48601-6-II

NO. 90912-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

AUTHUR WEST,

Repondent

v.

STEVE VERMILLION & CITY OF PUYALLUP,

Petitioners

OPENING BRIEF OF APPELLANT VERMILLION

(Corrected/Full Table)

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ORIGINAL

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I. INTRODUCTION

At first glance, this case appears to pit the Public Records Act against the constitutional right to privacy. But upon closer inspection, it is expected that the Court will find that by ruling in favor of Councilmember Vermillion's rights to privacy, the Court is also ruling in favor of the purposes of the PRA. While this case does pit disclosure obligations against privacy, disclosure is not the purpose of the PRA, rather the PRA serves "as a fundamental and necessary precondition to the sound governance of a free society."[1] In other words, the disclosure obligations are only a tool to preserve our freedom.

The most "basic [characteristic] to a free society" is "[t]he security of one's privacy against arbitrary intrusion[.]"[2] As the U.S. Supreme Court had repeatedly emphasized, "the child Independence was born" from our founding fathers' desire to retain their privacy.[3] The primary purpose of the constitution itself was to "confer[], as against the Government, their right to be left alone – the most comprehensive of rights and the right most valued by civilized man."[4]

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[1] Initiative 276, Laws of 1973, Ch. 1, Sec. 1(11), currently codified at RCW 42.17A.001(11).

[2] *Frank v. Maryland*, 359 U.S. 360, 375 (1959) (Douglas, J., dissenting).

[3] Rilely v. California, -- U.S. --, 134 S. Ct. 2473, 2494 (2014) (quoting John Adams); *see also Stanford v. Texas*, 379 U.S. 476, 484-85 (1965) (noting how James Otis's legal change to the writs of assistance "inaugurated" the movement that led to the Revolutionary War).

[4] *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 240, 654 P.2d 673 (1982) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandies, J., dissenting)), *affirmed*, 467 U.S. 20 (1984).

History shows that one of the most important aspects of our privacy rights is the right to engage in First Amendment political activity in private, outside of those in power. Thus, at the core of the "free society" that the people of this state seek to preserve though the Public Records Act is the right of the people to engage in political associations free from arbitrary surveillance by government. This was most recently summarized by Justice Gonzalez at the Conclusion of the majority opinion in *State v. Hinton*, where he wrote "Protecting the privacy of personal communications is essential for freedom of association and expression."[5]

The Court was not seeking to preserve the right to privacy in *Hinton* because it believed a drug users right to contact his dealer was an association that deserved special protecting. Rather, the Court protected Hinton's associational privacy because if government were allowed to invade their privacy, what would stop government from invading the privacy for relationships that are valued by society? As illustrated in pre-revolutionary England, and more recently in the struggles of the civil rights movement, one of the most valuable associations are those associations made for political causes.

In this way, the privacy rights of politicians thus become the most important tool we have for controlling government, because it allows us to engage in political associations to elect politicians who support our goals free from surveillance by those in power. Thus, the Court's rulings in favor

[5] *State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014).

of privacy, including the privacy of the disfavored, and the PRA are serving the same goals: both protect our free society, with a government that respects our "right to be left alone."[6] In the case at bar, a ruling in favor of a politician's privacy will thus further the goals of the PRA.

This should not be a surprise, of course, because the people, when they declared in 1972 that disclosure under the PRA was fundamental and necessary, added a qualifier, that we must be "mindful of the rights of individuals to privacy."[7]

As demonstrated in this brief, and illustrated by this Court in a long line of cases including the recent *Hinton* case, Steve Vermillion has constitutional rights of privacy in his private papers, including his personal email account. By ruling in favor of Vermillion, the Court will in fact be supporting the goals of the PRA.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred when it ordered Vermillion to produce emails from his personal email account and swear under perjury that he had complied.

Assignment of Error 2: The trial court erred in ruling that a search would not violate Vermillion's privacy rights.

Assignment of Error 3: The trial court erred in ruling that the PRA provided sufficient guidance to allow Vermillion to distinguish between

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[6] *Rhinehart*, 98 Wn.2d at 240.
[7] Initiative 276, Laws of 1973, Ch. 1, Sec. 1(11), currently codified at RCW 42.17A.001(11).

emails that relate to city business and emails protected by associational privacy.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue pertaining to assignment 1: Does the PRA authorize an agency to require an elected official to search a personal email account?

Issue pertaining to assignment 2: Are privacy rights defined by the items sought and is an order compelling someone to produce records a search?

Issue pertaining to assignment 3: Is the phrase "containing information relating to the conduct of government" sufficiently narrow and protect associational privacy when applied to personal email accounts?

In addition to identifying these issues, it is important to identify what is **not** included in Vermillion's arguments. Vermillion is not arguing that he or anyone else has a constitutional right to conduct city business in secret. He is not arguing that he could not be compelled to produce emails from his personal email account under certain circumstances. And he is not arguing that emails sent from his personal account to the city are protected by associational privacy. All he is arguing is that he has a right to privacy in his personal email account and therefore any search or seizure must be reasonable and done with authority of law. In addition. He is arguing that the the PRA as currently drafted does not meet constitutional standards.

IV. STATEMENT OF THE CASE

This case concerns what obligations Puyallup City Councilmember Steve Vermillion has to respond to a PRA request from Arthur West to the City of Puyallup for: **"communications received or posted by Mr. Vermillion at or on his website"**[8] that were **"concerning the City of Puyallup, City business, or any matters related to City governance the City Council and mayor, or his membership on the City Council."** CP 40-41.

Like many modern politicians, Councilmember Vermillion operates a personal website and has a personal email account associated with that website. CP 69-71. Vermillion started the website as a private citizen before running for any political office and originally used the website and email account to further personal aims, including his involvement in a veterans group and a community group working on restoring a city park. CP 69-71.

As he became more politically active, Vermillion began to use the website as a candidate, first when seeking a state legislative position and then when seeking a position on the Puyallup city council. CP 69-71. He has continued to use it for personal and political purpose, including to

[8] The original request sought "All records of communications received by or communications or posting by Steve Vermillion concerning the City of Puyallup, City business, or any matters related to City governance the City Council and mayor, or his membership on the City Council", but West later narrowed the request "to the communications received or posted by Mr. Vermillion at or on his website." The request also included two other categories of records that were fulfilled and not at issue. CP 40-41

communicate with other candidates seeking positions on the Puyallup City Council. CP 69-71.

In additional to these other uses, since being elected Vermillion invites city residents – his constituents – to contact him through his website, which sends an email his personal email account. CP 69-71. On a few occasions, Vermillion has received emails through this link that request the City to address a particular issue. CP 69-71. Vermillion has forwarded these emails to the City.[9] CP 69-71.

When informed of the request, and after consulting with the City Attorney, Vermillion refused to produce records that were in his home, on his personal computer, or in his personal email account. CP 69-71.

The City then informed West that it would not be producing records from Vermillion's personal email account. CP 40-41. In response, West filed a PRA action against the City and Vermillion seeking to have Vermillion's personal computer subject to an independent forensic review. CP 1-9.

The Defendants both filed motions for summary judgment and West responded with a cross-motion for partial summary judgment. The trial court denied the Defendants' motion and granted West's motion in part,

[9] For a period of time, Councilmember Vermillion also received his official correspondence from the City. The City has produced all emails it sent to and received from Councilmember Vermillion's personal email account. The City disputes whether these emails were responsive to West's original request, but that issue is not before the court on appeal, as this appeal involves the single issue of whether emails located on a personal computer or in a personal email account are within the definition of "public record."

ordering Vermillion to produce the responsive emails within 30 days. CP 182-86. Finally, the Court then stayed this ruling and certified his decision for immediate review pursuant to CR 54(d). CP 186. This order became final on September 19, 2014, when the court denied reconsideration. The Defendants now seek discretionary review.

V. SUMMARY OF ARGUMENT

Councilmember Vermillion has a right to privacy in his personal email account. The trial court's order, which is based on the trial court's interpretation of "public record," violates that right and must be reversed.

Under the doctrine of constitutional avoidance, this Court should not construe the PRA to authorize the City of Puyallup to force Vermillion to search his personal email account and produce emails from that account because such a requirement would violate his rights to personal privacy under Article 1, Section 7 and associational privacy under the First Amendment.

Public disclosure laws implicate privacy rights under Article 1, Section 7 and the First amendment. Thus, such laws as subject to exacting scrutiny. To survive a constitutional challenge, such laws must serve a substantial governmental purpose and be narrowly tailored to serve that interest and must contain adequate privacy protections to qualify as "authority of law."

