No. 44852-1-II

90875-3

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

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.

PIERCE COUNTY'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Petitioners Pierce County and Pierce County Prosecutor's Office ("County") seek review by the Supreme Court of the published Court of Appeals opinion terminating review referenced in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division II, filed its published opinion on September 9, 2014. A copy of that opinion is in the Appendix at pages A-1 and A-15.

C. ISSUES PRESENTED FOR REVIEW

(1) Is the record of a public employee's private communications device a "public record" within the meaning of RCW 42.56.010(3) and subject to production against that employee's wishes under the Public Records Act, RCW 42.56 ("PRA")?

(2) Is the record of a public employee's private communications device, even if a public record, exempted from disclosure under RCW 42.56.050/42.56.230 and applicable constitutional protections, thereby barring its disclosure?

D. STATEMENT OF THE CASE

The Court of Appeals opinion here offers a recitation of the facts and procedure in this case that contains a flawed premise from the outset concerning Pierce County Prosecutor Mark Lindquist's ("Prosecutor") treatment of records from his personal cell phone. Op. at 1-5. The court makes two particularly egregious factual misstatements in its FACTS and

ANALYSIS sections. The Court states that the Prosecutor "preferred" to "use his personal cellular phone to conduct government business,"[1] op. at 2, and that the County "conceded" that some of the Prosecutor's "personal cellular call logs contained records of his government-related communications and that some of his personal cellular text messages discussed government business." Op. at 8. Neither statement is accurate.

First, the claim that the Prosecutor "preferred" to use his personal communications devices to conduct government business implies he was doing so to circumvent the PRA and is false, belied by the record in this case. In making this statement, the court apparently relied on Nissen's baseless assertions. *See, e.g.*, Br. of Appellant at 3; CP 5-6. This statement is *directly refuted* by the record developed for the County's CR 12(b)(6) motion and the Prosecutor's motion to enjoin disclosures.[2]

Moreover, as will be developed more fully *infra*, the Prosecutor is an elected official whose political calls *had to be made* on his personal

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[1] As will be noted *infra*, the Court of Appeals uses the term "government business" from RCW 42.56.010(2) without defining it. This lack of precision is a critical flaw in the opinion.

[2] *See, e.g.*, CP 234, 258, 681-83 (the Prosecutor's emails, County directory, and declaration of his personal assistant expressly list the County's traditional land line for official calls to and from him at the County-City Building – *i.e.* "253.798.7792" – and it was on his "two County land line telephones assigned for his use" that he "conducted... most of his government related communications"), CP 453 (Prosecutor's sworn declaration attests he only "occasionally used my personal cellular telephone for county business").

communications devices under ethical standards for elected officials. RCW 42.17A.555(1); RCW 42.52.180(1). Thus, use of his personal communications device as to at least some communications was not a matter of preference, but rather *mandated by law*, a point the Court of Appeals failed to recognize in stating such calls related to "government business."

Second, the Court of Appeals' repeated claim that the County "conceded" the Prosecutor's calls pertained to the business of government misstates the record here.[3] Rather, in a surplus of openness, in response to Nissen's multiple PRA requests, the Prosecutor authorized the release of records of calls that "*may* be work related." CP 16, 82, 86, 217, 334-38, 340-350, 441, 445-46.[4] Indeed, the Prosecutor and the County consistently asserted this fact, at both the trial and on appeal, and nowhere "conceded" that any of the private records *actually* "contained records of his government-related communications" or "discussed government

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[3] The Court of Appeals reiterated this assertion throughout its opinion. *E.g.*, op. at 2, 10, 12.

[4] The Court of Appeals also makes a simple factual error in its opinion as to when the Prosecutor disclosed the records, stating these personal cell phone records were provided during the mediation of Nissen's separate whistleblower action. Op. at 2. This is mistaken. Indeed, even Nissen claimed only that records for "the County provided cell phone were produced in a whistleblower complaint mediation...." Br. of Appellant at 3; CP 7-8. The Prosecutor's redacted *personal* cell phone records were not produced at the mediation, but were actually produced in response to Nissen's later PRA requests that are at issue here. CP 14-15, 17, 82, 490, 597-98. Indeed, the records were requested after the whistleblower matter was resolved.

business." *Compare* CP 521; Br. of Resp't at 4, 26; County's Resp. to A.G. Amici at 3, 15; Br. of Intervenor at 2; Intervenor's Resp. to Amici at 1, 8.

