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

ROGER LEISHMAN,

Appellant,

v.

OGDEN, MURPHY & WALLACE, PLLC, and
PATRICK PEARCE,

Respondents.

CORRECTED BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellant Roger Leishman was previously employed by the Washington State Attorney General’s Office (“AGO”) as Chief Legal Counsel for Western Washington University. The AGO retained Patrick Pearce of Ogden Murphy Wallace, P.L.L.C. (“OMW”) to conduct an external investigation of issues related to Leishman’s complaint of sexual orientation discrimination. After conducting an investigation, Pearce provided a report (the “OMW Report”) to the AGO that determined (1) Leishman’s sexual orientation discrimination complaint was not substantiated and (2) Leishman had acted inappropriately during a meeting with his supervisor regarding his sexual orientation discrimination complaint. Leishman blames the OMW Report—and various aspects of the investigation that led to the OMW Report—for the fact that Leishman was subsequently terminated by the AGO.

The trial properly determined that, taking these allegations as true, Leishman’s claims fail as a matter of law, as Washington law grants immunity from civil liability to persons retained by government entities to conduct investigations like the one at issue here. RCW 4.24.510 provides that “a person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency

or organization regarding any matter reasonably of concern to that agency or organization.” Immunity under RCW 4.24.510 is very broad. The statute protects organizations and businesses as well as individuals; the statute immunizes not just the communication itself but all claims “based upon” the communication; and the statute provides immunity regardless of whether the communicator acted in good faith. As the Washington legislature and courts have recognized, this protection is important in order to avoid the chilling effect that would exist if those investigating matters of concern to government entities were silenced, or tempted to modify or distort their opinions, out of fear of facing civil damage claims from those who disagree.

The trial court properly determined that Pearce and OMW fall within this extremely broad immunity. Pearce and OMW (“persons” under the statute) provided the OMW Report (a “complaint or information”) to the AGO (a “government agency”) regarding Leishman’s complaint (a “matter[] reasonably of concern” to the AGO). Despite Leishman’s arguments to the contrary, all the claims in Leishman’s complaint clearly arise entirely out of Pearce and OMW’s investigation and report to the AGO.

Leishman’s entire argument is premised upon his belief that only “citizen whistleblowers” deserve the protections of RCW 4.24.510. He

argues because Pearce and OMW were retained by the AGO to conduct the investigation and paid for their work, Pearce and OMW are therefore stripped of the immunity to which they would otherwise be entitled as “persons” under statute. Leishman also claims that the OMW Report was not a “complaint or information” *to* the AGO simply because it included information *from* the AGO. As will be discussed further below, there is no support for either of Leishman’s strained attempts to limit the reach of RCW 4.24.510. Furthermore, Leishman’s interpretation is squarely foreclosed by the allegations in his own complaint, in which he admits that Pearce and OMW were not “agents” or “employees” of the AGO.

At any rate, the same policy considerations that support the protection of “citizen whistleblowers” also weigh in favor of protecting investigators who assist public function investigations into matters of concern to government entities. Investigators such as Pearce and OMW should be permitted to communicate with government entities without fear of civil damage claims from those, like Leishman, who are unhappy with the contents of those communications.

Leishman’s claims fail as a matter of law, and this Court should affirm the trial court’s decision to grant Pearce and OMW judgment on the pleadings pursuant to CR 12(c).

II. RESTATEMENT OF ISSUES

1. Whether OMW (a professional limited liability corporation) and Pearce (an individual) are no longer “persons” under RCW 4.24.510 because they were retained by the AGO to conduct an independent investigation regarding Leishman?

2. Whether the OMW Report did not constitute a “complaint or information” to the AGO under RCW 4.24.510 because it included information from the AGO?

3. Whether, under RCW 4.24.510, Leishman pleads any claim that is not “based upon” the OMW Report and the investigation leading to the OMW Report?

III. RESTATEMENT OF THE CASE

A. Leishman’s Employment at the Attorney General’s Office

Leishman began employment in July 2015 at the Washington Attorney General’s Office in Bellingham as Chief Legal Advisor to Western Washington University. CP 3 ¶ 17. Leishman is openly gay. CP 1 ¶ 1.

Leishman alleged that shortly after commencing work at the AGO, he began exhibiting serious trichotillomania, anxiety, and other symptoms, and that in November 2015, he was diagnosed with Post-Traumatic Stress Disorder (“PTSD”) and codependency. CP 3 ¶¶ 18, 21. In January 2016,

Leishman informed the AGO Human Resources Department that he intended to move forward with a “formal disability accommodation” request as a result of these symptoms. CP 4 ¶ 27. Leishman submitted his accommodation request on February 22, 2016, which the AGO subsequently denied. CP 4-5 ¶¶ 29, 34.

