No. 44852-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

90875-3

GLENDA NISSEN, an individual,

Respondent,

v.

PIERCE COUNTY, a public agency, PIERCE COUNTY PROSECUTOR'S OFFICE, a public entity,

Petitioners,

v.

PROSECUTOR MARK LINDQUIST,

Petitioner.

LINDQUIST'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Pierce County Prosecutor Mark Lindquist ("Petitioner") asks this Court to accept review of the decision designated in part B of this petition.

B. COURT OF APPEALS DECISION

The Petitioner asks this Court to review the published September 9, 2014 decision of the Court of Appeals, Division II. A copy of that decision is in the Appendix at pages A-1 through A-15.

C. ISSUES PRESENTED FOR REVIEW

(1) Are the records of the personal communications devices of public employees "public records" under the PRA, particularly where the Petitioner is not a public agency within the PRA definition, and where the records of his personal cell phone records were never used, retained, or possessed by the Petitioner or by Pierce County ("County") at the time of the requests?

(2) Are the Petitioner's personal cell phone records exempt from disclosure under the Washington and United States Constitutions?

D. STATEMENT OF THE CASE

The Petitioner notes the factual and procedural discussion in the Court of Appeals' opinion, op. at 2-5, and in the County's petition for review. He provides a supplemental discussion of facts and procedure below pertinent to the issues identified in this petition.

Glenda Nissen made a PRA request to the County for "work related" telephone records for certain dates from the Petitioner's personal cellular telephone. CP 15. Subsequently, she demanded similar records for another date that purposefully omitted the "work related" qualifier in order to obtain all of the Petitioner's personal communications. CP 17. Because neither the County nor the Petitioner had the records, the latter sought them from his personal telephone provider, Verizon Wireless ("Verizon"), for his own review. CP 15-16, 597-98. Verizon responded that its customers could not obtain text messages unless requested within three to five days after the messages are sent and thus no text content was available.[1] CP 58, 81, 444-46, 490, 598, 616. The Petitioner could and did, however, obtain responsive billing records that he reviewed with his legal advisors and their staff. CP 82, 445.

The County's copies of the Petitioner's redacted personal billing records that "*may*" have a work connection were then provided to Nissen, in the spirit of openness (even though these records were not public

[1] Months later, the County learned that, without notice to the Petitioner, Nissen had requested and obtained a temporary hold of the Petitioner's texts through an undisclosed request to Verizon's "Law Enforcement Resource Team Court Order Compliance Group" -- because she claimed she was conducting an "investigation." Verizon did not disclose this request to the Petitioner or the County as required by federal law. *See* CP 200-02, 598, 615-17. When in December 2011 Nissen finally revealed her conduct, the Petitioner took appropriate action to preserve the records in Verizon's hands. CP 251, 617-18. Nissen's duplicitous conduct, misleadingly claiming this was an "investigation" to Verizon's "Law Enforcement Resource Team," here only demonstrates how PRA requesters may abuse the privacy rights of public employees.

records). The records were accompanied with the explanation they did not include specifically identified non-public information such as the Petitioner's personal phone calls. CP 16, 18, 32-36, 40, 86, 334-38, 340-350, 445-46.[2] The County also noted that even if they were public records, they would be exempt under RCW 42.56.050 and RCW 42.56.250.[3] CP 16, 18, 86, 88.

When Nissen later sued the County under the PRA for the Petitioner's personal cell phone records, penalties and attorney fees, the Petitioner intervened immediately and moved to enjoin the disclosure of any of his personal phone records beyond those previously disclosed. CP 494, 548.

The trial court, the Honorable Christine Pomeroy, dismissed Nissen's action and held that the Petitioner's injunction motion was moot. RP (12/23/11):1-103; CP 258. The court ruled that dismissal was merited on three distinct bases:

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[2] The Petitioner treated the concept of "work-related" in a *broad* fashion, going beyond the PRA. As noted *infra*, the language of the statute references the conduct of government. No clear operating definition applies to that concept.

[3] *See also*, CP 480, 502-08, 524-25, 535, 595, 628, 690; Cy Br. 27-29 (discussing RCW 42.56.230 ("Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy"); RCW 42.56.250(3) ("residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, ... of employees ... of a public agency, and ... dependents of employees"); RCW 42.56.290) (records that "would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts")).

> [N]umber one, it is not a public record. The private cell phone records of a public elected official or a public employee are not public records. Number two. I believe that he has a right to privacy as a valid exemption; and three, I do think that I have absolutely no power to require the third-party provider, without a search warrant application with probable cause, to disclose records. I have no power to do so under this Act.

Op. at 5 n.9.

As noted in the County's petition, the Court of Appeals reversed the trial court's decision, but avoided addressing the constitutional grounds for exempting any of the Petitioner's personal communications records from disclosure under the PRA. The court remanded the case to the trial court for intrusive "discovery" on a variety of matters. Op. at 13.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Petitioner concurs in the grounds set forth in the County's petition for review that support review under RAP 13.4(b). All four of the considerations for review under RAP 13.4(b) are present here because the Court of Appeals' decision wrongly applies the PRA's definition of "public record," and required unspecified discovery in violation of public employees' well-established statutory and constitutional privacy rights. Critically, the court ignored the fact that the trial court's dismissal order was based on both statutory and constitutional grounds, but declined to address the constitutional issues. Distinct from the County's perspective

as a public agency, the Petitioner emphasizes the particular perspective of public employees generally, and elected officials specifically, who are affected by the Court of Appeals' decision.[4]

