Supreme Court Concludes Faculty's Union-related Emails on State University's Server Are "Public Records"

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In *SEIU Local 925 v. University of Washington*, the Washington Supreme Court unanimously reversed the state court of appeals, concluding that the "scope of employment" test from *Nissen v. Pierce County* applies only to records on personal devices, rather than agency devices.

The Freedom Foundation submitted a public records request to the University of Washington ("UW") seeking, among other records, UW employee emails related to union organizing. SEIU intervened to prevent disclosure of these records, arguing they were outside the statutory definition of a "public record."

To be a "public record," the record must (1) contain "information relating to the conduct of government or the performance of any governmental or proprietary function" and (2) be "prepared, owned, used, or retained by any state or local agency[.]" RCW 42.56.010(3). In *Nissen*, the Washington Supreme Court adopted a "scope of employment" test to address whether documents on an employee's personal device were "prepared, owned, used, or retained" by the agency itself, or by the individual employee. The Court reasoned that if the employee was acting within the scope of his or her employment as to the record in question, then the record was prepared, owned, used or retained by the agency, even though stored on a personal device, and therefore met that portion of the definition of a public record.

But in S*EIU Local 925*, the Court of Appeals applied Nissen's scope of employment test to records sent to and from employees' official email addresses, which are retained on UW servers. The Court of Appeals had concluded: "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."

The Supreme Court reversed, concluding that the Court of Appeals misapplied *Nissen*. The Court reasoned that the scope of employment test "serves a narrow purpose and was created to address policy concerns unique to the context of personal accounts or devices," namely the expectations of privacy associated with personal devices. Applying this test to records held on agency servers was error. The Court went on to hold that, "On the existing record, albeit limited, most of the disputed e-mails appear to satisfy that standard because they most likely address faculty working conditions or the UW's educational mission."

While the Court concluded that, on the record presented, the disputed emails appeared to satisfy the definition of a public record, the Court remanded for a determination of whether any statutory or constitutional provisions exempted the records from disclosure.

If you have questions, please contact any member of our Public Records & Open Government team.