In the same timeframe, Leishman also drafted a written complaint regarding sexual orientation discrimination against the AGO, claiming that the AGO had “[aken] serious adverse action against him” because of the AGO’s “deeply rooted implicit and explicit homophobia.” CP 4-5 ¶¶ 31-33. Leishman provided his draft sexual orientation discrimination complaint to his supervisor, Kerena Higgins, during an in-person meeting on March 1, 2016, in an effort to “see if they could resolve the matter privately in accordance with AGO policy.” CP 4 ¶ 31. During the meeting, Higgins disagreed with the allegations against her in Leishman’s complaint, and Leishman admits that he became “angry, restless, and agitated” and “raised his voice” to Higgins. CP 4-5 ¶¶ 31-33, Brief of Appellant Roger Leishman (“Br.”) at 9.

Leishman formally submitted his complaint to the AGO on March 2, 2016. CP 4-5 ¶¶ 32-33. The AGO promptly took steps to address the situation. On March 7, 2016, Michael Shinn, AGO Regional Services Division Chief, informed Leishman that “the AGO was aware of his

sexual orientation discrimination complaint and took it seriously, and said [Leishman] would be contacted when the AGO appointed someone to investigate his complaint.” CP 3, 5 ¶¶ 24, 36.

The AGO retained Patrick Pearce of Ogden Murphy Wallace P.L.L.C. to conduct an outside investigation of issues related to Leishman’s complaint. CP 6 ¶ 41. Pearce interviewed Leishman twice and considered various documents provided by Leishman, including a “written chronology enumerating multiple examples of homophobia and implicit bias at the AGO.” CP 6-7 ¶¶ 43, 47, 49-51. Pearce’s investigation culminated in the preparation of the Ogden Murphy Wallace Investigation Report, dated April 29, 2016, (the “OMW Report”) that was provided to the AGO. CP 8 ¶ 54.¹

In the OMW Report, Pearce considered (1) Leishman’s claim of sexual orientation discrimination, and (2) whether Leishman had behaved improperly during his March 1, 2016 meeting during which Leishman provided Higgins with his written sexual orientation complaint. CP 4, 8

¹ Though not necessary to the Court’s decision, the OMW Report is available at CP 197-215. The OMW Report is extensively referenced in the Leishman’s Complaint such that it is properly considered in evaluating this case. See CP 8-9 ¶¶ 55-66; *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015), citing *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008) (“[W]here a plaintiff asserts allegations in a complaint on specific documents but does not physically attach those documents, the documents may be considered in ruling on a motion for judgment on the pleadings.”)

¶¶ 31-32, 58, 60. In the OMW Report, Pearce found that Leishman's claim of sexual orientation discrimination were not substantiated, and that Leishman had acted inappropriately in his meeting with Higgins. *Id.*; see also CP 213-15. The AGO terminated Leishman effective June 1, 2016. CP 5, 8 ¶¶ 37, 57.

B. Leishman Sues Pearce and OMW after Settling Claims against the Attorney General's Office

Leishman initially brought employed-related claims against the AGO. CP 9 ¶¶ 67-69. Those claims were resolved via settlement in November 2016. *Id.* In the settlement agreement, Leishman "released his claims against the State, including the AGO, and any officers, agents, employees, agencies, or departments of the State of Washington." CP 9 ¶ 60.

In July 2017, Leishman sued Pearce and OMW for negligence, violation of the Washington Consumer Protection Act, negligent misrepresentation, fraud, and discrimination. CP 9-12 ¶¶ 73-105. Leishman's claims were based on his allegations that (1) he was not informed that his behavior during the March 1, 2016 meeting (during which he communicated his discrimination complaint to his supervisor) would be considered during the course of the investigation and in the OMW Report (*see* CP 6-8 ¶¶ 44, 53, 58, 60); (2) Pearce did not tell

Leishman that Pearce planned to “resolve[] disputed factual issues” and “ma[k]e credibility determinations” in the OMW Report; (*see* CP 6, 9 ¶¶ 44, 64) and (3) the OMW Report was false or misleading because Pearce did not sufficiently consider certain information or witnesses that Leishman wished him to consider. *See* CP 8 ¶¶ 59, 61-63.

