No. 44852-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION TWO

GLENDA NISSEN, an individual,

Appellant,

v.

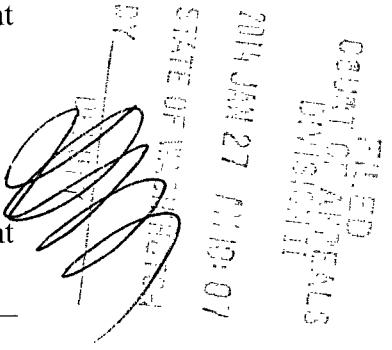
PIERCE COUNTY, a public agency; PIERCE COUNTY PROSECUTOR'S OFFICE, a public agency,

Respondent

v.

PROSECUTOR MARK LINDQUIST,

Intervenor/Respondent



AMICUS CURIAE BRIEF OF
WASHINGTON COALITION FOR OPEN GOVERNMENT, ALLIED DAILY NEWSPAPERS OF WASHINGTON AND THE WASHINGTON NEWSPAPER PUBLISHERS' ASSOCIATION
IN SUPPORT OF APPELLANT

ORIGINAL

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I. INTRODUCTION

"The stated purpose of the Public Records Act ("PRA") is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." Progressive Animal Welfare Loc. v. University of Washington, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

Disclosure of public records allows citizens to scrutinize how public officials conduct public business and to hold them accountable for such conduct. Historically, communications documenting such conduct reside in publically-owned repositories, whether agency file cabinets or computers. Today, other communication tools may contain such records when public officials tweet, text or call from cell phones about matters related to their jobs. If these take place with an agency phone, there is no question that records documenting these communications should be publically disclosable. The result in this appeal should be no different, even if the communications occurred over a personally-owned cell phone of a public official. Records documenting official calls and texts placed over a personal cell phone are publically disclosable. To hold otherwise would incent public officials to circumvent the PRA by texting or calling on private phones when doing public business, knowing that the public

would have no way to track them. Such a result would violate the fundamental purpose of the PRA.

II. INTEREST AND IDENTITY OF AMICUS

The Washington Coalition for Open Government ("WCOG") is a Washington nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of public business and matters of public interest. WCOG's mission is to help foster the cornerstone of democracy: open government, supervised by an engaged citizenry. WCOG regularly participates as amicus in appeals raising open government issues. For instance, WCOG was an intervenor in John Doe No. 1 v. Reed, 561 U.S. 186, 130 S.Ct. 2811 (2010), which helped establish the public's right to know who signs referendum petitions. Allied Daily Newspapers of Washington ("ADNW") is a Washington trade association representing 25 daily newspapers across the State of Washington. Washington Newspaper Publishers' Association ("WNPA") is a trade association representing 120 weekly community newspapers throughout Washington. Both associations and their members are frequent users of the Public Records Act ("PRA") and rely on the PRA to inform the public and keep the government accountable to the governed.

WCOG, ADNW and WNPA ("Amici") are interested in this case because it affects the public's ability to hold public officials accountable for how they conduct public business. In general, Amici have an interest in strict enforcement of disclosure laws, because such laws are a primary means by which Amici and their members and other citizens may hold government accountable.

III. DISCUSSION

A. Under the facts of this case, personal cell phone records can be produced.

Amici do not adopt any party's statement of facts but rely upon the following undisputed facts:

- Pierce County provides Mark Lindquist ("Lindquist") the Pierce County Prosecutor, with a cell phone, but he prefers to use his "personal" cell phone (Tel. No. 253-816-XXXX) for work business. CP 5-8, 24.
- Lindquist admitted in the Complaint (¶16) that he "uses this [personal] cellular phone to make work-related phone calls pertaining to his employment with the County." CP 15.
- Lindquist produced records for his personal cell phone usage to Pierce County in a collateral litigation involving Nissen. CP 8, 25.

- Pierce County had possession of, and produced redacted versions of, Lindquist's personal cell phone records in response to two (2) PRA requests from Nissen's attorney. Pierce County did not produce records of any texts, or that disclosed information that allegedly did not relate to Lindquist's employment with the County. CP 16-18.

Lindquist and Pierce County argue many factual scenarios other than the one in this case to support their privacy-based arguments, seeking a ruling far broader than necessary from this Court. Under the admitted facts of this case, however, this Court can resolve this appeal by holding squarely that personal cell phone records documenting communications of a public official about his public employment are disclosable under the PRA.