Critically, despite the Prosecutor's appeal of the injunction motion, CP 494; Br. of Intervenor at 33-36, the Court of Appeals reviewed only the order on the County's CR 12(b)(6) order. For the latter motion, courts generally must accept factual assertions made in the plaintiff's complaint as true, that is only *for purposes of the CR 12(b)(6) motion. Future-Select Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 331 P.3d 29, 34 (2014) ("we presume without deciding" a complaint's allegations for purposes of CR 12(b)(6) analysis); *Parks v. Fink*, 173 Wn. App. 366, 378, 293 P.3d 1275, *review denied,* 177 Wn.2d 1025 (2013) (same). The Court of Appeals opinion gave inordinate credence to Nissen's baseless facts, while ignoring the facts adduced in connection with the Prosecutor's injunction motion.[5]

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[5] The Court of Appeals' inclusion of Nissen's contested allegations in the "FACTS" section without noting they were directly contested and repeating those allegations as unassailable facts thereafter, unintentionally conveys to a trial court, should a remand be necessary, that it must accept them because the Court of Appeals labeled them as facts, despite contrary evidence that will be adduced by the County in the trial court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED[6]

Review of the Court of Appeals' published opinion by this Court is merited because that court declined to address in its published opinion any of the significant legal issues presented by this case. The Court of Appeals' treatment of the PRA conflicts with decisions of this Court and other divisions of the Court of Appeals in the definition of a public record under the PRA. The Prosecutor himself is not an agency, the County never prepared, retained, or used the records, and the records were never used by the County in the conduct of government. Review is merited. RAP 13.4(b)(1-2).

With respect to the exemptions from disclosure, under RCW 42.56.050/RCW 42.56.230, should the Court conclude that the records of a public employee's private communications device are public records under the PRA, state and federal constitutional issues are implicated and review is merited under RAP 13.4(b)(3).

Perhaps most critically, whether dealing with the issues under RCW 42.56.010(3) or RCW 42.56.050/RCW 42.56.230, these issues are also of significant public importance and require ultimate determination by this Court. The significance of this case to all public employees in

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[6] This Court is fully familiar with the criteria for review set forth in RAP 13.4(b).

Washington is manifest from the broad array of amici briefs in the Court of Appeals. *Every public employee in Washington* is affected by the Court of Appeals opinion. Moreover, the case is not confined to cell phone records alone. *All private communications devices*, whether they are home computers, tablets, cell phones, or public employees, are affected.

The issue of the PRA and the records of public employees' private communications devices will arise again in cases already in our court system.[7] It is also the type of issue that public agencies in Washington will confront again repeatedly in the future as requesters are emboldened by the Court of Appeals' opinion to demand public employees' records from their private communications devices of every sort. Conflicting lower court decisions are not only possible, but probable, until this Court articulates the appropriate rule. This Court should grant review. RAP 13.4(b)(4).

(1) The Court of Appeals Decision

The trial court here granted the County's CR 12(b)(6) motion to dismiss Nissen's complaint in which she alleged that the County violated the PRA when it did not produce the private cell phone records of the

[7] The issue of whether the private records of a public official are subject to the PRA has arisen in *Althea v. City of Bainbridge Island*, (Court of Appeals Cause No. 46381-4-II – argued September 17, 2014); *West v. Vermillion*, (Pierce County Cause No. 14-2-05483-7 – partial summary judgment granted July 25, 2014, motion to reconsider argued on September 19, 2014).

Prosecutor.[8] The Court of Appeals reversed that decision for "the further development of the record." Op. at 12 n.16.

The Court of Appeals' opinion recites the nature of the records at issue here -- call detail logs for the Prosecutor's personal cell phone and copies of text messages from that phone. Op. at 7-8. The court ignored the fact that neither the Prosecutor nor the County ever possessed the text messages; they were possessed by Verizon Wireless. CP 15-16, 58, 81, 251, 444-46, 597-98, 616-18. The court references a key definitional provision in RCW 42.56.010(3) relating to the conduct of government business without ever defining government business. Op. at 8-10. It discusses another aspect of that definitional statute, use or retention by a government agency. Op. at 10-12. It determines the key issue as to whether the Prosecutor himself was an "agency" as defined in the PRA only in a cursory footnote. Op. at 11 n.15. It then remands the issue to the trial court to develop a record, without deciding if the PRA has been violated. Op. at 12-15. Ultimately, the Court of Appeals' opinion does not answer the key legal questions presented by the case; it merely

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[8] The trial court, the Honorable Christine Pomeroy, was an experienced trial court judge in the Thurston County Superior Court. The trial court reasoned that private cell phone records of a public employee are not public records within the meaning of RCW 42.56.010(3) or are exempted from disclosure by virtue of constitutional privacy standards. Op. at 5 n.9.

reverses the trial court without careful analysis as to why the trial court's decision was actually erroneous.