In his complaint against Pearce and OMW, Leishman specifically stated that his claims against Pearce and OMW were not released by his settlement with the AGO. CP 9 ¶ 71. He alleged that Pearce and OMW were not covered by his release of claims against “officers, agents, employees, agencies, or department” of the state (CP 9 ¶ 69), because, as Leishman alleged, “[a]t all times relevant herein, neither Ogden Murphy nor Pearce was an officer, agent, employee, agency, or department of the state of Washington.” CP 2 ¶ 8. Leishman also specifically alleges that Pearce “had no attorney-client relationship. . . with the [AGO].” *Id.* ¶ 7.

C. Procedural History

Plaintiff filed the instant case on May 10, 2017. CP 1. OMW filed its Motion for Judgment on the Pleadings on October 6, 2017. CP 303. The Honorable John Ruhl of the Superior Court of Washington for King County granted OMW’s motion on November 3, 2017. CP 431. On December 14, 2017, OMW moved for its attorneys’ fees and costs pursuant to RCW 4.24.510. CP 438. On December 29, 2017, Judge Ruhl

granted OMW's motion for attorneys' fees and costs, and entered judgment against Leishman in the amount of \$24,058.55. CP 552-54. This appeal followed.

IV. ARGUMENT

A. Standard of Review

An appellate court “reviews de novo a trial court’s order for judgment on the pleadings.” *Pasado’s Safe Haven v. State*, 162 Wn. App. 746, 752, 259 P.3d 280 (2011), citing *N. Coast Enters., Inc. v. Factoria P’ship*, 94 Wn.App. 855, 858, 974 P.2d 1257 (1999). In reviewing such an order, appellate courts “examine the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, which would entitle the claimant to relief.” *Id.* The factual allegations contained in the complaint are accepted as true. *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 241, 242 P.3d 891 (2010).

B. RCW 4.24.510 Provides Broad Protection for Persons Making Reports to Government Entities Regarding Information of Concern

In 1989, the legislature enacted RCW 4.24.510 to “encourage the reporting of potential wrongdoing to governmental entities.” *Gontmakher*

v. The City of Bellevue, 120 Wn. App. 365, 367, 85 P.3d 926 (2004).² The statute provides, in relevant portion:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510.

Immunity under the statute is extremely broad. Though Leishman repeatedly claims that immunity under RCW 4.24.510 is provided only to “citizen whistleblowers,” (Br. at 1-2, 19-23) no such limitation is exists in the statute, which by its terms provides immunity to all “persons.”³ Therefore, while “citizen whistleblowers” are clearly covered by the statute’s terms because they are “persons,” the legislature plainly did not intend to protect *only* “citizen whistleblowers.” If that had been the

² RCW 4.24.510 is considered to be an anti-SLAPP (“Strategic Lawsuit Against Public Participation”) statute. However, the Washington Supreme Court’s 2015 decision in *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), does not impact the validity or application of RCW 4.24.510. *Davis* dealt only with RCW 4.24.525, a more recent and broader statute than RCW 4.24.510. The court’s opinion clearly stated that it was only addressing the burden-shifting and procedural framework found in the new Section 525: “This statute is unique from its predecessor [RCW 4.24.510] in that it creates an entirely new method for adjudicating SLAPPs, separate from the rules of civil procedure. The new statute did not amend or repeal the prior statute and instead codifies its new procedures in one new statutory section.” *Davis*, 183 Wn. 2d at 276.

³ Indeed, RCW 4.24.500—passed at the same time as RCW 4.24.510—specifically refers to “citizens,” but RCW 4.24.510 does not, instead referring to “person[s].” Therefore, it is plain that the Washington legislature intended RCW 4.24.510 to protect the broader class of “persons”—not only “citizens.”

legislature's intent, it could have included such a limitation explicitly in the text of RCW 4.24.510.⁴ It chose not to do so.

Washington case law is clear the statute may be applied to protect individuals, businesses, and entities other than "citizen whistleblowers." *See, e.g., Dang v. Ehredt*, 95 Wn. App. 670, 681-84, 977 P.2d 29 (1999) (holding that bank corporation had immunity for communications with police regarding possible criminal activity); *Harris v. City of Seattle*, 302 F. Supp. 2d 1200, 1202-04 (W.D. Wash. 2004) (granting immunity to human resources consulting firm in connection with report to the City of Seattle regarding allegations of a hostile work environment); *Engler v. City of Bothell*, No. C15-1873JLR, 2016 WL 3453664, at *6-7 (W.D. Wash. June 20, 2016) (bank corporation had immunity for communications with police); *Akmal v. Cingular Wireless Inc.*, No. C06-748JLR, 2007 WL 1725557, at *5 (W.D. Wash. June 8, 2007), *aff'd*, 300

