NO. 44852-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GLENDA NISSEN,

Appellant,

v.

PIERCE COUNTY, ET AL.,

Respondents.

MOTION TO FILE AMICUS CURIAE BRIEF OF ATTORNEY GENERAL OF WASHINGTON

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The Attorney General of Washington moves for leave under RAP 10.6 to file an amicus curiae brief in the above-captioned matter. The matter is scheduled for oral argument on February 25, 2014.

I. INTEREST OF AMICUS CURIAE

The Public Records Act, RCW 42.56, is Washington's principal statute providing open access to public records in Washington. In this respect, the Act provides an essential tool to help ensure government is open, transparent, and responsive. The people of the state of Washington and the agencies that serve them share this vital interest in government accountability under the Act. The Act applies to virtually every state agency.

As the legal officer for the state, the Attorney General advises state officers and state agencies in interpreting and applying the Public Records Act and, when necessary, represents them in legal actions under the Act. The Attorney General also fulfills specific statutory roles in administering the Act, including the adoption of model rules, the publication of educational materials (RCW 42.56.570), and the provision of written opinions concerning agency denials of public inspection (RCW 42.56.530). As the legal officer for the state, the Attorney General also has an interest in safeguarding Washington citizens' rights to remain informed about their government. Thus, the Attorney General has an

important interest in the sound development of case law concerning the Act.

The Attorney General also has an interest in protecting constitutional rights to privacy, including the privacy of government employees. The Attorney General's Office employs over 1,100 attorneys and staff, and serves as the attorney for state agencies that employ over 50,000 workers. While the Public Records Act demonstrates the state's strong interest in open government and disclosure of public records, the Washington and United States Constitutions demonstrate that the rights of all individuals to privacy and freedom from unwarranted government searches are also of great importance.

II. FAMILIARITY WITH THE ISSUES

The undersigned attorney, on behalf of the Attorney General, is familiar with the issues involved on review and with the arguments presented by the parties.

III. SPECIFIC ISSUES ADDRESSED BY AMICUS CURIAE

The Attorney General's proposed amicus brief addresses the following issues:

A. Whether billing records of a cell phone personally owned and paid for by a government employee, but used at times for work-related

calls, are public records, where the records are not prepared, owned, used, or retained for any governmental purpose.

B. Whether work-related text messages prepared and sent by a government employee using a personally owned cell phone can be public records.

IV. REASONS FOR ADDITIONAL ARGUMENT

When the Public Records Act was enacted by initiative in 1972, most public records were created and maintained within an agency's office as paper documents. Responding to a public records request generally meant retrieving papers from a filing cabinet in a government office and making copies available to a requester. Advancing technology and the prevalence of electronic records has required new procedures and policies. Among the public records challenges facing today's agencies is the use by many government employees of personal devices to conduct government business. This use contributes tremendously to productivity, efficiency, and employee safety, but can raise issues regarding application of the Public Records Act.

The Attorney General's Office seeks to provide briefing that would assist the Court in analyzing the difficult questions arising from employee use of personal devices, and in determining when such use implicates the Public Records Act. The Attorney General's Office has experience

analyzing public records issues in advising clients as well as responding to such requests as a government agency. That experience informs the accompanying amicus brief, and we respectfully submit that the perspective of a non-party with such experience would be helpful to the Court.

For these reasons, the Attorney General moves for leave under RAP 10.6 to file the amicus curiae brief that accompanies this motion.

RESPECTFULLY SUBMITTED this 23rd day of January, 2014.

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I. INTRODUCTION

The Public Records Act was adopted on the principle that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 714-15, 261 P.3d 119 (2011) (citations and quotations omitted). But another important principle of our free society is the right of individuals—including government employees—to be free from unreasonable searches and intrusions into private affairs. Wash. Const. art. I, § 7; U.S. Const. amend. IV. This case concerns the intersection of these two principles, and specifically the circumstances in which a government officer or employee's use of personal devices can create public records.

