COA #44852-1-II

NO. 87187-6

SUPREME COURT OF THE STATE OF WASHINGTON

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.

CORRECTED BRIEF OF RESPONDENT PIERCE COUNTY

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I. INTRODUCTION

This case concerns whether the Public Records Act (hereinafter "PRA") can be used to obtain the entirety of a governmental official's personal cell phone records -- including the substance of personal text messages -- simply because the official used that phone occasionally for work related calls, and regardless of the fact the official voluntarily provided redacted records pertaining to any call that was work related or *might* be work related.[1]

When Plaintiff Nissen sought forced disclosure in the trial court, Defendant Pierce County filed a CR 12(b)(6) motion to dismiss contending that any attempt to use the PRA to obtain privately owned and personal telephone records was contrary to the PRA and other state and federal statutory and constitutional laws. Intervenor Mark Lindquist, the Pierce County Prosecutor, independently sought a protective order. The superior court agreed with the County and granted the motion to dismiss and ruled that the request for a protective order was moot. CP 258.

Plaintiff sought direct review in this Court and requests it rule that an official cannot have "a separate individual ownership interest from that of

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[1] Because the Prosecutor's duties require him to be available "24 hours a day 7 days a week," he -- like the vast majority of public servants -- "occasionally used [his] personal cellular telephone for county business." *See* AB 453; GovLoop, "Exploring 'Bring Your Own Device' In the Public Sector," p. 9 (2012) (67% of employees at every level of federal, state, and local government use their personal telephones for work purposes).

his office to those texts [from his private telephone] that relate to government functions simply because he pays the bill." AB 36. Because plaintiff's suit and appeal are contrary to the Court Rules, the PRA, and other State and federal laws, the dismissal order should be affirmed.

II. STATEMENT OF THE ISSUES[2]

1. Where plaintiff files an untimely motion for reconsideration 13 days after her suit is dismissed and files an appeal three months later after reconsideration is denied, do court rules require dismissal to be affirmed?

2. In granting dismissal under CR 12(b)(6), may a Court consider the complaint, records to which it refers, and plaintiff's filings without converting it into a CR 56 summary judgment motion that requires discovery?

3. Did the trial court correctly hold an official's personal records from his private telephone are not "public records" subject to the PRA?

4. Did the trial court correctly hold the PRA exempts personal private telephone records and did that court abuse its discretion in declining to conduct an *in camera* inspection?

5. Does State and federal statutory and Constitutional law prevent

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[2] Plaintiff lists as an issue on appeal whether Prosecutor Lindquist's private telephone number was properly "sealed in court records," AB 1, but nowhere argues it in her brief. Because that issue therefore is abandoned, *see e.g.* RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992), it will not be addressed. *But see also Bennett v. Smith Bundy Berman Britton PS*, _ Wn.2d _, 291 P.3d 886 (2013) ("Documents filed with the court that do not become part of the decision making process of the judge, and are unrelated to the conduct of the judiciary, do not implicate article I, section 10" so a *Seattle Times Co. v. "Ishikawa*[, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982),] analysis will invariably favor nondisclosure of irrelevant material").

compelled production here of personal records from a private telephone?

III. STATEMENT OF THE CASE

In June of 2010, the Pierce County Sheriff's Department identified plaintiff Glenda Nissen -- its own detective -- "as the suspect in a death threat mailed to the home of [the] Pierce County Chief Criminal Deputy Mary Robnett." CP 82. As a result, Deputy Prosecutor Robnett requested Prosecutor Lindquist restrict Nissen "from the non-public area of the Prosecutor's Office, at least while the investigation and prosecutorial review were pending." *Id.* *See also* CP 361-62.

In April of 2011, Prosecutor Lindquist returned plaintiff's attorney's call about Nissen's restriction from the Prosecutor's office, the attorney learned the telephone he used "was not his County issued telephone," and thereby that her telephone had recorded his private number. CP 23.

On August 3, 2011, plaintiff made a PRA request to the Prosecutor's Office that demanded "work related" telephone records from Prosecutor Lindquist's private telephone for certain dates, CP 15, and on September 13, 2011, demanded similar records for another date that purposefully omitted the "qualifier 'work related.'" CP 17. In response, the County explained it first had "to receive records from telephone providers" for Prosecutor Lindquist. CP 15-16. However, when the Prosecutor's designee attempted to do so, she was advised by his service provider that its private

customers "could not obtain text messages unless requested within three to five days after the messages are sent" and therefore no record of the content of any text message was obtained. *See* CP 58, 81, 444-46; *Supp.* CP 616. Billing records for those dates, however, could be obtained by the Prosecutor, and he reviewed them with his civil division lawyers for redaction of clearly personal calls. CP 445. The County's copies of these redacted "personal cell phone records ... that may be work related" were then provided to plaintiff but were acknowledged not to include specifically identified "non-Public Information" such as the Prosecutor's "Personal Phone calls." CP 16, 18, 32-36, 40, 86, 334-38, 340-350, 445-46. The County explained the private data was not a "public record" under RCW 42.56.010(2) and would be protected by RCW 42.56.050 and RCW 42.56.250. CP 16, 18, 86, 88.

On October 26, 2011, plaintiff filed a PRA suit "for [Prosecutor] Lindquist's cell phone records" and claimed the County was prohibited "from parsing out public and non-public portions of public records" as well as that all "records showing calls made on public time by a public official contain 'information relating to the conduct of government' and thereby are subject to disclosure as 'public records.'" CP 17-18. The complaint made no request for an *in camera* review but demanded compelled production of all excised personal information and payment of attorney's fees,

costs, and "$100 per day for each day since the date of the requests until the date the records are actually provided to Plaintiff Nissen." CP 19, 21. The complaint also repeatedly listed the specific, private telephone number in question and publicly identified it as that of the Prosecutor. CP 15.

When the County requested she "agree to strike and seal the elected Prosecutor's private cell phone number" from her public filings in Court, plaintiff refused. CP 59; Supp. CP 483-88. "Because of the Prosecutor's role in criminal prosecution of violent criminals and criminal gangs," the County filed a CR 12(f) and GR 15 motion to "protect his and his family's safety and privacy." Supp. CP 479. Though Plaintiff opposed the motion and filed her counsel's declaration that again listed the complete private telephone number, CP 23, on November 4, 2011, the Court ordered all but four of the number's digits excised due to "identified compelling privacy and safety concerns ...." CP 10-11. On November 23, 2011, the County's request for a stay of discovery was granted until its CR 12(b)(6) motion could be heard. CP 43. That same day the Prosecutor also intervened as an individual to protect his "personal records." Supp. CP 489, 546.

On November 28, 2011, the County moved to dismiss under CR 12(b)(6) because the "complaint, the records to which it refers, and Nissen's filings of record establish that her ... suit sought to compel ... disclosure of non-'work related' personal and private telephone records

from the Prosecutor's private telephone that were in neither his nor the County's possession at the time of the request." Supp. CP 520. That same day Prosecutor Lindquist as Intervenor separately moved for a temporary restraining order and preliminary injunction to prevent "Pierce County from disclosing, and Plaintiff from receiving, any of his private telephone invoices beyond those previously disclosed." Supp. CP 494.

On December 9, 2011, before those motions were scheduled to be heard, plaintiff moved the court to "order[] Mr. Lindquist to obtain the evidence from the phone service provider and requiring him or his attorney to securely retain" the content of his text messages or authorize "a subpoena by Det. Nissen to the phone service provider to produce the evidence to Mr. Lindquist or his attorney for safe keeping." CP 45-54. She later withdrew her motion, explaining that Prosecutor Lindquist as "the account holder" had since taken "appropriate action to preserve the records" in the hands of his service provider. CP 251. Nevertheless, plaintiff went on to deny that her "preservation" motion actually had been a "ploy" to get personal text messaging records into County or court hands so as to later claim they thereby had become "public records," CP 252 -- even though she was making exactly that claim as to the billing records of the private calls at issue. *See e.g.* Supp. CP. 567; 12/23/12 VRP 42-43, 47-48, 66.

On December 23, 2011, the County and intervenor's motions were

heard by the court with plaintiff arguing, among other things, that the private records containing personal calls had to be produced for *in camera* review, made the subject of discovery, and ordered disclosed to show "the amount of time Lindquist spends on purely private calls" on his personal cell phone. Supp. CP 558-60, 567; 12/23/12 VRP 54-55. After extensive oral argument, the Honorable Christine Pomeroy granted the County's motion to dismiss and held the intervenor's injunction was therefore moot. 12/23/11 VRP 1-103; CP 258. Specifically, the Court ruled:

> [N]umber one, it is not a public record. The private cell phone records of a public elected official or a public employee are not public records. Number two. I believe that he has a right to privacy as a valid exemption; and three, I do think that I have absolutely no power to require the third-party provider, without a search warrant application with probable cause, to disclose records. I have no power to do so under this Act.

12/23/11 VRP 94.

On January 5, 2012 -- 13 days later -- plaintiff filed an untimely motion for reconsideration raising new legal arguments but failing to analyze the asserted grounds for reconsideration under CR 59. Supp. CP 633, 684. Reconsideration was denied on February 28, 2012, CP 447, and on March 27, 2012 -- three months after dismissal -- Nissen appealed directly to this Court without analysis of the requirements of RAP 4.2(a)(4). *See* 3/27/12 Notice of Appeal, Petition.

IV. ARGUMENT

A. Court Rules Limit Scope of Appellate Review and Require Affirmation of Trial Court

Appellate review requires filing a timely notice of appeal within 30 days after the entry of the contested order. *See* RAP 5.1; RAP 5.2(a). Though review of a judgment can be filed within 30 days of an order denying reconsideration, RAP 5.2(e)(1), an "untimely motion for reconsideration has no effect upon the commencement of time for filing an appeal in this court" so if parties do "not timely perfect their appeal, this court is without jurisdiction to review the merits." *Griffin v. Draper,* 32 Wn.App. 611, 125, 649 P.2d 123 (1982). *See also Schaefco, Inc. v. Columbia River Gorge Commission,* 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993) (since motion for reconsideration was untimely, it did not extend the 30-day limit for filing an appeal and so the appeal was untimely and dismissed).

Here, the order dismissing plaintiff's suit was entered December 23, 2011, CP 258, but she waited 13 days, until January 5, 2012, to move for its reconsideration. Supp. CP 633. Because a reconsideration motion "shall be filed not later than 10 days after the entry of the ... order," CR 59(b), plaintiff's motion was untimely and properly denied. *See e.g. Kaech v. Lewis County Public Utility Dist. No. 1,* 106 Wn.App. 260, 268, 23 P.3d

529 (2001) ("CR 59 service requirement is mandatory" and because "the motion for a new trial was untimely, the trial court lacked authority to order a new trial"); *Metz v. Sarandos,* 91 Wn.App. 357, 360, 957 P.2d 795 (1998) (where reconsideration was sought 13 days after dismissal the "trial court had no discretionary authority to extend the time period for filing").

Likewise, because plaintiff's untimely reconsideration motion did not extend the time for an appeal of the underlying December 23, 2011, dismissal order, her March 27, 2012, notice of appeal for that judgment was filed over three months too late. *See* 3/27/12 Notice of Appeal, Petition. Hence under RAP 5.2 there is no appellate jurisdiction to review that dismissal judgment. Though there is jurisdiction over the order denying reconsideration, denial of that untimely motion was required by CR 59(b).

B. Because County's CR 12(b)(6) Motion Was Based on the Complaint, Records Cited Therein, and Plaintiff's Own Filings, It Did Not Become a CR 56 Motion

Under CR 12(b)(6), "where it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). On appeal, "[w]hether dismissal was appropriate under CR 12(b)(6) is a question of law that we review de novo." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). *See also Regan v. McLachlan*, 163 Wn.App. 171, 177, 257 P.3d 1122 (2011). In making this analysis the court exam-

ines the complaint and takes "judicial notice of matters of public record" such as court "proceedings." *See Berge*, 88 Wn. 2d at 763. *See also Birnbaum v. Pierce County*, 167 Wn.App. 728, 732, 274 P.3d 1070, *rev. denied* 175 Wn.2d 1018 (2012) (under CR 12(b)(6) the Court "may also consider documents whose contents are alleged in the complaint"); *Rodriguez*, 144 Wn.App. at 725-26 ("[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss"); *Tellabs, Inc. v. Makor Issues & Rights, Ltd,* 551 U.S. 308, 322 (2007) (courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); ER 201(f) ("Judicial notice may be taken at any stage"). In so doing a "court is not required to accept the complaint's legal conclusions as true," *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18, 189 P.3d 168 (2008); *see also Haberman v. Washington Public Power Supply System*, 109 Wn. 2d 107, 120-21, 744 P. 2d 1032 (1987) (same), and will ignore conclusory factual allegations if they "do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 597 (1969).

Plaintiff claims the Superior Court "looked outside the complaint and accepted declarations of the defendants, while simultaneously staying discovery" when it should have converted the motion into one for summary judgment under CR 56(f). AB 8. However, documents referred to in a complaint and materials of which a Court takes judicial notice are not "outside the pleadings and [are] properly considered" under CR 12(b)(6)), *see Rodriguez*, 144 Wn.App. at 725-26, so their consideration does not convert a CR 12 motion into a CR 56 motion. *See Haberman*, 109 Wn.2d at 121 (though "court considered matters extraneous to the complaints, it ruled as a matter of law that plaintiffs and intervenors had not stated a claim and did not make any determination of facts in dispute" so "standard of review remains that required by CR 12(b)(6)"); *Ortblad v. State*, 85 Wn.2d 109, 111, 530 P.2d 635 (1975) (CR 12(b)(6) motion not converted since "basic operative facts are undisputed and the core issue is one of law"); *Judy v. Hanford Environmental Health Foundation*, 106 Wn.App. 26, 34, 22 P.3d 810 (2001) (same).

Second, plaintiff nowhere cites where in the record the court ever "looked" to any "declaration of the defendants" for dismissal. AB 8-10 (emphasis added). *See also* RAP 10.3(a)(6) (requiring "references to relevant parts of the record"); RAP 10.4(f) (requiring specific references to record); *In re Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998)

(party must "cite to the record to support" argument). Her only specific factual assertion on the issue, again made without any reference to the record, is her claim the County "asserted during oral argument that it did not possess any of the requested records at the time of the request" and she should have been allowed discovery to test that assertion. AB 9-10, 37-38 (emphasis added). However, an attorney's oral argument is not "evidence." *See e.g. Convention Center Coalition v. City of Seattle*, 107 Wn.2d 370, 379, 730 P.2d 636 (1986); WPI 1.02. Indeed, the superior court expressly and repeatedly noted counsel's statement at issue "really makes no difference" to dismissal. *See* 12/23/11 VRP at 96, 103. *C.f. Forbes v. City of Gold Bar*, 171 Wn.App. 857, 288 P.3d 384 (2012) (PRA case dismissed where city came into possession of private documents only while responding to record request); *discussion infra* at 23-26. In any case, the complaint and plaintiff's filings[3] confirm the County in fact did not have access to -- or even use as attorney work product -- the requested

[3] Plaintiff's complaint and filings specifically established the documents at issue were records from the "personal cell phone" of the prosecutor, "not his county issued telephone," and had to be "obtained from the service provider" of the official. *See* CP 18-19 n. 3, 23, 30, 171, 173, 205, 207. *See also* CP 10-11 (order striking from pleadings "the private telephone number of the elected prosecutor"). Further, the face of her complaint expressly cites documents without comment or challenge that also established the County did not possess these records prior to her request. *See* CP 16; *Berge*, 88 Wn.2d at 764 (accepting on CR 12(b)(6) motion the truth of attorney general's letter because it was "quoted in the complaint without comment or challenge"). *See also* CP 444-46; Supp. CP 597-98. Finally, plaintiff's opposition brief to the Superior Court expressly admitted the County in response to her request only "possessed the 861 records because [Prosecutor] Lindquist authorized their release" in redacted form. Supp. CP 570 (emphasis added).

private documents until after the request.

Third, under CR 26(c)(1) the "court clearly had the discretion to stay discovery until after the CR 12(b)(6) hearing," and such a stay is "harmless" when the case later is properly dismissed. *See Quinn Const. Co., L.L.C. v. King Cy Fire Protection Dist. No. 26,* 111 Wn.App. 19, 33, 44 P.3d 865 (2002). *See also Ortblad*, 85 Wn.2d at 111 ("No purpose would exist for ... granting an opportunity to present factual evidence pertinent under CR 56 if whatever might be proven would be immaterial"); *City of Moses Lake v. Grant Cy,* 39 Wn.App. 256, 259, 693 P.2d 140 (1984) (same); *Gross v. Sunding*, 139 Wn.App. 54, 68, 161 P.3d 380 (2007) (even CR 56(f) does not allow a continuance so as to conduct discovery if "the desired evidence will not raise a genuine issue of material fact"). Plaintiff cites no authority otherwise. *See* RAP 10.3(a)(6). Hence her arguments over CR 12(b)(6), CR 56, and discovery, AB 8-10, 37, are without merit.

C. PRA Does Not Apply to an Official's Personal Records of His Private Telephone

The threshold issue in any PRA case is whether the requested documents are "public records" and therefore whether the PRA has any application. *See Smith v. Okanogan County*, 100 Wn.App. 7, 16, 994 P.2d 857 (2000) ("The Act applies only to public records" and the demand there was "not a request for 'public records'"); *Bonamy v. City of Seattle*, 92 Wn.

App. 403, 409, 960 P.2d 447 (1998), *rev. denied*, 137 Wn.2d 1012 (1999) ("As a threshold matter, ... the act only applies when public records have been requested"). Though plaintiff claims *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010), "squarely rejected" the principle that "personally-paid for communication devices" are not subject to the PRA, AB 22, that case did not concern personal records generated as a result of an official's use of his own private property -- much less records generated and kept only by an official's privately contracted service provider. *O'Neill* instead dealt only with a document that was apparently originally contained in a City email account, used for a government purpose by discussing its contents at a city council meeting, and thereafter manipulated on an official's private home computer. *See* 170 Wn.2d at 142. Further, even as to what was originally a City document, *O'Neill's* bare majority never reached constitutional and privacy issues about compelling production from the owner of the private device because it assumed consent to release. *See* 170 Wn.2d at 150 n. 4. Because *O'Neill* nowhere held private records like those here are "public records," it cannot help plaintiff overcome her threshold burden of proving the PRA applies.

1. **Records Made By an Official's Private Service Provider Are Not a "Writing Prepared, Owned, Used, or Retained By" His Agency**

Under RCW 42.56.010(2), a "public record" is "any writing prepared,

owned, used, or retained by any state or local agency ...." Hence, all three requirements -- *i.e.* (1) a "writing;" (2) "containing information relating to the conduct of government or the performance of any governmental or proprietary function;" (3) that is "prepared, owned, used, or retained by any state or local agency" -- must be satisfied for a record to be "public." *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn.App. 433, 444, 161 P.3d 428 (2007). The records demanded here were not work related "writings" so as to be "information relating to the conduct of government or the performance of any governmental or proprietary function." Likewise, at the time of the request, the personal records of the official at issue -- whether or not "work related" or made during "public hours" -- are shown by the complaint, the documents to which it refers, plaintiffs' own submissions to the court's file and judicial notice, to have been "prepared" instead by the employee's private third party service provider. Hence, they were never "owned, used, or retained by any state or local agency" as also required for a public record. *See* CP 16, 331. *See also* https://videos.verizonwireless.com/Understanding-Your-Paper-Bill/v/D0R35AR0/.[4]

[4] Under ER 201, the Court can take judicial notice of websites. *See e.g. Pudmaroff v. Allen*, 138 Wn.2d 55, 65 n. 5, 977 P.2d 574 (1999) (judicial notice of statistical data contained in a Washington Traffic Safety Commission research website); *Banks v. County of Allegheny*, 568 F.Supp.2d 579, 585 n. 3 (W.D.Pa. 2008) (citing website on MRSA treatment to grant Rule 12(b)(6) motion).

The complaint asserts as decisive that the elected Prosecutor -- like the vast majority of governmental employees -- used his personal telephone to discuss work. However, records of the service provider for that telephone are not "writings" even of the official -- much less of his agency employer. In *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Col. 2011), a Colorado Open Records Act (hereinafter "CORA") suit was dismissed for failure to state a claim where a newspaper requested the Governor's personal cell phone records. Similar to the PRA, a "public record" under CORA is a "writing (1) made, maintained, or kept by the state, an agency, or political subdivision of the state, (2) for use in the performance of public functions or that are involved in the receipt and spending of public money." *Id.* at 1090. The Colorado Supreme Court refused to find the Governor had "made the phone records" simply by "participat[ing] in the phone calls that resulted in the billing statement." *Id.* at 1091 (emphasis added). That state's highest court explained:

> In common parlance, one does not "make" a "writing" merely by performing acts that a private third party memorializes in a writing it makes. According to the Post's theory, any writing memorializing an event in which a public official participates would constitute a "writing made ... by the state." However, to make a "writing" pursuant to CORA, the Governor must have created or fashioned or directed creation or fashioning of the cell phone bills. As the court of appeals aptly observed, the carrier not the Governor created the phone bills. "[The Post] has requested the records that memorialize the fact that the conversations oc-

> curred, which are created and generated only by the service provider."

Id. at 1091. *See also West v. Thurston County*, 168 Wn.App. 162, 183, 275 P.3d 1200 (2012) (billing records of county's retained counsel were not public records because records were not owned, possessed, used, or retained by the county); AGO 1989 No. 11, at 4 ("where the registrar prepares, maintains, and retains the records, and where the county has only a right of inspection, we cannot say that the county "owns" the records in any meaningful sense").

Indeed, if memorialization by non-governmental third parties of even official conversations were to constitute a "public record," such a broad interpretation would encompass news reporters' notes of statements made by government employees, quotes of government officials printed in newspapers, notes of statements made by government employees taken by opposing private counsel in litigation, and notes of comments made by a government official taken by a private citizen at a community meeting. Likewise, billing statements of any constituent who called a government employee would become a public record, as would messages from government employees left on private voice mail systems of third parties. Records of an official's privately paid third party service provider simply are not "prepared" by the official who owns the personal private telephone

-- much less "by any state or local agency" as RCW 42.56.010(2) requires.

2. Under PRA Elected Official Is Neither an "Office" nor "Agency"

The PRA authorizes suits only against an "agency" for its failure to disclose "public records" -- not for an official's refusal to provide his private records. *See e.g.* RCW 42.56.010(1), (3); RCW 42.56.520; RCW 42.56.550. Plaintiff argues the Prosecutor "is the Office" and therefore the County "owned" his records because he "is an agent of the County." AB 26, 29-34. Not only was this argument not raised until reconsideration,[5] but plaintiff's proposed interpretation of "agency" as synonymous with an "official" is nowhere found in the plain text of the definition of "agency" in RCW 42.56.010(1). *See* Appendix. Our courts hold it is the Legislature's role to rewrite a statute rather than that of the court. *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 816, 123 P.3d 88 (2005). Accordingly, when *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), applied the PRA's definitional language so as to determine to whom it applied, this Court held -- relying in part upon the

[5] Plaintiff's current argument on the definition of "agency" was not briefed or raised to the superior court until she moved for reconsideration. *See* CP 419-425; Supp. CP 694. Courts can properly decline to consider new arguments on reconsideration where those arguments were available earlier. *See e.g. Sterling Savings Ass'n v. Ryan*, 751 F.Supp 871, 882 (E.D. Wa. 1990) (reconsideration motions "are not the proper vehicle for offering evidence or theories of law that were available to the party at the time of the initial ruling"); *Fay Corp v. BAT Holdings I, Inc.*, 651 F.Supp. 307, 309 (W.D.Wa. 1987) ("'after thoughts' or 'shifting ground' are not an appropriate basis for reconsideration").

plain text of the PRA -- that courts were exempt because, among other things, the PRA's definitions did not "specifically include" them. *Id.* at 306. So too, the PRA's definition of "agency" does not include the terms "office holder," "official," "public employee," or any natural person. Similarly, RCW 42.56.010 nowhere supports the claim that government "owns" data resulting from a service privately paid for by its employees. The Legislature's avoidance of language applying the PRA to persons prevented it from violating privacy rights and allowing unconstitutional seizures.[6]

Because plaintiff's argument is contrary to the express terms of the statute and the rules of statutory construction, it has been rejected by *West*, 168 Wn.App. at 183. In *West,* as in this case, a plaintiff claimed the County's attorneys "were agents of the County, and that therefore, the County (acting through its agents) 'prepared'" billing statements. Rejecting this argument, the court in *West* recognized it must "assume that the legislature 'means exactly what it says' and, in this instance, our state's legislature has not yet chosen to extend the PRA this far, expressly designating 'agencies'

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[6] See discussion *infra* at 40-49. Courts use common sense to avoid absurd results when interpreting statutes. *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007), and avoid statutory interpretations that will produce illegal or unconstitutional results. *See Sheehan*, 155 Wn.2d at 816; *Cawsey v. Brickey*, 82 Wash. 653, 663-64, 144 P. 938 (1914). That one construction among other alternatives involves serious constitutional difficulties is reason to reject that interpretation in favor of another. *State ex rel. Morgan v. Kinnear,* 80 Wn. 2d 400, 494 P.2d 1362 (1972); *State v. Dixon,* 78 Wn. 2d 796, 804, 479 P.2d 931 (1971).

as the only entities that can prepare 'public records' subject to disclosure under the PRA." *Id.* (*quoting Morgan v. Johnson*, 137 Wn.2d 887, 892, 976 P.2d 619 (1999); *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995)) (internal quotations omitted)). The *West* Court therefore held: "Applying the maxim expressio unius est exclusion alterius, 'to express one thing in a statute implies the exclusion of the other,' we assume that the legislature intended to exclude from this designation" even an agency's "lawyers who prepare documents that the agency never physically possesses." 168 Wn.App. at 183-84.

Ignoring this precedent, plaintiff instead cites only decisions having nothing to do with the PRA and that undermine her argument. She cites *Diaz v. Washington State Migrant Council*, 165 Wn.App. 59, 265 P. 3d 956 (2011), that addresses only the obligations of a corporate entity and its officers to produce records pursuant to civil discovery in the course of litigation against that corporation. AB 30. Even then, *Diaz* held a corporate entity does not have possession, custody, or control over responsive personal records just because such belongs to its directors and therefore the employer could not be found in contempt for failing to produce them because "Mr. Diaz cites no statutory or common law authority, nor have we identified any, imposing a duty on a corporate director to make personal

records available to the corporation that he or she serves." *Id.*[7] Similarly plaintiff relies on *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000), to claim "the term 'office' contemplates acts committed by a public officer in his official capacity committed during the official's term of office." AB 31. Again, however, the cited case does not concern the PRA but addresses the meaning of the phrase "malfeasance in office" contained in former RCW 29.82.010(1)(b) (recodified at RCW 29A.56.110 (1)(b)), and as that phrase applied to RCW 29A.56.110, which concerned the charging petition form for "the recall and discharge of any elective public officer ... [who] has committed an act or acts of malfeasance or an act or acts of misfeasance while in office ...." Far from supporting plaintiff's argument, that case instead demonstrates the Legislature is fully capable of including an express reference to an individual officer when it intends the statute to apply to an official.

Finally, plaintiff cites *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004), as alleged support for her assertion that "a privacy interest generally does not arise where communications concern something that is a subject of legitimate news interest." AB 32. In fact, *Roe* did not concern privacy interests but whether a former police officer's obscene off-duty con-

[7] Plaintiff has never sued Prosecutor Lindquist directly on any supposed underlying legal claim to discover his personal records -- presumably because it would warrant a counterclaim for malicious prosecution. *See* RCW 4.24.350.

duct was unrelated to his employment, so that his termination based thereon could have violated his First Amendment free speech rights. 543 U.S. at 79. Plaintiff's brief distorts *Roe's* use of the term "public concern" to mean something other than "as the court's cases have understood that term in the context of restrictions by government entities on the speech of employees." *Id.* (emphasis added). *Roe* nowhere supports plaintiff's disturbing proposition that privacy interests do not arise or are destroyed if a private communication concerns anything of "news interest."

Further, the threshold burden is not on the County to show the documents at issue are private -- though it has done so as a matter of law -- but on plaintiff to show the subject records are "public records." *See e.g. Smith,* 100 Wn.App. at 16; *Bonamy*, 92 Wn.App. at 409. As shown above, the trial court properly held she had not met this threshold burden.

3. County Did Not "Use" Official's Private Record Simply By Legal Staff Reviewing Copies for Redaction

An agency's obligations under the PRA are determined as of the time of the request, *see e.g. Building Industry Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 740, 218 P.3d 196 (2009), and only "applies to 'the situation where the agency has the records but says, 'we are not going to give them to you' ... [rather than where the agency says] 'we do not have these records.'" *Id.* (*quoting Daines v. Spokane County*, 111 Wn.App. 342, 348, 44

P.3d 909 (2002), *overruled on other grounds*, 172 Wn.2d 702 (2011)). Plaintiff asserts she made her "second request" seeking non-work related communications while the Prosecuting Attorney's Office was examining copies of private telephone records in order to respond to her first request. AB 37-38. She argues that this maneuver caused those private documents to become "public records," at least to her second request, because the County must have "possessed" them at some point in order to prepare its response. *Id.* However, plaintiff's second request sought records for a different date than her first and they would not have been obtained from the official's private service provider until after that second request was received. *See* CP 15 ¶s 19 & 22, CP 17 ¶ 31; CP 18-19, 23, 30, 295, 297, 299, 331; Supp. CP 570. *See also discussion supra.* at 2 n. 2. Indeed, the face of the complaint expressly cites evidence without comment or challenge that establishes the County did not possess the records until after her requests. *See* CP 16. *See also* Supp. CP 597-98; *Berge,* 88 Wn.2d at 764 (truth of letter accepted since it was "quoted in the complaint without comment or challenge").

If plaintiff instead intends to refer to her earlier, more narrow version of her second request (*i.e.*, that initially sought "work related" calls of a certain date that she later revised to seek all calls for that same date), she apparently is arguing that her mid-stream revision could have come while

the Prosecutor may have been reviewing his private records with his county lawyers. *See* CP 17 ¶ 32-33. The fact is that the County never possessed any text message or unredacted copy of billing records, *see* CP 81, 44-446; Supp. CP 597-98, 616, and plaintiff cites no language from the PRA, precedent or policy, supporting her assertion she can make non-responsive private information in a personal record "public" because the target reviewed the records with his or her lawyers.

Indeed, where private records were obtained from officials that included both government related and private communications, the Court held the private communications were "not responsive" and therefore "nothing was withheld and no log document needed to be created." *Forbes*, 288 P.3d at 388. This is because "the critical inquiry" as to "whether information has been 'used'" by an agency is "whether the requested information bears a nexus with the agency's decision-making process." *Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1 of Clark County,* 138 Wn.2d 950, 961, 983 P.2d 635 (1999). Here plaintiff cannot show how undisclosed non-"work related" private communications redacted from billing statements had any nexus to the decision to disclose potentially "work related" data. This is especially so where even work related personal documents "are not public records" because -- as here -- they are "maintained in a way indicating a private purpose, are not circulated or

intended for distribution within agency channels, are not under agency control, and may be discarded at the writer's sole discretion." *Yacobellis v. City of Bellingham*, 55 Wn.App. 706, 712, 780 P.2d 272 (1989) (*citing American Fed. of Gov't Emp.s v. Dep't of Commerce*, 632 F.Supp. 1272 (D.DC.1986); *Kalmin v. Dep't of Navy*, 605 F.Supp. 1492 (D. DC. 1985); *British Airports Auth. v. Civil Aeronautics Bd.*, 531 F.Supp. 408 (D. DC. 1982); *Shevin v. Byron & Assoc.*, 379 So.2d 633 (Fla.1980)). *See also Denver Post, supra.*

In short, "the issue of access to records should be determined by the role the documents play in our system of government and the legal process." *Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584, 587, 637 P.2d 966 (1981). *See also Yacobellis*, 55 Wn.App. at 712-13 (any analysis of whether a record contains "information relating to the conduct of government or performance of any government function or proprietary function" must address "the role the document plays in the system"). At the time plaintiff's revised second request was made, the non-work related private records played no role in our system of government and the legal process because they were non-work related. Records of non-work related calls had nothing to do with the conduct of government or performance of any government function -- or with the potentially work related documents later provided.

Plaintiff's position, "If you give an inch, I get a mile," is contrary to the policy behind the PRA. The County and the Prosecutor could have declined to obtain any of the Prosecutor's personal private communication records. However, Prosecutor Lindquist -- out of an abundance of openness and in an effort to avoid litigation -- was willing to provide to the County his personal private records that were work related and may be work related. CP 16. Plaintiff now seeks to fine an agency for its official's willingness to go beyond what was legally required in order to produce what she originally requested -- *i.e.*, records of "work related" communications on an official's personal private telephone. Her claim that she can trick the County into making non-work related private records into public records by legal review, and thereby subject to disclosure, is contrary to law and discourages openness and transparency -- a result contrary to the PRA's purpose.[8]

Finally, even if agency legal staff does obtain unredacted records of a personal cell phone in the course of responding to a PRA request, those

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[8] Plaintiff makes the summary assertion in a footnote that if the records are not possessed by the County, it still "must obtain" them because they supposedly were "used" as in *Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999). AB 42 n. 11. However, in *Ratepayers* the records were "used" as part of negotiations with a government subcontractor and had an "impact on an agency's decision making process" -- but it noted "mere reference to a document that has no relevance to an agency's conduct or performance may not constitute 'use' ...." 138 Wn.2d at 961-62. Here there is no claim that even the disclosed records of "work related" calls on the official's private cell phone were "used" by the County, *see supra* at 4, much less that his non-work related records that were possessed only by the official's private contractor somehow had "an impact" on a County "decision making process."

records would be privileged and protected from disclosure separate and apart from the fact they are not "public records." As shown below, even as to plaintiff's revised, all-encompassing request, the billing statements would be protected not only under the PRA's express exemptions, *e.g.* RCW 42.56.050, RCW 42.56.230(3), RCW 42.56.250(3); RCW 42.56.290, but by 18 U.S.C. §2701, Article I §7, and the Fourth Amendment.