⁴ Leishman misleadingly describes a portion of the legislative history of RCW 4.24.510. *See* Br. at 21. Leishman states the legislature amended the pending bill before its passage in 1989 to "broaden the scope of whistleblower immunity to also immunize other 'claims arising from the communication of such complaint or information,'" but the governor subsequently vetoed that section of the bill. *Id.* at 21-22. Leishman implies that the vetoed section of the bill has some relationship to the application of RCW 4.24.510 to his claims. In reality, the omitted section would have provided immunity for *all claims* against persons who "chose to go public with their concerns" if their complaint to an agency was not acted upon. CP 364-65 at 1120-21. The governor noted that private individuals could be harmed when such claims were made public to the extent such claims were "false and damaging." *Id.* at 1121. This omitted section has *nothing whatsoever* to do with Leishman's claims against Pearce and OMW.

F. App'x 463 (9th Cir. 2008) (granting immunity to corporation for communications with Washington Employment Security Department regarding reasons for termination of employee); *see also Segaline v. State, Dep't of Labor & Indus.*, 169 Wn. 2d 467, 474 n.4, 238 P.3d 1107 (2010) (noting that immunity under 4.24.510 applies to “non-government individual[s] or organization[s]”).

Also, Washington law is clear that the RCW 4.24.510 does not protect only the fact of the communication to the government agency, but all claims “based upon” the communication, including, but not limited to the “conduct of the investigation” leading to the communication, and other “events surrounding the communication.” *Dang*, 95 Wn. App. at 681-85.

Furthermore, communications to government entities regarding matters of concern are protected “regardless of content or motive.” *Bailey v. State*, 147 Wn. App. 251, 261, 191 P.3d 1285 (2008). Though RCW 4.24.510 contained a “good faith” requirement at its inception, that requirement was deleted by the legislature in 2002. *Id.* at 261-62, *citing* Laws of 2002, ch. 232. § 1; *see also Dehlin v. Forget Me Not Animal Shelter*, 200 Wn. App. 1072 (2017), at *7 (unpublished) (holding that RCW 4.24.510 immunized communications from defendants to police, even if defendants’ communications were, as plaintiff alleged, motivated by a “preexisting grudge” against plaintiff). In other words, the

communicator of the “complaint or information” does not have to be “citizen whistleblower” whose motive is to protect the public good—the statute is equally protective of communications motivated by a grudge against the subject of the “complaint or information.”⁵

Under RCW 4.24.510 and supporting case law, Leishman’s claims against Pearce and OMW should be dismissed. The AGO is a branch of the state government. *See* RCW 43.10 *et seq.* The AGO retained Pearce and OMW—“persons” under the statute—to conduct an outside investigation regarding Leishman’s complaint of sexual orientation discrimination and Leishman’s behavior associated with that complaint. CP 6 ¶ 41. Pearce conducted an investigation, reviewing documents (including documents provided by Leishman) and interviewing witnesses (also including Leishman). CP 6-7 ¶¶ 43, 47, 49-51. Pearce prepared a report, which he provided to the AGO. CP 8 ¶ 54. All of Leishman’s allegations against OMW are “based upon” the OMW Report or the investigation that led to the OMW Report. Finally, Leishman does not

⁵ In his brief, Leishman makes a variety of claims focusing on OMW or Pearce’s supposed bad faith. *See, e.g.*, Br. at 12-16. In particular, Leishman cites emails from Pearce to the AGO supposedly showing that Pearce misled Leishman about the scope of the investigation. *Id.* at 12. In reality, a plain reading of the emails shows the opposite: that Pearce was preparing to interview Leishman and wanted to make sure Leishman was informed regarding the scope of the investigation. However, for the Court’s purposes here, these allegations are simply irrelevant and need not be considered, as the question of Pearce and OMW’s good faith is not material to the issues before the Court.

dispute that communications regarding Leishman's complaint of sexual orientation discrimination and his related conduct were "matters reasonably of concern" to the AGO.