Personal communications and the places where such communications are stored have received the highest level of protection in recognition that the mere "[a]wareness that the Government may be

watching chills associational and expressive freedoms." *Hinton*, 179 Wn.2d at 877 (quotation omitted). Based on these protections, personal email accounts are private affairs protected by both Article 1, Section 7 and the First Amendment.

This protection remains in place once someone has been elected to serve on a city council. While the operational realities of the work-place can serve to reduce expectations of privacy in the work-place, such realties do not extinguish privacy rights in places where employees or officials have superior property rights. Thus, an employer's needs will not justify a warrantless search of a personal email account or personal electronic device.

While a substantial government interest like the need for accountability can justify affirmative disclosure requirement, such requirement must be tailored to serve that need to pass muster under the First Amendment. The PRA's obligations are too broad to meet this exacting scrutiny analysis. This is especially true for elected officials who have very limited powers and are subject to extensive regulations that already allow for sufficient public scrutiny.

Thus, if the PRA were held to include records in personal email accounts, it would raise constitutional doubts under Article 1, Section 7 and the First Amendment. These doubts can be avoided if the Court applies the doctrine of constitutional avoidance and adopts the defendants' proposed interpretation of "public record," which excludes records held exclusively by employees and officials in personal email accounts.

This narrowed construction is consistent with the ultimate purpose of the PRA, which is to protect a free society, including the essential element of liberty – our personal privacy.

This does not mean elected officials and public employees have a constitutional right to conduct the people's business in secret by using personal email accounts for city business. It just means that before the PRA can be used to pry into personal email accounts, the PRA must be amended to limit that intrusion to serve accountability and ensure that sufficient protections are available to protect the private affairs of those officials.

VI. ARGUMENT

A. The Court Should Apply the Doctrine of Constitutional Avoidance when It Conducts a De Novo Review of the Trial Court's Ruling and Interpretation the Term "Public Record"

The trial court interpreted the PRA to support the summary judgment order requiring Vermillion to produce emails from his personal email account that relate to "city business," because the trial court determined that emails in that account might contain "information relating to the conduct of government" and fit within the definition of "public record." The trial court rejected the defendants' proposed definition of public record, under which records in a personal email account or on a personal computer would be excluded from that definition. Both the court's summary judgment ruling and its interpretation of "public record" are subjected to de novo review. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009) ("*Federal Way v. Koenig*").

The trial court's ruling interprets the PRA to require the City of Puyallup to intrude on Vermillion's rights to personal privacy under Article 1, Section 7[10] and associational privacy under the First Amendment.[11] And statute that intrudes on privacy must be "reasonably necessary to further substantial governmental interests that justify the intrusion." *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). Under Article 1, Section 7, such a statute must also qualify as authority of law. Under the First Amendment, the intrusion must meet exacting scrutiny. *Doe v. Reed*, 561 U.S. 186, 195 (2010).

To avoid chilling First Amendment rights, it must also be clearly defined and give wide birth to allow the free exercise of those rights. *VED*, 161 Wn.2d at 482. Stated another way, the burden on First Amendment rights must be narrowly tailored to serve an important governmental interest that justifies the obligation. *See Utter v. BIAW*, -- Wn.2d --, -- P.3d --, 2015 WL 276347 at *18-*19 ¶¶ 73-73 (2015) (noting disclosure obligation had survived "exacting scrutiny" because it was narrowly tailored to sufficiently important governmental interests).

A corollary to the narrowly tailored rule is the Court's "constitutional avoidance" doctrine. *Utter*, ¶ 73 ("We construe statutes to avoid constitutional doubt."). When doubts are raised about legislation that

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[10] *Hinton*, 179 Wn.2d at 877 (suspect had privacy right in phone containing text messages).

[11] *Voters Educ. Committee v. Public Disclosure Commission*, 161 Wn.2d 470, 166 P.3d 1174 (2007) ("VED") ("The United States Supreme Court has recognized that compelled disclosure may encroach on First Amendment rights by infringing on the privacy of association and belief.").

could infringe on First Amendment rights, the U.S. Supreme Court holds that "it is a cardinal principle that this Court will first ascertain whether a construction of a statute is fairly possible by which the question may be avoided."[12] The "constitutional avoidance doctrine mandates" that when the Court faces two possible interpretations of a disclosure obligation, it should adopt the narrower interpretation that avoids constitutional issues, rather than the broader option that "arguably" fails to meet the narrowly tailored rule in the "exacting scrutiny" review. *Utter*, ¶¶ 72-73.

Statutes that implicate First Amendment rights such as disclosure statutes are particularly suspect and do not receive the presumption of constitutionality afforded to other statutes. *VED*, 161 Wn.2d at 482; *State v. Homan*, 181 Wn.2d 102, 111 n.7, 330 P.3d 182 (2014). Thus, when applying the constitutional avoidance doctrine, the Court will select a narrower interpretation that provides clear guidance and avoids constitutional doubt, even over a more literal reading that is overbroad or vague.[13]

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[12] *United States v. Rumely*, 345 U.S. 41, 45 (1954); *see also, e.g., San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 162-164, 157 P.3d 831 (2007) (noting preference for interpreting disclosure statute so it has bright line rules so it can avoid addressing any constitutional challenge to the legislation); *Seeber v. Public Disclosure Commission*, 96 Wn.2d 135, 142, 634 P.2d 303 (1981) (rejecting board interpretation of Public Disclosure Commission's ("PDC") subpoena power and thus avoiding constitutional privacy challenge).

[13] *State v. Dan J. Evans Campaign Committee*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976) ("DJE") ("A fundamental guide to statutory construction is that the spirit or intention of the law prevails over the letter of the law."). This includes adopting a "strained" interpretation to avoid putting the constitutionality of legislature in "doubt." *Rumely*, 345 U.S. at 47 (quotation omitted); *see also, e.g., Scales v. United States*, 367 U.S. 203, 211 (1961) ("Court will often strain to construe legislation so as to save it against constitutional attack" as long as it does not undermind the intent).

As demonstrated below, if the term "public record" were interpreted to apply to personal email accounts, it would raise serious constitutional problems under Article 1, Section 7 and the First Amendment. These problems are avoided if the Court interprets the PRA so that it does not apply to personal email accounts.

B. Personal Email Accounts Are Protected by Two Provisions in the Washington State Constitution

"Protecting the privacy of personal communications is essential for freedom of association and expression" because the "[a]wareness that the Government may be watching chills associational and expressive freedoms[.]" *State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014) (holding sender of a text message had a privacy interest in text message sent to a third party). Therefore, this Court has granted private communciations and locations that store communications the strongest constitutional privacy protection.

1. The Right to Privacy Is the Most Basic and Fundamental Characteristic of a Free Society

The concerns of the chilling effects of government intrusion dates back to two landmark 1765 English cases known as the "Cases of the Seized Papers."[14] These cases arose after a several-century-long struggle between the English Crown, who sought to expand their powers, and the people who sought to maintain their traditional rights as Englishmen to live free of

[14] *See Stanford v. Texas*, 379 U.S. 476 (1965) (citing *Entick v. Carrington* and *Wilkes v. Wood*); *see also State v. McCollum*, 17 Wn.2d 85, 101, 136 P.2d 165 (1943) (opinion of Millard, J.) (noting these cases are referred to as the "Cases of the Seized Papers").

oppressive governmental interference.[15] After messengers of the Crown used a general warrant to enter the home of a disfavored member of parliament and a publisher and seize all of their personal papers looking for any criticisms of King George, the politician and publisher both sued.[16] The Court ruled that the messengers of the Crown were liable because the entry and seizure based on a general warrant violated the politician's and publisher's rights to privacy and was "totally subversive of the liberty" of "everyman[.]"[17]

The *Cases of the Seized Papers* helped inspire the colonists, who were engaged in their own struggle for privacy and against the use of a type of general warrant called a writ of assistance.[18] It was out of this struggle for privacy that "the child Independence was born."[19] The Bill of Rights became the ultimate expression of the belief that our right be free from government intrusion was the essential element of the free society our founding fathers sought to build.[20]

Both the U.S. Supreme Court and this Court have often recounted this history and the primacy of the privacy rights in a free society. "The security of one's privacy against arbitrary intrusion" is the most "basic

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[15] *See Marcus v. Search Warrants*, 367 U.S. 717,724-30 (1961) (recounting this history)

[16] *Marcus*, 367 U.S. at 728.

[17] *Marcus*, 367 U.S. 728-29 (quoting *Wilkes* decision)

[18] *Stanford*, 379 U.S. at 484 n.13 (noting founding fathers were "undoubtedly familiar" with the Cases of the Seized Papers).