(1) The Petitioner's Personal Cell Phone Records/Texts Are Not a Public Record under RCW 42.56.010(3) to Which the PRA Applies

The Petitioner concurs in the County's argument that his records are not public records under the PRA, but three features of that argument bear emphasis. First, an individual public employee is not a public agency as defined in RCW 42.56.010(1). Second, in modern telecommunications practice, not only does a public agency not "possess" records that are actually in the possession of the telecommunications service provider,

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[4] The Court of Appeals' decision impacts every single, non-judicial public employee in Washington as they are covered by the PRA. According to the Census Bureau, there are 272,436 full-time public employees in Washington as of 2012. http://www.census.gov/govs/apes/how_data_collected.html. Moreover, the Court of Appeals opinion does not affect solely those employees' cell phones. It will impact *all* of their private communications devices-personal computers, cell phones, tablets, to name but a few, again evidencing the breadth of the impact of the Court of Appeals' opinion.

The fact that 67% of public employees at every level of federal, state, and local government use their personal telephones for work purposes, *see* GovLoop, "Exploring 'Bring Your Own Device' In the Public Sector," p. 9 (2012), explains why the Washington Association of Prosecuting Attorneys, Washington State Association of Municipal Attorneys, Washington Federation of State Employees, International Association of Fire Fighters, Washington Education Association, Washington Council of Police and Sheriffs, Washington State Patrol Troopers Association, and Pierce County Prosecuting Attorneys' Association filed amici briefs in the Court of Appeals. These organizations representing hundreds of thousands of public servants show this "petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

neither does the public employee.[5] Finally, the records at issue here were not used for a governmental purpose.

The Court of Appeals' published opinion essentially restates the obvious proposition that private records are not subject to the PRA and public records are, unless they are subject to a PRA exemption. Op. at 8-9. *See, e.g., Forbes v. City of Gold Bar*, 171 Wn. App. 857, 867-69, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013) (personal records that come into agency possession while responding to a PRA request are *not* "public records."). The Court of Appeals' superficial treatment of the array of complex and important issues presented here on the definition of a "public record" supports granting review.

(a) A Public Employee is Not an "Agency" under the PRA

In a footnote, the Court of Appeals rules, without explanation, that a public employee is an "agency" and therefore subject to the PRA. Op. at 11 n.15. The definitional language of RCW 42.56.010(1) does not support the Court of Appeals' cursory determination. Public employees are not listed in the definition of "agency" under RCW 42.56.010(1). The Court of Appeals' ruling conflicts with precedent mandating an application of the

[5] The Court of Appeals acknowledges that cell phone call logs "are more problematic." Op. at 11. After it notes that neither the County nor the Petitioner ever prepared nor possessed the logs for any public business, it conjures up speculative uses justifying their possible production. Op. at 11-12.

statutory language as written by the Legislature. *Nast v. Michels*, 107 Wn.2d 300, 306, 730 P.2d 54 (1986) (Courts are not "agencies" because the PRA's definition did not "specifically include" them); *West v. Thurston County*, 168 Wn. App. 162, 183-84, 275 P. 3d 1200 (2012) (finding "no Washington authority extending this principal-agency relationship to the PRA context or establishing that records prepared by agents of a public agency automatically become 'public records' subject to disclosure under the PRA," and "legislature 'means exactly what it says'" and "intended to exclude from this designation" contractors "who prepare documents that the agency never physically possesses").

Moreover, from a public policy perspective, there is logic in differentiating between individual public employees and public agencies under the PRA. The Act was designed to address records used, possessed, or retained *by agencies in their decisionmaking capacity. Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1 of Clark County*, 138 Wn.2d 950, 960-61, 983 P.2d 635 (1999). It was never intended to intrude upon the personal records of public employees. Neither Nissen nor the Court of Appeals can point to *anything* in the legislative history of Initiative 276 or any subsequent legislative re-enactments of RCW 42.56.010(3) evidencing any intent to subject public employees' personal records to a

disclosure obligation on the part of their public agency employer. Review is merited. RAP 13.4(b)(1-2).

(b) A Public Agency Does Not Possess Telecommunications Records That Its Public Employees' Actual Service Providers Possess

Federal law controls the privacy rights of the persons who generate telecommunications records.[6] The Stored Communications Act, 18 U.S.C. § 2703, et seq. ("SCA"), governs the privacy of the telecommunications records of customers and mandates that such records may generally only be accessed with a warrant. The SCA, which preempts the PRA, bars entities who provide an "electronic communication service" from divulging the contents of communications in electronic storage to anyone other than the "addressee or intended recipient of such communication," § 2702(a)(1) & (b)(1), with very limited specific exceptions. Verizon fits the definition of "any service which provides to users thereof the ability to send or receive wire or electronic communications." § 2510(15).

One section of the SCA provides that in the absence of consent, a cell phone carrier (Verizon) cannot release a customer's information to a third party (the County) without obtaining a search warrant, or court order based on suspected criminal activity. 18 U.S.C. § 2703(c)(1). The SCA

[6] Technology controls who actually possesses and retains telecommunications records. The records of private telecommunications may not be stored in the device itself, for example, but may actually be possessed by the telephone service provider.

allows federal officers to use pen registers after "first obtaining a court order under section 3123 of this title or under the Foreign Intelligence Surveillance Act....." 18 U.S.C. § 3121. Thus, the County has no lawful ability to obtain the records sought here.

