No. 90875-3

IN THE WASHINGTON STATE SUPREME COURT

(No. 44852-1-II COURT OF APPEALS, DIVISION TWO)

GLENDA NISSEN, an individual,

Respondent,

v.

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

Petitioners

v.

PROSECUTOR MARK LINDQUIST,

Petitioner

NISSEN'S ANSWER TO PETITIONS FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent is the Plaintiff/original Appellant Detective Glenda Nissen, the requestor of the public records at issue.

II. ISSUES PRESENTED FOR REVIEW

Detective Nissen disagrees that review is appropriate by this Court of the Division Two decision, but if review is accepted, this Court should address the refusal of Division Two to award fees and costs for the agency's failure to provide an appropriate statement and explanation of exemptions.

III. ARGUMENT

Division Two, in a well-reasoned opinion, held that dismissal of the PRA case under CR 12(b)(6) was inappropriate here, and has remanded for further development of the record to more fully address the precise issues in this case. Petitioners' arguments to this Court, and below, are circular, claiming records are "personal" and thus not "public" and allegedly that a court cannot review records in camera or obtain them because of their "personal" nature. While a review by this Court may need to occur some day in this case, or another like it, it would be premature at this stage to review this case and address the issues Petitioners suggest. Review should be rejected. The parties should be allowed to develop the factual record, and the trial court should be allowed to review in camera

the text messages and unredacted phone records to decide if the records are public records and if portions of them are exempt. Petitioner Lindquist has finally admitted the text messages still exist and have been maintained. See Lindquist's Petition at 2 n.1. Trial courts, and appellate courts, should be afforded access to the records about which they are asked to rule, and the circumstances of their creation, ownership, use and retention prior to making the broad holdings Petitioners ask this Court to make now without such access and information. Parties and the courts are not required to accept the characterization of Lindquist or his agencies as to these facts.

This Court does not need to step in to decide if in camera review of records is appropriate here. In camera review is a mainstay of PRA litigation, and our courts are entrusted to review records alleged to be public records in camera and make determinations whether they meet the definition of a public record and, if so, whether or not some portion is exempt. Petitioners have not shown, and cannot show, that a trial court's in camera review of these records here under the circumstances of this case violate anyone's constitutional rights. In camera review should be allowed and the record more fully developed before another appellate court is asked to explore the issues suggested by Petitioners here.

A. Lindquist Deliberately Used a Personal Cell Instead of His Agency Cell to Transact Agency Business.

To be a public record, a record must be (1) a "writing", (2) "containing information regarding the conduct government or the performance of any governmental or proprietary function", and be (3) "prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3).

Rather than deal with the "what ifs" and parade of horribles or the result that might be declared in a case involving other level employees or other facts, a court must apply the above three-part test of a public record to these records under the facts established thus far for this case. Review is not appropriate to address this test until a record has been more fully developed as Division Two has ordered, and it will be a poor vehicle to address the broader issues with an undeveloped record.

This case involves the elected prosecutor for Pierce County Mark Lindquist, an attorney, who was provided a government-issued and government-paid-for cell phone but who nonetheless chose not to use that phone and to use his personal cell phone (the "861 cell phone") for agency business. CP 1-9, 24-25, 375-399.

There were 46 minutes worth of calls on 6/7/11 on the 861 cell phone that Lindquist concedes may have been work-related. CP 25-26, 32-

36. There were 72 minutes worth of calls on 8/2/11 on the 861 cell phone that Lindquist concedes may have been work-related. **Id.** There were 41 minutes worth of calls on 8/3/11 on the 861 cell phone that Lindquist concedes may have been work-related. **Id.** That is more than two and a half hours of potentially work-related calls on the 861 cell phone just on these three specific days. During this same time period, there was a total of **less than 10 minutes per month** of calls to anyone and for any purpose on Lindquist's agency-provided cell phone. CP 6-8, 24. It cannot reasonably be disputed that Lindquist chose to use his personal cell instead of his government cell to conduct agency business. CP 5-8, 24-26, 345-349, 374-402, 453, 681-682.

Lindquist also concedes there were at least 16 work-related texts sent from or received by him on his personal cell between 8/2/11 and 8/3/11, the time that someone contacted the Tacoma News Tribune and convinced it to alter its story and delete the sentence that no suspect had been identified in the death threat investigation. CP 81, and CP 26, 40, 63-64, 346-347. Lindquist chose not to use his government-provided cell to send these 16 text messages. Lindquist has now conceded these text messages still exist and have been maintained by his provider. Lindquist's Petition at 2 n.1. The County redacted some of the phone numbers from the record of

the text messages and from the phone records it produced and the County provided none of the text message contents. See, e.g., CP 345-349.