[19] *Boyd v. United States*, 116 U.S. 616, 625 (1886) (quoting John Adams).

[20] *Stanford*, 379 U.S. at 484-85.

[characteristic] to a free society."[21] "Personal rights found in the guaranty of privacy are fundamental to or implicit in the concept of ordered liberty."[22] The privacy protections embodied in the First and Fourth Amendments thus make up the "very essence of constitutional liberty and security."[23] If courts fail to scrupulously protect the individual privacy rights embodied in the First and Fourth Amendments, it "would soon amount to a total loss of those liberties," and ultimately the whole concept of a free society first recognized in the Magna Charta.[24]

Thus, when a court protects the privacy right of a criminal suspect, the purpose is not to protect the criminal's right to violate the law; instead the court is protecting the most fundamental right in our free society. The Court should make sure its interpretation of the PRA is also consistent with these higher goals. "[T]he important policy of public disclosure of information relating to the performance of public officials cannot encroach upon the general personal privacy rights to which every citizen is entitled." *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

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[21] *Frank v. Maryland*, 359 U.S. 360, 375 (1959) (Douglas, J., dissenting).

[22] *State v. Lee*, 135 Wn.2d 369, 391, 957 P.2d 741 (1998).

[23] *Boyd v. United States*, 116 U.S. 616, 630 (1886); *see also, e.g., Eddy v. Moore*, 5 Wn. App. 334, 339, 487 P.2d 211, 214 (1971) (quoting *Boyd* and noted that the "right of privacy [is] older than the Bill of Rights")

[24] *City of Bremerton v. Smith*, 31 Wn.2d 788, 798-800, 199 P.2d 95 (1948) (Simpson, J., and three other justices dissenting from majority opinion upholding warrantless arrest and warrantless search of a vehicle incident to that arrest).

2. Private Papers Are Protected by Two Constitutional Privacy Rights: Personal Privacy under Article 1, Section 7 and Associational Privacy under the First Amendment

The constitutional right to privacy includes two aspects: personal privacy (Art. 1, §7) and associational privacy (First Amendment). Together these provisions grant the Citizens of this State "the most comprehensive ... right[]" to privacy that extends beyond the First Amendment and Fourth Amendment of the U.S. Constitution and "contains no express limitations." *Hinton*, 179 Wn.2d at 877 (noting Art. 1, §7 provides broader protection for personal privacy than the Fourth Amendment); *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990) (holding First Amendment protects associational privacy).

a) Privacy Interest Are Not Defined by the Items to Be Seized

To determine the privacy protections in Article 1, Section 7 apply, the Court looks at whether citizens in this state expect and have traditionally expected to be free from government intrusion in the particular location. *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990). While privacy rights under Article 1, Section 7 are not limited by the Fourth Amendment's "reasonable expectation" test, unreasonable searches are prohibited by this provision. *Charcon Arreola*, 176 Wn.2d at 292. This determination requires the consideration of how the location has traditionally been used. *See, e.g., Boland*, 115 Wn.2d at 577-78 (summarizing location identified in prior decisions).

Finally, the courts have consistently and routinely rejected efforts to define privacy rights based on the objects government is seeking to uncover

in a search. Thus, a search cannot be justified after the fact simply because it uncovered contraband or evidence of illegal activities. *See State v. Kinnear*, 162 Wash. 214, 220, 298 P. 449, 451 (1931) ("Probable cause must be shown before a warrant will issue."); *see also, e.g., State v. Eisfelt*, 163 Wn.2d 628, 640, 185 P.3d 580 (2008) (search warrant cannot be upheld based on evidence obtained during search).[25]

b) Locations that Store Private Papers such as Personal Email Accounts and Personal Electronic Devices Receive Heightened Privacy Protections

Based on these privacy rights, Courts have provided the strongest privacy protections to locations were personal papers are stored, including personal electronic devices and digital records accounts. Thus, in *Hinton*, the Court held that a drug user retained privacy rights in his electronic communication sent to his drug dealer, and therefore the warrantless search of the dealer's phone violated the drug user's privacy. *Hinton*, 179 Wn.2d at 871. Similarly, the U.S. Supreme Court ruled that personal cell phones could not be searched without a warrant because these phones contained personal records and allowed access to cloud based accounts were personal records were stored. *Riley v. California*, -- U.S. --, 134 S.Ct. 2473, 2493 (2014) (ruling police must have a warrant to search personal electronic

[25] *See also, e.g., State v. Jones*, 163 Wn. App. 354, 361, 266 P.3d 886 (2011) ("The open view doctrine does not ... provide authority to enter constitutionally-protected areas to take the items without first obtaining a warrant."); *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009) (rejecting inevitable discovery doctrine); *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)(evidence found in a search that would have been lawful incident to the suspect's arrest, but in fact occurred before suspect was actually arrested, had to be suppressed, even though the suspect could have been arrested prior to the search).

devices because such devices contain personal private papers); *see also State v. Nordlund*, 113 Wn. App. 171, 181-82, 53 P.3d 520 (2002) (noting computer serves as "the modern day repository" of our private papers and other First Amendment materials); *Boland*, 115 Wn.2d at 577 (extending privacy protections to garbage cans because personal papers may be "stored" there).

Moreover, Washington Courts have provided additional protections when a search may potentially infringe on First Amendment rights. Thus, warrants must meet a heightened specificity requirement. *State v. Perrone*, 119 Wn.2d 538, 547-48, 834 P.2d 611 (1992) (heightened specificity in warrant required to search for items stored amongst First Amendment protected materials); *Nordlund*, 113 Wn. App. at 181-82 (same for computer search). Someone seeking records protected by First Amendment associational privacy in civil discovery must make a heightened showing of need, rather than meet the standard "relevance" requirements. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990); *see also Eugster v. City of Spokane*, 121 Wn. App. 799, 808, 91 P.3d 117 (2004) (correspondence between elected official and constituent presumed to be protected by associational privacy).

Absent this showing of need, courts may not review such materials in camera because even an in camera review can have a chilling effect on First Amendment associational privacy rights. *Right-Price Recreation v. Connells Prairie Community Council*, 105 Wn. App. 813, 822, 21 P.3d 1157 (2001) (reversing order for in camera review made before requestor

demonstrated need), *aff'd on other grounds*, 146 Wn.2d 370, 46 P.3d 789 (2002); *see also Snedigar*, 114 Wn.2d at 167 (holding that "in camera review of associational materials is not a course to be routinely undertaken"). Moreover, such material cannot be obtained through discovery if the information can be obtained by other sources. *Snedigar*, 114 Wn.2d at 158; *see also Rhinehart v. Seattle Times*, 98 Wn.2d 226, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20 (1984) (emphasizing importance of court's authority to issue protective orders to limit disclosure when associational privacy records are produced).

Based on this authority, a person's private email account is part of the person's "private affairs" that will receive the highest level of privacy protection under Article 1, Section 7 and the First Amendment, especially if that person has used the email account for political activities. This is as true for the average citizen as it is for the elected official or public employee.

3. Public Employees and Elected Officials Do Not Forfeit Their Personal or Associational Privacy Rights in Their Personal Email Accounts or Other Private Papers

"Individuals do not lose Fourth Amendment rights merely because they work for government instead of a private employer" or when they decided to run for elective office. *City of Ontario v. Quon*, 560 U.S. 746, 756 (2010) (*Quon*) (*quoting O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)); *Chandler v. Miller*, 520 U.S. 305, 313 (1997). Likewise, they cannot be required to forfeit their First Amendment associational privacy rights as a condition of employment or obtaining public office. *Baggett v. Bullitt*, 377 U.S. 360, 371-74 (1964) (holding persons employed by State of

Washington could not be required to sacrifice associational privacy as a condition of public employment).