Federal courts also have held that in addition to this statutory privacy right cell phone subscribers have a constitutionally protected expectation of privacy with regard to their cell phone records although they are the business records of their cell phone service providers. *Riley v. California,* ___ U.S. ___, 134 S. Ct. 2473, 2493, 189 L.Ed.2d 430 (2014) (under the Fourth Amendment a warrant is generally required before a search of a cell phone is permitted, even incident to arrest). *See also, e.g., U.S. v. Herron,* 2 F.Supp.3d 391 (E.D. N.Y. 2014) (defendant's legitimate expectation of privacy in cell phone gives standing to challenge execution of order issued under SCA directing cell phone service provider to disclose information pertaining to that phone).

The Court of Appeals' opinion makes no mention of this important federal statute.

(c) The Records at Issue Here Were Not Used for a Governmental Purpose

In defining a public record, RCW 42.56.010(3) uses the amorphous phrase that the record must be used, possessed, or retained for a

"governmental purpose." But apart from this Court's *Concerned Ratepayer* decision, no court has provided a coherent definition of what that means, or its constitutional limits. This Court made clear in *Ratepayers* that the document must have a nexus to "governmental decisionmaking." 138 Wn.2d at 961-62. This still does not provide a practical analytical tool for affected agencies and trial courts. Does a county employee who is cleaning out garbage cans on a county ballfield and texts his wife from his personal tablet about how angry he is at the sloppiness of people using the ballfield have a "nexus to government decisionmaking?" Does a prosecutor working late at night meet the test when she texts her husband from her personal cell phone indicating that she will be working on the next day's closing argument and she will be late in coming home?

Here, the Court of Appeals mistakenly and *repeatedly* asserted that the Petitioner *conceded* that he used his personal cell phone to conduct "government work." *E.g.,* op. at 8. This is simply not true. In a spirit of openness, the Petitioner provided those communications that *may be* "work related," even though they were not public records. CP 16, 86.

As explained in the County's petition, and as noted above, the absence of a practical description of what precisely constitutes "the conduct of government" under RCW 42.56.010(3) by this Court is truly

problematic for public agencies and public employees alike. Is a work "relationship" of a writing synonymous with a "governmental purpose" under RCW 42.56.010(3)? For elected officials, is a communication on a personal communications device for campaign or political purposes, as *required* by applicable ethics laws, a "governmental" or "work" purpose in the broadest sense of those terms? No one can know from the Court of Appeals' superficial treatment of the issue. Op. at 8-10.

This issue of what constitutes a government purpose under RCW 42.56.010(3) requires review. RAP 13.4(b)(1, 2, 4).

(2) The Petitioner's Records, Even if Public Records under the PRA, Are Exempt from Production[7]

Perhaps most troubling is the fact that the Court of Appeals' opinion dodged the constitutional issue presented by compelled access by government under the PRA to a public employee's personal records, op. at 13, despite the trial court having rested its decision in part on the Petitioner's constitutional rights. The Court of Appeals cannot avoid considering exemptions to disclosure under well-developed analytical principles of the PRA.[8]

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[7] The Petitioner concurs in the County's statutory privacy exemption arguments under RCW 42.56.230(3).

[8] The Court of Appeals discussion of whether the Petitioner's personal records become "public records" is but the *first step* of a *two step* analysis:

The PRA recognizes that other statutes may constitute grounds for exemption, RCW 42.56.070(1), *Ameriquest Mortgage Co. v. Wash. State Office of Att'y Gen.*, 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010), but that same rationale applies to constitutionally-mandated exemptions.

(a) The Petitioner's Constitutional Rights Would Be Violated by Compelled Warrantless Production of Private Records

There is no doubt that a public employee has a constitutional right to the privacy of her/his personal communications records under both the Fourth Amendment and article I, section 7. *See, e.g., Riley*, 134 S. Ct. at 2495 ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant"); *State v. Hinton*, 179 Wn.2d 862, 865, 319 P.3d 9 (2014) ("text message conversation was a private affair protected by the state constitution from warrantless intrusion").

> First, determine whether any public records are responsive to the request—if not, the PRA does not apply. Second, insofar as certain public records are responsive, determine whether any exemptions apply generally to those types of records or to any of the types of information contained therein.

Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 428, 431-39, 300 P.3d 376 (2013), *republished as amended* at 327 P.3d 600 (2013), *amended on denial of reh'g* 327 P.3d 600 (2013). This separate "exemption" analysis was *required* because, as the Court of Appeals' own precedent acknowledges, even where "public records" are ultimately found present they may still be properly withheld if exempt under the PRA. *Tiberino v. Spokane,* 103 Wn. App. 680, 13 P.3d 1104 (2000) (though public employee's private emails made on a County computer during work hours were "public records," she was entitled to enjoin their release because "the e-mails were exempt from disclosure as personal information.").

The Court of Appeals here claimed that in *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010), "[o]ur Supreme Court has refused to exempt personal device communications from records subject to the PRA," op. at 11, but that is not entirely accurate. In *O'Neill*, this Court never decided the constitutional issues raised by compelling production of records for public employees' personal communications devices because it assumed consent by the public employee under the facts in that case. *See* 170 Wn.2d at 150 n.4. ("We do not address whether the City may inspect Fimia's home computer absent her consent"). The Petitioner intervened here because (unlike the official in *O'Neill* who did not intervene) he *does not* and *will not* consent to the production of the records of his personal communications devices. CP 492, 494-518; Intervenor br. at 37; Intervenor's Ans. to Amici at 4. Indeed, Petitioner's intervention plainly indicates the assertion of his rights. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-10, 239 P.3d 190 (2011) (action to prevent production is consistent with an intention to protect an employee's right to privacy, not to waive it).