Left unaddressed by the Court of Appeals published opinion are numerous vital, practical questions:

(1) Will the hearing on remand to determine if any of the records are indeed public records under the PRA be an *in camera* proceeding? *See* Wash. Const. art. I, § 10. This is not discussed anywhere in the Court of Appeals opinion.

(2) Does the fact that the County reviewed some of the Prosecutor's records solely to determine if they fell within the PRA constitute the County's "use" of the records within the meaning of RCW 42.56.010(3), thereby making them subject to the PRA? The Court of Appeals evades this issue. Op. at 12 n.16.

(3) Are the records of the Prosecutor's private cell phone exempted from disclosure and production by the County where, as a matter of law under RCW 42.56.050/RCW 42.56.230, federal statutory provisions govern certain telecommunications records, and constitutional protections apply to the Prosecutor's private records, barring their production? The Court of Appeals does not address either issue, even though the latter issue was an express basis for the trial court's CR 12(b)(6) ruling. Op. at 13.

This Court should grant review to address and resolve the significant issues presented in this case. The County addresses in turn each of the issues touching upon whether the records at issue here are public records under RCW 42.56.010(3), and, even if public records, their

disclosure is precluded as a matter of law under RCW 42.56.050/RCW 42.56.230 and constitutional principles.

(2) The Records at Issue Here Are Not Public Records under the PRA

RCW 42.56.010(3)[9] defines a public record as a writing "relating to the conduct of government" that is "prepared, owned, used, or retained" by a governmental agency. The Court of Appeals decision is contrary to decisions of this Court and other decisions of the Court of Appeals on what constitutes a public record, meriting review by this Court. RAP 13.4(b)(1-2).

Only public records must be disclosed under the PRA.[10] *Smith v. Okanogan County*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000). Purely personal records of public employees are not subject to the PRA. *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 712, 780 P.2d 272, *review denied*, 114 Wn.2d 1002 (1989) (personal notes, phone messages,

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[9] RCW 42.56.010 is set forth in the Appendix.

[10] The burden to identify with some precision the public record being sought rests with the requester. RCW 42.56.080 (requiring requester to reference "identifiable public records"). While an overly broad request does not justify a rejection of the request, RCW 42.56.080, *Hangartner v. City of Seattle*, 151 Wn.2d 439, 449, 90 P.3d 26 (2004), it is indicative of the fact that Nissen's requests for the Prosecutor's cell records were a "fishing expedition." The Court of Appeals was compelled to reinterpret Nissen's broad requests for *all* of Lindquist's private cell phone records, CP 15, 17, 29, as being confined to those records that are "work-related." Op. at 2-4. This only reinforces the point that PRA requests to elected officials and other public figures will be routinely abused by requesters.

and personal appointment calendars); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 868-69, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013) (purely personal emails exempt). The Court of Appeals recognized this distinction, op. at 7, but failed to address the key provisions of RCW 42.56.010, defining the scope of public records subject to the PRA.

A public record subject to the PRA is present if (1) it is a writing; (2) it contains information relating to the conduct of government or performance of governmental or proprietary functions; and (3) it is prepared, owned, used, or retained by a government agency. RCW 42.56.010(3). A "writing" and "agency" are defined respectively in RCW 42.56.010(4) and (1). "Conduct of government" and "preparation, ownership, use, or retention" have been addressed in case law.

First, the Prosecutor himself is not an "agency" within the meaning of RCW 42.56.010(1). The language of RCW 42.56.010(1) is explicit. Nowhere in its definition of an agency does it address private records maintained by *individuals*. Division II's cursory treatment of this issue in a footnote, op. at 11 n.15, is inconsistent with its treatment of an agency in *Worthington v. WestNET*, 179 Wn. App. 788, 320 P.3d 721, *review granted*, 180 Wn.2d 1021 (2014) where it strictly applied the language in RCW 42.56.010(1) to conclude that a regional task force formed to

combat drug-related crime in Western Washington with its own policy board was not an agency under the PRA.