D. PRA Protects Personal Private Records at Issue

Under RCW 42.56.070(1) an agency may delete from public records information "to the extent required to prevent an unreasonable invasion of personal privacy." Plaintiff's brief nowhere contests that even if the records here were "public," the redacted data would be exempt under RCW 42.56.230 (protecting "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy"), RCW 42.56.250(3) (protecting "residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, ... of employees or volunteers of a public agency, and the residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses ... of dependents of employees"), and RCW 42.56.290 (records "relevant to a controversy to which an agency is a party but which records would not be

available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter). *See also Soter v. Cowles Pub. Co.,* 162 Wn.2d 716, 739, 174 P.3d 60 (2007) (documents obtained for purposes of litigation by agents of government attorney were protected from PRA disclosure because the CR 26 work product protection "also governs disclosure under the controversy exception contained in the Public Records Act"); *Limstrom v. Ladenburg,* 136 Wn.2d 595, 608-09, 963 P.2d 869 (1998) (work product of prosecutor protected from PRA disclosure); *Koenig v. Pierce County,* 151 Wn.App. 221, 232, 211 P.3d 423 (2009), *rev. denied,* 168 Wn.2d 18 (2010) (records gathered in anticipation of litigation by prosecutor's office protected from PRA disclosure). Instead, she argues only that the County is barred from relying on any exemption. AB 10-16. She again is mistaken.

1. **County Is Not Barred From Asserting Other Privacy Exemptions**

The face of the complaint acknowledges that "numerous claims of exemption" were expressly asserted by the County. *See* CP 16-18 Similarly, the records to which that complaint refers -- and that plaintiff herself submitted as exhibits to the trial Court -- show the County also expressly asserted what has unambiguously been recognized as another "valid exemption" -- *i.e.* "RCW 42.56.250(3)." *See* CP 18 (quoting "exemption log"),

88 (Mell dec. attaching exemption log page repeatedly claiming "RCW 42.56.250(3)" exemption).

Nevertheless, plaintiff argues "RCW 42.56.050 was the only exemption ... claimed by the County for this request" and that the statute "is not an exemption" but "just a definition," and therefore the County violated the PRA because it supposedly "must cite at least one (valid) exemption when it withholds a record." AB 10-22. Because the complaint's allegations do not support this factual assertion, under CR 12(b)(6) such conclusory factual statements are to be ignored when they "do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 597 (1969). *See also e.g. McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 863, 233 P.3d 861 (2010) (plaintiff's alleged "set of facts" opposing CR 12(b)(6) must be those "which plaintiff could prove, consistent with the complaint, [that] would entitle the plaintiff to relief on the claim") (*quoting Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Stangland v. Brock*, 109 Wn.2d 675, 676, 747 P.2d 464 (1987) (a hypothetical "set of facts" must be "consistent with the complaint"); *Havsy v. Flynn*, 88 Wn.App. 514, 520, 945 P.2d 221 (1997) (hypotheticals must be "allege[d]" ... without violating CR 11). Hence, even under plaintiff's mistaken legal interpretation, there would

have been no violation of the PRA by an alleged failure to claim a "valid exemption" because -- as even plaintiff admits -- "an initial claim of exemption does not preclude the claim of a differing, valid, exemption following its initial response." AB 17.

Further, plaintiff simply is mistaken that it violates the PRA to claim what is later determined to be a wrong exemption because somehow it is "directly analogous to citing nothing at all." AB 20. None of the cases cited by plaintiff so hold. *Compare* AB 17-22 *with Newman v. King County,* 133 Wn.2d 565, 571, 947 P.2d 712 (1997) (nowhere mentioning that failing to claim a "(valid) exemption" is a violation and instead upholding denial of record request); *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009) (nowhere finding a violation for failing to claim a "(valid) exemption"); *Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) (hereinafter "*PAWS*") (rejecting assertion agency was confined only to exemptions listed in its response because: "if agencies were forced to argue exhaustively all possible bases under pain of waiving the argument on review, the goal of prompt agency response might well be subverted"); *Mechling v. City of Monroe*, 152 Wn.App. 830, 855, 222 P.3d 808 (2009) (on remand agency allowed to articulate any other applicable exemption where it had previously exempted portions of emails by only

asserting it did not meet the definition of a public record); *Citizens for Fair Share v. State D.O.C.*, 117 Wn.App. 411, 431, 72 P.3d 206 (2003) (unlike here, agency "did not include a statement of the specific exemption"). Indeed, no analogous situation is recognized even in the publication authored and elsewhere cited by plaintiff's counsel. *See Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws*; 2006, Chapter 16, G. Overstreet, Court Remedies to Obtain Disclosure §16.2(3) ("An agency is not limited to only the exemption it identifies in its response to a request for records" so "even if the [agency's] stated reasons for refusing disclosure were invalid, it could argue at the show cause hearing the information is deletable for other reasons").

Finally, though unnecessary to upholding dismissal here, plaintiff also is mistaken that RCW 42.56.050 is not a "(valid) exemption." Though plaintiff cites as support *PAWS,* 125 Wn.2d at 258, AB 12, that case nowhere holds RCW 42.56.050 is not a "stand alone" exemption but only that the PRA "contains no general 'vital governmental functions' exemption." Otherwise plaintiff cites only: 1) the expressly "nonbinding" model rule WAC 44-14-06002(2); 2) an equally non-binding Attorney General's opinion, Op. Att'y Gen. 12 (1988); and 3) a passage from the "Public Records Act Deskbook" -- authored by plaintiff's counsel. *Compare* AB 13 n. 4 *with* WAC 44-14-00003 ("The model rules, and the comments accom-

panying them, are advisory only and do not bind any agency"); *Mitchell v. Wash. State Dept. of Corrections*, 164 Wn. App. 597, 607, 277 P.3d 670 (2011) (AG's model PRA rules are not "authority" and "not binding"); *Building Industry Ass'n of Washington,* 152 Wn.App. at 737 (same); *Koenig,* 151 Wn.App. at 232 (same); *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Com'n,* 151 Wn.App. 788, 801 n. 4, 214 P.3d 938 (2009) ("[a]ttorney General Opinions are not binding on the court and we may disregard them") (*quoting City of Pasco v. Dep't of Ret. Sys.*, 110 Wn. App. 582, 592 n. 11, 42 P.3d 992, *rev. denied*, 147 Wn.2d 1017 (2002)). No case has relied on plaintiff's non-binding citations for such a holding.

Instead, *DeLong v. Parmelee*, 157 Wn.App. 119, 130, 156, 236 P.3d 936 (2010), later recognized "a person's right to privacy under RCW 42.56.050" can be violated and that the PRA "does exempt from disclosure documents that, if released, would constitute an unreasonable invasion of privacy, RCW 42.56.050 ...." (Emphasis added.) Likewise, the four justices in *O'Neill*, 170 Wn.2d at 157, who actually addressed the question later recognized -- without dispute by the majority -- that RCW 42.56.050 is a standalone exemption. 170 Wn.2d at 155, (J. Alexander, dissenting) ("Even if by some stretch it can be said that an employee's computer hard drive is a public record, the disclosure of it should be precluded pursuant to RCW 42.56.050, which prohibits a records requester

from obtaining such a record if it '[w]ould be highly offensive to a reasonable person'") (emphasis added).[9]

2. Right to Privacy Exempts the Requested Data From Disclosure

Even examining only RCW 42.56.050's protection of the right to privacy shows non-work related communications -- even those owned by the agency and created while on the job and using its equipment -- are exempt from disclosure under the PRA. In *Tiberino v. Spokane*, 103 Wn.App. 680, 13 P. 3d 1104 (2000), hundreds of private messages created on a government computer during public hours by a public employee were held exempt. The Court so held because the former RCW 42.17.310(1)(b) (now RCW 42.56.230(1)) exempted personal information in files maintained for officials to the extent disclosure would violate their "right to privacy":

> Ms. Tiberino's e-mails contain intimate details about her personal life and do not discuss specific instance of misconduct. An individual has a privacy interest whenever in-

[9] Plaintiff also cites *Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010), for the parasitic claim that "failure to adequately explain how [an] exemption would apply to the records in question is a violation as well" and argues because the County supposedly "failed to claim an exemption from the PRA, Defendant necessarily failed to explain how an exemption applied to the record in question and thereby violated the PRA." AB 22. However, not only does the complaint and plaintiff's submissions show such an explanation was given by the County, *see* CP 17-18, 86-88, *Sanders* actually holds a failure to provide an explanation for even an actual public record is not a "freestanding" violation of the PRA. *See* 169 Wn.2d at 860-61 ("the PRA does not expressly sanction a separate penalty for a brief explanation violation"); *Mitchell*, 164 Wn.App. at 606 ("Failure to provide an exemption statement may constitute an aggravator when deciding the amount of penalties for an agency's wrongful withholding of a record, but penalties are not available for a 'freestanding' failure to provide an exemption statement") (emphasis added).