In sum, the Petitioner's constitutional rights are squarely before this Court.

If the implicit belief of the Court of Appeals is that a public employee tacitly waives the right to the privacy of his/her personal

communications records as a condition of public employment, such a notion has been firmly rejected in Washington. *Edwards v. Dep't of Transp.*, 66 Wn. App. 552, 559, 832 P.2d 1332 (1992) ("government cannot compel persons to relinquish their First Amendment right ... as a condition of public employment."). Additionally, such a position would implicate other constitutional rights of affected public employees.[9]

This Court should grant review to address the Petitioner's constitutional arguments, arguments adopted by the trial court in its decision below. RAP 13.4(b)(3-4).

(b) The Court of Appeals' Remand for Further Discovery Only Exacerbates the Constitutional Violations About Which the Petitioner Is Concerned

The Court of Appeals' direction on remand to the trial court to develop a record to determine "which of [Petitioner's] personal cellular phone text messages and call logs, if any, pertained to the conduct of

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[9] The compelled production of personal communications, including political speech of elected officials, also intrudes on fundamental rights to freedom of speech, association, and private affairs under the First Amendment and Article I §§ 5 and 7, as the Petitioner contended below.

Further, an overbroad interpretation of "public record" unconstitutionally "takes" the Petitioner's private property without due process, equal protection or just compensation. *See* U.S. Const. Amend. 14; Wash. Const. art. I, §§ 3, 16. It subjects his private property to a court's unlawfully compelled seizure and threatens to punish retention by its owner with a *per diem* penalty. It "chills" creation of intimate and innocuous personal records "relating to government business in his official capacity." *See, e.g., O'Day v. King County,* 109 Wn.2d 796, 749 P.2d 142 (1988) ("Washington's free speech guarantee requires us to pay especially close attention to allegations of overbreadth" and "[r]egulations that sweep too broadly chill protected speech prior to publication, and thus may rise to the level of a prior restraint.").

government business; and ... determine which portions of the records Nissen requested, if any, constitute public records that must be disclosed under the PRA," op. at 13, will only increase the constitutional violations the Petitioner has identified here.

Simply put, it was improper for the Court of Appeals to avoid considering the constitutional issues raised by the Petitioner in the guise of requiring further discovery. The constitutional issue, an integral aspect of the PRA process, is a legal question for the courts to decide in any event.

Though the Court of Appeals decision stated "[w]e balance" the PRA "against the countervailing principle that individuals, including government employees, should be free from unreasonable searches and intrusions into their private affairs," op. at 6, it then failed to do so.

The Court of Appeals has dodged the proverbial $64,000 question in this case. How can the Petitioner or any other public employee be *compelled* by her/his employer or a court under the PRA to produce personal records? Under the SCA, as noted *supra*, personal telecommunications may only be produced against a person's will if a court finds "reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703. *See also, In re Subpoena Duces Tecum to AOL, LLC,* 550

F.Supp.2d 606 (E.D. Va. 2008) ("'private parties' and governmental entities are prohibited from using ... civil discovery subpoenas to circumvent" 18 U.S.C. § 2701-03). Because Petitioner's personal telephone records are not relevant to an ongoing criminal investigation, neither the County nor any court has authority under the SCA to demand their production.

Indeed, the *only* way discovery could dispute the sworn declarations confirming that just the Petitioner's personal calls were excised from the records produced (CP 81, 445-46), would be to force the Petitioner and similarly situated public employees to somehow waive their constitutional rights or the SCA's privacy mandate, something they need not do as a condition of public employment.

Further, if the Petitioner was ordered to produce personal telephone call logs in his possession, it is unclear not only how the PRA authorizes such discovery of documents but it would require an unconstitutional seizure of personal records without a warrant based on probable cause of a crime, under the Fourth Amendment or article I, § 7. In sum, no court could meet the warrant requirement of article I, § 7 or the Fourth Amendment to compel a public employee to turn over personal records to her/his public agency employer to address a PRA request.

Moreover, if a court ordered the Petitioner's deposition or that of his legal staff who assisted him in reviewing the records, requiring them to explain why each redaction was personal, such conduct would not only violate the Petitioner's constitutional rights, but would also invade the attorney-client privilege and attorney work product protections. *See, e.g.,* Tegland, 14A *Wash. Practice* 545 (2nd ed. 2009) (CR 26 protects against asking "questions designed to reveal an attorney's impressions, theories or strategies"); James W. Moore, *Federal Practice*, ¶ 26.15[1] at 26-293 (2d ed. 1995) ("activities of the attorneys" are "protected regardless of the discovery method employed").

Compelling such discovery raises a myriad of practical issues of substantial public interest. First, it exposes hundreds of thousands of state and local governmental employees and those who communicate with them to such violations. Second, it will also make impossible actual agencies' satisfaction of their duty under the PRA to conduct "reasonable searches" for records. *See, e.g., Neighborhood Alliance of Spokane County v. County of Spokane,* 172 Wn.2d 702, 736, 261 P.3d 119 (2011) (summary judgment is defeated by showing agency failed to make a "reasonable search"). Third, because the overbroad definition of "public record" universally makes personal records of every public employee subject to the PRA, it is unworkable as well. The inability of public agency

employers, when responding to a PRA request, to find – much less obtain – responsive records from employees, will create an insurmountable barrier to a proper response to PRA requests and an unlimited exposure to fees and penalties for taxpayers.

