48601-6-II

No. 90912-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON,

STEVE VERMILLION AND
THE CITY OF PUYALLUP,
Appellants,

v.

ARTHUR WEST,

Respondent

RESPONDENT WEST'S AMENDED OPENING BRIEF

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I. SUMMARY OF ARGUMENT

This is an action for disclosure of public records concerning the governance of the City of Puyallup sent to or received at an ostensibly "private" email account, Steve@stevevermillion.com.

Appellant Puyallup City Council member Vermillion, in his declaration in support, (CP 71-2) certified that the City possessed copies of numerous records sent to, and received by him at his ostensibly "private" email address, which address was apparently his preferred mode of contact with the City for his work as a City Council Member. When the City was finally compelled by the Court to produce the records in its possession sent to or received from this address, it produced **literally hundreds of emails city employees sent to Steve@stevevermillion.com or which were forwarded to various City employees and officers from Council member Vermillion's ostenibly "private" email account**. (CP at 331)

This pattern of communication was no inadvertent accident, as the email appearing at CP 332 demonstrates that Vermillion refused to employ a City email for communications and was expressly warned by Puyallup City Manager Ralph Dannenberg that

> **Using your personal email will open you to records requests as well. I would re-think using personal devices. (CP 332)**

Vermillion's counsel on page 3 of his motion for summary judgment, (CP 45) lines 1-4, also states that records were sent by City

employees to vermillion's "private" internet address and records were forwarded to the City from Vermillion's "private" address. These known responsive records were not identified, disclosed or exempted by the City of Puyallup, and no privilege log was been prepared until a motion for contempt was noted and set on September 2nd, 2014. (CP 330-334)

The City and Vermillion not only failed to produce records within their control, but instead advanced a series of creative red herring "personal privacy" related issues to attempt to obscure their deliberate withholding of records in their possession: records which were of substantial interest to the public. Under these circumstances, it can readily be seen that these spurious constitutional issues have been raised merely to obstruct the disclosure of records showing how the Puyallup City council conducts the publics' business in smoky back room conclaves.

Respondent West does not dispute that there exist many printed words on paper that purport to "rigorously promote transparency and accountability, but as the records appearing at CP 337-364 demonstrate, the Puyallup City Council, and appellant council member Vermillion, despite the existence of thesen laws that (according to the brief filed by appellant Vermillion) "Rigorously promote transparency and accountability" blatantly continues to violate the OPMA by means of serial email communications. (CP 337-364)

If public officers were able to routinely veil such email communications behind the legal fiction of a penumbral shadow of personal privacy, as the appellants advocate, it would be impossible for the public to even discover what their elected officials were really doing behind closed doors. Under such circumstances the alleged "Rigorous" promotion of transparency by existing laws would be rendered ineffectual and both the PRA and OPMA would be reduced to just so many empty words on paper that could be flaunted with no prospect that the public would ever be able to discover that they had been cheated out of the lawful conduct they rightfully expect of their duly elected public servants.

Municipal politicians of every stripe would be free to solicit political contributions in the same secret communications they conducted with their constituents to transact the business of their government entity, to communicate covertly with those bringing development applications or quasi-judicial appeals before the selfsame government entity, and to enter into secret conclaves and cabals to make decisions for their governmental body behind a specious veil of overly broad "personal privacy". In short by overzealously guarding our public guardian's personal privacy, we would ensure that no one would be in the position to hold these selfsame guardians accountable for their actions in executing their public duties.

In order to try to bring bout such an absurd state of affairs, as far as the records of City business transacted by Puyallup City Council Member

Vermillion that the City does not admit to having copies of, the City and Vermillion grossly distort the existing constitutional and statutory framework to reach untenable and unworkable conclusions at odds with not only good government but reasonable operational realities, common sense, federal precedent, the third party doctrine and the doctrines of waiver and estoppel.