Prior Washington court decisions show that documents created or stored on personally owned home computers can be public records. In the Attorney General's view, there is no reasoned distinction between personally owned home computers and personally owned cell phones. Thus, documents created or stored on a personally owned cell phone can be public records. But this does not mean that every document created, used, or owned by a government employee is a public record simply because it references or relates to the work of the employee. Rather, the

Court should determine whether the record was created, used, or owned for public agency work purposes or for personal purposes. In this way, the Court upholds open government without jeopardizing government employees' personal privacy. Applying that analysis to the present case, the personal cell phone billing records of the Pierce County Prosecutor are not public records, but the work-related text messages may be public records.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the Attorney General of Washington. As the legal officer for the State, the Attorney General advises state officers and state agencies in interpreting and applying the Public Records Act and, when necessary, represents them in legal actions under the Act. The Attorney General also fulfills specific statutory roles in administering the Act, including the adoption of model rules, the publication of educational materials (RCW 42.56.570), and the provision of written opinions concerning agency denials of public inspection (RCW 42.56.530). In addition, the Attorney General recognizes the important public policy of the state of Washington, reflected in the Public Records Act, favoring access to records relating to the conduct of government, absent circumstances where disclosure would harm the public interest. For these reasons, the Attorney General has a significant interest in the development

of the law concerning disclosure of public records, and the scope and construction of the provisions of the Act.

The Attorney General also has an interest in protecting constitutional rights to privacy, including the privacy of government employees. The Attorney General's Office employs over 1,100 attorneys and staff, and serves as the attorney for state agencies that employ over 50,000 workers. While the Public Records Act demonstrates the state's strong interest in open government and disclosure of public records, the Washington and United States Constitutions demonstrate that the rights of all individuals to privacy and freedom from unwarranted government searches are also of great importance. *See also* RCW 42.17A.001(11) (including in Public Records Act declaration of policy that access to government information must be "mindful of the right of individuals to privacy"). Accordingly, the Attorney General's Office has an interest in ensuring that the constitutional rights of all citizens—including government employees—are protected.

III. ISSUES ADDRESSED BY AMICUS

A. Whether billing records of a cell phone personally owned and paid for by a government employee, but used at times for work-related calls, are public records, where the records are not prepared, owned, used, or retained for any governmental purpose.

B. Whether work-related text messages prepared and sent by a government employee using a personally owned cell phone can be public records.

IV. ANALYSIS

A. Writings Created Or Stored On Personally Owned Devices Can Be Public Records

Washington case law and the language of the Public Records Act show that a government employee's use of a personal device does not necessarily fall outside the application of the Act. A "public record" is defined as a "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." RCW 42.56.010(3) (emphasis added). Although Washington courts have not explicitly analyzed whether an individual employee or official can act as an "agency" for purposes of the Public Records Act, several opinions implicitly rely on this proposition or discuss agency actions that implicitly rely on this proposition. *See O'Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010) (holding e-mail received and forwarded on city councilmember's personal home computer is a public record); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 859, 288 P.3d 384 (2012) (finding city's response to public records request reasonable, which included

search for records stored on city officials' personal computers), *review denied*, 177 Wn.2d 1002, 300 P.3d 415 (2013); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009) (holding personal e-mail addresses not exempt from public disclosure in case where city provided e-mails from councilmembers' home computers that discussed city business), *review denied*, 169 Wn.2d 1007, 236 P.3d 206 (2010).