The Court of Appeals decision in *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012) also strictly construed the requirement of agency involvement. There, a county's private attorneys were held not to be agents of the county in preparing their private billing invoices. *Id.* at 183-84. The Court of Appeals' cursory treatment of whether the Prosecutor was a RCW 42.56.010(1) agency merits review. RAP 13.4(b)(2).

Second, the County never used or retained the Prosecutor's cell phone text records because the Prosecutor himself never possessed the records at the time of the requests. Only his service provider, Verizon, possessed the records. Both state and federal law forbid the disclosure of personal telephone records without customer consent. RCW 9.26A.140(1)(d); 18 U.S.C. § 2703. Further, left unaddressed by the Court of Appeals' opinion is *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Col. 2011), a case in which the Colorado Supreme Court held that the governor did not even create a public record by participating in phone calls that resulted in billing statements, *id.* at 1091, and the cell phone service provider actually possessed whatever records were at issue. *See also,*

West, 168 Wn. App. at 183 (county never owned, possessed, used, or retained billing records of its retained counsel).

Further, the County never "used" the billing records that the Prosecutor chose to provide when its legal staff reviewed such records to determine if they were subject to disclosure under the PRA. As noted *supra*, the Court of Appeals declined to reach that issue, but it is important to address the issue nonetheless. To hold that otherwise private records are "used" by an agency simply by referring to them in an effort to respond in good faith to a PRA request, even if the employee does not believe the records are public, is a perversion of the Act. It would allow requesters to make baseless PRA requests for private records and, when an agency reviewed the record, to claim the PRA was now applicable. This is a "Gotcha" argument. It only provides a further disincentive to a public employee from erring on the side of openness, as did the Prosecutor. The employee would be compelled to refuse any request by his/her public employer to produce private records to even assess whether they might be work-related to avoid the contention that federal statutory or constitutional exemptions she/he could legitimately claim for such records were inapplicable. Review on this question is merited. RAP 13.4(b)(4).

Finally, a vital part of the definition of a record under RCW 42.56.010(3) is that the record must pertain to the conduct of government.

As noted *supra*, the Court of Appeals nowhere addresses what this term means. The Court merely stated: the Prosecutor "is an elected official in charge of a local government agency -- the Pierce County Prosecutor's Office." Op. at 10. It *presumed*, without analysis, that the conduct of government was implicated by the Prosecutor's private cell phone records.[11] The Court of Appeals did not address the requirement set forth in this Court's decision in *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1 of Clark County*, 138 Wn.2d 950, 960-61, 983 P.2d 635 (1999) that to meet the "government conduct" aspect of the definition of a public record, the record must have a nexus to agency decisionmaking. Nissen has never articulated in her fishing expedition PRA request, nor her pleadings, how any of the Prosecutor's private cell phone records pertain in any way to County decisionmaking.

This issue is of particular concern for elected officials. The "conduct of government," broadly defined, could mean their activities associated with their election and political activities apart from their election are subject to the PRA.[12] Such activities could not be undertaken

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[11] Plainly, personal cell phone records contain *personal* information.

[12] Political opponents could use the PRA and the legal system to obtain information on elected officials' campaign activities by seeking the records of their private communications devices, and perhaps those of their campaigns, in the hope of finding records on the conduct of government business among them, opening yet another venue for political combat.

by the elected official on governmentally-issued communications devices without violating ethical standards.[13] This issue merits review. RAP 13.4(b)(1), (4).

In sum, the records at issue here did not qualify as public records under the definition in RCW 42.56.010(3). This Court should grant review of the published Court of Appeals decision. RAP 13.4(b)(1), (2), (4).

(3) Even If the Prosecutor's Cell Phone Records Are Public Records, and They Are Not, the Records Are Exempt from Disclosure

Although it addresses an exemption issue raised by amici, op. at 9 n.12, the Court of Appeals opinion neglects to address the specific statutory and constitutional grounds that exempt the Prosecutor's records

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[13] Elected officials like the Prosecutor, as a matter of law, may not use public facilities, which includes any county-issued cell phone, for activities that are political or campaign-driven. RCW 42.52.150(1) (state employees); RCW 42.17A.555 (all elected officials and their employees). *See Herbert v. Wash. State Public Disclosure Comm'n*, 136 Wn. App. 249, 148 P.3d 1102 (2006) (teachers violated statute through use of school's internal mailing and email systems to gather ballot measure signatures); *Knudsen v. Wash. State Executive Ethics Bd.*, 156 Wn. App. 852, 235 P.3d 835 (2010) (community college instructor violated ethics law by using college email system to urge support for two bills on tenure protection for part-time faculty). Elected officials *must* use private communication devices to communicate about a myriad of matters, such as contacts about endorsements for legislative, executive, or judicial races, fundraising matters for themselves and others, as well as the political ramifications of certain decisions.