While the operational realities of the workplace and public safety needs will allow limited intrusions into employee privacy, none of those restrictions could justify the warrantless intrusion into an employee's personal email account.

a) The Operational Realities of Government Employment Do Not Authorize Government to Search an Employee's Personal Email Account

In situations where the employer has a superior property interest, such as in an office or on an agency electronic device, the operational realities of the work place will allow the employer to search those areas when a legitimate employment based need justifies the search. *O'Connor*, 480 U.S. at 716. But if the search is not based on that need, or if the search exceeds the scope of a reasonable search, it will still be unconstitutional. *Quon*, 560 U.S. at 761 (recognizing search of employer issued electronic device could be unconstitutional if "excessively intrusive).[26]

Moreover, the employer's interests do not allow warrantless searches based on need when the employee's property interest is greater than the employer's interest. Thus, a government agency's needs as an employer would not support the search of an employer's purse or brief case

[26] *See also, e.g., Ortega v. O'Connor*, 146 F.3d 1149, 1159-60 (9th Cir. 1998) (decision on remand for U.S. Supreme court sub nom.); *Alexander v. City of Greensboro*, 762 F. Supp. 2d 764, 806 (M.D.N.C. 2011) (applying *Quon* and holding question of fact existed whether search was excessive, were police department downloaded all of officer's emails from his city email account).

even if it was stored in the employee's office.[27] Nor could an employer require an employee to allow the employee's home to be searched, even pursuant to a legitimate employment-related investigation.[28] Finally, a government agency's interest as an employer would not justify as search of an employee's office if the search undertaken at the request of law enforcement to assist with a criminal investigation.[29]

An employer does not have a superior property interest in an elected official's personal email account. Thus, a person's status as an elected official or public employee cannot justify a government employer's intrusion into a personal email account.

b) Intrusions into Employee Privacy to Protect Public Safety Must Be Carefully Tailored

In addition to the traditional needs as an employer, the government may also intrude on an employee's privacy for public safety concerns. But even when a compelling need such as public safety justifies a search, the search must be narrowly tailored to serve that need and must otherwise protect the employee's privacy. *Robinson v. City of Seattle*, 102 Wn. App. 795, 817-18, 10 P.3d 452 (2000) (holding any intrusion into employee privacy must be based on a "compelling need" and the intrusion must be

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[27] *See O'Connor*, 480 U.S. at 716 ("The appropriate standard for a workplace search does not necessary apply to a closed piece of personal luggage, a handbag, or a briefcase that happens to be within the employee's business address.").

[28] *Clemente v. Vaslo*, 679 F.3d 482, (6th Cir. 2012) (city official violated employee's privacy by threatening termination if the employee did not allow his home to be searched); *Delia v. City of Rialto*, 621 F.3d 1069, 1077 (9th Cir. 2010), *rev'd in part on other grounds sub nom., Filarsky v. Delia*, -- U.S. --, 132 S.Ct. 1657 (2012).

[29] *United States v. Jones*, 286 F.3d 1146, 1150-51 (9th Cir. 2002) (search for records responsive to a criminal grand jury subpoena not a reasonable employment-related search).

"narrowly tailored" to serve that need);[30] *O'Hartigan v. State*, 118 Wn.2d 111, 120-21, 821 P.2d 44 (1991) (polygraph tests only permissible if questions pre-determined and tailored to safety needs and protections are in place to protect the confidentiality of the responses).

Just as the operational realities of the workplace do not justify a warrantless search of Vermillion's personal email account, public safety concerns cannot justify such a search. Therefore, any support for the trial court's order must be found exclusively within the PRA.

C. The PRA's Strongly Worded Mandate Is Too Broad to Apply to Personal Email Accounts without Violating Personal and Associational Privacy Rights

The broad disclosure mandate of the PRA serves the public by ensuring that agencies to not play games or have discretion is determining what qualifies as a "public record."[31] But if that mandate were held to apply to a personal email account, the mandate's breadth becomes a problem because it is not tailored to serve a compelling or substantial interest.

1. Virtually Every Record Generated by an Agency Is a "Public Record" that Must be Produced Regardless of Need

The Court has repeatedly described the PRA as a "strongly worded mandate for broad disclosure of public records." *RHA v. City of Des*

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[30] Article 1, Section 7 provides government employees stronger privacy protections than the Fourth Amendment. *Robinson*, 102 Wn. App. at 812 (applying "*Gunwall*" analysis).

[31] *Compare Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978) (holding that under the PRA's definition of public record, "[v]irtually every document generated by an agency is available to the public in one form or another"); *with Judicial Watch, Inc. v. United States Secret Service*, 726 F.3d 207 (D.C. Cir. 2013) (holding that under Federal Freedom of Information Act, "Nor are all documents that are generated by an agency 'agency record'").

Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978)). The Court's description of that mandate emphasized this fact

- "Virtually every document generated by an agency is available to the public in one form or another." *Hearst*, 90 Wn.2d at 128.
- "public record" is "defined very broadly, encompassing virtually any record related to the conduct of government." *O'Neill v. City of Shoreline*, 170 Wn. 2d 138, 147, 240 P.3d 1149 (2010).
- The PRA makes "virtually every document generated by an agency available to the public unless an exemption applies." *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 719, 261 P.3d 119 (2011).

A key component to the broad application is the PRA's definition of "public record": "Public record includes any [1] writing containing information [2] relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by [4] any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). The Court "broadly interprets th[e] second element of the statutory definition of public record." *Confederated Tribes v. Johnson*, 135 Wn. 2d 734, 746, 958 P.2d 260 (1998). Prior law only mandated access to records that "officials were required by law to maintain"; access to any other records was "largely within the discretion" of the agency. *Official Voters Pamphlet, General Election 1972*, at 11 (I-276: "Law as it now exists") ("*1972 Voters Pamphlet*"). By using the broad

phrase "relating to the conduct of government," the PRA was intended to mandate disclosure "regardless of whether or not the particular record is one which the official having custody is required by law to maintain." *1972 Voters Pamphlet* 108 ("Effect of Initiative Measure No. 276 if approved into Law").

Another key component is that the PRA does not have any "need to know" requirement. *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002). A requestor does not need to show that a request will benefit any "legitimate public concern" before a requested record will be subject to disclosure. *See Bellevue John Does v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 224, 189 P.3d 139 (2008) (court "need not determine whether there is a legitimate public concern" before a record is disclosed). Instead, "[a]ny member of the public can demand any public record from any public agency at any time for any reason[.]" *Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 900, 130 P.3d 840, 848 (2006) *aff'd*, 162 Wn. 2d 716, 174 P.3d 60 (2007). A requestor "shall not be required to provide information as to the purpose of the request" and any "intended use of the information cannot be a basis for denying disclosure." RCW 42.56.080; *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002).

In addition, agencies cannot deny a request based on an "overbroad" request, or because of the burdens of compliance. *See Zink v. City of Mesa*, 140 Wn. App. 328, 337, 166 P.3d 738 (2007) ("*Zink I*") (burden on agency does not excuse compliance); RCW 42.56.080 (request cannot be denied because it is overbroad). Moreover, the PRA "does not place a limit on the

number of record requests an individual can make." *Zink 1*, 140 Wn. App. at 340.

Finally, to encourage agencies to disclose public records, the Courts hold agencies to a "strict compliance" standard and even good faith errors mandate an award of attorney fees and penalties up to $100 per day per record or request. *See Zink 1*, 140 Wn. App. at 337 (trial court erred when it dismissed claim based on agency's substantial compliance with requests); *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 751, 174 P.3d 60 (2007). The mandatory penalty and attorney fee provisions are designed "to encourage broad disclosure and discourage agencies from improperly denying access to public records." *Robbins, Geller v. State*, 179 Wn. App. 711, 736, 328 P.3d 905, 918 (2014). Thus, even the loss of a single email can have extreme consequences. *See O'Neill v. City of Shoreline*, 183 Wn. App. 15, 332 P.3d 1099 (2014) (noting judgment of over $500,000 that resulted from the loss of one email).

2. The PRA Does Not Support the Issuance of a Subpoena or Warrant that Would Qualify as "Authority of Law" Under Article 1, Section 7

The PRA does not expressly authorize any tool that would allow an agency to search an elected officials person email, whether through a warrant or administrative subpoena, and ironically its broad disclosure mandate would make any such warrant or subpoena unconstitutional.

a) An administrative warrant or subpoena must be expressly authorized by a statute that provides for a neutral magistrate and reasonable standards

Because personal email accounts are private affairs and thus protected by Article 1, Sec. 7, the government can only search that account based on the "authority of law." *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986). With few limited exceptions that do not apply in this case, the "authority of law" required is a properly issued search warrant. *Gunwall*, 106 Wn.2d at 66-67.

Outside of a criminal investigation, a search warrant (known as an administrative warrant) will only qualify as "authority of law" if at least three factors are present. *State v. Miles*, 160 Wn.2d 236, 248, 156 P.3d 864 (2007) (search warrant "is not authority of law simply because it is authorized by a statute"). First, a specific statute must expressly authorize the "administrative warrant." *City of Seattle v. McCready*, 123 Wn.2d 260, 272, 868 P.2d 134 (1994) ("*McCready I*"). Second, the statute must provide for standards limiting when the warrant will be issued. *Seymour v. State*, 152 Wn. App. 156, 167, 216 P.3d 1039 (2009). Third, the statute must provide for a neutral magistrate to issue the administrative warrant to ensure the factors are met and the search is otherwise reasonable. *Miles*, 160 Wn.2d at 248-49.