B. Lindquist was on Notice that Using a Personal Cell to Conduct Agency Business Created Public Records and Subjected the Device to Access by the Agency.

It also cannot be ignored that the public official who chose to use his personal phone to make these work-related calls and send these work-related texts was an attorney, and the head of the prosecuting attorney's office and the elected head of that agency. Nor can it be ignored that for many years prior to Lindquist making the choice to use his personal device for these work-related calls and texts officials had been warned that use of a personal device for agency business results in records that are public records being stored on the personal device and subjecting the personal device to access by the agency to retrieve those records. See, for example, CP 1-9; see also **O'Neill v. Shoreline**, 170 Wn.2d 138, 240 P.3d 1149 (2010); **O'Neill v. City of Shoreline**, 145 Wn.App. 913, 187 P.3d 822 (2008); **Mechling v. Monroe,** 152 Wn. App. 830; 222 P.3d 808 (2009); see also AGO Amicus Br. at 1-6. **The record in this case shows that Lindquist himself was informed** by former Pierce County Prosecutor Ladenburg during a mediation **on 7/26/11, that his use of his personal cell phone created public records that had to be disclosed**. CP 1-9. July 26, 2011, was **six days before Lindquist sent and received work-related**

texts from his 861 cell phone on 8/2/11. AGO Model Rules, in place years before Lindquist made those work-related calls and texts from his personal cell, recommended employees and officials forward communications on their personal devices to agency servers and agency repositories to prevent their personal devices from needing to be accessed (see AGO Amicus Br. at 1-6)– a measure Lindquist chose not to use here.

Further, the **O'Neill v. Shoreline** decision was decided in the Division One Court of Appeals in 2008 and in this Court in 2010 putting Lindquist on notice that the original version and metadata of an agency-related communication sent to a personal email and reviewed on a personal laptop was a public record that needed to be maintained and provided, and that the personal device could be subject to search by the agency for retrieval. **O'Neill**, 170 Wn.2d 138; **O'Neill**, 145 Wn.App. 913.. The **Mechling v. Monroe** decision was issued by the Court of Appeals in 2009 putting Lindquist on notice that personal emails of public officials related to agency business could be public records subject to retrieval and production. **Mechling,** 152 Wn. App. 830.

Lindquist and all public officials were on notice in 2011 that using a personal cell for agency business created public records on that device and subjected that device to access by the agency to retrieve such records. Lindquist was on notice in 2011 when he chose not to use the government-

provided cell phone and instead chose to use his personal cell to make numerous work-related calls and send numerous work-related texts that he was creating public records through his personal cell usage, that those records would need to be maintained, and that his personal cell and records would need to be accessed by the agency to retrieve those records if they were requested. He was on notice six days before he sent the text messages in question that use of his personal cell for work-related phone calls and texts created public records that had to be provided. CP 1-9.

This case is not about the ballpark janitor husband who texts his wife complaining about garbage at the ballpark or the prosecutor wife texting her husband that she will be late for dinner because of work, nor the other innocuous uses discussed by Petitioners. This case further does not prevent agencies from allowing employees to use personal devices to save on costs so long as employees follow the Model Rule guidelines and retain and forward work-related texts and records to the agency for production. If an employee took steps to either not use a personal device for work business or to assure the work-related records were forwarded to an agency location, there would not be the risk of intrusions Petitioners allege because the employee would have provided the public record to the agency to produce without need of his or her personal device or records.

This is a case about a lawyer who surely knew the implications of using his personal cell for agency business (see, e.g. CP 1-9 and the two **O'Neill** and one **Mechling** decisions) yet did so anyway, intentionally, leaving the government cell in the drawer unused and not forwarding the work-related records to the agency for production. Instead, he deleted texts from his phone as soon as one day after they were sent (compare CP 322, showing request for 8/2/11 texts was made on 8/3/11, and the County and Intervenor's claims these texts were deleted and could not be produced contained throughout their briefing) and took no steps at the time to provide a copy to the agency. If Lindquist had brought in his personal laptop to prepare all of his official records for the agency ignoring the government-provided desktop computer sitting on his desk, a court would likely have no trouble finding that intentional—and unnecessary—usage of a personal device did not preclude those records from becoming "public records" under the three part test. Lindquist's intentional—and unnecessary—usage of his personal cell for his work-related calls and texts similarly cannot prevent these records from being public records.