In *O'Neill*, the Washington Supreme Court held that metadata associated with an e-mail received by a city councilmember on her home computer was a public record. *O'Neill*, 170 Wn.2d at 150. The Court remanded for the city to search the councilmember's home computer, noting that it assumed that the councilmember would consent to the search and that "this inspection is appropriate only because [the councilmember] used her personal computer for city business." *Id.* In support of its holding that a government official's home computer may contain public records, the Court reasoned that "[i]f government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined." *Id.*

The *O'Neill* holding is consistent with the purpose and language of the Public Records Act. As noted by the Court, the purpose of the Public Records Act—allowing citizens broad access to records relating to government—could be undermined if individual officials or employees

used home computers to conduct official business. Likewise, the *O'Neill* holding is supported by statutory language, which applies the Public Records Act to writings prepared, owned, used, or retained by an "agency," because an agency must necessarily act through its officials or employees.[1] Thus, when an agency official or employee prepares, owns, uses, or retains records for work purposes, the records may be subject to the Public Records Act regardless of what equipment the employee is using.

The model rules for public records compliance promulgated by the Attorney General are also consistent with this approach. The comments to the model rules state: "Sometimes agency employees work on agency business from home computers. These home computer records (including e-mail) were 'used' by the agency and relate to the 'conduct of government' so they are 'public records.'" Comment to WAC 44-14-030 at WAC 44-14-03001(3). Although the model rules are non-binding, courts have relied on them as persuasive authority. *See* RCW 42.56.570(2) (model rules are "advisory"); *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 753-54, 174 P.3d 60 (2007) (citing

[1] "Agency" is defined in the Public Records Act as including "all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW 42.56.010(1).

Attorney General model rules in analysis); *Mechling*, 152 Wn. App. at 849 (Attorney General model rules are not binding, but "offer useful guidance").

The court opinions and model rules discuss the use of home computers, but there is no reasoned distinction between computers and other devices, such as cell phones, that can also create or use records related to the conduct of government. As technology advances, the lack of legal distinction between the two is made even plainer, as government employees make use of tablets, iPads, and other hybrid cell phone/computer devices. The key inquiry should not be the type of device used, but rather the character of any record that is prepared, owned, used, or retained when an employee uses a personal device. *Cf. Cowles Publ'g Co. v. Murphy*, 96 Wn.2d 584, 587, 637 P.2d 966 (1981) ("[T]he issue of access to records should be determined by the role the documents play in our system of government and the legal process.").

B. A Record Associated With A Government Employee's Use Of Personal Devices Is A Public Record Only When The Employee Prepares, Owns, Uses, Or Retains The Record For Work Purposes

When using a personal device, for an agency employee to create a record subject to the Public Records Act, i.e., a record that the "agency" prepared, owned, used, or retained, the employee must have created the

record for work purposes. Applying this standard to material created on personal devices fully realizes the purpose of the Public Records Act, which is concerned with information relating to government conduct, but not personal, private conduct. *E.g.*, RCW 42.56.010(3) (defining public record); *O'Neill*, 170 Wn.2d at 150 (recognizing that search of home computer appropriate only because it was used for government business).

While a court might presume that an agency employee is acting for work purposes when using agency-owned computers or devices, the same cannot be said for an agency employee using personal devices. Instead, most if not nearly all documents and other materials created by an employee on a personal device will be personal records rather than public records, even if those records in a broad sense relate to the conduct of government. For example, an agency employee may have a newspaper delivered (either electronically or in paper form) to his or her home for personal use, and the newspaper might contain information relating to the conduct of government. The employee may even read the newspaper with the idea that it may contain information useful to the employee's work. Similarly, an agency employee may send a text message or leave a note to his or her spouse stating that the employee will be working late that evening. In either instance, it would be absurd to suggest that the

newspaper, text message, or personal note were public records, even though the records might contain information "relating" to government.

