how that test would apply to these records. The University treated the records as public records, and therefore reviewed them and prepared them for release.

Amici argue that *Nissen*’s “scope of employment” test should be applied to the “related to the conduct of government” prong of the definition. That is the central question before this Court. Applying that test from *Nissen* as the measure of whether a requested record is “related to the conduct of government” could effectively exclude from the Act any record that a government employee creates that was not required by the job, at the employer’s direction, or furthering the employer’s interests. *Nissen*, 183

Wn.2d at 878-79. Taken to its logical conclusion, use of this test could define records created through employee misconduct as not “public records.” For example, no reasonable employer agency would ask its employees to send emails sexually harassing another employee or a member of the public, or to create false records in order to embezzle funds. An uncritical use of the “scope of employment” test in applying the “related to the conduct of government” prong could result in these kinds of records being defined as not “public records” and therefore not subject to the requirements of the Public Records Act.

**B. The Court Should Decline to Consider the Constitutional Argument Raised by Amici**

Amici argue that the records at issue here are protected from public disclosure by article I, section 7 of the Washington Constitution. Br. of Amici at 16-19. While brief mention has been made previously of possible constitutional interests (*see, e.g.*, COA Resp. Br. of UOW at 4; Resp’t SEIU Local 925’s Suppl. Br. at 19-20), no party has fully briefed or argued that issue. The Court need not decide issues argued only by amicus. *See State v. Duncan*, 185 Wn.2d 430, 440, 374 P.3d 83 (2016) (the Court “may, but usually [does] not, reach arguments raised only by amicus”); *City of Seattle v. Evans*, 184 Wn.2d. 856, 861 n.5, 366 P.3d 906 (2015) (the Court “will not address arguments raised only by amicus”).

Article I, section 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Here, the Court knows relatively little about the content of the records, beyond a general categorization made by SEIU 925. And the location of the records—a public agency’s servers—would not typically be a location in which an individual would hold a significant privacy interest, especially where University policy indicates that these resources should be used only for official business. CP at 653-60.

### III. CONCLUSION

The University complied with the Public Records Act and is prepared to release the records at issue when permitted or directed to do so by the Court.

RESPECTFULLY SUBMITTED this 30th day of April 2019.

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## CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the law of the State of Washington that on April 30, 2019, I filed with the Supreme Court of the State of Washington by e-filing and I served by email the foregoing document and this certificate of service on:

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April 30, 2019 - 3:33 PM

## Transmittal Information

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

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University of Washington's Answer To Brief Of Union Amici Curiae

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