> formation which reveals unique facts about those named is linked to an identifiable individual.

103 Wn.App. at 689. The Court held there was no legitimate "public interest" in "the content of personal emails or phone calls or conversations" because it "is personal and it is unrelated to governmental operations," and hence they were exempt from disclosure. *Id.* at 603. The *Tiberino* Court concluded the entirety of the e-mails were exempt as private, apparently including the e-mail addresses of both the senders and receivers of the e-mails and their duration and time. Such addresses are the functional equivalent of phone numbers called and received shown on a billing statement.

Upon close inspection, plaintiff's only argument on privacy under RCW 42.56.050 appears to be limited to the redaction from records of "the time and duration" of the calls. Specifically, she notes *Tiberino* in *dicta* stated that a public official's time spent on private matters while at work is "of legitimate concern to the public." AB 16. However, she ignores that *Tiberino* nevertheless apparently protected the records as exempt in their entirety. In any case, there plaintiff previously had been warned the government's "computers were not to be used for personal business" so her misuse of them had "significance in her termination action and the public has a legitimate interest in having that information." 103 Wn. App. at 684, 691. Here, there is no termination action and no misuse of County equip-

ment in which the public could have a legitimate interest. *See id.* ("To be 'legitimate,' the public interest must be 'reasonable'") (*quoting Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993)).

Plaintiff next summarily claims without any authority or rationale that "there is no conceivable argument that" the "time and duration" of non-work related private calls on an official's personal telephone "could be exempt from disclosure as being 'private.'" AB 43-44. In fact, public disclosure of the time and duration of private calls made on personal telephones is so "highly offensive to a reasonable person" that statutory and Constitutional laws expressly preclude it absent a lawful search warrant. *See e.g.* RCW 9.73.260 (protecting as private all "pen register" information, which includes call duration and time it took place); *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986) (Article I §7 prevents the government from warrantlessly obtaining pen register information for private telephones because it confers a right of privacy in personal telephone records that cannot be invaded absent valid authority of law); *United States v. Jadlowe*, 628 F.3d 1, 6 n.4 (1st Cir. 2010) ("pen order" authorized officers to track numbers dialed, time of call, and call duration); *Commonwealth v. Rodgers*, 897 A.2d 1253, 1257 (Pa. Super. 2006); *State v. Thompson*, 60 P. 2d 1162 (ID. 1988) (pen register that recorded phone numbers and duration of calls required search warrant); *State v. Jones*, 354 S.E.2d 251 (N.C.

App. 1987). Hence any reasonable person would find disclosure of the date and duration of non-government related calls on his or her personal private telephone highly offensive, and RCW 42.56.070(1) authorizes an agency to delete information from any document "to the extent required to prevent an unreasonable invasion of personal privacy[.]"

Adopting plaintiff's position also would mean receipt by an official of a personal call on a private cell phone during "public time" would produce a cascading nullification of the privacy of every other personal call record contained in third-party created billing statements. It would lead to public exposure of at least thirty days of call events on a monthly statement -- whether it was a superior court judge's private telephone number that a prosecutor called to obtain an after hours warrant or that of a governmental employee's daycare provider or dentist who called the official during "public time." Plaintiff claims anyone can use the PRA to conduct random audits of a public servant's private cell phone records, without probable cause or a warrant, in a speculative effort to obtain information to use against either them or against those with whom they have contact. Plaintiff states that she "believes" her own unsubstantiated allegations, CP 14, and therefore she is entitled to a warrantless search of private records.

Such an abuse of the PRA would not be confined to cell phone records, but logically extend to all billing records of a government employ-

ee's debit or credit card record to determine if any portion of it reflects use during "public hours." Should an employee order lunch while at work or purchase fuel while using his or her car for official business during "public time," those and every other private transaction on a monthly billing statement would be a "public record."

Indeed, under plaintiff's interpretation and tactics employed here, a requestor need only call the cell phone of a public official during "public time," or mention something about work, to force the creation of a public record and thereby compel disclosure of all the public servant's call records and the records of those who called him or her. If the official failed to retain any of his or her own personal records, it could be claimed a crime was committed. *See* RCW 40.16.010. The results of plaintiff's theory are staggering in their consequential deprivation of privacy and devoid of any reasonable nexus to government or the purpose of the PRA.

3. PRA Does Not Require an *In Camera* Inspection Here

Under the PRA and local rule, an *in camera* inspection is within the discretion of the trial court, *see* RCW 42.56.550(3) ("Courts may examine any records in camera") (emphasis added); Thurston Cy LCR 16(c)(2) (PRA *in camera* review only by court order), and is not required in a PRA action when a Court can "evaluate the asserted exemptions based upon the information contained in the written record." *King County Dept. of Adult*

and Juvenile Detention v. Parmelee, 162 Wn.App. 337, 254 P.3d 927 (2011). *See also Harris v. Pierce County*, 84 Wn.App. 222, 235-36, 928 P.2d 1111 (1996) ("it was not necessary for the court to view the document in camera before ruling on whether the memorandum was subject to disclosure"). Here plaintiff argues only that "[u]nless the text content is reviewed in camera the content of the text messages remains unknown" and the court "could not know if the actual records at issue contain 'information relating to the conduct of government.'" AB 34, 37.

First, there is no abuse of discretion to refuse *in camera* inspection of an "official's personal electronic devices" for a "fishing expedition." *Forbes*, 288 P.3d at 388-89.

Second, in response to plaintiff's motion to compel it was shown that neither the County nor its Prosecutor possess "the content of the text messages." *See* CP 81, 444-46; Supp. CP 597-99, 616. *See also Forbes*, 288 P.3d at 389 ("[p]urely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit which is accorded a presumption of good faith"). Indeed, plaintiff has always known this because she herself claimed it was necessary to compel the County to acquire this "text content" from the official's private service provider. *See* CP 45, 56-60. Neither citing legal authority that requires an *in camera* review nor a rationale for it, plaintiff cannot meet her burden of

showing an abuse of discretion for the County's failure to obtain records not in its possession.[10] *See Koenig*, 151 Wn.App. at 232 (agency not required to obtain records it does not already have).

Third, the "written record" of plaintiff's own submissions identified in her complaint confirm an inspection of the unredacted billing documents would not reveal whether the calls identified as private somehow actually were related "to the conduct of government or the performance of any governmental or proprietary function." Rather, it only would give unhelpful data such as the telephone number of the unknown person who called or was called -- and thereby the inspection would also violate his or her privacy. *See* CP 32-36, 40. Hence, there is no reason to go beyond the PRA, its exemptions protecting private information and work product, or plaintiff's submissions. As shown below, compelled production of private records for *in camera* inspection or to give a requestor is unlawful.[11]

E. Statutory Law and State and Federal Constitutions Also Restrict Court Compelled Production Under the PRA of Private Records

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[10] Plaintiff may have intended to claim after an *in camera* review that the inspected records would have to be disclosed under Article I, section 10 of the Washington State Constitution. *Bennett, supra.*

[11] *See discussion supra.* p. 19 n. 6.

Under the Stored Communications Act (hereinafter "SCA"), specifically the Stored Wire and Electronic Communications and Transactional Records Access statute, 18 U.S.C. §2703(c)(1)(B), a "governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity ... obtains a court order" which, according to §2703(d), must issue from a court "only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." (Emphasis added.) *See also In re National Security Agency Telecommunications Records Litigation*, 483 F.Supp.2d 934 (N.D. Cal. 2007) (SCA was enacted to regulate the disclosure of both non-content and content of telecommunication service providers). Because the private telephone records here are not "relevant and material to an ongoing criminal investigation," neither a public employer nor any court had authority to demand production by the provider of these personally-owned telephone records without violating 18 U.S.C. §2703(d).