Though Leishman claims this case presents an "issue of first impression," (Br. at 1) in fact, in *Harris v. City of Seattle*, 302 F. Supp. 2d 1200, 1202 (W.D. Wash. 2004), *aff'd*, 152 F. App'x 565, 569 (9th Cir. 2005), a federal court found that RCW 4.24.510 applied in *identical* circumstances to those at issue here. Harris was the Secretary and Chief Examiner of the City of Seattle's Public Safety Civil Service Commission. *Id.* at 1201. Two employees under her supervision complained of a hostile work environment, and the City retained the Washington Firm, a human resources consulting firm, to investigate. *Id.* at 1201-02. The Washington Firm interviewed several Commission employees, including Harris, concluding there was not a hostile workplace environment but Harris's handling of the dispute had been questionable. *Id.* at 1202. At the conclusion of the investigation, the Washington Firm drafted a report and provided it to the Seattle City Attorney. *Id.* As a result of the report, Harris sued the Washington Firm for defamation, invasion of privacy, presenting her in a false light, and infliction of emotional distress. *Id.* at 1201.

The Court found that RCW 4.24.510 applied, and dismissed Harris’s suit against the Washington Firm. The Court found that “because all of Plaintiff’s possible allegations against these Defendants arise out of the workplace investigation report the Firm submitted to the City, which relates to a matter reasonably of concern to the City, the Washington Firm Defendants are immune as to all of Plaintiff’s claims.” *Id.* at 1201.⁶

Bailey v. State, 147 Wn. App. 251, 191 P.3d 1285 (2008) also highlights the extremely broad immunity provided by RCW 4.24.510 and its applicability to this case. In *Bailey*, Lindeholt, upset with statements made by Bailey at meetings of the Spokane County Air Pollution Control Authority (“SCAPCA”), informed Bailey’s employer, Eastern Washington University (“EWU”), that (1) Bailey had purported to represent EWU at the SCAPCA meetings when she actually was serving the interests of her husband’s asbestos removal business; and (2) Bailey previously had been charged with felony embezzlement. *Id.* at 255-58. EWU terminated Bailey, and Bailey sued Lindeholt claiming that Lindeholt’s statements to EWU were false and constituted tortious interference with Bailey’s relationship with EWU. *Id.* at 255.

⁶ In *Harris*, the Court applied the pre-2002 version of RCW 4.24.510 that incorporated a good faith requirement. 302 F. Supp. 2d at 1201 n. 1. The Court dismissed plaintiff’s claims for the further reason that she had failed to present evidence that the Washington Firm acted in bad faith. *Id.* at 1203. As stated above, this requirement no longer exists.

The Court of Appeals reversed the trial court's refusal to apply RCW 4.24.510 and dismissed Bailey's claims. *Id.* The court found that Lindholdt's communications regarding Bailey's conflict of interest and criminal history were "of reasonable concern" to EWU, noting, among other things, "[t]he fact that these communications resulted in Ms. Bailey's termination . . . demonstrates that they were matters of reasonable concern to EWU." *Id.* at 261-62.

Leishman now asks the Court to read limitations into RCW 4.24.510 that simply do not exist. Leishman argues (1) Pearce and OMW are not "persons" under RCW 4.24.510 and are therefore stripped of the immunity to which they would otherwise be entitled, because they were retained by the AGO to conduct the investigation and provide a report; (2) Pearce and OMW did not communicate a "complaint or information" to the AGO because the OMW Report contained information received *from* the AGO; and (3) Leishman's claims were not "based upon" the OMW Report or the "method of arriving at" the OMW Report. As will be discussed further below, each of these claims is contradicted by the language of RCW 4.24.510, Washington caselaw, and the allegations in Leishman's complaint.

C. Pearce and OMW Are Protected “Persons” Pursuant to RCW 4.24.510

Pearce and OMW qualify as protected “persons” under RCW 4.24.510. As previously discussed, Washington law is clear that RCW 4.24.510 protects organizations, including businesses and corporations, as well as individuals. *Supra* § IV.B. Professional limited liability corporations like OMW (CP 1 ¶ 2) and individuals like Pearce fall squarely into the definition of “persons” under the statute. Leishman does not argue otherwise. Instead, Leishman argues that because Pearce and OMW were paid by the AGO to perform the investigation relating to Leishman, Pearce and OMW are somehow transformed into *de facto* government entities not entitled to protection under RCW 4.24.510. Br. at 22-25.

Leishman’s argument depends entirely on a misreading of Washington Supreme Court’s decision in *Segaline v. State Department of Labor and Industries*, 169 Wn. 2d 467, 473, 238 P.3d 1107 (2010) for his claim that RCW 4.24.510 does not protect provide immunity to individuals or organizations retained by the government to conduct an investigation into a matter of public concern.

Segaline says nothing of the sort. In *Segaline*, the Supreme Court considered the “narrow issue” of whether “a government agency that reports information to another government agency is a ‘person’ under RCW 4.24.510.” 169 Wn. 2d at 473. In *Segaline*, the Washington State Department of Labor and Industries reported to the police certain behavior

of Segaline, an electrical contractor who often came into the Department’s offices seeking to purchase electrical permits. *Id.* at 470-71. Segaline was arrested and subsequently sued the Department for malicious prosecution, intentional and negligent infliction of emotional distress, negligent supervision, and violation of his civil rights. *Id.* at 472. The Court of Appeals dismissed Segaline’s claims pursuant to RCW 4.24.510. *Id.* The Supreme Court reversed, holding that government agencies were not “persons” under RCW 4.24.510. *Id.* at 473. The Supreme Court reasoned that the legislature had intended RCW 4.24.510 to protect the exercise of the right to free speech—and government agencies, unlike individuals and organizations, did not have free speech rights. *Id.* at 473-74.⁷ *Segaline* expressly did not abrogate the immunity provided by RCW 4.24.510 to organizations, including businesses and corporations, nor does its holding have *anything whatsoever* to do with “government vendors” as Leishman claims. Br. at 22-23.

⁷ Pearce, as an individual, has free speech rights. OMW, as a professional limited liability corporation, also has free speech rights. *See, e.g., First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (holding that “speech that otherwise would be within the protection of the First Amendment” does not “lose[] that protection simply because its source is a corporation”); *see also Fed. Election Comm’n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 452 (2007) (noting the U.S. Supreme Court has held “the corporate identity of a speaker does not strip corporations of all free speech rights.”); *Arizona Students’ Ass’n v. Arizona Bd. of Regents*, 824 F.3d 858, 868 (9th Cir. 2016) (“Both natural persons and corporations enjoy. . . free-speech rights.”)

The defendant in *Segaline* was a government agency. Pearce and OMW are not government agencies or employees, as *Leishman admits*. In his complaint, Leishman specifically stated that OMW was not covered by his release of claims against “officers, agents, employees, agencies, or department” of the state (CP 9 ¶ 69), because, as Leishman alleged, “[a]t all times relevant herein, neither Ogden Murphy nor Pearce was an *officer, agent, employee, agency, or department of the state of Washington.*” CP 2 ¶ 8 (emphasis added). Effectively, Leishman claims that Pearce and OMW are government “agents and employees” for one purpose—using *Segaline* to avoid the effect of RCW 4.24.510—but are not “agents and employees” for another purpose—avoiding the release of claims he signed with the AGO. Leishman cannot have it both ways. By Leishman’s own admission, *Segaline* is inapplicable to save his claims.

Indeed, Leishman ignores the majority opinion in *Segaline*, instead relying *entirely* upon Justice Madsen’s concurring opinion—to which no other Justice joined. 169 Wn. 2d at 479. In her concurrence, Justice Madsen theorized that “insofar as” anti-SLAPP statutes are designed to protect overtures to the government by parties petitioning in their status as citizens, those statutes should not apply to “communications of one hired by a government agency made within the context of that employment.” *Id.* at 483. For this proposition, Justice Madsen cited *Kobrin v.*

Gastfriend, 443 Mass. 327, 332, 821 N.E.2d 60 (2005), a case construing the Massachusetts anti-SLAPP statute. Leishman relies heavily upon *Kobrin*, but it has no applicability here. The Massachusetts anti-SLAPP statute differs dramatically from the Washington statute at issue.

Compare Mass. Gen. Laws ch. 231, § 59H with RCW 4.24.510. In particular, the Massachusetts statute states that the defense applies *only* to claims arising out of the accused “party’s exercise of its right of petition.” Mass. Gen. Laws ch. 231, § 59H. Massachusetts courts have found that this language (in particular, the word “its”) requires a party to exercising its *own personal* right of petition, and that persons employed by the government to make a communication are not exercising *their own personal* right to petition and are therefore not covered by the statute’s immunities. *See Kobrin*, 443 Mass. at 332-33. This language is not present in RCW 4.24.510, which makes no reference to parties’ “rights of petition.” The plain language of RCW 4.24.510 is clearly intended by the Washington legislature to be broader than the Massachusetts statute, and thus the Court should not impose those limitations here. Indeed, in her concurrence, Justice Madsen acknowledged that RCW 4.24.510 is broadly worded and therefore does not, by its terms, limit its protections to “citizens” who exercise their “First Amendment rights to petition government.” *Id.* at 481-82.

In sum, there is no support in *Segaline* or any other Washington authority for Leishman’s claim that Pearce and OMW are stripped of the immunity to which they are entitled under RCW 4.24.510 simply because they received compensation for OMW Report. To hold otherwise would frustrate the legislature’s decision to protect communications under RCW 4.24.510 “*regardless of content or motive.*” *Bailey*, 147 Wn. App. at 261, *citing* LAWS OF 2002, ch. 232, § 1. Indeed, communications to government agencies are immunized pursuant to RCW 4.24.510 even if they are motivated by a “preexisting grudge” against the subject of the communication. *Dehlin*, 200 Wn. App. 1072, at *7. The mere fact that certain communications are “motiv[at]ed” by a desire to receive compensation does not invalidate the protection of RCW 4.24.510.⁸ Interpreting RCW 4.24.510 in this way would disrupt agencies’ efforts to seek assistance with investigations into “matters reasonably of concern” to those agencies.

⁸ The United States Supreme Court has held that First Amendment protection is not diminished merely because “speech is sold rather than given away.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (noting that a “great deal of vital expression” “results from an economic motive” and is protected under the First Amendment).

D. The OMW Report Is a “Complaint or Information” Communicated to the AGO

Leishman also relies upon another artificially construed limitation to RCW 4.24.510. Leishman argues OMW and Pearce are not entitled to protection under RCW 4.24.510 because the OMW Report was not a “complaint or information” *to* the AGO given that the OMW Report contained information that Pearce received *from* the AGO. Br. at 23-25. RCW 4.24.510 immunizes persons communicating a “complaint or information to [a government agency]”—and Leishman now asks the Court to add the words “that the government agency does not already have.” Leishman’s claimed limitation has no basis in the text of RCW 4.24.510, which makes no reference to the source of the “complaint or information,” nor does it require that the “complaint or information” consist only of knowledge not already in the possession of the government agency.

Indeed, such a rule would lead to absurd results. Under Leishman’s theory, as long as Pearce got *any information* from a source other than the AGO, Pearce and OMW would be protected under RCW 4.24.510. Also, Leishman agrees Pearce *would* be protected by RCW 4.24.510 if Pearce had “discovered procurement fraud at the AGO during the course of his assignment [related to Leishman] and reported it to the State Auditor.” Br. at 23 n.2. However, under Leishman’s theory, if Pearce had discovered procurement fraud at the AGO during his investigation as a result of a witness interview with someone at the AGO,

and reported it *to the AGO* rather than the State Auditor, Pearce would not be protected. Neither result makes sense.

Also, though Leishman claims that Pearce “relied solely on information furnished by the AGO,” (Br. at 24) Leishman admits in his complaint that Pearce did, in fact, consider information from Leishman himself. *See* CP 6-7 ¶¶ 43, 49-51 (alleging that Leishman sent Pearce a “detailed written chronology” regarding his claims of sexual orientation discrimination and that the OMW Report “acknowledges Leishman’s written chronology was among the documents Pearce reviewed as part of his investigation,” and that Pearce interviewed Leishman on two occasions during the course of the investigation). It is unclear whether Leishman (who was, at the time, an AGO employee) considers himself to be a source of information “from the AGO.” Br. at 24. If Leishman is *not* a source of information “from the AGO,” then Leishman’s own allegations belie his argument. If Leishman *is* a source of information “from the AGO” that operates (as he argues) to invalidate Pearce and OMW’s protections under RCW 4.24.510, then the absurdity of his argument is only highlighted further—given that Leishman, at the time, considered the AGO to have taken “adverse employment action” because of the AGO’s “implicit homophobia,” and certainly saw himself as adverse to the AGO. Br. at 7-8.

E. All of Leishman’s Claims Are “Based Upon” OMW’s Report to the AGO

Leishman also argues that RCW 4.24.510 does not grant immunity for Pearce and OMW’s “other conduct” that is not “based upon” the OMW Report communicated to the AGO. Br. at 25. However, Leishman’s complaint does not allege any conduct whatsoever that is not “based upon” the OMW Report. CP 1-13. Leishman’s claims boil down to assertions that (1) the OMW Report was false or omitted information that Leishman believes should have been included; and (2) Leishman was not informed during the investigation that the OMW Report would address certain topics. CP 6-9 ¶¶ 44, 53, 58-64.