The authority to issue a search warrant cannot be implied for legislation, even when the warrant will further the policy goals of the statute, or otherwise serve the public interest. *McCready I*, 123 Wn.2d at 278-81 (authority to issue warrant cannot be implied, even for statute that

grants government a "right of entry" into a home). The statute must include standards that are reviewed by a neutral magistrate to ensure that that "the frequency and purpose of inspections" is not left "to the unchecked discretion of Government officers[.]" *Seymour v. State*, 152 Wn. App. 156, 167, 216 P.3d 1039 (2009). Even when warrant authority is provided by statute, that authority will be strictly limited to the statute's express terms. *Seeber v. Public Disclosure Commission*, 96 Wn.2d 135, 142, 634 P.2d 303 (1981).

The Court has unambiguously held that these conditions are not met simply because someone obtains court review by resisting the search, which then forced the government to seek court enforcement. *Miles*, 160 Wn.2d at 251 (noting this is too late, and would violate the rights of those who do not resist). Moreover, a search is not constitutional merely because someone consents to a claim of lawful authority. *Seymour*, 152 Wn. App. at 170. Constitutional privacy rights are not implicitly waived. *Seymour*, 152 Wn. App. at 170.

The PRA does not contain any express authority authorizing anyone to issue a search warrant or subpoena. Because this authority cannot be inferred, this fact alone means the PRA does not qualify as authority of law that would allow the City to search Vermillion's personal email account. *See McCready I*, 123 Wn.2d at 272 (warrant authority cannot be implied); *see also Seeber*, 96 Wn.2d at 139-40 (limited subpoena authority in the Public Disclosure Act based on the express language in the act).

Even if the authority could be implied, the PRA expressly rejects the use of the protections that are needed for a valid administrative warrant. *See Miles*, 160 Wn.2d at 248 ("a subpoena is not authority of law simply because it is authorized by statute").

First, there is no neutral magistrate because "[a]ny member of the public can demand any public record from any public agency at any time for any reason[.]" *Soter*, 131 Wn. App. at 900. Second, there are no standards to apply because the PRA "does not place a limit on the number of record requests an individual can make"[32] and agencies cannot require a requestor to provide a purpose or limit the request based on any intended use of the record. RCW 42.56.080; *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002).[33]

In sum, the PRA does not authorize an agency to search or subpoena an elected official's personal email account and with its broad disclosure mandate, any such warrant or subpoena would be too broad to qualify as authority of law.

b) The trial *court erred in ruling that Vermillion had no privacy rights in his personal email account*

The trial court did not consider a warrant or subpoena necessary because it held Vermillion did not have any privacy right, reasoning that

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[32] *Zink I*, 140 Wn. App. at 340

[33] *See also Wash. Dep't of Transp. v. Mendoza de Sugiyama*, 182 Wn. App. 588, 596, 330 P.3d 209 (2014) (court could not use CR 26 standard of "annoyance, embarrassment, oppression, or undue burden or expense" to block PRA request for 174,000 emails that were subject to CR 26 protection order)

there is no privacy right in a public record. Thus, focus on the object of a search turns Article 1, Sec. 7 on its head.

The exchange at oral argument illustrates the trial court's erroneous reasoning. When Vermillion's attorney argued that Vermillion has a right to privacy in his home and the records located at his home, the Court responded by incredulously asking, "Well, wait a minute. You're saying because the computer is located in his home all of these communications related to the public business are his private papers?" CP 157: 7-11 (RP 6/6 at page 19 lines 7-11). The Court later stated that "no reasonable expectation of privacy ... [and] [t]he whole issue of search and seizure ... simply isn't present in this case because what is being requested is for Mr. Vermillion to produce those communications which concern his role in City governance ..." CP 172 (RP 6/6 page 34 line 19 to 35 line 1). This ruling is rooted in a fundamental misunderstanding of constitutional privacy rights. Even if emails in this account could qualify as public records, those emails could only be obtained by searching the email account and reviewing the content of all of the emails to determine if the email qualified as a public record. This would violate Vermillion's personal and associational privacy rights. *See Perrone*, 119 Wn.2d 538, 547-48 (noting search of personal records for contraband would violate privacy rights).

The error in the trial court's reasoning is that the trial court sought to define privacy by looking to the item sought in the search, rather than looking at the place to be searched. *See Eisfelt*, 163 Wn.2d at 640 (warrant cannot be supported by evidence seized in search). Under this reasoning,

the City of Puyallup could conduct warrantless searches of any location – even a city employee's home – as long as it thought there might be a public record there. This of course is not the law.

In fact, it is absolutely clear under this Court's ruling in *State v. Boland* that there is one location the City could not search for a public record without a warrant – Vermillion's home garbage can. *See State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990) (search of home garbage can for evidence to illegal sales of legend 1 drugs violated suspect's constitutional privacy rights). When recognizing this right, the Court did not consider the actual evidence found – evidence of illegal drug sales – but instead focused on the type of evidence that might be found in the garbage: "[b]usiness records, bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person's activities, associations, and beliefs." *Boland*, 115 Wn.2d at 578 (quotation omitted). These same type of records are more likely to be found in a personal email account and thus Vermillion's personal email account warrants at least as much privacy protection as his garbage can.[34] *Hinton*, 179 Wn.2d at 872 (courts should "generally presume that conversations between two parties are intended to be private.").

The court's reasoning is thus contrary to over a century of privacy protection for personal communications as well as all of the Court's

[34] Moreover, the content of personal email accounts, unlike garbage cans, receives additional state and federal legislative protection. See Washington State's Privacy Act, ch. 9.73 RCW; *see also Gunwall*, 105 Wn.2d at 66-67 (noting Privacy Act has protected private communications for over 100 years and is one of the strongest laws in the nation); Stored Communications Act, 18 U.S.C 2701 et seq.

decisions defining privacy under Article 1, Section 7. Even if emails that met the PRA's definition of "public records" were located in Vermillion's personal email account, that fact alone cannot justify a warrantless search of that account.

c) The trial *court erred in ruling that an order requiring Vermillion to produce records was not a search*

A second error in the trial court's reasoning was its order would not require the City to violate Vermillion's privacy because City could "[j]ust order Mr. Vermillion to produce [the requested records in his personal email account] under the penalty of perjury." CP 168:16-17 (RP 6/6 at page 30 lines 16-17). Thus, the summary judgment order requires that "Councilmember Vermillion, under the penalty of perjury, shall produce records that are within the scope of Plaintiff's request." CP 185 Order ¶1.

The trial court's conclusion that a forced search, to be enforced by criminal sanctions and possible jail, would not be a search is incorrect and if upheld would eliminate the protections of Article 1, Section 7 for elected officials. "[A] search and seizure, or, what is equivalent thereto, the compulsory production of a man's private papers ... is ... an 'unreasonable search and seizure." *Boyd v. United States*, 116 U.S. 616, 622 (1886).[35]

[35] While discovery in civil suits has been liberalized since 1886, in part because court protective orders can protect privacy rights in some instances. *See Rhinehart v. Seattle Times*, 98 Wn.2d 226, 654 P.2d 637 (1982) (allowing discovery of materials protected by a party's associational privacy rights only conditions on a protective order the prevented the other party, a newspaper, from disseminating the materials), *aff'd* 467 U.S. 20 (1984). The PRA does not permit an agency to impose any such limits on records produced in response to a PRA request.

Thus, under similar circumstances, Washington Courts and the Ninth Circuit have both held that such compelled searches are unconstitutional. *Seymour*, 152 Wn. App. at 170 (target's production of records in response to "a claim of a lawful authority" was not consent); *Delia*, 621 F.3d at 1077 (illegal search occurred when employee was ordered to fetch items from home and place on his front lawn so city could inspect).

The trial court's rulings reflect the problem inherent in holding the PRA applies to personal email accounts – absent the trial court's clearly erroneous rulings, the PRA does not provide any means to obtain such emails. But instead of resolving this problem by ruling that Puyallup was required to violate Vermillion's constitutional rights, the court should adopted the narrower interpretation of the public record proposed by the defendants.