C. The Records Here are Public Records.

Turning to the remaining two parts to the test for public records – both sets of records "contain[] information regarding the conduct government or the performance of any governmental or proprietary

function". RCW 42.56.010(3), the second part of the test. The phone records show the dates, times, duration and numbers called by Lindquist or the dates, times, duration and numbers of calls received by Lindquist all of which he concedes were work-related calls. The text messages will show the actual texts sent by Lindquist or received by Lindquist which he again concedes are work-related texts. Thus both sets of records contain "information" regarding the conduct of government as they contain information about the elected prosecutor's performance of official duties.

If these records are either "prepared," "owned," "used" or "retained" by the agency, then they are public records regardless of the nature of the device on which they were created, used, or retained.

1. The Text Messages

Agencies act through the actions of their employees and officials. While an agency might "own" or "retain" a record as an entity, an entity cannot really "prepare" or "use" a record except through the actions of the individuals who run and make up the agency. Thus an agency can "use" a record when the elected head of the agency "uses" that record. And the agency "prepares" the record when the elected official prepares the record.

Here, Lindquist prepared the work-related texts he sent, and he "used" the work-related texts he received. As the agency acts through its officials, Lindquist's preparation of the texts and use of the texts is

preparation and use by the agency. Further, Lindquist's receipt of texts by others within the agency, or sending of texts to others in the agency, mean that others within the agency, beyond Lindquist, have prepared or used the same texts, and their actions are also the acts of the agency. If the other recipients or senders used their government-provided cell, instead of a personal one as Lindquist did, the agency further might have direct retention of the texts as well as clear ownership of the texts as the agency owns the texts sent and received from the agency-provided cell phones. (Since the case was decided on a CR 12(b)(6) motion before any factual development, the record on these issues has not been developed, making remand as Division Two has ordered appropriate.)

Also, Nissen has argued, and Petitioners have not effectively rebutted, that Lindquist, as the elected prosecutor is the "office" of the Prosecutor and so Lindquist is the "agency". RCW 42.56.010(1); Br. of App. at 29-34. In this case, as Lindquist is the elected prosecutor – the head of the agency, the speaking agent for the agency, the one who decides what the agency will and will not do, and the one through which the agency acts, Lindquist is "any office ... thereof" of the local agency that is the Prosecuting Attorney's Office, and thus under RCW 42.56.010(1), Lindquist is the agency. Lindquist clearly "owns" the text messages sent or received on his personal cell. And as he is the "agency",

the "agency" in this case also owns them as well. (The agency may also retain and own them by virtue of their having been sent to an agency-provided cell phone or from an agency-provided cell phone, a fact that was not explored due to the CR 12(b)(6) dismissal that has now been overturned..)

The records have also been retained at both Lindquist's and the County's specific direction, (**see** CP 47-48, 59, 65, 90-99,111-113, 251, 617-18, 798-801; Lindquist's Petition at 2 n.1) and thus the records have also been "retained" by the agency.

A court need only find one of the verbs to have been met—prepared, owned, used or retained. Prepared and used cannot be questioned. The ownership issue is also established making the arguments related to unauthorized access meritless. Lindquist knew that by choosing to use his personal cell to send work-related texts and by refusing to use the government-provided cell phone or to forward the texts to a government cell or server for storage, that he was creating a public record on his personal cell and that he could be made to provide those texts to the agency if they were requested. (**See, e.g.**, CP 1-9.) Lindquist created the problem about which he now complains. It could have been avoided had he but used his government-provided cell or forwarded the work-related texts to a government server or device for retention and production.

Lindquist cannot deliberately create public records on his personal device and then complain that he now must provide access to them.

2. The Cell Phone Records

The cell phone records are also "owned" by Lindquist, and as above, as Lindquist is the agency the agency owns the records. Lindquist at the time of the request "retained" the records as there were a number of PRA requests some of which came after copies had been obtained. CP 173 (confirms on 8/12/11 that PRO Glass has in her possession unredacted billing records and is determining what portions are exempt), CP 175 (confirms on 8/18/11 that the County is determining what calls are work-related in those unredacted bills), CP 308-320 (8/29/11 and 9/13/11 requests for unredacted phone records and correspondence with Glass re same). The records need not have been prepared or used by Lindquist to be a public record as they were owned, and only one verb is required to be shown to apply.