The appellant's briefs themselves amply demonstrate that their arguments are based upon freewheeling, extra-textual, and profoundly confused broad misperceptions of the 'purposes and objectives' embodied within both the Constitution and the Public Records Act, which misperceptions, it must be noted, lack substantiation in any published precedent or opinion.

The Court, like the Court of Appeals in Nissen, should see through the transparent attempt by the City of Puyallup and Puyallup City Council Member Vermillion to revive the fatally defective arguments rejected by the Trial Court by injecting fanciful constitutional issues into what should be a simple open and shut case of violations of the Public Records Act, and should either reject their attempt to make a Supreme Court case out of whole cloth or, alternatively, conclude that there is no "privacy" interest in the secret conduct of government officials in their of the people's business that trumps the operational realities of reasonable, transparent, legitimate, and honest public service.

Ultimately, this case is the result of a series of deliberate refusals by the City of Puyallup and it's agent Council member Vermillion: a refusal by Mr. Vermillion to employ a City Email address for City business, (CP 331) a refusal to accept reasonable limitations on personal privacy incumbent upon elective office, a refusal of the City to disclose Emails in its possession the city sent to or received from Mr. Vermillion's "private" Email address, and a refusal of Mr. Vermillion to either turn over to his employer the small subset of records related to his actions on behalf of the City that the City did not already possess, or apply for a protective order expressly allowed under the provisions of RCW 42.56.540.

An additional default is apparent in the refusal of the appellants to notify the Attorney General of their intent to make a constitutional challenge to the validity of RCW Title 42.56

The Appellants would have this Court allow them to parlay this series of refusals and an express waiver of their rights to relief under RCW 42.56.540 into a constitutional challenge to the Public Records Act, despite the fact that they are barred from asserting such a constitutional challenge due to their failure to serve or notify the State of Washington, (See Jackson v. Quality Loan Servicing, ___ Wn. App. ___, (2015) and by their additional failure to seek a protective order as would be required under the accepted rules of standing had they truly wished to seek protection under and test the limits of their rights under the PRA.

Having failed to exhaust available remedies under the Public Records Act, and therefore having waived them, appellants lack standing to assert the strident complaints they make as to the constitutional deficiencies of a duly enacted and longstanding State Law.

While this series of deliberate refusals and waivers on the part of the City and a single Council member are egregious, they simply do not a constitutional challenge make. The constitutional confusion of appellant's counsel is evident in a number of critical points in their argument, such as their reversal of the doctrine of constitutional avoidance to attempt to justify a constitutional challenge to a statute in exactly the manner the doctrine is intended to avoid. As Chief Justice John Marshall cautioned nearly 200 years ago...

> "if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed." Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558)

The appellants in this case, lacking a just respect for the People who enacted I-276, are transparently attempting to unnecessarily and wantonly assail the obligations of duly enacted law (The Public Records Act) in precisely the manner prohibited by a fair understanding of the avoidance doctrine. Sadly, this type of transparency is the only type that appellants seem capable of observing.

Nor can the appellants prevail by misrepresenting the intent of the People in adopting the PRA and, indeed, the last 700 years history of

Anglo-Saxon law[1] as being primarily concerned with the vindication of the government's rights to privacy against the People, rather than the advancement of the People's rights in relation to the exercise of power by their government.

Significantly, in contrast to the terms of section 45 of the very Great "Charta" they attempt to cite to as precedent, appellants are neither "well versed in the law nor well minded to obey it", and rather seek to employ their own defaults and misperceptions to mount a devious form of assault upon the law they are so brazenly attempting to defy.

As Chief Justice Rhenquist noted in Webster v. Reproductive Health Services, 492 U.S. 490 (1989) in demonstrating the scope of judicial restraint and constitutional avoidance...

> There is no merit to Justice Blackmun's contention that the Court should join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as *Griswold v. Connecticut*, 381 U. S. 479, (1965).