C. Personal Cell Phone Billing Records, Which Are Used Solely For Personal Purposes, Are Not Public Records

Applying the "work purposes" rule to the first class of records at issue here, the cell phone billing records of a personally owned cell phone are not public records, even if the cell phone was used for work-related calls. First, setting aside Ms. Nissen's argument that the unredacted billing records were used in responding to her public records request (addressed below), the cell phone billing records were not prepared, owned, used, or retained by the agency itself. The agency was not financially responsible for paying the bill and there was no governmental purpose for using or retaining the bill. Second, if Mr. Lindquist himself ever possessed or used the cell phone billing records to pay his bill, he was not doing so for work purposes. Rather, he was acting in his personal capacity in paying a personal bill. Nor did Mr. Lindquist "prepare" the records simply by making calls with his cell phone. Rather, a private company (Mr. Lindquist's wireless provider) prepared the records for Mr. Lindquist's personal, non-official use. Accordingly, the cell phone billing records are not public records.

The Colorado Supreme Court reached the same conclusion with respect to personal cell phone billing records of the Governor of Colorado, even though the cell phone was used for work-related calls. *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011). Interpreting the language of Colorado's public records law, the court first held that the records would be public records only if they were made, maintained, or kept in the governor's official capacity.[2] *Id.* at 1091-92. The court then held that the cell phone billing records were not public records because "the Governor kept the phone bills only for the purpose of paying them . . . ." *Id.* at 1093. In doing so, the court rejected the argument made by Ms. Nissen here—that the records were public records because they were created as a result of work-related calls: "Making a phone call does not amount to creating or fashioning the phone bills or directing the carrier to do so." *Id.* at 1092. This Court should follow Colorado's sound reasoning and hold that Mr. Lindquist's personal cell phone billing records are not public records.

Similarly, the Court should reject Ms. Nissen's argument that the billing records became public records when they were "used" by the

[2] Ms. Nissen correctly points out that Colorado's statutory definition of "public record," unlike Washington's, explicitly requires that records be "for use in the exercise of functions required or authorized by law." Br. of App. at 28 (quoting Colo. Rev. Stat. § 24-72-202(6)(a)(I)). However, as discussed above, in order for an individual to fill the Washington statutory requirement that documents be prepared, owned, used, or retained by an "agency," he or she must be acting for work purposes. The *Denver Post* opinion thus remains strong persuasive authority.

County to respond to her public records request. Br. of App. at 27. The Attorney General agrees with the County that the unredacted portions of the cell phone bills were not related to the conduct of government and thus are not public records, and that review by staff for purposes of determining whether a record is a public record does not automatically change the record into one relating to the conduct of government. Accepting Ms. Nissen's argument would mean that an agency could never review a document to determine if it was a public record, because doing so would in every case make the document a public record. The Court should reject such an absurd result. *E.g.*, *Killian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) ("The court must also avoid constructions that yield unlikely, absurd or strained consequences."). Accepting Ms. Nissen's interpretation would not only create an absurd result, but would also undermine the very purposes of the Public Records Act of openness and transparency in government. Rather than encouraging agencies to be as responsive as possible and to review records that were potentially public records, agencies would be encouraged to avoid reviewing any questionable documents to avoid creating public records where none existed before. The Court should reject an interpretation so counter to the Public Records Act's purposes. *See State v. Eaton*, 168

Wn.2d 476, 480, 229 P.3d 704 (2010) (courts construe statutes consistent with their underlying purposes).

D. Work-Related Text Messages Sent From A Personal Cell Phone Can Be Public Records

Applying the "work purposes" rule to the second class of records at issue here, some of Mr. Lindquist's text messages may be public records. Unlike the cell phone billing records, which were never prepared, owned, used, or retained by Mr. Lindquist for any governmental purpose, work-related text messages themselves may have been prepared and used for a governmental purpose, and thus may be public records. Again, the key inquiry would be whether Mr. Lindquist was acting for work purposes when preparing and using the text messages or instead acting in his personal capacity.[3] For example, a text message to a colleague regarding a social outing may have been sent in Mr. Lindquist's personal capacity even though the communication was directed to a work colleague.