But as to the cell phone bills a court need not even reach the issue of whether or not Lindquist is the agency or whether the agency owned the records because in this case the agency actually possessed the unredacted billing records at a time a PRA request for them was issued. See CP 173-175, 308-320. Thus the agency itself "retained" the records at that time and the agency also "used" those records to assess the application of the

PRA and a PRA request for them and to perform redactions. CP 173-175, 308-320, 441, 445 and Correct. Br. of Resp. at 4.

The record is clear the agency did possess unredacted billing records. The Public Records Officer in a sworn declaration admitted she reviewed the unredacted records to redact the "personal calls." See CP 445 and Corrected Br. of Respond. at 4. Lindquist voluntarily brought in his unredacted records to allow the agency to review them. **See, e.g.**, CP 173, 175, 445 and Correct. Br. of Respond. at 4. This is not surprising. Nissen's own personal cell phone records had been requested in a PRA request during the litigation, and Nissen had committed to production. CP 149-150, 248-249. And at a 7/26/11 mediation with former Pierce County Prosecutor Ladenburg acting as mediator the County and Lindquist had been advised by Ladenburg that the records were public records if they contained work calls and should be released. CP 1-9.

D. The Constitutional and Federal Statutory Restriction Arguments Do Not Bar Production Here.

Petitioners allege constitutional violations by access to or production of the text messages or phone records, but those arguments ignore the precise facts at issue here. The agency did not search Lindquist's garbage or invade his home or tap his phone to retrieve these records. The agency did not seize his phone and pretend to be him and communicate with

others. Lindquist voluntarily brought in his cell phone records with the consent that work-related records be released, and both he and the agency have secured the text messages on the Verizon servers should those be deemed to be public records. CP 47-48, 59, 65, 90-99, 111-113, 251, 617-18, 798-801. Lindquist has not actually said he would refuse to authorize access to the text messages if found to be public records, and it is reasonable to expect the elected prosecutor, who created this problem for his agency by not retaining the texts on his device or using his government-provided cell to send and receive them in the first place, would facilitate access to these conceded work-related texts should they be held to be public records. A trial court has the right to perform an in camera review of the records to determine if they are records subject to disclosure or not. This Court should not accept review to address the broad Constitutional arguments and claims, some made below only by Amici, when the subject here provided the cell records and has never been faced with a request or order by the court to allow for their in camera review.

1. The Stored Communications Act Does Not Prevent In Camera Review or an Order to Lodge Records with the Court.

The Stored Communications Act (SCA) does not prevent in camera review or an order to lodge the records with the trial court for in camera review. Text data stored exclusively with a third party provider is not

shielded from discovery under the SCA. **Theofel v. Farey-Jones,** 359 F.3d 1066 (2003), **Crispin v. Christian Audigier, Inc.**, 717 F.Supp. 2d 965 (C.D. Cal. 2010), and "*A User's Guide to the Stored Communications Act, and A Legislator's Guide to Amending It" Orin S. Kerr*, 72 Geo. Wash. L. Rev. 1208, 2003-2004. "Remote computing service" ("RCS") data does not have the same privacy protections as data kept by an e-mail service provider. RCS may be accessed via a court order, rather than under the more stringent standards applicable to electronic communication services ("ECS"). 18 U.S.C. §§ 2703(b), 2703(d); **Low v. LinkedIn Corp.**, 900 F.Supp. 2d 1010 (2012). A "remote computing service" is defined in the SCA as "the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. §2711(2). The 16 work-related texts at issue in this case have been read by Lindquist and now are stored at Verizon separately from any phone bills. They are governed by the rules for RCS, and not the rules for ECS. 18 U.S.C. §§ 2702(a)(2), 2703(b), see also **Steve Jackson Games, Inc. v. U.S. Secret Serv.**, 36 F.3d 457, 461-463 (5th Cir. 1994). Content retained beyond 180 days is treated under distinct provisions from those held 180 days or less. 18 U.S.C. § 2703(a). Lindquist has stored the texts with Verizon for more than 180 days. The data has not expired in the normal course, meaning the ECS standard is not applicable and the RCS

standard is controlling. A warrant is not necessary to obtain the texts. A trial subpoena is sufficient. 18 U.S.C. § 2703(b)(1)(B)(i). Text messages are discoverable and may be also produced by consent from the sender or recipient without violating the SCA. **In re Facebook, Inc**., 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

The SCA does not preclude in camera review, or an order to lodge the records for in camera review, and it is not a basis for this Court to accept review of this case at this time.