Finally, the Court of Appeals' avoidance of the constitutional issues which were a basis for the trial court's decision only delays the *inevitable* appellate review of these legal issues. The Petitioner will not waive his statutory and constitutional rights. Discovery will be a futile exercise in delay. The issues will return to the appellate courts. Review of these constitutional issues is merited *now,* not later.

No amount of discovery on the issue of "public record" can avoid the determinative and significant constitutional issues. Review is proper under RAP 13.4(b)(3-4).

F. CONCLUSION

This is a Supreme Court case. To the hundreds of thousands of Washington public employees, the question of whether the records from their personal communications devices are public records under the PRA is a momentous issue that this Court must address. Similarly, unlike *O'Neill,* this case squarely presents the constitutional exemptions from disclosure even if such records are public under the PRA. Public employees like the Petitioner should not have to sustain the uncertainty of

whether every record in their personal computer, cell phone, or tablet is subject to intrusive scrutiny by a judge to satisfy a PRA requester's fishing expedition. Review is merited here. RAP 13.4(b).

DATED this 9 day of October, 2014.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GLENDA NISSEN, an individual, Appellant, v. PIERCE COUNTY, a public agency; PIERCE COUNTY PROSECUTOR'S OFFICE, a public agency, Respondent. PROSECUTOR MARK LINDQUIST, Intervenor.	No. 44852-1-II PUBLISHED OPINION

HUNT, J. — Glenda Nissen appeals the superior court's CR 12(b)(6) dismissal of her Public Records Act (PRA)[1] action against Pierce County and the Pierce County Prosecutor's Office (County); she also appeals several other related superior court orders. At issue is whether a government employee's private cellular telephone call log records and text messages are "public records" subject to disclosure under the PRA. We hold that (1) call logs for a government official's private cellular phone constitute "public records" only with regard to the calls that relate to government business and only if these call logs are used or retained by a government agency; (2) text messages sent or received by a government official constitute "public records" only if the text messages relate to government business; and (3) because some of the private cellular phone call logs and text messages Nissen requested may qualify as "public

[1] Chapter 42.56 RCW.

records," the superior court erred in granting the County's CR 12(b)(6) motion to dismiss her PRA complaint. We also hold that the superior court did not err in staying discovery until after the CR 12(b)(6) hearing. We reverse the superior court order granting the County's motion to dismiss and remand to the superior court to reinstate Nissen's action and to develop the record.[2]

FACTS

I. PUBLIC RECORDS REQUESTS

Glenda Nissen is a detective with the Pierce County Sheriff's Department (Department) and a member of the Pierce County Deputy Sheriff's Guild (Guild). The Department hired her in 1997; she has worked there as a detective since 2000. Mark Lindquist is the elected Pierce County Prosecutor. Lindquist has a County-provided cellular phone, which he rarely uses, apparently preferring instead to use his personal cellular phone to conduct government business.

In connection with a separate whistleblower action that Nissen filed,[3] the County produced (1) records showing that Lindquist generally used his County-provided cellular phone less than 10 minutes per month, and (2) heavily redacted records of Lindquist's personal cellular phone use. These redacted personal cellular phone call logs showed: 9 work-related calls totaling 41 minutes on August 3, 2011; 13 work-related calls totaling 72 minutes on August 2, 2011; 10 work-related calls totaling 46 minutes on June 7, 2010; and 16 work-related text messages on August 2 and 3, 2011.

On June 3, 2011, Nissen submitted a PRA request asking the County to preserve "any and all . . . cellular telephone records" for Lindquist's personal cellular telephone number.

[2] Therefore, we do not address Nissen's challenge to the superior court's other orders.

[3] Nissen's whistleblower claim is not at issue in this appeal.

Clerk's Papers (CP) at 29. On August 3, Nissen sent another PRA request to the County, which stated:

> Please produce any and all of Mark Lindquist's cellular telephone records for number 253-861-[redacted here but provided in Nissen's records request[4]] or any other cellular telephone he uses to conduct his business including text messages from August 2, 2011.

CP at 15.

On September 16, the County produced the first installment of requested records; on September 28 the County was "prepared" to release the remaining records that it considered responsive to Nissen's request. CP at 16. The County also provided a log of exemptions that it had used to support redacting the produced records. These claimed exemptions variably cited "RCW 42.56.050"; "Invasion of Privacy"; "Non-Public Information, Personal Phone Calls"; "Non-Public Information, Last 4 digits of employee's personal phone number redacted"; "Residential or personal wireless phone numbers, last 4 digits redacted"; "Non-Public Personal Phone Calls"; or "Non-Public Personal Text Messages." CP at 88.

On September 13, Nissen submitted another PRA request, which stated, "The new public records request is for Mark Lindquist's cellular telephone records for number 253-861-[redacted

[4] To protect Lindquist's privacy, the superior court redacted from its records the last four digits of his personal cellular phone number. We issued a similar order redacting from the appellate record the last four digits of Lindquist's personal cellular phone number.

here but stated in the records request] for June 7, [2010]."[5] CP at 17. This request, however, omitted Nissen's previous request's qualifier that the records be work related. The County responded on September 19 with heavily redacted records of Lindquist's personal cellular phone use and an exemption log citing the same exemptions it had previously cited when it produced records in response to Nissen's earlier request.