B. Lindquist Relinquished Any Right to Claim Privacy as a Basis to With-hold His Phone Records When He Chose to Use His Personal Cell-Phone for Public Business Instead of the County-Provided Cell-Phone.

This court should be as alarmed and outraged as Amici by Lindquist's conduct, which has wasted the taxpayer's money to defend a situation that could have been prevented and that undermines government transparency. Lindquist, as a publicly elected official and attorney, should be deemed to have full knowledge of his duties under the PRA. He should

know that records that relate to the conduct of public business are public records. Therefore his deliberate choice to use his personal cell phone for his public work, instead of a public cell phone, can only be construed as an effort to thwart government transparency under the guise of a privacy interest that he abandoned when made his choice. Lindquist and the County have the burden-- both under the PRA and as a matter of basic equity-- to remedy the loss of transparency that Lindquist willfully created. To hold otherwise would reward Lindquist for his conduct and signal to all Washington public officials that the best way to avoid public scrutiny is to do their jobs via private cell-phones and text messaging. All public officials need to be put on notice that choosing to use personal electronic devices for official communications does not protect them from public disclosure.

C. Personal devices used by public officials to conduct public business can be searched for public records.

O'Neill v. City of Shoreline, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010), squarely holds that communications on a government employee's private computer are disclosable public records if they relate to official city business. Otherwise:

> "... government employees could circumvent the PRA by using their home computers for government business, [and] the PRA could be drastically undermined."

Id.

In O'Neill, the Supreme Court said that the City could inspect an employee's private computer to see if it was used for public business, at least if she consents. In this case, Lindquist turned over his cell phone records to Pierce County in the collateral Nissen litigation. Thus, as in O'Neill, there is no "consent issue," and the Court can decide that Lindquist's dual use of his personal cell phone for public business expose records reflecting such dual usage to public scrutiny, just as with O'Neill's personal computer.

D. Personal cell phone records containing information about public calls and texts can, and should, be disclosable.

Mechling v. City of Monroe, 152 Wn.App. 830, 222 P.3d 808 (2009), held that private e-mail addresses used by public officials discussing City business are not exempt under the PRA. In Mechling, the Court said "E-mail messages of public officials or employees are subject to a public records request if the e-mails contain information related to the conduct of government." *Id.* at 843-44, citing Tiberino v. Spokane County, 103 Wn.App. 680, 688, 13 P.3d 1104 (2000).

The same logic applies in this case: If the text or call is related to County business, then it must be disclosed. Cell phone calls might not be recorded, but call detail information on cell phone bills will document the fact that a call was placed and, hence, "relates" to the performance of a

government function if the call dealt with such performance. This information meets the definition of a public record, which is to be broadly defined. ("[N]early any conceivable government record related to the conduct of government is liberally construed in Washington." O'Neill, 170 Wn.2d at 147.)

The PRA defines a "public record" as:

> any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

RCW 42.56.010(2).

The PRA defines a "writing" as:

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

RCW 42.56.010(3).

A call detail record relates to the conduct of government if it documents a government call. So does a text message about government performance that can be retrieved to ascertain the actual content of a communication sent from a cell phone via text.

Accordingly, call detail records and information regarding text messages can, and should be, disclosable. Otherwise, the logic and holdings in O'Neill and Mechling would be undermined by carving out an artificial, arbitrary distinction for cellular communications records.

Lindquist and the County paint a parade of horribles, alleging countless – and baseless – privacy violations if Lindquist's cell phone records must be disclosed. These ignore the fact that Lindquist knowingly chose to use his private cell phone to do his public job, rather than use a County cell phone. By doing so, Lindquist had no reasonable expectation of privacy in those call records and texts, because he knowingly intermingled personal and public business, which exposes his cell phone records about public conduct to public scrutiny.

The Court need not decide whether an occasional call incidental to public business to a public official's private cell phone means that all private cell phone records become disclosable. This case does not involve such occasional calls, but multiple calls and texts from a prosecutor who chose to use his private cell phone to conduct public business.

Whether private cell phone records are "public records" or "private records" because Lindquist personally paid his cell phone bills does not

matter.[1] What matters is the fact that Lindquist's cell phone was routinely used to conduct public business, and records relating to that must be disclosable.

Amici's overarching concern in this case is with the necessary disclosure of records documenting the communications of public officials about the conduct of their job. That is the information that the public is entitled to have under Washington's PRA.