Public employees, like all citizens, have a First Amendment right to participate in politics, but are prohibited from using government equipment to do so. RCW 42.52.150(1) (state employees); RCW 42.17A.555 (all elected officials and their employees). Political communications related to the "conduct of public business," but under the law may not be made on county-issued communications devices.

at issue here from disclosure under the PRA. Instead, it leaves this critical *legal* issue to the trial court, after the development of a *factual* record, op. at 13, a record unnecessary for the appropriate *legal* analysis here. Review of this issue is merited under RAP 13.4(b)(3-4). [14]

It is clear that public employees do not forfeit their civil liberties as a condition of public employment. *See, e.g., In re Disciplinary Proceedings Against Sanders,* 135 Wn.2d 175, 188, 955 P.2d 369 (1998) (judge's First Amendment rights); *DeLong v. Parmelee*, 157 Wn. App. 119, 156 n.19, 236 P.3d 936 (2010), *review granted and remanded*, 171 Wn.2d 1004 (2011), *dismissed as moot*, 164 Wn. App. 781, 267 P.3d 410 (2011), *review denied,* 173 Wn.2d 1027 (2012) (DOC employee's article I, § 7 rights).

RCW 42.56.230(2) exempts from production under the PRA records that violate personal privacy rights of public employees. This Court has specifically upheld such a privacy interest as an exemption to the PRA where the disclosure of the information at issue would be highly offensive to a reasonable person and the information is not of legitimate

[14] The Prosecutor may amplify on this discussion of the exemptions in his own petition for review. Plainly, a serious practical problem will be faced by public agencies regarding the production of such private records: Should a public agency be subject to the penalties of RCW 42.56.550(4) when a public employee insists on his or her statutory/constitutional rights and legitimately refuses to provide such records to their public employer?

concern to the public. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 212, 189 P.3d 139 (2008). This principle has even extended to highly personal communications sent from a public employee's public computer station. *Tiberino v. Spokane County*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000).

The Court of Appeals never addressed this statutory exemption, a legal issue for the court that must be reviewed de novo. *Ameriquest Mortgage Co. v. Office of Attorney General of Wash.,* 177 Wn.2d 467, 478, 300 P.3d 799 (2013) ("The application of a statute to a fact pattern is a question of law..."). Indeed, it is rather clear that it would be highly offensive to *any* public employee in Washington that, merely because they are a public employee, a judge would have free rein to indiscriminantly review, no matter how private, the contents of their home computer's hard drive, or their cell phone's or tablet's texts and records, to determine if the PRA was, in some fashion, implicated.[15]

In addition to any statutory exemption, a constitutional privacy dimension is also present here. This issue, too, is a question of law. *State v. Bao Dinh Dang,* 178 Wn.2d 868, 874 312 P.3d 30 (2013). Public

[15] It is even more potentially offensive if such a search is done in open court, rather than in an *in camera* proceeding. The Court of Appeals does not address the potential article I, § 10 issue here.

employees have a property and liberty interest in the records of their private communications devices.[16]

The United States Supreme Court has unambiguously held in *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014) that data contained in a person's private cell phone is protected under the Fourth Amendment from a warrantless search incident to the person's arrest, noting that such cell phones are ubiquitous in modern life[17] and contain such a vast quantum of personal data that privacy interests protected by the Fourth Amendment were fundamentally implicated. *Id.* at 2489-91. *See also, Klayman v. Obama*, 957 F.Supp.2d 1 (D.D.C. 2013) (wholesale NSA collection of phone and internet record metadata from telecommunications companies violated Fourth Amendment rights of subscribers).

Moreover, this Court has recognized that article I, § 7 of the Washington Constitution broadly protects the "private affairs" of

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[16] Indeed, to the extent Nissen might contend that a public agency has a right to access or owns the records of a public employee's private communications device, such an action would effectuate a taking under article I, § 16 of the Washington Constitution or the Fifth Amendment. *See Manufactured Housing Cmtys. of Wash. v. State*, 142 Wn.2d 47, 363-68, 13 P.3d 183 (2000) (broad definition of property in Washington subject to taking).

[17] Modern cell phones "... are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 2484.