II. PROCEDURE

On October 26, 2011, Nissen sued the County, asserting that it had claimed improper exemptions and had wrongfully redacted records in responding to her PRA requests.[6] Lindquist intervened.[7] The superior court entered orders (1) striking and sealing all court filing references disclosing the last four digits of Lindquist's personal cellular phone number, and (2) staying all discovery pending a hearing on the County's CR 12(b)(6) motion to dismiss.[8] Later ruling that private cellular phone records of elected government officials are not public records subject to

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[5] Although Nissen's September 13, 2011 public records request initially requested records from "June 7, 2011," this was a typographical error that the parties clarified in subsequent communications. Neither Nissen nor the County disputes that they understood the request to be for records from June 7, 2010. CP at 17.

[6] Despite Nissen's complaint's lack of specificity, her counsel told the superior court that she was seeking records responsive to both her August 3 and September 13, 2011 requests.

[7] As an intervenor in the superior court proceedings below, Lindquist is also involved in this appeal, even though the superior court did not rule on his motion for temporary restraining order and preliminary injunction.

[8] This latter order is also called the "November 23, 2011 status conference order."

the PRA, the superior court granted the County's motion to dismiss Nissen's complaint.[9] The superior court later denied Nissen's motion for reconsideration.

Nissen sought direct review by the Washington State Supreme Court of the superior court's orders (1) striking and sealing Lindquist's personal cellular phone number, (2) postponing discovery until after the hearing on the County's motion to dismiss, (3) dismissing her complaint, and (4) denying her motion for reconsideration. On May 1, 2013, the Supreme Court transferred Nissen's appeal to our court.

ANALYSIS

Nissen argues that the PRA does not, as a matter of law, insulate Lindquist's personal cellular phone call logs and text messages from public records release requests, especially where

[9] Although the superior court's written order did not set forth its reasoning, its oral ruling explained:

> I find that [RCW] 42.56.050, the invasion of privacy is simply that. I go back to number one, *it is not a public record.* The private cell phone records of a public elected official or a public employee are not public records. Number two. I believe that [Lindquist] has a right to privacy as a valid exemption; and three, I do think that I have absolutely no power to require the third-party provider, without a search warrant application with probable cause, to disclose records. *I have no power to do so under [the PRA].* Whether or not [the PRA] violates the elected official or public official's constitutional rights, be either state or federal, I find that they still have those rights; that just because you run for public office does not make you exempt in your maintaining of your right against search and seizure, either under the state constitution or the federal constitution, and that's my ruling.

Verbatim Report of Proceedings (Dec. 23, 2011) at 94-95 (emphasis added).

such records contain communications about government business.[10] To the extent that an elected public official uses a private cellular phone to conduct government business, we agree.

I. STANDARD AND SCOPE OF REVIEW

We review de novo a superior court's CR 12(b)(6) dismissal of a plaintiff's action. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Dismissal under CR 12(b)(6) is appropriate only "if 'it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.'" *Burton*, 153 Wn.2d at 422 (quoting *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). We presume Nissen's allegations to be true; and we "'may consider hypothetical facts not included in the record.'" *Burton*, 153 Wn.2d at 422 (quoting *Tenore*, 136 Wn.2d at 330).

We interpret the PRA in light of the principle that full access to information concerning the conduct of every level of government is a fundamental and necessary precondition to the sound governance of a free society. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 714-15, 261 P.3d 119 (2011). We balance this free and open government principle against the countervailing principle that individuals, including government employees, should be free from unreasonable searches and intrusions into their private affairs.

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[10] Nissen similarly argues that the superior court erred in granting the County's CR 12(b)(6) motion to dismiss her complaint by "wrongly presum[ing]" that a public official's government-related records on a personal cellular phone can never be disclosed. Br. of Appellant at 9. The County responds that the superior court properly dismissed Nissen's complaint because, as a matter of law, the PRA did not convert Lindquist's personal phone records into "public records." Br. of Resp't at 13.

Nissen also argues that the trial court considered evidence outside of her complaint's allegations, thereby converting the motion to dismiss into a motion for summary judgment. Because we decide the underlying PRA issue on unrelated grounds, we do not further address this summary judgment argument.

WASH. CONST. art. I § 7; U.S. CONST. amend. IV; *see Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013) ("PRA must give way to constitutional mandates").

II. CR 12(B)(6) DISMISSAL OF PRA CLAIM

The PRA applies only to requests for "public records," which consist of three elements: (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). Washington courts "liberally construe" the term "public record" as referring to "nearly any conceivable government record related to the conduct of government." *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010). We address each of these three public record components in turn.

A. Writing

Nissen's PRA requests included two types of "writings": (1) a call detail log[11] of incoming and outgoing calls from Lindquist's personal cellular phone, and (2) copies of text messages sent and received by Lindquist from his personal cellular phone. Both types of records fit within the PRA's broad definition of a "writing" as

> [h]andwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.010(4).

[11] A call log includes information about the duration of a phone call, the phone number from which a call was made or received, and, sometimes, the origin and destination of a phone call.

The County does not contend that cellular phone text messages do not constitute writings. A copy of a text message is plainly a "communication or representation" within the meaning of the PRA's definition of a "writing." RCW 42.56.010(4). The County does argue, however, that Lindquist's personal cellular phone call logs do not constitute disclosable "writings" under the PRA because a third party provider prepared them. But the PRA does not limit disclosure to documents prepared only by government officials.

B. Relating to Government Conduct

Lindquist admits that he conducted government work on his personal cellular phone. He and the County concede that some of his personal cellular call logs contained records of his government-related communications and that some of his personal cellular text messages discussed government business. Therefore, at least some of Lindquist's personal cellular phone records satisfy the second element of a public record because they contain "information relating to the conduct of government or the performance of any governmental or proprietary function." RCW 42.56.010(3).

Nissen argues that all of Lindquist's personal cellular phone records are public records because he used that phone to conduct government business. Lindquist and the County contend that not all of Lindquist's personal cellular phone records related to government business and that some of the information Nissen sought was purely personal. Purely personal

communications of government officials are not public records subject to PRA disclosure.[12] *See Forbes v. City of Gold Bar*, 171 Wn. App. 857, 868, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013) (purely personal emails not public records). Nor does a government employee's use of a single device for both work and personal communications transform *all* records relating to that device into "public records." *Forbes*, 171 Wn. App. at 868.

We take judicial notice that the unique nature of Lindquist's employment as Pierce County Prosecutor requires him to be available to fulfill "public duties 24 hours a day 7 days a week." CP at 453. But Nissen's broad interpretation of what constitutes a "public record"[13] could conceivably subject *all* records of a public prosecutor's personal phone calls to a PRA request, whether made on a government-owned device or on a personal device, thereby eradicating protections for purely personal information.

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[12] *See also* amici curiae's argument that Lindquist's private cellular phone records are not "public records" because they fall under the exempt categories of "personal notes, phone messages, and personal appointment calendars." Br. of Amici Curiae of WA Fed'n of State Empls., at 5 (citing *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 712, 780 P.2d 272 (1989), *review denied*, 114 Wn.2d 1002 (1990)). *Yacobellis*, however, excluded those records from PRA disclosure because they were:

> created solely for the [government official's] convenience or to refresh [the official's] memory, [were] maintained in a way indicating a private purpose, [were] not circulated or intended for distribution within agency channels, [were] not under agency control, and [could] be discarded at the writer's sole discretion.

Yacobellis, 55 Wn. App. at 712. Here, in contrast, neither Lindquist nor the County argues that Lindquist's private cellular phone call logs were created solely for his personal convenience. Nor does Lindquist argue that he could require his cellular phone service provider to destroy the records at his sole discretion. Thus, *Yacobellis* does not necessarily exempt all of Lindquist's personal cellular phone records from being "public records."

[13] Despite Nissen's argument that the public would want to know how a government employee spends the work day, her standalone assertion is inadequate to show that a government employee's purely personal records, made on a private device, are "public records" subject to disclosure. *Forbes*, 171 Wn. App. at 868.

Nevertheless, Lindquist's decision to forego his County-issued cellular phone in favor of using his personal cellular phone to conduct government-related communications (1) rendered his cellular phone use no longer purely personal; and (2) thus, potentially subjected his personal cellular phone call detail log and text message records to agency scrutiny before release in response to a PRA request. Lindquist's personal cellular phone records that "relat[e] to the conduct of government"[14] satisfy the second element of a public record. On the other hand, the portions of the cellular phone call logs relating to Lindquist's personal calls and his personal text messages do not satisfy the second, "government" element and, therefore, are not "public records."

The record before us on appeal, however, is inadequate to determine which portions of Lindquist's personal cellular phone records and which text messages satisfy the second element of the definition of "public record." The superior court must make this determination after developing the necessary record on remand.

C. Used or Retained by Government Agency

The third element of a "public record" is whether Lindquist's personal cellular phone call logs and text messages were "prepared, owned, used, or retained by [a] state or local agency." RCW 42.56.010(3). Lindquist is an elected official in charge of a local government agency—the Pierce County Prosecutor's Office. Here, we focus on the "used" or "retained" components.

1. Text messages

Text messages relating to government business that Lindquist sent and received on his personal cellular phone clearly were "prepared" and "used" in his capacity as a public official,

[14] RCW 42.56.010(3).

and, therefore, satisfy the third "public record" element. That such government-business-related text messages were contained on a personal cellular phone is immaterial. Our Supreme Court has refused to exempt personal device communications from records subject to the PRA, stating, "If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined." *O'Neill*, 170 Wn.2d at 150.

2. Call logs

Lindquist's personal cellular phone call log records are more problematic. Neither Lindquist nor the County prepared these records. Rather, Lindquist's cellular phone provider prepared them and apparently mailed them to him at his private address. Under the plain language of RCW 42.56.010(3), Lindquist's personal cellular phone records do not qualify as "public records" if he (or a prosecutor's office employee) did not review, refer to, or otherwise use them in his capacity as a government official or if he did not store them in his government office. The issue here is whether Lindquist used or retained his personal cellular phone call logs in his capacity as a government official so as to satisfy the third element of the "public record" test.[15]

More specifically, the third element of a "public record" under RCW 42.56.010(3) is that the government agency "used" the records, not the cellular phone to which the records relate. Thus, the more specific issue is not whether Lindquist "used" his personal cellular phone in his capacity as a government official, but rather whether he "used" his personal cellular phone *records* in that capacity. For example, Lindquist might have consulted his personal cellular

[15] The County also asserts that Lindquist himself is not a "state or local agency" and, thus, his personal cellular phone call logs are not subject to the PRA. Br. of Resp't County at 18 (emphasis omitted). We disagree. As an elected public official, Lindquist is subject to the PRA if he owned, used, or retained records relating to government business in his official capacity.

phone call logs to determine when he talked to a particular person about government business or to track the number of calls relating to a particular governmental issue. If so, he would have been "using" these logs in his capacity as a government official. Lindquist's personal cellular phone call logs also would be "public records" under RCW 42.56.010(3) and subject to PRA disclosure if he "retained" them in his capacity as a government official by storing them in the prosecutor's office or in some other government office.