Clearly, the "**Avoidance** Doctrine" requires that the courts to "**avoid**" rather than foolishly rush into entertaining the very type of unnecessary, wanton, unsubstantiated and freewheeling assault upon a duly enacted statute that the appellants seek to bring in this instance, particularly when the targeted statute furthers a compelling State interest in the manner of the Public Records Act.

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1 Appellant's profound misunderstanding of the development of English law is indicated by their citing to the Magna "Charta" to support their far-flung, freewheeling and fanciful theories.

Similarly, there is no merit to appellants' contention that this Court should entertain a "great issues" direct review in regard to an unenumerated, extra-textual and spurious penumbral right to privacy on the part of government officials to conduct the people's business secretly. (See also Judicial Restraint and the Non-Decision in Webster v. Reproductive Health Services; Crain, Christopher A, 13 Harv. J. L. & Pub. Pol'y 263 (1990)

As the Supreme Court of the United States has recognized, in Garcetti v. Ceballos, 547 U.S. 410 (2006),

> When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e. g.*, *Waters* v. *Churchill*, 511 U. S. 661, 671 (1994)

The defendants attempt to make a simple matter overly complex, and deny this basic truth of responsible public service. Clearly, defendant Vermillion had no reasonable expectation of privacy in communications received in response to an email address published on a website seeking public comments on City business, especially in light of the explicit City policies prohibiting such conduct. Far from being required to passively stand by while their agent violated the law, the City had a duty under the PRA and its own policies to act to compel its agent Council Member Vermillion to comply with State law, including the Public Records Act.

To require that public officers allow limited intrusion into their privacy while they act as public servants in the conduct of the people's

business is not only reasonable, it is, as provided in the Public Records Act, essential to the preservation of democratic institutions and the people's sovereignty. (The purpose of the PDA is to "ensure the sovereignty of the people and the accountability of the governmental agencies that serve them" by providing full access to information concerning the conduct of government.) Amren v. City of Kalama, 131 Wash.2d 15, 31, 929 P.2d 389 (1997).

As the State Supreme Court in O'Neil recognized...

> If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined. O'Neill v. City of Shoreline, 145 Wash.App. 913, 923,187 P.3d 822 (2008)

Similarly, in Mechling v. Monroe, Division II held that...

> An e-mail message is a "writing" under the PDA. O'Neill v. City of Shoreline, 145 Wash.App. 913, 923,187 P.3d 822 (2008), rev. granted, --- Wn.2d ----, 208 P.3d 551 (2009). E-mail messages of public officials or employees are subject to a public records request if the e-mails contain information related to the conduct of government. Mechling v. City of Monroe, 152 Wn. App. 830, 222 P.3d 808 (2009), citing Tiberino v. Spokane County, 103 Wash.App. 680, 688, 13 P.3d 1104 (2000).

In light of this precedent, the appellants simply protest too much. This case is governed by Mechling and City of Ontario, Cal. v. Quon, 560 U.S. ___, 2010, 130 S. Ct. 2619 (2010) and O'Connor v. Ortega, 480 U.S. 709 (1987). which establish the standard for when non-investigative

searches of government employees by their employers violate the Fourth Amendment.

In O'Connor, the Court indicated that the "operational realities of the workplace" and the need for efficiency lessen Fourth Amendment protection for government employees. However, the Court also cautioned that where a reasonable expectation of privacy exists, the search must still be reasonable within the context. For these purposes, a reasonable search will be both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place."

As the Court in Quon noted, citing Treasury Employees v. Von Raab, 489 U.S. 656 (1989)...

> In the *Von Raab* decision, the Court explained that "operational realities" could diminish an employee's privacy expectations, and that this diminution could be taken into consideration when assessing the reasonableness of a workplace search. 489 U.S., at 671, 109 S.Ct. 1384.

In this case the "operational realities" of Mr. Vermillion deliberately conducting City business via a "private" Email address incorporated in an internet site in violation of clearly stated City policies, (in addition to the fundamental public policy of the PRA), simply outweigh any legitimate privacy interest in a reasonable review of the City related communications Mr. Vermillion solicited on his Email site.

"The stated purpose of the Public Records Act ("PRA") is nothing less than the preservation of the most central tenets of representative

government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." Progressive Animal Welfare Loc. v. University of Washington, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

Disclosure of public records is necessary to allow citizens to scrutinize how public officials conduct public business and to hold them accountable for such conduct. Historically, communications documenting such conduct reside in publicly-owned repositories, whether agency file cabinets or computers. Today, other communication tools may contain such records when public officials tweet, text or call from cell phones about matters related to their jobs. If these take place with an agency computer, there is no question that records documenting these communications should be publically disclosable. The result in this appeal should be no different, even if the communications occurred over a personally-owned computer of a public official. Records documenting public official's working email are publicly disclosable. To hold otherwise would incentivize public officials to circumvent the PRA by using private email accounts to conduct the public's business, knowing that the public would have no way to track them. Such a result would violate the fundamental intent and purpose of the Public Records Act.

II COUNTERSTATEMENT OF THE CASE

Defendant Vermillion was elected to the Puyallup City Council in 2012. Shortly after being sworn in, Vermillion maintained and operated a website, a true and correct screen print of which appears as exhibit 1. The website contained the following information and contact data.

> On December 15th, I was officially sworn in as a Puyallup City Council Member with my first official duty day as January 1, 2012. I am thrilled to have been elected and have the opportunity to serve the citizens of our city.
>
> The "current Projects" page lists those issues or projects that I am currently pursuing or working on.
>
> The "Citizen Update" page will be my page with providing current information for citizens to read and stay abreast of what is going on the council and within the city.
>
> If you have questions, concerns or just want to chat, please contact at your pleasure. I will not have formal office hours at City hall but do have an office and meeting space where we can sit down and talk.
>
> I am happy to come to your home, a group meeting, or whatever, and talk. And I am more than happy to do a site walk with you if you have a road drainage or other property problem that falls within the City's scope.
>
> If you call and get a voice mail, the call will be returned within 12 hours, unless I am in an area for a prolonged time that is out of cellphone coverage. Likewise, I will respond to all emails.
>
> I look forward to serving you.
>
> Cordially,
> *Steve Vermillion*
> *Cellphone 253-906-2938*
> *Email: stevenvermillion.com*

On or about August 1, 2013, plaintiff West submitted a request to the City of Puyallup.

The request sought for the following records:

"

> "1. All records of communications received by or communications or posting by Steve Vermillion concerning the City of Puyallup, City business, or any matters related to City governance the City Council and mayor, or his membership on the City Council.
>
> 2. All records of any website maintained by Mr. Vermillion to discuss city business or city council related business.
>
> 3. Any communications or directives from or of the City concerning the use of social media or "private" websites for city business."

Also on August 1, 2013, defendant Vermillion sent an Email to various City officials stating...

> Folks: No issue with Churchman's request no issue with Churchmans request. Those emails that came in and there was dialogue are saved in my domain account under city file. There are 52 emails as of this evening in that file going back to 2012, Feb. I can give you my domain name log in and pw info and one of you can go in and download those files.

On August 8, 2013, Brenda Arline, the Puyallup City Clerk, responded in a timely manner to the August 1 request...

> The city estimates that it will require 30 days to respond to your request. As you know, the provisions of Chapter 42.56 RCW pertain only to existing records and do not require the city to respond to questions or create records that do not currently exist.

On September 6, the City sought an extension of time to October 30.

On September 7, 2013, the City disclosed records responsive to request No. 3, including the attached true and correct copy of the City's Policy and Procedure directive in the Use of Technology Resources.

Section 5.6 of the City Policy & Procedure manual states...

Except as authorized by the City Manager or a supervisor that has authority over a City employee or volunteer, City employees or volunteers should not use personal technology resources or third party technology resources to perform city business, including electronic or digital communications...

Section 5.7 of the City Policy & Procedure manual states, in pertinent part...

> Except where otherwise provided by law, **users of City technology resources have *no expectation of privacy*...**

Section 4.1 of the City Policy & Procedure manual defines "City Technology Resources" extremely broadly to include "Information and technology systems, in which the City has a legal or beneficial interest..."

On September 9, in order to make the City's search more reasonable, plaintiff later restricted Item No. 1 to communications on or through the contact information contained in the website.

On October 13, the city sought another extension to November 13.

On November 14 the City sought another extension to December 20, 2013.

On December 23, the City sought another extension to January 10, 2014.

On January 10 the City wrote as follows:

> Because the remaining records that you are seeking are not within the City's possession or control, the City plans to commence a declaratory action, likely in the first part of this year, for the purpose of clarifying under Washington law whether or not the City has the authority to obtain records from Councilmember Vermillion's private website and e-mail account. You will likely be named as party in declaratory action. The City's response to your request will follow the Court's substantive ruling in the case. Accordingly, due to the time required for the declaratory action, the City estimates that it will be able to respond to your request in substance by September 30, 2014.

Plaintiff thereupon commenced this action.

On July 25, 2014, this Court ordered defendant City of Puyallup to produce the records in its possession sent to or received from the "private" email address appearing on council member Vermillion's Website.

The City refused to comply with this order, and did not produce records within 10 days. When it did produce records, it produced only the first installment. Even the 3 true and correct copies of records attached to this declaration, taken from the 399 email records in this first installment produced by the City, demonstrate that the City clearly warned Mr. Vermillion that using his personal Email for public purposes was inappropriate, and that non-private City business was discussed on an almost daily basis via the "private" website as a regular business practice. These records demonstrate material facts that the Superior Court and Appellate Courts should be aware of in order to make informed determinations based upon the actual facts of this case.

III. ARGUMENT

A. Appellants have waived or are equitably estopped from asserting a privacy interest in the records of the public business that Vermillion transacted secretly via a "personal" email account

Defendants gloss over the four (4) separate waivers of his privacy interests effected by council member Vermillion by his (1) taking an oath of office swearing to uphold the laws of the State of Washington, (including the Public Records Act), (2) violating the City's Social Media Policy, (3) deliberately comingling public and private activities on one website, in violation of ordinary and contemporary standards of care and the express warning he received from the City, and (4) failing to seek a protective order as allowed to protect any rights he may have had under the PRA itself, RCW 42.56.540.

Defendants, by failing to assert the privacy exemption contained in the Public Records Act and obtain a protection order as allowed under the PRA, have waived any claim to unconstitutionality of the PRA, as written or as applied, as they have failed to exhaust available remedies.

Having deliberately refused to obtain protection as allowed under the PRA's provision for an injunction, and being bound by a formal oath to abide by the Public Records Act, they simply lack standing to contest that the privacy protections of the law are inadequate. In addition, the Attorney General is a necessary party to any constitutional challenge to a State statute, and the defendants have failed to join the Attorney General.

The doctrine of equitable estoppel (See Shafer v. State, 83 Wn.2d 618, 521 P.2d 736) also prevents Vermillion from asserting a privacy interest to communications received at a site where he deliberately conducted public business, and the public reasonably relied upon his actions to be public. In any case, a lack of standing and the failure to join a necessary party is fatal to the defendants' claims that the PRA is unconstitutional.

B. Public officers have no historic or equitable privacy interest in conducting the business of the public in private that is cognizable under Article I, Section 7

The purpose of the PDA (now partially re-codified as the PRA) has been recognized by the Courts not to protect personal privacy as the appellants claim, but rather to "ensure the sovereignty of the people and the accountability of the governmental agencies that serve them" by providing full access to information concerning the conduct of government. Amren v. City of Kalama, 131 Wash.2d 15, 31, 929 P.2d 389 (1997).

The intent section of the PRA also contains strong language about the people's right to know being essential for control over the instruments they create. As Juvenal noted in Satire 6, the question of who shall guard the guardians is as old as infidelity or western civilization itself.

Defendants' answer to this question, that the public guardians and elected officials are free to act without oversight or accountability is

contrary to common sense, operational realities, and the manifest intent of the public records act, that the public remain informed so they may retain control over the instruments they have created. It is evident that this type of fictitious "privacy interest" is not one public servants have held or should be entitled to hold if we are to enjoy the benefits of popular sovereignty and the sound governance of a free society. As the Supreme Court held in State v. Surge, 160 Wn.2d 65, (2007)...

> (t)he protections of article I, section 7 and the authority of law inquiry are triggered only when a person's private affairs are disturbed or the person's home is invaded. Carter, 151 Wn.2d at 126.... The "private affairs" inquiry focuses on " 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant'." Surge, citing State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984))

The key and critical distinction that defendants attempt to obscure is that a government official's "privacy interest" in evading public accountability in an email account where official business has been deliberately transacted in violation of an express warning, accepted practices and common sense is simply not a legitimate "privacy interest" which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant. Historically, no legitimate privacy interest has been recognized in the secret conduct of the people's

business by public officials. The Courts have repeatedly denied recognizing the "privacy" interest asserted by the defendants in this case.

> A person's right to privacy is violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.17.255. Under these provisions, the use of a test that balances the individual's privacy interests against the interest of the public in disclosure is not permitted. Brouillet v. Cowles Publ'g Co., 114 Wash.2d 788, 798, 791 P.2d 526 (1990). Even if the disclosure of the information would be offensive to the employee, it shall be disclosed if there is a legitimate or reasonable public interest in its disclosure. Dawson v. Daly, 120 Wash.2d at 797-98, 845 P.2d 995 (1993).

This rule of law has its basis in the common sense principle that the disparate status of individuals has historically been a basis for differing standards of privacy, (See State v. Surge) and in the case of a government employee, a legitimate governmental interest in the integrity of government employees was enough to justify the intrusive search of a polygraph test. (See O'Hartigan v. Department of Personnel, 18 Wn.2d 111, (1991)

These cases should be dispositive of the frivolous "constitutional" claims made by the defendants in this case where Appellant Vermillion disregarded the express warning he received from the City and insisted upon using his "private" email account to send and receive over 400 email messages to and from the City of Puyallup concerning his duties as a public servant.

Under these circumstances, Vermillion's email address was not a private one that occasionally had government business transacted upon it, but rather was his official public address for communication with the City that was also occasionally used improperly by Council Member Vermillion to issue the messages of unknown content that both he and the City refuse to disclose.

Defendants also cite to an off point telephone text case involving a criminal investigation, (Hinson) but fail to note that the specific issue of Emails was directly resolved in a different manner in State v. Townsend, where the Court ruled

> A person sends an e-mail message with the expectation that it will be read and perhaps printed by another person. To be available for reading or printing, the message first must be recorded on another computer's memory. Like a person who leaves a message on a telephone answering machine, a person who sends an e-mail message anticipates that it will be recorded. That person thus implicitly consents to having the message recorded on the addressee's computer. See State v. Townsend, 147 Wn.2d 666, (2002)

As operational realities, common sense, and the legitimate government interest in the sound governance of a free society dictate, a civil review of recorded emails sent from or received by a public officer's email account when public business has been conducted on it simply does not produce the same disturbance or invasion of "private affairs" as a criminal search of a private citizen's seized telephone for evidence of drug trafficking. Under the flawed view of the defendants, Article 1 Section 7

of the Constitution is a to be unreasonably employed as a virtual "suicide pact" fatal to the sound administration of a free society, popular sovereignty, public accountability, the appearance of fairness doctrine, and the Open Public Meetings Act, as well as the Public Disclosure and Public Records Acts. This perspective, while novel, simply does not make sense.

C. Appellant's arguments ignore the operational realities of public service that establish a legitimate and compelling public interest in disclosure of the records documenting the conduct of public servants

Like the petitioner in State v. Surge, defendants in this case argue Article I, Section 7 of the Constitution of the State of Washington provides greater protection in all warrantless search situations and no exceptions apply. Defendants' arguments assume ordinary citizens and (public officers) enjoy the same privacy interests under the state constitution and, therefore, our article I, section 7 analysis will not vary based on the status of a petitioner.

As the petitioners did in Surge, defendants rely on a single sentence in State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980), to assert that Article I, Section 7 recognizes an individual's right to privacy with no express limitations and, therefore, any invasion into a person's privacy requires either a warrant or a narrowly drawn exception to the warrant requirement. However, the Supreme Court in Surge also made short work of this argument...

> Petitioners read Simpson too broadly. In Simpson, we focused our analysis on the Fourth Amendment to find the challenged search unreasonable. Also, in State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003), we declared article I, section 7 recognized an individual's right to privacy with no express limitations, but explicitly analyzed Cheatam's claim under state constitutional principles, and found Cheatam, as an arrestee, had lost any privacy interest in his personal items that had already been lawfully exposed to police view. Thus, while article I, section 7 does not expressly limit the right to privacy, not every asserted right qualifies as a "private affair." We still analyze the interest under state constitutional principles to determine if a valid privacy interest exists. We find the petitioners' arguments unpersuasive for two additional reasons. First, the constitutional rights afforded to a person often depend on his or her status...

As a person with the particular status of a public official, deliberately conducting public business on an ostensibly "private" email account, defendant Vermillion's rights to nondisclosure or confidentiality may be compromised when the State has a rational basis for doing so. The Supreme Court has ruled ...

> (t)he right to nondisclosure of intimate personal information or confidentiality,..may be compromised when the State has a rational basis for doing so, A,B,C,D,E, 121 Wn.2d 80 (1993), citing O'Hartigan, at 117...The use of polygraph testing by the State Patrol does not violate O'Hartigan's constitutional privacy rights. The State has demonstrated a legitimate governmental interest in providing its citizens with law enforcement employees of high moral character and integrity... Given the strong state interest in testing, we find no conflict with this branch of privacy. O'Hartigan v. State, 118 Wn.2d 111, at 117-120 (1991)

This basic principle was recently reinforced by Division III on March 18, 2015 in Martin v. Riverside School District, No. 31178-3-III.

Even in the context of criminal investigations, which, like polygraph examinations, are far more intrusive than a PRA records request, the State Supreme Court has consistently held that without a bona fide "private affair", there is no search and no requirement for authority of law.

The PRA provides a rational basis for any minor, de minimus review of records maintained by defendant Vermillion on a site used to transact public business. In this context is also significant to realize that had Puyallup City Council Member Vermillion really wished to secure his "privacy interests" he could have done so by the simple expedient of conducting all City business at his City address, as his Counsel Mr. Ramerman takes great pains to do.

D. The Public Records Act is a comprehensive and predictable Legislative scheme for transparency and accountability in the conduct of public officials.

Even in the unlikely event the review of councilmember Vermillion's Emails is somehow found to constitute a "search", the comprehensive legislative scheme of the Public Records Act and the special needs of the people and the government to be able to rely upon the integrity and rectitude of public servants dispel any requirement for a warrant.

In the 2013 update to their Survey of Washington Search and Seizure Law, Justices Johnson and Stephens note that comprehensive and

predictable legislative schemes substitute for a warrant in certain situations.