These are clearly claims that are “based upon” the OMW Report under controlling Washington caselaw. Courts have also been clear that immunity covers not just the communication itself, but also “events surrounding the communication.” *Dang v. Ehredt*, 95 Wn. App. 670, 681–84, 977 P.2d 29 (1999). In *Dang*, bank personnel reported to the police that Dang was attempting to pass a bad check. *Id.* at 674-75. Dang was arrested by the police based on the bank’s report. *Id.* It was later determined that Dang’s check was valid. *Id.* at 675-76. Dang sued the bank for negligence and false imprisonment. *Id.* at 673. In response to the bank’s assertion of immunity under RCW 4.24.510, Dang argued that the bank had immunity only with respect to its call to the police, not its negligence in the conduct of the investigation, including “its retention of [her] driver’s license and its attempt to keep her in the branch while the

police were summoned.” *Id.* at 681-82. The court rejected Dang’s argument, finding that immunity under RCW 4.24.510 extended to “cause[s] of action based on the method of arriving at the content of the report.” *Id.* “Allowing a cause of action for negligence in the investigation which leads to a report to the police would be tantamount to allowing a cause of action for error in the report.” *Id.* at 683 (citation omitted). The court further found that “allowing a cause of action for the events surrounding the communication . . ., while immunizing the communication itself, would thwart the policies and goals underlying the immunity statute.” *Id.*

Similarly, here, the fact that Leishman brings certain claims that relate to OMW’s method of investigation does not save his Complaint from dismissal pursuant to RCW 4.24.510. Under *Dang*, all of the claims in Leishman’s complaint concern the OMW Report, the “method” of creating the OMW Report, the “investigation. . . lead[ing] to [the OMW Report],” or the “events surrounding” the OMW Report.⁹ *See also Harris*,

⁹ Leishman argues that “[u]nder the broad rule of statutory immunity adopted by the trial court, anyone injured by commercial vendors during the course of their tax-payer-funded assignments would have no legal recourse against even the most flagrant wrongdoer.” Br. at 26. This argument is absurd. For example, a claim by the AGO against OMW for fraudulent billing would not be “based upon” a “communication” merely because the OMW had communicated with the AGO in the course of its work. If Pearce had injured Leishman in a car accident in the AGO parking lot during the course of his investigation, Leishman’s claim against Pearce would not be “based upon” a “communication” with the AGO. These claims would be nothing like Leishman’s claims here, which arise entirely out of the OMW Report, a communication to the AGO regarding “matter[s] reasonably of concern” to the AGO.

302 F. Supp. 2d at 1204 (holding that “Plaintiff’s outrage and intentional infliction of emotional distress against the Washington Firm Defendants fail . . . since they both arise out of the report submitted to the City”).

Leishman argues that unlike the plaintiff in *Dang*, Pearce and OMW “made other statements directly to Leishman, and took other identified actions that injured him.” Br. at 27. However, Leishman has never alleged *any* injurious statements or actions that did not occur during the investigation that led to the OMW Report, nor does he so here.¹⁰ Immediately after Leishman claims that OMW engaged in “other conduct” that is not “based upon” the OMW Report, he cites a list of conduct and damages that are plainly “based upon” the Report. *See* Br. at 27-28. He claims that Pearce mislead him regarding the scope of the investigation that led to the report, that OMW’s “shoddy work” on the OMW Report caused Leishman’s termination, that OMW “disregard[ed]. . .Leishman’s sexual orientation and disability” or caused him “dignitary harms.” *Id.* Leishman has not alleged—and still does not allege—that these harms arose from anything other than OMW’s investigation or Report to the AGO.

¹⁰ In his opposition to OMW’s Motion for Judgment on the Pleadings, Leishman provided a list of “Additional Hypothetical Facts” in, among other things, an effort make some showing that his claims were not “based upon” the OMW report. CP 322-23. Leishman relies on many of these assertions in his brief. However, all of the “Hypothetical Facts” provided by Mr. Leishman are (1) complaints about OMW’s investigation and Report, or (2) complaints about the AGO that have nothing to do with OMW. *Id.* These “Hypothetical Facts” are not sufficient to save his claims.

F. OMW and Pearce Are Entitled to Fees on Appeal

Pursuant to RCW 4.24.510, Leishman is liable to OMW and Pearce for “expenses and reasonable attorneys’ fees incurred in establishing [their] defense” on appeal. RAP 18.1, RCW 4.24.510.

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V. CONCLUSION

For the foregoing reasons, Pearce and OMW respectfully request that the Court affirm the trial court's grant of judgment on the pleadings pursuant to CR 12(c).

DATED this 8th day of August, 2018.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on August 8, 2018, I caused a copy of the foregoing Brief of Respondents to be served via the Washington State Appellate Courts' Portal electronic service to:

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The undersigned declares under penalty of perjury under the laws of the State of Washington that on August 10, 2018, I caused a copy of the foregoing Corrected Brief of Respondents to be served via the Washington State Appellate Courts' Portal electronic service to:

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