Further, Article I, §7 of the Washington State Constitution states: "No

person shall be disturbed in his private affairs, or his home invaded, without authority of law." A disturbance of a person's "private affairs" includes government intrusion upon "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass absent a warrant." *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990) (quoting *State v. Myrick*, 102 Wn. 2d 506, 510-11, 688 P.2d 151 (1984). Hence, as earlier noted, *State v. Gunwall*, 106 Wn.2d at 68-69, holds Article I §7 prevents the government from obtaining even pen register data for an individual's private telephone without a warrant because it confers a right of privacy in personal telephone records that cannot be invaded absent valid authority of law. In so holding, *Gunwall* agreed with the Colorado Supreme Court that a "telephone subscriber ... has an actual expectation that the dialing of telephone numbers from a home telephone will be free from governmental intrusion" because:

> A telephone is a necessary component of modern life. It is a personal and business necessity indispensable to one's ability to effectively communicate in today's complex society. When a telephone call is made, it is as if two people are having a conversation in the privacy of the home or office, locations entitled to protection under ... the Colorado Constitution. The concomitant disclosure to the telephone company, for internal business purposes, of the numbers dialed by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government.

Id. at 67 (*quoting People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983)).

Indeed, our state's Courts recognize such records also "may affect other persons and can involve multiple invasions of privacy." *Id.* at 69.

Telephone records therefore cannot be accessed without a warrant or other valid judicial subpoena. *See State v. Butterworth*, 48 Wn. App. 152, 737 P.2d 1297 (1987), *rev. denied*, 109 Wn.2d 1004 (1987) (privacy of unlisted telephone is protected by Article I §7). *See also York v. Wahkiakum Sch. Dist No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008) (once a matter is deemed private by Article I §7 a court must consider "whether a search has 'authority of law'--in other words, a warrant"); *City of Seattle v. McCready*, 123 Wn.2d 260, 273–74, 868 P.2d 134 (1994) (no general common law right to issue search warrants and "Washington's longstanding tradition of limiting search warrants to carefully circumscribed statutory categories provides powerful support for the proposition that Const. art. I section 7 prohibits courts from issuing warrants without an authorizing statute or court rule").

The PRA however lacks even an administrative subpoena provision -- much less the required procedural mechanism to judicially compel production of private matters protected under Article I §7. Indeed, all of the justices in *O'Neill* recognized the presence of a constitutional issue in obtaining what was undisputedly a public record sent to a public employee's privately owned home computer. *O'Neill*, 170 Wn.2d at 150, n. 4; *id.*, at 155

(J. Alexander, dissenting). For this reason, the justices in the majority simply addressed whether the computer could be inspected "if [the employee] gives consent to the inspection" and not "whether the City may inspect ... absent her consent." *O'Neill*, 170 Wn.2d at 150, n. 4. An agency therefore cannot obtain and disclose personal telephone records while avoiding liability under RCW 42.56.060 simply by claiming "good faith" compliance with the PRA because such records have long been held to be "private affairs" protected from government intrusion. *See also Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 602, 694 P.2d 1078 (1985) (school officials and parents were state actors under Fourth Amendment and Article I, §7 when searching students' luggage).

State v. Boland, supra. at 578, holds that though children, scavengers, snoops, and sanitation workers might sift through unsecured garbage, citizens reasonably expected to be free from such warrantless intrusion by government. The risk to privacy even of trash was considerable since it typically contained items that "can reveal much about a person's activities, associations and beliefs." *Id.* If there is a reasonable expectation of privacy even in trash, Prosecutor Lindquist -- like any other citizen -- certainly has a reasonable expectation of privacy in his own private telephone records and other personal papers such as bank records that can be accessed by use of his cellular phone. *See State v. Miles*, 160 Wn.2d 236, 246-47, 156

P.3d 864 (2007) (bank records are part of one's "private affairs" because they "reveal sensitive personal information" such as "what a citizen buys, how often, and from whom," and "disclose what political, recreational, and religious organizations a citizen supports" as well as "where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more"). Under Article I §7, absent a warrant based on probable cause, no compelled seizure or *in camera* inspection of personal records is lawful.

The Fourth Amendment likewise protects an individual's expectation of privacy in telephone records. *See United States v. Finley*, 477 F. 3d 250, 258-60 (5th Cir. 2007) (expectation of privacy against search of employer issued cell phone because defendant maintained a property interest in it, had a right to exclude others from using it and exhibited a subjective expectation of privacy in it, and took normal precautions to maintain privacy); *United States v. Chan*, 830 F.Supp.531, 533-535 (N.D. Cal 1993) (individual had reasonable expectation of privacy in digital pager records under Fourth Amendment); *United States v. Gomez,* 807 F.Supp. 2d 1134 (S.D. Fla. 2011) ("As the weight of authority agrees that accessing a cell phone's call log or text message folder is considered a 'search' for Fourth Amendment purposes, it would logically follow that an individual also has a reasonable expectation of privacy with respect to operational functions,

such as making calls or exchanging text messages"); *United States v. Lynch*, 908 F. Supp. 284, 287 (D.V.I. 1995); *United States v. De La Paz*, 43 F.Supp.2d 370, 372 (S.D.N.Y. 1999) (privacy expectation for receipt of cellular calls and identity of callers since "courts have consistently held that the owner of an electronic pager has a legitimate privacy interest in the numerical codes transmitted to the device even when the transmissions are received while the pager is in the government's lawful possession").

Personally-owned cell phones are not shared with the government, are in the sole possession of the official who owns and pays for it, and a public employer would know and expect personal data to be stored on such personally-owned devices. *See City of Ontario, Cal. v. Quon*, __ U.S. __, 177 L.Ed.2d 216, 130 S. Ct. 2619, 2633 (2010). Under the Fourth Amendment, it is clear employees have a reasonable expectation of privacy in their personally-owned telephone records, and that a search of such is unreasonable in scope and unreasonably intrusive in light of the procedural purpose of the PRA. The Fourth Amendment likewise applies to searches of employee text messages just as it does to the seizure of personal devices. *See Quon*, *supra.* at 2630. Consequently, government review of an employee's text messages violates the Fourth Amendment if an employee (1) has a reasonable expectation of privacy in the transcripts and (2) the employer's search is unreasonable in inception or scope. *Id.* at

2628. Seizure of the personal telephone records here to respond to plaintiff's PRA requests would be unconstitutional absent a search warrant because a reasonable expectation of privacy exists in those text messages and any search under the PRA would be unreasonable in its inception. Plaintiff's interpretation of the PRA would render it unconstitutional.

For these reasons, third party telephone numbers are properly withheld under the Federal Freedom of Information Act (hereinafter "FOIA") based on the reasonable expectation of privacy of individuals to whom the documents pertain. *See e.g. Berger v. IRS*, 487 F.Supp.2d 482, 502 (D.N.J. 2007). The PRA "closely parallels" the FOIA and therefore judicial interpretations of FOIA are "particularly helpful in construing" our PRA. *See e.g. Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). *See also O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 907, 895, 25 P.3d 426 (2001); *Limstrom*, 136 Wn.2d at 608 (same); *Dawson,* 120 Wn.2d at 791–92 (1993), *overruled on other grounds*, *PAWS.*

Plaintiff's only mention of the SCA, Article I §7 or the Fourth Amendment -- despite all having been raised in and by the superior court, *see e.g.* Supp. CP 535-41; 12/23/11 VRP 94-95 -- is her assertion she is "putting aside" some unidentified "problems"[12] with them. Instead, she

[12] Citing only "generally" a criminal case concerning constitutional rights, *i.e. State v. Walker*, 136 Wn.2d 678, 685, 965 P.2d 1079 (1998), plaintiff "at the outset" argues the County has "no standing to assert the privacy interests of [Prosecutor] Lindquist, who has

inexplicitly considers the issue resolved by her unsupported allegation that the County "need not forcibly obtain [Prosecutor] Lindquist's records, because it already has them." AB 40-42. A plaintiff not only must "cite to the record to support" her argument, *In re Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998); *see also* RAP 10.3(a)(6) (requiring "references to relevant parts of the record"); RAP 10.4(f) (requiring specific references to the record), but must provide "argument in support of the issues presented for review, together with citations to legal authority ...." *See* RAP 10.3(a)(6). *See also Point Allen Service Area v. Washington State Dept. of Health,* 128 Wn.App. 290, 115 P.3d 373 (2005) (refusing to "consider alleged errors unsupported by citation to the record or legal analysis"). She nowhere explains how her baseless factual invention would negate an official's statutory and Constitutional protections. The SCA and state and federal constitutions cannot be so easily waived aside without

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intervened in this case as a private person." AB 44. However, unlike *Walker*, this appeal is a PRA action and not a CrR 3.6 criminal suppression hearing. Though criminal defendants lack standing to assert another's privacy rights, the PRA expressly confers such standing on agencies where "the record falls within the specific exemptions of ... this chapter, or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1) (emphasis added). Indeed, according to the treatise quoted by plaintiff as being "balanced and objective," AB 13 n. 4, the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510 et seq., is an "other statute" under RCW 42.56.070(1) that agencies must follow in exempting records under the PRA. *See Public Records Act Deskbook*, Chapter 12 K. Wiitala, Other Statute Exemptions from Disclosure, Appendix: Federal "Other Statutes" (citing ECPA and describing "affected records" as "Electronic, oral and wire communications"). Indeed, the PRA protects an agency from state law liability to others for the release of records only if it exercises "good faith in attempting to comply with the provisions of this chapter." *See* RCW 42.56.060. Further, state statutory immunity does not extend to constitutional claims. *See Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 606, 238 P.3d 1129 (2010).

legal argument or citation to authority since -- to paraphrase John Adams' argument to a colonial court -- the law, like facts, "are stubborn things."

More importantly, as already noted, plaintiff's own motion expressly sought to have the court compel the County to acquire and preserve "text content" from the personal telephone precisely because the County does not have them. *See* CP 45, 56-60. Hence, her own submissions and the record not only disprove her invented facts, *see also discussion supra. at 12 n. 2;* CP 81, 444-46; *Supp.* CP 597-99, 616, but it has been shown a government does not own something just because an official owns it -- much less when it is in fact owned by the official's private service provider. *See supra.* at 18.

Even where an agency does possess undisclosed personal telephone data, production of any part of a public employee's private records entrusted to his or her governmental employer would violate Article I §7 and the Fourth Amendment. *See e.g. Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008), *rev'd on other grounds* 130 S.Ct. 2619 (2010). Plaintiff's argument ignores the obvious: the relief expressly sought by her complaint is the court compelled production of records to her against the will of their actual owner, *see* CP 21; Supp. CP 494, while her appeal seeks to similarly compel production by court order for an opposed *in camera* inspection. *See* AB 48. *See also e.g. McCready*, 123 Wn.2d at

267–68 (court not authorized by Constitution, statute or common law to issue "inspection warrants" absent probable cause). Because the relief sought is the compelled disclosure of private matters to plaintiff or the court, these privacy protections apply.

Plaintiff also attempts to avoid any substantive discussion of these issues by similarly claiming that "as in *O'Neill,* the Court here need not reach the issue of what would occur if [Prosecutor] Lindquist had not given consent" because she has claimed "he consented" -- even though she admits *O'Neill* "did not address whether the city could inspect absent [the official's] consent" and here "[Prosecutor] Lindquist obviously objects to the production ...." AB 41. Again, her invented assertion of "consent" is contradicted by her own filings and a disregard of her pleadings that expressly seek court compelled production from files of an official's attorney against his will. AB 42.

As to compelling production of text messages possessed solely by the official's private service provider, plaintiff's policy argument made without any legal basis or rationale is that such is necessary because she claims officials "should not be allowed to immediately delete" private text messages on their own personal telephones "and then attempt to use the protections of the SCA to make it impossible to obtain those records." AB 42 (emphasis added). This last expansive, conclusory assertion improperly

depends on an unexplained, unsupported, and unsettling claim that the PRA somehow independently requires retention of private records on a citizen's personal telephone. *See* RAP 10.3(a)(6). No authority has ever gone to this extreme because state and federal statutes and constitutional law prohibit such an assault on personal rights.

V. CONCLUSION

As the Colorado Supreme Court held in *Ritter*, records created and held by a third party telephone service provider are not prepared, owned, used or retained by an agency, and therefore are not public records as a matter of law. The telephone records at issue in this case also would be privileged under the PRA and the SCA, as well as are per se constitutionally protected private affairs under Article I §7 and the Fourth Amendment. The PRA, as a procedural statute, is insufficient authority of law to violate the constitutionally protected privacy rights of public servants. Plaintiff's assertions that the PRA, through court compelled production, can eviscerate constitutional and statutory privacy rights should be rejected by affirming the dismissal of the complaint.

DATED this 7th day of March, 2013.

MARK LINDQUIST
Prosecuting Attorney
By s/ DANIEL R. HAMILTON
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Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing CORRECTED BRIEF OF RESPONDENT PIERCE COUNTY was delivered this 7th day of March, 2013, by electronic mail pursuant to the agreement of the parties as follows:

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OFFICE RECEPTIONIST, CLERK

To: Christina Smith
Cc: Dan Hamilton; 'Stewart A. Estes'; 'Michele Earl-Hubbard'; PCPATVECF
Subject: RE: Nissen v. Pierce County - 871876 - Respondent's Corrected Brief

Rec'd 3-7-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Christina Smith [mailto:csmith1@co.pierce.wa.us]
Sent: Thursday, March 07, 2013 8:50 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dan Hamilton; 'Stewart A. Estes'; 'Michele Earl-Hubbard'; PCPATVECF
Subject: Nissen v. Pierce County - 871876 - Respondent's Corrected Brief

Clerk of the Court,

You will please find attached the CORRECTED Brief of Respondent Pierce County. Please substitute this brief in its entirety for the brief filed on March 4th.

For ease of reference the following highlights the only changes that have been made to the brief:

- p. 12: *See* 12/23/11 VRP at 96, 103. *C.f. Forbes v. City of Gold Bar*, __ Wn.App. __, 288 P.3d 384 (2012) (PRA case dismissed where city came into possession of private documents only while responding to record request); *discussion infra* at **23-26**.
- p. 19 n. 6: *See discussion infra* at **40-49**.
- p. 23: *See also discussion supra.* at **2** n. 2.
- p. 26 n. 8: *see supra* at **4**.
- p.39: *See Koenig*, 151 Wn.App. at **232** (agency not required to obtain records it does not already have).
- p. 39 n. 11: Delete footnote, insert: "***See discussion supra.* p. 19 n. 6.**" [With extra space to maintain page ending.]

All parties of record have been cc'd in this email pursuant to GR 30.

Thank you.

Christina Smith | Legal Assistant 3 | Pierce County Prosecutor's Office - Civil Division
955 Tacoma Avenue South, Suite 301, Tacoma, WA 98402
Phone: 253-798-7732 | Fax: 253-798-6713 | Email: csmith1@co.pierce.wa.us

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GLENDA NISSEN, an individual, Appellant, vs. PIERCE COUNTY, a public agency; PIERCE COUNTY PROSECUTOR'S OFFICE, a public agency, Respondents.	NO. 87187-6 RESPONDENT PIERCE COUNTY'S NOTICE OF ERRATA IN RESPONDENT'S BRIEF

Respondent respectfully submits this notice of errata to the Corrected Brief of Respondent Pierce County filed March 7, 2013. The citation on page 32 of the brief should be updated to read as follows: *DeLong v. Parmelee*, 157 Wn.App. 119, 236 P.3d 936 (2010), *remanded*, 171 Wn.2d 1004 (2011), *appeal dismissed on other grounds*, 164 Wn.App. 781 (2011).

DATED this 27th day of March, 2013.

MARK LINDQUIST
Prosecuting Attorney

s/ DANIEL R. HAMILTON
DANIEL R. HAMILTON
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ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing RESPONDENT PIERCE COUNTY'S NOTICE OF ERRATA IN RESPONDENT'S BRIEF was delivered this 27th day of March, 2013, by electronic mail pursuant to the agreement of the parties as follows:

Michele Earl-Hubbard
Email: michele@alliedlawgroup.com

Stewart A. Estes
Email: sestes@kbmlawyers.com

s/ CHRISTINA M. SMITH
CHRISTINA M. SMITH
Legal Assistant
Pierce County Prosecutor's Office
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OFFICE RECEPTIONIST, CLERK

To: Christina Smith
Cc: Dan Hamilton; 'Stewart A. Estes'; 'Michele Earl-Hubbard'; PCPATVECF
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Rec'd 3-27-13

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From: Christina Smith [mailto:csmith1@co.pierce.wa.us]
Sent: Wednesday, March 27, 2013 3:15 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dan Hamilton; 'Stewart A. Estes'; 'Michele Earl-Hubbard'; PCPATVECF
Subject: Nissen v. Pierce County - 871876 - Respondent's Corrected Brief

Clerk of the Court,

You will please find attached for filing Respondent Pierce County's Notice of Errata in Respondent's Brief.

All parties of record have been cc'd in this email pursuant to GR 30.

Thank you.

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Christina Smith | Legal Assistant 3 | Pierce County Prosecutor's Office - Civil Division
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