Emails of unionizing UW profs subject to public disclosure after high court ruling

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A legal test on whether documents should be released to the public applies only to records created or stored on a government employee's personal device and should not be extended to records on public agencies' e-mail servers, the Washington state Supreme Court ruled Thursday.

In a unanimous opinion, the court reversed an appeals court decision that said state law did not require the release of records from several University of Washington employees who are union members because they were prepared outside their "scope of employment."

The Freedom Foundation, an Olympia-based free-market think tank, filed a public records request in 2015 for records relating to union organizing by several UW faculty members. The university reviewed emails of one of the faculty members, who is a member of Service Employees International Union Local 925. UW said it planned to release 3,913 pages of e-mails unless there was a court injunction.

SEIU 925 filed a complaint in King County Superior Court, conceding that some "probably relate to government business" but many others were personal and their release would chill union organizing efforts, restrain speech and violate individuals' privacy rights.

About 100 pages of records were provided to the Freedom Foundation, but the trial court ruled that state law did not require release of the rest of them. An appeals court agreed.

The Freedom Foundation appealed, arguing that the scope of employment test applies only to records created or stored on an employee's personal device and should not be extended to records on public agencies' e-mail servers, where many of the records it sought were stored.

In its decision released Thursday, the high court agreed with the Freedom Foundation.
“Consistent with the (Public Records Act) ‘strongly worded mandate for broad disclosure of public records,’ we construe the statute’s disclosure requirements liberally and its exemptions narrowly,” wrote Justice Debra Stephens.

State law defines a public record as “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.”

In a 2015 decision, the Supreme Court unanimously ruled that then-Pierce County Prosecutor Mark Lindquist’s text messages created on his private phone were public records if they pertained to government duties. The high court concluded that records on a private cell phone “can be a public record’ if they are prepared, owned, used, or retained within the scope of employment.”

The issue raised by SEIU 925’s complaint was a different one, the Supreme Court said in its decision released Thursday. The issue was whether records stored on a public agency server meet another part of the definition of a public record; whether they “contain information relating to the conduct of government or the performance of any governmental or proprietary function.”

Judge Stephens wrote that the appeals court erred, conflating the analyses in the Supreme Court’s 2015 decision to conclude that regardless of where a particular record is created or stored, “whether an agency employee’s record is subject to disclosure hinges on if the record was prepared, used, or retained within the scope of employment.”

The Supreme Court said the “scope of employment” test applies only to records on a public employee’s personal device or account. Also, the test determines only whether such records meet the third part of the definition of a public record, which is whether the document was "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."

The high court sent the case back to King County Superior Court to issue another ruling based on the “proper analysis.” The justices also said the Superior Court should consider SEIU 925’s other arguments against release of the records, which focus on statutory and constitutional claims.

Eric Stahfeld, a Burien attorney who represented the Freedom Foundation, applauded the Supreme Court’s decision, saying the public would have lost access to many public records if the appeals court had not been overturned.

Sydney Phillips, the foundation’s litigation counsel, added: “The Washington state Supreme Court is going to continue to uphold the mandate behind the Public Records Act that the citizens are not controlled by the government and they have the right to know the information about what the government is doing.”
Attorneys for SEIU 925 didn’t return messages seeking comment.

Toby Nixon, president of the Washington Coalition for Open Government, said the nonprofit group agrees with the Supreme Court’s unanimous decision.

“If a record is retained by an agency on an agency server, then it’s almost presumed it is a public record -- unless it can be shown that it is clearly, completely unrelated to public business,” said Nixon, a former state legislator.

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