2. Lindquist Did Not Have A Reasonable Expectation of Privacy in the Records at Issue Here.

The Fourth Amendment arguments pre-suppose that Lindquist had a reasonable expectation of privacy in the records at issue here. As explained above, he did not. He was on notice in 2011 when he sent and received the 16 work-related texts and sent and received the calls he concedes may be work related that the records here could be public records and that any device on which they were stored could require agency access to retrieve them.

Any constitutional privacy interest further depends upon a subjective and reasonable expectation of privacy in private affairs. **State v. Goucher,** 124 Wn.2d 778, 881 P. 2d 210 (1994). Matters of legitimate public interest outweigh offensive public scrutiny of private life. AGO 1983 No. 9, citing

to **Hearst Corp. v. Hoppe,** 90 Wn.2d 123, 580 P.2d 246 (1978). The "special needs" of a government workplace justifies a warrantless examination of digital communications under search and seizure laws. **City of Ontario, Cal. v. Quon**, 560 U.S. 746, 130 S. Ct. 2619, 2630 (2010). Detective Nissen is seeking work-related text communications of the elected prosecutor. Setting aside the fact that privacy is not a stand alone exemption and Petitioners have not identified an applicable exemption, under the definition of privacy in the PRA, the text content would have to be highly offensive information that is truly secret and of no legitimate concern to the public in order to apply the definition of privacy under the PRA. RCW 42.56.050. **Van Buren v. Miller**, 22 Wn. App. 836, 592 P.2d 671, review denied, 92 Wn.2d 1021(1979); **Cowles Publ'g Co. v. State Patrol,** 109 Wn.2d 712, 721, 748 P.2d 597 9 (1988); **Seattle Firefighters Union Local No. 27 v. Hollister,** 48 Wn. App. 129, 135, 737 P.2d 1302, review denied, 108 Wn.2d 1033 (1987); **Bellevue John Does 1-11v. Bellevue Sch. Dist.,** 164 Wn.2d 199, 212-12, 189 P.3d 139 (2008)

An elected prosecutor's work-related texts cannot meet the definition for an invasion of privacy, statutory or constitutional. Public officials are held to a high standard because the public has the right to judge an official's performance and safeguard against corruption. **King County v.**

Sheehan, 114 Wn. App. 325, 57 P.3d 307 (2002). That is precisely the purpose of Detective Nissen's request. The public has a legitimate interest in the content of those work-related messages, and the elected prosecutor similarly has no legitimate expectation of privacy in the content of those work-related texts, and certainly not in August 2011 when these texts were sent and received.

In camera review provides an appropriate safeguard to address any legitimate privacy concerns of Lindquist. In camera review is the process identified in the civil rules for addressing privilege claims. CR 26(b)(6). In camera review is designed to effectively enforce the constitutional right of a plaintiff to civil discovery. **King v. Olympic Pipeline Co.**, 104 Wn. App. 338, 362, 16 P.3d 45 (2000), citing Wash. Const. art. I § 10. In camera review is essential to addressing the constitutional interests at stake. **Snedigar v. Hoddersen**, 114 Wn.2d 153, 786 P.2d 781 (1990). In camera review is proper in a public records case. RCW 42.56.550, **Limstrom v. Ladenburg**, 136 Wn.2d 595, 963 P.2d 869 (1998).('The only way that a court can accurately determine what portions, if any, of the file are exempt from disclosure is by an in camera review of the files").

Petitioners have not established grounds for review by this Court of this case, on this record, at this time. Division Two appropriately has

remanded for further fact finding and an in camera review of the records at issue. That process should be allowed to occur. Review should be denied.

IV. CONCLUSION

For the foregoing reasons, Detective Nissen asks that this Court deny the Petitions for Review.

RESPECTFULLY SUBMITTED this 5th day of November, 2014

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 5, 2014, I served by email pursuant to agreement the foregoing document and this certificate of service on:

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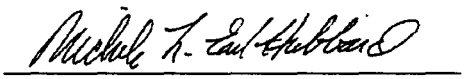
Dated this 5th day of November, 2014, at Shoreline, Washington.



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Attached for filing please find Respondent Glenda Nissen's Answer to Petitions for Review in case number 90875-3, Glenda Nissen v. Pierce County, et al.

The attorney filing this document is Michele Earl-Hubbard, WSBA #26454, attorney for Respondent Glenda Nissen. My contact information is below.

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