3. The PRA's Broad Disclosure Mandate Would Violate an Official's Associational Privacy Rights Because It is Overbroad and Vague

The trial court's order also violated Vermillion's First Amendment associational privacy rights. When the PRA's strongly worded mandate is considered under First Amendment standards that the Court applies to campaign finance laws, similar problems arise.[36]

[36] Privacy protections under Article 1, Section 7 and the First Amendment are cumulative. *See Perrone*, 119 Wn.2d at 547. Most cases that address First Amendment associational privacy, however, address it in the context of campaign disclosure laws, which require disclosure of information, not private papers, or civil discovery where the court rules provide a right to access, and thus only address the First Amendment issues. Nevertheless, despite the constitutionality of these requirements, enforcement agencies still need a valid administrative warrant to compel the production of papers needed to investigate compliance. *See, e.g., Seeber*, 96 Wn.2d at 139-41.

a) To pass constitutional muster, disclosure obligations must be sharply drawn to

Courts have routinely upheld disclosure obligations of financial and identifying information when the disclosure directly furthers state goals such as fighting corruption and the appearance of corruption, or otherwise protecting the integrity of elections process.[37] As noted, the goals of the PRA are substantial and at least as important as protecting the integrity of elections and fighting corruption. But because disclosure obligations will infringe on First Amendment rights, courts have been critical of disclosure requirements that only marginally further a compelling interest or that cause particularized harm to associational privacy.[38] Moreover, disclosure obligations that are overbroad or vague are unconstitutional no matter how substantial or compelling of an interest they serve. *See, e.g., Wash. State Republic Party v. Public Disclosure Commission*, 141 Wn.2d 245, 266, 4 P.3d 808 (2000) ("WSRP").

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[37] *See, e.g., Doe v. Reed*, 561 U.S. at 201 (upholding disclosure of identifying information to protect integrity of referendum process); *Buckley v. Am. Constitutional Law Found.*, 515 U.S. 182, 202 (1999) (upholding disclosure obligations related to campaign donations and spending to help maintain public confidence in elections process); *Fritz v. Gorton*, 83 Wn.2d 275, 294-300, 517 P.2d 911 (1974) (upholding candidate financial disclosures); *United States v. Harriss*, 347 U.S. 612, 623-24 (1954) (upholding disclosures for paid lobbyists to ensure legislators know who is seeking to influence them).

[38] *See, e.g., Buckley*, 515 U.S. at 203 (requirement that signature gatherers disclosure amounts paid unconstitutional because it was not tailored to public's legitimate informational interest); *see also Fritz*, 83 Wn.2d at 298-99 (upholding financial disclosure obligations because they did "not intrude upon intimate personal matters" or "cavalierly mandate a picayune itemization of personal affairs."); *Young Am. for Freedom v. Gorton*, 83 Wn.2d 728, 731-32, 522 P.2d 189 (1974) (agreeing with association that disclosure obligation would be unconstitutional if it applied to membership list, but adopting narrow interpretation that only applied to persons who contributed to influence Washington law).

A statute is overbroad if it would intrude on a substantial amount of First Amendment activity. *State v. Johnson*, 156 Wn.2d at 355, 363, 127 P.3d 707 (2006). Overbroad regulations on First Amendment rights allow selective enforcement and thus have a chilling effect by discouraging people exercising their First Amendment rights. *State v. Homan*, 181 Wn.2d 102, 111 n.7, 330 P.3d 182 (2014). Overbroad regulations also allow the government to selectively target speech that is disfavored. *Homan,* 181 Wn.2d at 111 n.7.

An overbroad statute is not cured by the promise of "reasonable" enforcement because the chilling effect comes for the possibility of enforcement. *Homan*, 181 Wn.2d at 111 n.7 (reject dissent's argument that "little possibility" of any prosecution based on protected speech). "It will not due to say that a prosecutor's sense of fairness" would prevent the enforcement of an overbroad statute because "[t]he hazard of being prosecuted" for protected First Amendment activing is what cause the chilling effect, even if such a prosecution is "wholly fanciful." *Baggett*, 377 U.S. at 373. For the same reasons, the existence an affirmative defense or appellate relief is insufficient to preserve an overbroad statute. *See Baggett*, 377 U.S. at 374 (legislation cannot be saved by claims that no conviction for protected activity would be sustained); *Homan*, 181 Wn.2d at 111 n.7 (noting affirmative defense for First Amendment activity does not prevent chilling effect).

A statute is unconstitutionally vague when it fails to provide sufficient guidance allow a person of ordinary intelligence to determine

when the regulation applies. *Public Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 630-31, 555 P.2d 1386 (1976) (finding provision of Public Disclosure Act unconstitutional because it requires persons to "guess" about when it applies). When a statute regulates speech, courts apply a "stricter" vagueness test, and any regulations must be drawn with a "greater degree of specificity" to withstand a vagueness challenge. *Rains*, 87 Wn.2d at 630. This is heightened further when a regulation affects political speech: "to avoid vagueness and chilling effect on political speech, ... [the regulation] must be sharply drawn[.]" *WSRP*, 141 Wn.2d at 266. In the political arena, regulations are unconstitutionally vague if they require persons to negotiate a thin line between regulated conduct and protected First Amendment activities. *WSRP*, 141 Wn.2d at 264. Likewise, if the some governmental body must "scrutinize the content" of a record to determine whether the regulation applies, the regulation must include "sharply drawn" rules and cannot require the agency to intrude into internal associational communications. *WSPR*, 141 Wn.2d at 266.

b) Elected Officials have strong associational privacy interest in political communications

West filed this lawsuit and has asserted that public records must be on Vermillion's personal email account because on Vermillion's personal website, he invites constituents to email him. But such communications are often political in nature and thus protected by association privacy.

"Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and

messages, and to do so in private. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2009). "A political campaign's communications and activities "encompass a vastly wider range of sensitive material" protected by the First Amendment[.]" *Perry*, 591 F.3d at 1158. This right to associational privacy, however, also applies to at least some communications between an elected official and constituent. *Eugster*, 121 Wn. App. at 808.[39] "Essential to the success of modern representation is the maintenance of an on-going dialogue between legislators and their constituents throughout the term of office." *Gordon v. Griffith*, 88 F. Supp. 2d 38, 47 (E.D.N.Y. 2000). In addition to allowing the official and constituent to privately discuss common political aims, associational privacy can also benefit the public at large allowing the constituent to report abuses of the executive, which might go unreported absent confidentiality. *Gordon*, 88 F. Supp. at 47. Thus, "[u]nclogged avenues of communication between constituents and legislators is essential" to our modern democracy. *Gordon*, 88 F. Supp. 3d at 48. This includes "New modes of communication resulting from the on-going technological revolution-such as electronic mail[.]" *Gordon*, 88 F. Supp. 3d at 48.

The non-public nature of these types communications in also inherent in the prohibition on the use of public resources for campaign-related activities. See RCW 42.17A.555; *see also Herbert v. PDC*, 136 Wn.

[39] Associational privacy interests under the First Amendment arise anytime two or more people seek to associate privately. *See Myrick v. Pierce County*, 102 Wn.2d 698, 704-05, 677 P.2d 140 (1984). While these rights are not limited to political associations, they provide the greatest protection when applied to records that show political associations. *See Eugster v. City of Spokane*, 121 Wn. App. 799, 808, 91 P.3d 117 (2004).

App. 249, 256, 148 P.3d 1102 (2006) (holding that prohibition "does not contain a de miminis use exception" and therefore was violated when a teacher sent an email from his school email account in support of a campaign).

"The compelled disclosure of political associations can have ... a chilling effect." *Perry*, 591 F.3d at 1160; *see also Snedigar*, 114 Wn.2d at 163 (recognizing privilege). "Compelled disclosure of internal campaign information can deter ... participation" in political campaigns and deter the "free flow of information within campaigns[.]". *Perry*, 591 F.3d at 162; *see also WSRP*, 141 Wn.2d at 266 (finding campaign regulation unconstitutional in part because it would require "extensive intrusion into internal communications" of a campaign). A broad unfocused disclosure obligations that captures associational communications cannot therefore pass constitutional muster, because such a request is by definition not tailored to further a substantial or compelling need.[40]

Vermillion has explained that he uses the website and email account not just for constituent contacts, but for other activities such a veteran's group that he is active in and for political campaigns, including two of his own and the campaign of a likeminded resident who Vermillion had hoped would join him on the Puyallup City Council. His private email account also would allow employees to contact him privately to report any abuse of

[40] *See, e.g., AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003) (holding that blanket disclosure violated associational privacy); *Perry*, 591 F.3d at 1165 (discovery request for all internal campaign communications barred because of associational privacy); *Eugster*, 121 Wn. App. at 804, 808 (discovery request for all communications between elected officials and private association barred because of associational privacy).

power but executive staff. Thus, there are legitimate reasons for Vermillion to use a personal email account.

c) A blanket disclosure requirement for all emails that "contain information relating to the conduct of government" would be overbroad

