No. 44852-1-II

IN THE COURT OF APPEALS, DIVISION TWO

GLENDA NISSEN, an individual,

Appellant,

v.

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

Respondent

v.

PROSECUTOR MARK LINDQUIST,

Intervenor/Respondent

APPELLANT'S AMENDED ANSWER TO AMICUS CURIAE BRIEFS OF ATTORNEY GENERAL'S OFFICE, WASAMA, WAPA, AND PUBLIC EMPLOYEE UNIONS PURSUANT TO COURT'S FEBRUARY 25, 2014, ORDER

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I. LEGAL AUTHORITY AND ARGUMENT

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).

There are two categories of records at issue here: cell phone billing records for the 861 cell number and text messages sent to or from the 861 cell phone. There is no dispute both categories are "writings" meeting part (1) of the definition. Amici newspaper associations and WCOG agree both categories of records here meet all three parts of the test and are public records. Amici Attorney General's Office ("AGO") agrees the text messages could be public records but disagrees the cell phone bills should be. The other Amici ("other Amici") raise a parade of horribles arguing why neither should be deemed public records based largely on facts not present here and grounds not really at issue here or an impermissible narrowing of the PRA.

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, this Court must apply the above three-part test of a public

record to these records under the facts of this case. It need not, and should not, reach the broad Constitutional and other claims the other Amici raise on theories involving other types of public employees, and facts dramatically different than those here.

This case involves the elected prosecutor for Pierce County Mark Lindquist who was provided a government-issued and government-paid-for cell phone but who nonetheless chose not to use that phone and to use almost exclusively his personal cell phone (the "861 cell phone") instead 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 were 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 were work-related. **Id.** There were 41 minutes worth of calls on 8/3/11 on the 861 cell phone that Lindquist concedes were work-related. **Id.** That is more than two and a half hours of 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 the vast majority of the time. 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.

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 the Washington State Supreme 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 v. Shoreline**, 170 Wn.2d 138, 240 P.3d 1149 (2010) and **O'Neill v. City of Shoreline**, 145 Wn.App. 913, 187 P.3d 822 (2008). 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 v. Monroe,** 152 Wn. App. 830; 222 P.3d 808 (2009).

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 firefighter husband who texts his teacher wife that he will be late to dinner because of a fire, or the other innocuous uses discussed by the other Amici. 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 the other Amici address 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 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, this 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. AGO discusses "creation" of a record as in an employee created a record as a public record by owning, using, retaining or preparing a writing containing information about a governmental purpose. This should not be read to mean that preparation of a record is a more important or exclusive requirement to find a record to be a public record as this is not supported by the language of the PRA or case law. An individual employed by the agency can "use" or "own" or "retain" a record on a personal device that he or she never prepared and it can still be a public record of the agency. In **O'Neill**, the Deputy Mayor received an email from a constituent at her personal email address which she opened and read solely on her personal laptop computer after working hours from her home. The email was a writing and it contained information relating to the conduct of government or the performance of a proprietary function as it related to a zoning mater that would be addressed at an upcoming Council meeting. The Deputy Mayor read this email to herself on her personal laptop and this reading of the email was use of the record. She owned the email as she received it on her personal email account and it was stored to her personal laptop computer. She retained it – for a time – before she claimed she inadvertently deleted it after it was requested through a PRA request. The Deputy Mayor did not create this record so it was not "prepared" by her.

Nonetheless the Division One Court of Appeals and the Washington State Supreme Court held the record, and its metadata, were public records – not because the Deputy Mayor later mentioned it at a Council meeting but because the email itself related to the conduct of government and the Deputy Mayor used it by reading it to herself at her home on her laptop after hours. The Deputy Mayor did not forward the metadata of this email to a City email address and yet metadata, residing solely with the original email on the Deputy Mayor's personal computer and stored by her internet service provider to its server, was also declared to be a public record of the agency. The City never possessed the metadata on any City device or via any City email as the metadata remained solely on the Deputy Mayor's original personal email and with her private email service provider. When the Deputy Mayor deleted the original, and the sole copy was potentially on the server of her personal internet service provider, the Supreme Court remanded the case to the trial court for the agency to search the laptop and try and recover the original email and its metadata or locate it from the private internet provider.

If only records created by the employee could be a public record, then the PRA would not use the words "owned, used, retained" and would only use the word "prepared." And the **O'Neill** case would not have found an email which was only read by an official and was not prepared by an

official, and the metadata that resided solely on the personal computer and the internet service provider's server to be public records. This Court is bound by the Supreme Court's reasoning in **O'Neill** and the plain language of the PRA. So long as the record "contain[s] information relating to the conduct of government or the performance of a proprietary purpose" it can become a public record regardless of whether or not the employee "created" the record.

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. (The trial court barred Nissen from engaging in any discovery to explore these issues, which was error, and requires remand for such exploration.)

Also, Nissen has argued, and no party or Amici has 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 trial court's barring of discovery.)

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, 618, 798-801) and thus the records have also been "retained" by the agency.

The 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 this 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.

Despite recent protestations, 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.

The other Amici argue a host of alleged 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. 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, 798-801. Lindquist has not said he would refuse to authorize access to the text messages if found to be public records, and as the AGO argues, 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 or subject to in camera review for such a determination. The Court should not reach the broad Constitutional arguments and claims, some made only by Amici, when the subject here provided the cell records and has never been asked by the agency or court to lodge the text messages for in camera review or to produce them if deemed to be public records.

RESPECTFULLY SUBMITTED this 7th day of March, 2014

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on 3/7/14 I served by email pursuant to agreement the foregoing document and this certificate of service on:

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Dated this 7th day of March, 2014, at Seattle, Washington.

Michele Earl-Hubbard

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March 07, 2014 - 3:44 PM

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Appellant's Amended Answer to Amicus Briefs pursuant to 2/25/14 Order

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