Washington citizens.[18] *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984); *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990) (reasonable expectation of privacy in one's trash). Indeed, this Court has held that telephone records are constitutionally protected in *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986) when it held that police could not use pen registers to collect telephone numbers dialed by a defendant without a warrant; the Court also indicated that obtaining phone toll and long distance records constituted an intrusion into a person's private affairs. *See also, State v. Butterworth*, 48 Wn. App. 152, 737 P.2d 1297, *review denied*, 109 Wn.2d 1004 (1987) (privacy of unlisted telephone number protected under article I, § 7).

This Court recognized the article I, § 7 implications of a court's PRA decision to require a public employee to reveal the records of his or her private communications device in *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 156, 240 P.3d 1149 (2010) (Alexander, J. dissenting). The *O'Neill* court did not reach the article I, § 7 issue because it required the city there to inspect the public employee's home computer "if she gives consent to the inspection," *id.* at 150 n.4, obviating the constitutional issue, but simultaneously recognizing its potential importance. *Id.* ("We

[18] Article I, § 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

do not address whether the City may inspect Fimia's home computer absent her consent."). Here, the Prosecutor has decidedly declined to consent to any intrusion into his personal cell phone records, nor has he actually or impliedly waived his constitutional right to privacy in the records of his private communications devices or his general right to privacy. *See* Answer of Intervenor to Amicus Briefs at 6-13.[19]

Simply stated, a public employee does not waive his or her constitutional rights to the privacy of their records of their private communications device by their public employment. Under either the Fourth Amendment or article I, § 7, a public employee cannot be *compelled* by his or her public agency employer to turn over their private communications device without a warrant.[20] In apparent recognition of its constitutional limitation, the PRA nowhere provides "authority of law" to

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[19] There is a presumption against the waiver of constitutional rights. For a waiver to be effective, it must be clearly established that there was an intentional abandonment of a known right or privilege. *Brookhart v. Janis*, 384 U.S. 1, 86 S. Ct. 1245, 16 L.Ed.2d 314 (1966); *Johnson v. Zerbst*, 304 U.S. 454, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (citing *Glasser v. U.S.*, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680 (1942); *Ohio Bell Tel. Co. v. Public Utility Comm'n of Ohio*, 301 U.S. 292, 307, 57 S. Ct. 724, 81 L.Ed. 1093 (1937) (court would not presume acquiescence or implied waiver of fundamental property rights held by utility).

[20] A mere subpoena would likely not suffice to constitute "authorization by law" under article I § 7. *State v. Miles*, 160 Wn.2d 236, 248, 156 P.3d 864 (2007) ("a subpoena is not authority of law simply because it is authorized by statute." - - Administrative regulation for phone company authorizing police access to unlisted phone numbers was not authority of law under article I, § 7).

either agencies or courts to compel a public employee to turn over his/her records from a private communications device.

A public agency is placed in an ultimately untenable position. It is subject to PRA penalties if it fails to turn over "public records." But if the employee legitimately claims a statutory or constitutional privacy right, *the public agency has no ability to force the employee to provide it the records sought by the requester.* Such a Catch 22 requires this Court to grant review to address the statutory and constitutional privacy exemptions to the PRA implicated in this case. RAP 13.4(b)(3-4).

F. CONCLUSION

This is an extremely important case to the people of Washington and the hundreds of thousands of men and women in our State in public service in state and local government. The Court of Appeals opinion punts on addressing the core issues concerning the PRA's application to the records generated by the private communications devices of public employees and the statutory and constitutional protections under the Fourth Amendment and article I, § 7 to which such records are entitled. It further neglects to address the myriad of practical questions implicated by its decision. This Court should grant review under RAP 13.4(b) and reverse the Court of Appeals, reinstating the trial court's thoughtful decision. Costs on appeal should be awarded to the County.

DATED this 6th day of October, 2014.

Respectfully submitted,

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APPENDIX

RCW 42.56.010:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agency" includes 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.

(2) "Person in interest" means the person who is the subject of a record or any representative designated by that person, except that if that person is under a legal disability, "person in interest" means and includes the parent or duly appointed legal representative.

(3) "Public record" includes 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. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house or representatives.

(4) "Writing" means handwriting, 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 42.56.050:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

RCW 42.56.230:

The following personal information is exempt from public inspection and copying under this chapter:

. . . . . .

> (3) 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;

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

[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

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[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.

Bjorgen, A.C.J.

Maxa, J.

Maxa, J.

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Petition for Review in Court of Appeals Cause No. 44852-1-II to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 6, 2014, at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick