No. 90875-3

SUPREME COURT
OF THE STATE OF WASHINGTON

GLENDA NISSEN, an individual,

Respondent,

v.

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

Petitioners,

v.

PROSECUTOR MARK LINDQUIST,

Petitioner.

PIERCE COUNTY'S RESPONSE TO AMICI MEMORANDA

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A. INTRODUCTION

The amici memoranda of the Washington Association of Municipal Attorneys ("WSAMA") and the various public employee organizations ("Public Employee Associations") reinforce the point made in petitioners Pierce County/Pierce County Prosecutor's Office's ("County") petition for review that the Court of Appeals opinion is an unworkable and unconstitutional expansion of the scope of Public Records Act, RCW 42.56 ("PRA"). This case is one of vital public importance meriting this Court's review. RAP 13.4(b).

Indeed, respondent Nissen's answer to the County's petition further confirms why those amici are concerned about the Court of Appeals' opinion here. That opinion is an unvarnished assault on the privacy rights of public employees which would essentially convert all private records of public employees into public records, or at the very least would subject such records to fishing expedition PRA requests culminating in intrusive *in camera* judicial proceedings. For example, Nissen argues that public employees and public officials are an "agency" under the PRA (answer at 9-12), which would mean that any writing by a public employee that possibly relates to work – emails to family and friends, text messages, diaries, etc. – become "public records" even though the agency has no ability to lawfully obtain these private writings.

Further, merely reviewing documents for PRA compliance transforms private documents into public records subject to the PRA (*id.* at 12-13). Finally, public employees have no expectation of privacy in their personal records, thus denying any constitutional protection to them (*id.* at 13-14, 16-19). In Nissen's view, fishing expeditions into public employee private records through the use of the PRA are justifiable.

This Court should grant review. RAP 13.4(b).

B. STATEMENT OF THE CASE

The County adheres to the statements of the case in its petition, and in its briefing below, but it notes that in her argument section, Glenda Nissen has *repeatedly* misrepresented the facts. For example, Nissen asserts that Prosecutor Mark Lindquist ("Prosecutor") "chose" to use his personal cell phone for "agency business." Answer at 3. In a burst of bombast that is characteristic of Nissen's argument throughout this case, she asserts that the Prosecutor left his County cell phone in his desk and engaged in what amounts to intentional violation of the PRA. *Id.* at 8. These assertions are simply false. County pet. at 3-4.

Finally, as oblivious as ever to public employees' constitutional rights to privacy in their records and personal communications devices, Nissen claims that the Prosecutor has not actually ever said he would refuse access to the records by insisting on his constitutional rights. *Id.* at

14. That statement is utterly false, belied by the Prosecutor's own petition. Prosecutor pet. at 2-3, 18 ("The Petitioner will not waive his statutory and constitutional rights.").[1]

C. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The amici here have offered a number of additional arguments for review by this Court beyond those advanced by the County and the Prosecutor in their respective petitions. The County will discuss each below.

(1) The Records at Issue Here Are Not Public Records under the PRA

First, in order to make the records of public employees' private communications' devices subject to the PRA, the Court of Appeals had to overcome the interpretive hurdle that the PRA *only* applies to government entities. RCW 42.56.010(1). It addressed this issue with little analysis in a footnote to its opinion. Op. at 11 n.15.[2] As the public employee associations correctly observe, the Legislature used the term *public agency* deliberately. Pub. emp. ass'ns amici br. at 2-3. This Court should give

[1] The Prosecutor turned over any records that may be possibly work-related and opposes a fishing expedition into his private communications with family and friends.

[2] Nissen tries to sidestep this issue by simply equating a public employee's actions with those of the agency. Answer at 10-11. If that had been the legislative intent, and it was not, the language of RCW 42.56.010(1) would have so stated. It did not.

deference to the Legislature's specific use of the language in RCW 42.56.010(1). Individual public employees are *not* agencies.

Second, the Court of Appeals' opinion fails to define "conduct of government," the core phrase to RCW 42.56.010(3), thereby subjecting private citizens who happen to be Washington public employees to extreme uncertainty as to the reach of the PRA into their private lives, into their communications on private devices, their personal Facebook pages, and other personal writings that might mention work. As WSAMA notes with particularity in its amicus memorandum at 4-8, the Court of Appeals' opinion is contrary to numerous appellate court decisions on that point such as *Concerned Ratepayers Ass'n v. Public Util. Dist. No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999); *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012); and *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272, *review denied*, 114 Wn.2d 1002 (1989), to name only a few.

Nissen, however, proposes a breathtaking expansion of the PRA that ignores the statutory language of RCW 42.56.010(3), and cases like *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013), that make clear that private records of public employees are not subject to the PRA. Nissen essentially ignores the statutory language and case law, arguing that if a

record is in any conceivable way "work-related" (and she nowhere defines such a concept), it is subject to the PRA. Answer at 3-13.[3]

Nissen even contends that where a public employee like the Prosecutor seeks to comply with a PRA request, the very act of seeking to assess whether records are subject to the PRA transforms private records into public records. Answer at 12-13. Such a position, if correct, will force public employees *not* to seek guidance on records, for fear that their private records will become subject to the PRA. This will necessarily make impossible a true government agency's "reasonable efforts" to obtain from its employees what could be now deemed its "public records."

In sum, the amici briefs support the County's position that this Court should grant review to address the Court of Appeals' treatment of a public record under RCW 42.56.010(3). RAP 13.4(b)(1-2).[4]

(2) Even if the Prosecutor's Cell Phone Records Are Public Records, the Records Are Barred from Disclosure under Federal law and Constitutional Principles

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[3] In asserting the Prosecutor "owned" text messages and cell phone records, answer at 9-13, Nissen *ignores Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011), not even choosing to mention it despite having been cited it repeatedly.

[4] If this Court is concerned that public employees might seek to use private communications devices to avoid the PRA, the Legislature is in the best position to confront such a possibility. For example, in H.R. 1233, Congress recently amended the Presidential Records Act to require employees using "non-official electronic messaging accounts" to make copies of any communications for "official" accounts. 44 U.S.C. § 2911. Contrary to Nissen's assertion in her answer at 5-6, neither the PRA, nor any appellate decision, requires such a process by a Washington public employee.

The amici briefs also reinforce the point articulated in the County's petition at 14-20 that even assuming, arguendo, the records at issue here are public records under RCW 42.56.010(3), they are nevertheless still not subject to production because RCW 42.56.050/42.56.230 and constitutional provisions bar their disclosure. The Court of Appeals simply refused to address this issue. Op. at 13.

As the public employee associations note in their amici brief at 3-9, federal and state constitutional provisions, as well as federal communications law, bar court-ordered disclosure of these records.

Nissen, however, contends that a public employee waives any privacy protections afforded that employee as a condition of public employment, answer at 16-19, in defiance of repeated decisions of this Court.[5] Nissen fails to even cite the United States Supreme Court's seminal opinion on the application of the Fourth Amendment to private communications devices, *Riley v. California*, __ U.S. ___, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014), and misrepresents this Court's decision on article I, § 7 in *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010) where the Court did not reach the application of the Washington Constitution. Nissen is oblivious to the practical problem that an employee may, and will, insist on the application of constitutional

[5] *See, e.g.*, authorities in County's petition at 15; Pub. emp. ass'ns amici memo. at 10.

provisions to resist a PRA request, and the public employer is powerless to force the employee to comply. County pet. at 20.[6]

Similarly, the Stored Communications Act, 18 U.S.C. §§ 2701-03, bars disclosure of private telecommunications unless relevant to a criminal investigation, as the public employee associations set forth in their amici memorandum at 5-6. Nissen's attempt to argue that the PRA can trump such federal law fails, answer at 14-16, because it is oblivious to the Supremacy Clause, and RCW 42.56.050/.230. None of the cases Nissen cites holds that telecommunications records can be produced over an employee's objection without a court order and unless relevant to a criminal investigation.

Finally, Nissen argues the Court of Appeals ordered an *in camera* review at 10, 12, which is itself violative of public employees' privacy rights, as WSAMA has argued in its amicus memorandum at 8-9. WSAMA is entirely correct in noting that this Court has expressed reservations about in camera review where key constitutional rights are at issue. *Snedigar v. Hodderson*, 114 Wn.2d 153, 165-67, 786 P.2d 781 (1990).

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[6] The public employee associations have also argued that article I, § 5 and First Amendment associational rights are at stake in this case, pub. emp. ass'ns amici memo. at 8-9, and the County agrees.

Nissen's mantra in her answer at 14 and elsewhere that the Court of Appeals' direction that an *in camera* hearing must occur here and will cure any concern about a public employee's constitutional and statutory privacy rights is tone deaf to reality. Emboldened by such an interpretation of the Court of Appeals' decision, requestors will routinely seek private communications records of public employees and such employees will be subjected to the intrusion of a judge poring through the hard drive of such employee's personal computer, his/her tablet, and the records of his/her cell phone hoping to chance upon a reference to their work (under Nissen's "work-related" standard). Such a process is a spectacular diminution of the privacy rights of public employees, to say nothing of the unworkable nature of overworked Superior Court judges reviewing the personal devices of hundreds of thousands of public employees.[7]

(3) This Case Has Serious Public Ramifications Requiring Review by this Court

One of the reasons articulated by the County in its petition at 5-6 in support of review under RAP 13.4(b)(4) is the fact that the Court of

[7] Review is appropriate at this time on these key statutory and constitutional issues because such issues will re-emerge after the remand the Court of Appeals has ordered. Nissen will seek discovery on such records and an *in camera* proceeding on them. The County, however, does not have them to produce and the intervenor has consistently asserted his statutory and constitutional rights. The issue will be back up on review thereafter on the very same *legal* issues the Court of Appeals refused to address and that are now before this Court.

Appeals opinion will impact every one of the hundreds of thousands of public employees in Washington.

Nissen belittled this assertion, claiming that this Court should not worry about the ramifications of the Court of Appeals opinion, ("deriding concerns about "what ifs" and a parade of horribles), as though a Court of Appeals opinion lacks precedential value. Answer at 3. Nissen further contends that this is not a case about a "ballpark janitor," as if such a public employee has no interest in the privacy of his or her personal communications devices. *Id.* at 7. Further, the very fact that organizations representing all state employees, teachers and school employees, firefighters, state troopers, local law enforcement officers, and the Pierce County deputy prosecutors have joined in this action severely undercuts Nissen's argument. They are all concerned about the vagueness of the Court of Appeals' analysis of the PRA issues here. They are even more concerned about Nissen's interpretation of the PRA that envisions a public employee's waiver of his/her constitutional privacy rights merely by virtue of public employment, offers no principled limitation on records of such employees' private communications devices being public records under the PRA, and permits, if not requires, judges, at the whim of any PRA requestor, to conduct intrusive in camera reviews of public employees' private communications devices, such as personal computers, tablets, and

cell phones, to ferret out possible mention of "work-related" activities on them. These concerns are precisely why review here is merited under RAP 13.4(b)(4).

D. CONCLUSION

The amici memoranda support the view that this case is extremely important to the people of Washington and the hundreds of thousands of men and women in our State in public service in state and local government. This Court should grant review under RAP 13.4(b) and reverse the Court of Appeals, reinstating the trial court's thoughtful decision. Costs on appeal should be awarded to the County.

DATED this 23d day of January, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of Pierce County's Response to Amici Memoranda in Supreme Court Cause No. 90875-3 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 23, 2015, at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick/Tribe

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Subject: Glenda Nissen v. Pierce County, et al. Cause No. 90875-3

Good Morning:

Attached please find Pierce County's Response to Amici Memoranda in Supreme Court Cause No. 90875-3 for today's filing. Thank you.

Sincerely,

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