The PRA covers all writings that contain "information relating to the conduct of government or the performance of any governmental or proprietary function." RCW 42.56.010(3). This definition is broadly construed and agencies are encouraged by the "strict compliance" standards to err on the side of disclosure. *See Confederated Tribes*, 135 Wn.2d at 746 (must broadly construe this requirement); *Zink 1*, 140 Wn. App. 337 (strict compliance). There is no based for withhold records based on a lack of need. *Soter*, 131 Wn. App. at 900; RCW 42.56.080. Nor can information with redacted or withheld based on privacy, even if such information is not related to the conduct of government.[41]

If the PRA were interpreted to require elected officials to produce any records that related to the conduct of their agency, this would include a substantial amount of First Amendment protected communications. *See Johnson*, 156 Wn.2d at 363. Many First-Amendment-protected campaign-related communications will related to the conduct of government. Most if

[41] *See Mechling v. City of Monroe*, 152 Wn. App. 830, 845, 854-55, 222 P.3d 808 (2009) (city could not redact personal email address or other personal information from emails held by the city that discuss city business under privacy exemption for employee files or employment related records); *City of Lakewood v. Koenig*, -- Wn.2d--, -- P.3d --, 2014 WL 7003790 at *2 ¶8 (2014) (PRA does not have general privacy exemption). Moreover, it uses a definition of privacy taken from Restatement (Second) of Torts § 652D (1977) (§ 652D) which, applies when private but true facts are publicly disclosed. This definition only contemplates privacy interest when government already possesses private information; it is not sufficient to meet the authority of law requirement.

not all communications from constituents would likewise fall within this definition. Even purely personal communications could fit into this definition if, for example an elected official wrote a family member about an event at work. *See generally, e.g., Wick Communications Co. v. Montrose County*, 81 P.3d 360 (Colo. 2003) (ruling personal diary where supervisor wrote about problems with an employee was not a public records under Colorado law).

As Justice Gonzalez noted in *Hinton*, "[a]wareness that the Government may be watching chills associational and expressive freedoms[.]" *Hinton*, 179 Wn.2d at 877. Elected officials would be hesitant to use any form of written communication to discuss campaign issues or even personal issues that touch on work if the PRA were to apply to their personal records. This is thus exactly what the First Amendment protections are meant to avoid.

What qualifies as "information relating to the conduct of government" is also vastly broader than is needed to further the substantial interest in accountability because agencies cannot limit the records it produces based on need. Thus, if a record in a personal email account were deemed to contain information relating to the conduct of government and no exemption applied, the agency would have to disclose it even if disclosure is "clearly not ... in the public interest" and would cause "substantial[] and irreparabl[e] damage" to government accountability. *See Franklin County v. Parmallee*, 175 Wn.2d 476, 285 P.3d 67 (2012) (holding that the no-public-interest/substantial-and-irreparable-harm injunction

standard in RCW 42.56.540 is not a stand-alone basis for withholding a public record).

While the problem of overbreadth can be solved by a limiting construction of a statute, any limitation on the meaning of "information relating to the conduct of government" will also apply to records held by the agency. *See WSRP*, 141 Wn.2d at 282 (rejecting limiting construction that either undermined the statute or relied on "disingenuous" distinctions that had no statutory support). To pass constitutional muster, the narrowed definition would have to give "wide latitude" to allow the official to exercise associational rights; otherwise the chilling effect will remain because some will "steer far wide" of the zone of communications that could qualify as a public record. *See VED*, 161 Wn.2d at 484 (quoting *WSRP*, 141 Wn.2d at 265). The strict compliance standard, with the harsh penalties will work against any limiting construction and thus any "wide latitude" will have to be wider yet. Such a limiting construction for the definition of public record, when applied to records created by the agency, could not be squared with the Court's repeating holding that "virtually every document generated by an agency" is covered by the PRA.

Finally, any narrowing construction must also be definite enough from creating new problems with vague meanings. *See Baggett,* 377 U.S. at 371-74 (adding knowing element did not cure overbreadth because it was too vague). To survive a vagueness challenge, the obligation must be "sharply drawn" to provide clear guidance. *WSRP*, 141 Wn.2d at 266.

Here, the trial court tried to avoid First Amendment issues by interpreting the request to only cover emails that "relate[] to the City of Puyallup's business, not political business." CP 154:1-3 (RP 6/6 at page 16 lines 1-3). The court later clarified that its interpretation was not limited to city governance issues. CP 204:7-14 (RP 7/24 at page 18, lines 7-14). These distinctions between city business and political business are not sharp enough to give a candidate sufficient breathing room to exercise First Amendment rights, particularly because of the use "relating to." The distinction between city business and political business is not sufficiently definite to avoid the chilling effect of vague legislation. *See WSRP*, 141 Wn.2d at 259 (noting phrases "relative to" and "without direct association with" was unconstitutionally vague).[42]

d) The public's interest in accountability can be protected without applying current overbroad PRA requirements to personal email accounts

The public's interest in accountability also cannot justify applying the PRA to personal email accounts because accountability can be served

[42] Nor is it a viable option to adopt a constitutional privilege exemption such as the Court adopted in *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013). In that case, there was no question that the records at issue were "public records." *See Freedom Foundation v. Locke*, 127 Wn. App. 243, 110 P.32d 858 (2005) (holding that office of the governor was an agency so its records were public records). Thus, the in camera review needed to determine the privilege would not itself invade privacy rights. Second, the test for determining the application of the privilege is better defined and thus more easily applied. *See Perry*, 591 F.3d 1157 (noting broad case law governing attorney client privilege but spare authority defining First Amendment Associational privacy). Third, whether the PRA applies to personal email accounts could affect hundreds of thousands of persons, while executive privilege only affects the governor and a limited number of advisors, making a privilege more manageable. Compare Freedom Foundation with Nast, (noting complications of applying PRA to court records).

by narrower requirements that are constitutional. *Compare California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000) (finding California blanket primary statute violated association privacy rights where proffered interests of state did not justify intrusion on First Amendment rights because public's interest could be achieved by narrower provisions, such as a non-partisan blanket primary) *with Wash. State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) (upholding non-partisan blanket primary, as identified in Jones decision).

First, it may be that no additional laws are needed to hold city councilmembers accountable. When analyzing what disclosure is needed for accountability, it is first necessary to consider the role of a city councilmember. In a council-manager form of city government like Puyallup, an individual city councilmember has very little actual authority. The council as a whole hires the city manager, and the city manager is then responsible for exercising the city's authority. See RCW 35A.13.120 (defining "Interference by councilmembers). Councilmembers are prohibit from giving directions to staff, except to ask for information. RCW 35A.13.120 ("Except for the purpose of inquiry, the council and its members shall deal with the administrative service solely through the manager and neither the council nor any committee or member thereof shall give orders to any subordinate of the city manager, either publicly or privately."). Thus, the only real authority a councilmember has is as a member of the council and that authority is limited to setting policy through legislation and hiring and firing the city manager.

Existing law already regulates the councilmembers' official activities to assure accountability. The council itself can only discuss issues and act collectively in an open public meeting. See Open Public Meetings Act, chapter 42.30 RCW. If councilmembers take any "action," which includes discussion among a quorum of members, outside of an open meeting, they can be sued for violating the OPMA, which can include personal fines. See RCW 42.30.120 (noting fine).

Councilmembers are also subject to broad financial disclosure requirements and strict conflict of interest rules. See RCW 42.17A.700-.715 (financial disclosure); RCW 42.23.030 (prohibit conflicts of interest). Moreover, they must identify all persons who donate over $100 in a year. RCW 42.17A.240.

Any enforcement of these provisions in superior court will open up the councilmember's records to discovery requests, which then potentially allow access to a councilmember's personal email account. *See, e.g., Eugster v. City of Spokane*, 110 Wn. App. 212, 226–27, 39 P.3d 380 (2002) (remanding for discovery in OPMA case to determine if illegal meeting occurred); *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (2001) (review emails of newly elected school board members sent both before and after members were sworn in to determine if email exchanges violated the OPMA). The PDC also has extensive subpoena powers to enforce reporting requirements. *See Seeber*, 86 Wn.2d at 139. Finally, violations of these regulations can serve as ground for recall. *See, e.g., In re Recall of Ward*, 175 Wn.2d 429, 438-39, 282 P.3d 1093 (2012)

(OPMA violation legally sufficient to support recall); *In re Recall of Davis*, 164 Wn. 2d 361, 369, 193 P.3d 98 (2008) (allegation that single commissioner improperly tried to exercise authority of full commission was sufficient to support petition for recall).

In light of a councilmember's very limited authority, the existing regulations mandating disclosure of financial and campaign contributions, and enforcement tools that allow for discovery, the public already has significant tools to ensure that councilmembers do not abuse their very limited authority. The use of the PRA to intrude into personal email accounts for no reason at all is not necessary for accountability.

If some access to personal email accounts was necessary for accountability, the PRA could be amended to provide for additional requirements and enforcement tools that comply with constitutional standards. This would be consistent with how the law normally addresses claimed constitutional problems. *Compare Miles*, 160 Wn.2d at 248 (finding statutory subpoena constitutionally deficient) with Laws of 2011, Ch. 93 (adopting new subpoena process in response to *Miles* that remedies constitutional deficiency).

First, elected officials and public employees could be required to copy a city email account or forward emails to a city account anytime they use a personal email account for city business. *See, e.g.*, Presidential and Federal Records Act of 2014, Public Law 113-187 (amending 4 USC 2209 and 2911 to prohibiting use of non-official email account for agency

business unless official account is copied in the email or email is forwarded to official account within 20 days).

Second, the definition of public record could be amended provide a more definitive definition of public record that is tied directly to official conduct. See e.g. RCW 40.14.010 (defining "public record" for retention purposes to include all records "made by or received by any agency of the state of Washington in connection with the transaction of public business").

A Florida court, applying a definition of public record similar to the definition is RCW 40.14.010, found that an email sent from a personal email account by a sitting mayor to her supporters touting her past accomplishments was not a public record. *See Butler v. City of Hallandale Beach*, 68 So.3d 278 (2011). Such an email is a classic example of a political communication that should be protected by associational privacy and should not be a public record under Washington law either. But how would one determine that it does not relate to the conduct of government? Under Florida's definition of "public record," the determination was simple because it could be determined based on why the email was sent. *See also, e.g., Wick*, 81 P.3d at 364-66 (applying a similar definition and determining personal diary created by a supervisor, where he recorded issues with an employee, was not a public record).

With these two changes, elected officials could determine at the time of creation or receipt whether an email qualified as a public record, and then when appropriate, copy the official's agency account or forward it to that

account. This would ensure the agency has access to all public records without intruding on anyone's private affairs.

Finally, the PRA could be amended to provide for a subpoena process where a neutral magistrate, upon a prima facie showing that an official had not complied with the copy/forward requirement, could issue a subpoena for emails from a personal email account. This process could incorporate a form of the *Snedigar* test and allow for in camera review upon a proper showing to ensure the protection of associational privacy rights.

In summary, if the PRA were interpreted to apply to personal email accounts, it would violate the associational privacy rights of those elected officials. While accountability is a substantial public interest that might justify some level of intrusion, the PRA as currently drafted would be overbroad and cover a substantial amount of protected communications that are not needed for public accountability. Moreover, alternative methods could be used to serve accountability without any overbroad intrusion. Thus, the Court should seek to interpret the PRA in a way that exclude personal email accounts from the definition of "public record."

D. The Court Should Avoid the Constitutional Problems Inherent in the Trial Court's Ruling by Defining the Term "Public Record" to Exclude Personal Email Accounts.

In contrast to the interpretation of "public record" used by the trial court, the defendants have proposed interpreting the term to exclude records in a personal email account, which avoids the constitutional complications raised by the trial courts interpretation. This narrower definition would be

consistent with how the Court defined the term in *Nast v. Michaels*[43] and *Federal Way v. Koenig*; it is consistent with the actual language of I-276; and unlike the trial court's interpretation, this narrower interstation furthers the purpose of the PRA by protecting associational privacy, which is essential for the public to maintain control of government agencies. It thus comports with the Court's doctrine of constitutional avoidance and should be adopted by this Court.[44] *See State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972) ("Where a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so."). Finally, any hole in public accountability caused by this narrower definition can be remedied by legislative amendment.

1. Under *Nast v. Michaels*, Records in Personal Email Accounts Are Not Held by an Agency and Can thus Be Excluded from the Definition of "Public Record"

In *Nast v. Michaels*, the Court squarely addressed the issue of whether court records qualified as "public records" under the PRA. *Nast*, 107 Wn.2d at 305. Under the separations of powers doctrine, courts have inherent authority over court records. *Yakima County v. Yakima Herald*, 170 Wn.2d 775, 795, 246 P.3d 768 (2011). The Court perceived that if the PRA were applied with Court records it would interfere with this inherent

[43] *Nast v. Michaels*, 107 Wn.2d 300, 730 P.2d 54 (1986)
[44] Although the issue of records on personal devices was raised in *O'Neill v. Shoreline*, 170 Wn.2d 138 and *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014), neither opinion addressed the constitutional issues.

authority and create uncertainty with regard to existing common privacy protections that apply to court records. *Nast,* 107 Wn.2d at 305-06. Thus, seizing on the fact that "courts" are not listed within the definition of "agency," the Court ruled that court records are not agency records. *Nast*, 107 Wn.2d at 305. The Court then went on to hold that although the court's records in King County were actually held by a separate department that did squarely fit within the definition of "agency," the Court's inherent authority justified ruling the court records were still not public records. *Nast*, 107 Wn.2d at 305-06.

Here, a much stronger case can be made for concluding records in personal email accounts are not public records because the definitions in the original public disclosure act expressly distinguished between agencies and individuals in its definition of "person" and then defined "candidates" as individuals. *Compare* RCW 42.17A.005(2) (defining agency) *with* .005(7) (candidate) and .005(35) (person).[45] Such distinctions compel finding that individuals are not agencies. *See Seeber*, 96 Wn.2d at 139-40 (finding the people must have meant different provisions of I-276 to have different meanings when different language is used).

Thus, by recognizing records held by individuals in personal email accounts are not public records because they are not agency records, the

[45] As noted, the PRA was enacted as part of the public disclosure act, which contained these same definitions. See Laws of 1973, §2(1) (agency); (5) (candidate); (19) (person).

Court is applying *Nast* and avoiding constitutional issues that would arise if personal accounts were subject to the PRA as currently drafted.[46]

2. By Protection the Privacy of Elected Officials, the Court Furthers the Purposes of the PRA

As noted, the purpose of the PRA is to protect a free society, and the essential ingredient of that free society is the right to privacy. This right originated as a reaction to the efforts of the English Crown to search and seize political papers to quiet dissent.

This potential abuse of disclosure laws has repeatedly played out in history, as seen during the civil rights movement and even today in fights between supporters of limited taxes and big government. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958); *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 166, 157 P.3d 831 (2007) (Johnson, J.J., concurring) (noting that a "legal action ostensibly for disclosure" can be used "for the purpose of restricting or silencing political opponents").

Moreover, to further the PRA's goal of allowing the people to "maintain control over the instruments that they have created," a politician in office is often an essential tool to get other like-minded officials elected. This is the primary reason for Councilmember Vermillion's stance in this case. As he indicated in his declaration, he used in personal email account in the last election cycle to support a like-minded city resident seeking to join him on city council. The trial court's interpretation would cut off any

[46] When the Court revisited the issue in *Federal Way v. Koenig*, it noted that this decision avoided any separation of powers issues. *Federal Way v. Koenig*, 167 Wn.2d at 348 n.2.

such effort at the knees by dissuading those who distrust the government from communication with Vermillion.

VII. CONCLUSION

The disclosure requirements in the PRA are fundamental and necessary tools for protecting our freedom, but disclosure requirements should not be interpreted in a manner that erode or undermines the most essential element of that freedom – our right to privacy. This does not mean we are doomed to unaccountable governments, however. The PRA can be amended to allow for a constitutional intrusion into the personal computers of elected officials. But the Constitution does not allow for the short-circuiting of that process, not even for something as important as the PRA. Justice Millard described the risk of this type of incremental erosion by using an unattributed quotation from Lord Alfred Tennyson's poem, "The Idylls of the King":

> ... the little rift within the lute,
> That bye and bye will make the music mute,
> And, slowly widening
> Ever silence all."

See State v. McCollum, 17 Wn.2d 85, 101, 136 Wn.2d 165 (1943) (opinion of Millard, J.)

The PRA is important, but it is not the "authority of law" that justifies silencing the right to privacy that has for nearly 250 years been recognized as the essential theme of our free society. Every criminal that has been ever set free because of an inadequate warrant or other blunder has set free so that we the people enjoy our privacy and enjoy the ability to

change government when necessary to protect that privacy. The Court should therefore adopt an interpretation of the PRA that protects constitutional rights to privacy and should reverse the trial court's summary judgment order.

RESPECTFULLY SUBMITTED this 10th day of February, 2015.

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OFFICE RECEPTIONIST, CLERK

To: Ramsey Ramerman
Cc: Arthur West; Kathleen J. Haggard; Steve Kirkelie
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90912-1 West v. Vermillion & City of Puyallup

Brief of Appellant Steve Vermillion (corrected)*

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