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[3] The Attorney General is aware of only one court opinion specifically addressing whether a text message sent from a personal cell phone of a government official or employee can be a public record. *City of Champaign v. Madigan*, 992 N.E.2d 629 (Ill. App. Ct. 2013). In that case, the Illinois Attorney General issued an opinion that text messages sent and received on personal cell phones of city council members were public records because the text messages were used by one or more members of a public body "in conducting the affairs of government." *Id.* at 637. The Illinois Court of Appeals agreed that the text messages were public records, but only because they were sent while the city council was in session, reasoning that the public records act applied only to a "public body" rather than to individual members of the body. *Id.* at 639. The reasoning of the Illinois Attorney General rather than the reviewing court is more consistent with Washington case law. *E.g.*, *O'Neill*, 170 Wn.2d at 150 (e-mail received on government official's home computer is public record). The Attorney General nevertheless cites the case to make the court aware of it, noting that it was issued after the briefing by the parties in this case was complete.

The County has also argued that the text messages are not public records because they are "maintained in a way indicating a private purpose, are not circulated or intended for distribution within agency channels, are not under agency control, and may be discarded at the writer's sole discretion." Corr. Br. of Resp. at 24-25 (quoting *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 712, 780 P.2d 272 (1989)). The Attorney General expresses no opinion whether the text messages here can be considered non-public records under this doctrine, other than to note that the fact that a personal cell phone is used to prepare and transmit the text messages is not controlling. Rather, the same analysis should apply regardless of the ownership of the cell phone. Otherwise, as the *O'Neill* court noted, agency officials and employees could circumvent the Public Records Act. *O'Neill*, 170 Wn.2d at 150.

E. Public Records Stored By Individuals On Non-Agency Devices Implicate Constitutional Privacy Protections, But The Court Need Not Resolve The Appropriate Balancing Of Those Interests Here

In contrast to public records retained by the agency itself, records stored by an individual, either electronically or otherwise, implicate an individual's right to be free from unreasonable search and seizure and from government intrusion into private affairs. *See* U.S. Const. amend. IV; Wash. Const. art. I, § 7. Government employees do not lose their

constitutional rights to privacy "merely because they work for the government." *City of Ontario v. Quon*, 560 U.S. 746, 130 S. Ct. 2619, 2628, 177 L. Ed. 2d 216 (2010) (citations and internal quotes omitted). While public records stored by an individual may not be entitled to privacy protections, it can be difficult to retrieve those records without intruding into private affairs. Thus, the comments to the Attorney General's model rules outline the following suggested approach:

> Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work e-mails back to the employee's agency e-mail account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers.

WAC 44-14-03001(3).

In the present case, the County has asserted that constitutional provisions as well as federal law prevent the County from obtaining the requested text messages without Mr. Lindquist's consent. Corr. Br. of Resp. at 40-44 (discussing, Wash. Const. art. I, § 7; U.S. Const. amend. IV; and 18 U.S.C. § 2703(c)(1)(B)). But if this Court holds that the text messages may be public records and remands for determination as to

whether any qualify, it is quite possible that Mr. Lindquist will consent to their review, eliminating the need to address the difficult questions the County raises. The Court should therefore decline to address those questions for now, and instead wait to see how the facts and issues develop on remand. *See Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000) (court avoids deciding constitutional issues possible).

V. CONCLUSION

The Court should uphold the principles of open government while also acknowledging and protecting the personal right to privacy of government officials and employees. Thus, the Attorney General suggests an analysis focusing on whether a government employee using a personal device is acting for work or personal purposes when determining whether a public record has been created.

RESPECTFULLY SUBMITTED this 23rd day of January, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I served the Motion to File Amicus Curiae Brief of Attorney General of Washington and Amicus Brief of Attorney General of Washington, via First Class U.S. Mail, postage paid and electronic mail, upon the following:

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RESPECTFULLY SUBMITTED this 29th day of January, 2014.

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WASHINGTON STATE ATTORNEY GENERAL

January 23, 2014 - 4:30 PM

Transmittal Letter

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Please find Motion to File and accompanying Amicus Brief

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