In this case, Lindquist turned his cell phone records over to the County, which then purported to redact truly "private" information.[2] Whether the redactions were proper must be determined by the principles in the PRA, which requires courts to liberally construe the PRA's disclosure provisions and to interpret exemptions narrowly. RCW 42.56.030. The County bears the burden of justifying its redactions. RCW 42.56.550(1). A Superior Court may have to conduct an in camera review under RCW 42.56.660(3) to satisfy itself that redacted "private" information is truly "private." Amici does not take a position on whether records relating to purely personal calls or texts become disclosable if

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[1] This distinction fails because public officials may use multiple "personally-paid for" means to communicate about public duties, such as a "private" yellow notepad or a personal computer, as in O'Neill.

[2] The County's claim that it does not "own" Lindquist's cell phone records is irrelevant if it used them for County purposes when Lindquist provided them to the County. They become public records at that point. WAC 44-14-03001(3); Concerned-Ratepayers Ass'n. v. Public Utility District No. 1, 138 Wn.2d 950, 960, 983 P.2d 635 (1999).

intermingled with public calls or texts. Amici simply do not want this Court to find that all private cell phone records are not covered by the PRA, or are exempt, when these records document public activity.

E. Elsewhere Public Officials Use Personal Electronics to Skirt Public Disclosure: This Trend Must Not Be Sanctioned in Washington.

Increasingly, government officials are using "private" technology such as personal e-mail accounts, cell-phone texting or Blackberry devices to conduct public business to avoid state open records laws. Recently in New Jersey, a top aide to Governor Chris Christie used a private e-mail account to ask an official of the Port Authority to shut down three lanes on the busy George Washington Bridge for political purposes.[3] New York Governor Andrew Cuomo used an untraceable Blackberry message system to conduct public business, creating no written e-mail of how he conducts business.[4]

Health and Human Services Secretary Kathleen Sebelius used secret, unpublished email accounts for her work.[5] In San Jose, California, city council members took instructions during council meetings on how to

[3] "Christie Aide is Latest to Use Private Emails." http://bigstory.ap.org/article/christie-aide-latest-use-private-emails (Jan. 11, 2014) (last visited Jan. 23, 2014).
[4] *Id.*
[5] *Id.*

vote based upon text messages sent by representatives of unions and other special interests.[6]

The potential to wreak havoc to government transparency due to new digital technologies cannot be underestimated as new tools emerge that could allow public officials to skirt public records laws, unless constrained by the courts. How will the public know if their elected officials act in the public interest if secret text messages direct their actions? The only way to prevent certain harm to the public's right to open and transparent government is to find that any and all records relating to the conduct of public business must be retained and disclosed, unless covered by a specific exemption. It is irrelevant if the records are created by, and maintained by, a personal digital device.

Even if created and stored on a private device, those public records must be maintained so that they can be retrieved in response to PRA requests in accordance with RCW Ch. 40.14. In McLeod v. Parnell, 286 P.2d 509, 516 (2012) the Alaska Supreme Court affirmed a grant of summary judgment in favor of a requestor who sought the private e-mails of Governor Sarah Palin that related to the "conduct of official business of the State of Alaska." The court affirmed that:

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[6] *See* "Government officials use personal email and texting to avoid public access laws. Why not use technology to enhance accountability instead of to subvert it?" at http://firstamendmentcoalition.org/2009/08/government-officials-use-personal-email-and-text (last visited Jan. 23, 2014).

> "McLeod established that the duty to preserve emails exists as to both official accounts and private accounts, and that the duty cannot be extinguished by a public official's unreviewable decision simply not to preserve them." *Id.*

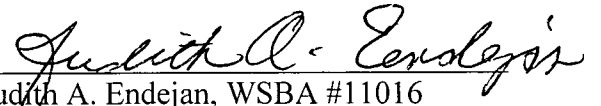
Similarly, here, Lindquist had a duty to preserve cell phone records related to his job and to disclose them.

IV. CONCLUSION

Full cell phone records that document calls or texts relating to Lindquist's job as a prosecutor should be disclosed under the PRA.

Respectfully submitted this 24th day of January, 2014.

GARVEY SCHUBERT BARER

By: 

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Amicus Curiae Brief of Washington Coalition for Open Government, Allied Daily Newspapers of Washington and the Washington Newspaper Publishers' Association in Support of Appellant, **by Email** pursuant to agreement with backup **by regular U.S. Mail** on the 24th day of January, 2014, to the following counsel of record at the following addresses:

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