The record before us on appeal is inadequate to determine whether portions of Lindquist's personal cellular phone call logs relating to government business satisfy the third element of the definition of "public record," namely whether Lindquist (or a prosecutor's office employee) actually reviewed, referred to, or otherwise "used" these call logs for government purposes. The superior court must make this determination after developing the record on remand.[16]

D. Summary

Based on our analysis of the three elements of RCW 42.56.010(3)'s definition of "public record" and on Lindquist's admission that he conducted some government work using his personal cellular phone, at least some of Lindquist's personal cellular phone call records and text messages may qualify as "public records," subject to PRA disclosure, sufficient to defeat CR 12(b)(6) dismissal. Lindquist's personal cellular phone call logs are "public records" if (1) the calls reflected in the logs related to government business; and (2) Lindquist (or another public

[16] Because we reverse the superior court's dismissal order and remand for further development of the record, we do not reach the question of whether Lindquist's personal cellular phone call logs became "public records" when he delivered them to the prosecutor's office for the agency to redact.

employee) reviewed, referred to, or otherwise "used" these records for government purposes or stored the records at a public office. Similarly, text messages that Lindquist sent and received on his personal cellular phone are "public records" subject to disclosure under the PRA only if they related to government business. But any portions of the call log records reflecting Lindquist's private calls are not public records and, thus, are not subject to disclosure under the PRA. Similarly, Lindquist's purely private cellular phone text messages are not "public records" and are not subject to disclosure under the PRA.

Because we consider even hypothetical facts when reviewing a superior court's CR 12(b)(6) dismissal, we hold that (1) Nissen stated a claim that at least some of Lindquist's personal cellular phone call logs and text messages are subject to PRA disclosure, (2) it does not appear "'beyond doubt that [she] cannot prove any set of facts which would justify recovery,'"[17] and (3) the superior court erred in dismissing Nissen's action under CR 12(b)(6). Thus, we reverse and remand to the superior court (1) to reinstate Nissen's complaint; (2) to develop a record necessary for determining which of Lindquist's personal cellular phone text messages and call logs, if any, pertained to the conduct of government business; and (3) to determine which portions of the records Nissen requested, if any, constitute public records that must be disclosed under the PRA.

Because we remand to the superior court, we do not address Nissen's and Lindquist's constitutional privacy arguments. Instead, we leave these arguments for the superior court, which will be in a better position to consider them on remand after developing the appropriate record.

[17] *Burton*, 153 Wn.2d at 422.

IV. ORDER ON STATUS CONFERENCE

Nissen also appeals the superior court's November 23, 2011 status conference order, arguing that (1) this order improperly stayed discovery pending the hearing on the County's CR 12(b)(6) motion, and (2) the superior court improperly considered declarations and matters outside her complaint when it decided the CR 12(b)(6) motion. The County argues that the superior court properly stayed discovery and that its consideration of documents referenced in Nissen's complaint did not convert CR 12(b)(6) review into a CR 56 summary judgment motion.

We review a superior court's decision to stay proceedings for an abuse of discretion. *See King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000). Although we reverse the superior court's CR 12(b)(6) dismissal of Nissen's complaint, we nevertheless hold that CR 26(c)(1) gave the superior court discretion to stay discovery until after the CR 12(b)(6) hearing, which discretion the superior court did not abuse.[18]

V. ATTORNEY FEES

Nissen asks us to award attorney fees and costs for both appellate and superior court proceedings, as well as penalties under the PRA. The County does not expressly contest Nissen's request for attorney fees; instead, it relies on its argument that we should affirm the superior court's CR 12(b)(6) dismissal.

RCW 42.56.550(4) of the PRA provides:

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[18] Because we reverse the superior court's CR 12(b)(6) dismissal of Nissen's complaint, we do not address (1) Nissen's argument that, in deciding the County's CR 12(b)(6) motion, the superior court improperly considered declarations and matters outside her complaint; and (2) Nissen's motion for reconsideration.

Because Nissen failed to present adequate argument in her opening brief, contrary to RAP 10.3(a)(6), we do not address her appeal from the superior court's November 4, 2011 order granting motion to strike and seal or its November 23, 2011 status conference order.

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time *shall be awarded* all costs, including reasonable attorney fees, incurred in connection with such legal action.

(Emphasis added.) Nevertheless, our Supreme Court has held that attorney fees "should be granted only when documents are disclosed to a prevailing party," and "where further fact finding is necessary to determine whether the PRA was violated, the question of attorney fees should be remanded to the trial court." *O'Neill*, 170 Wn.2d at 152 (citing *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1 of Clark County*, 138 Wn.2d 950, 964, 983 P.2d 635 (1999)). Because we do not reach the question of whether the County violated the PRA, and because we do not decide whether the County must disclose particular documents, we do not award fees. Instead, we leave that issue for the superior court to address on remand if appropriate. *See O'Neill*, 170 Wn.2d at 152.

We reverse the superior court's CR 12(b)(6) dismissal of Nissen's PRA action against the County. We remand to the superior court to reinstate Nissen's action and to determine whether, under the specific facts of this case, Lindquist's personal cellular phone call logs and text messages constitute "public records" as defined in RCW 42.56.010(3).

Hunt, J.

We concur:

Bjorgen, A.C.J.

Maxa, J.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on October 9, 2014, I emailed a courtesy copy and mailed a true and correct copy of the foregoing *Petition for Review* to the following parties:

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