> Warrants are not required in certain limited situations when the searches are made pursuant to comprehensive and predictable legislative schemes. See Donovan v. Dewey, 452 U.S. 594, 598.99, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981). Such situations are characterized by a substantial federal interest in inspection, as in the case of hazardous industries, and by the necessity of a warrantless inspection to enforce the legislative purpose. See id. At 598.99, 101 S. Ct. 2534 (congressional scheme authorizing warrantless inspections of mines found constitutional); see also Murphy v. State, 115 Wn. App. 297, 307.08, 62 P.3d 533 (2003) (state statute requiring pharmacies to keep records of dispensed prescriptions and to make them available for inspection by state pharmacy board or other law enforcement officer does not violate search and seizure provisions of either state or federal constitutions). Survey of Washington Search and Seizure Law: 2013 Update Justice Charles W. Johnson* Justice Debra L. Stephens**
>
> As the Court recognized in Murphy...
> (T)hese constitutional privacy protections are not absolute and must be balanced against the need for comprehensive and effective governmental oversight of prescription narcotic use and distribution...

Similarly, a public officer like Puyallup City Council member Vermillion's privacy interests are not absolute, but must be balanced against the equally important (or potentially more important) need for comprehensive and effective public oversight of the conduct of government, a recognized element of the sound governance of a democratic society.

As the Court recognized in O'Hartigan,

> The use of polygraph testing by the State Patrol does not violate O'Hartigan's constitutional privacy rights. The State has demonstrated a legitimate governmental interest in providing its citizens with law enforcement employees of high moral character and integrity. O'Hartigan v. State, 118 Wn.2d 111, at 120 (1991)

A similar type of government interest exists in this case.

E Appellant's arguments must fail because Article 1 Section 7 only protects against "disturbance" of rights that citizens have held and are entitled to hold, and the private conduct of public business is not such a right

Perhaps the most compelling reason that the appellants' arguments must fail is that the "right" of a public official to conduct the people's business in secret is simply not a right that citizens have held or should be entitled to hold under Article I, section 7.

The language of article I, section 7 requires a two-part analysis. The Courts begin by determining whether the action complained of constitutes a disturbance of one's private affairs. If there is no private affair being disturbed, no article I, section 7 violation exists.

The Courts have repeatedly held that Article 1, section 7 requires that in each case reasonableness must be considered in light of particular circumstances to determine if "private affairs" have been disturbed.

> Evaluating the reasonableness of the...action and the extent of the intrusion, each case must be considered in light of the particular circumstances...."State v. Lesnick, 84 Wn.2d at 944. This is consistent with our approach to article 1, section 7 which requires us to look at the reasonableness of the officer's actions to determine whether "private affairs" were disturbed. State v. Kennedy, 107 Wn.2d 1 (1986)

Defendant Vermillion voluntarily and deliberately conducted the people's business via his ostensibly "private" email address, violated the City's Social Media policy and established standards of care, and failed to exhaust available remedies under the Public Records Act to protect any legitimate constitutional or privacy interest that he might have had. Under these particular circumstances, and where available remedies to protect any legitimate privacy interests (as defined in the Restatement of Torts) have not been exhausted, a review of Council member Vermillion's email is not unreasonable and appellants can raise no judicially cognizable claim that any legitimate "private affair" will be invaded or disturbed.

In this case, a private affair will not be "disturbed" because a civil inspection of records of government officials conducting the people's business does not infringe on a privacy interest that government officials of this state have held, or should be entitled to hold, safe from reasonable operational realities of the workplace. As the Supreme Court recognized in State v. Surge...

> ...Because no private affair is implicated, we need not reach the second step of the inquiry - whether authority of law exists for the search. See State v. Surge, 160 Wn.2d 65, (2007)

It is clearly established that the State Constitution is a limitation, not a grant, of power. See Gruen v. Tax Commission, 35 Wn.2d 1 (1949) As a public official, defendant Vermillion has no constitutional grant of

power to violate the Public Records Act. Rather, he is limited by his Oath of Office and the Constitution and Laws of the State of Washington he has sworn to uphold, including the Public Records Act.

The original response of the City failed to identify any particular records withheld or supply any explanation of how any of the broadly asserted exemptions or vaguely cited case law applied to any specific records. This violated the requirements of a valid response under RCW 42.56.520 and the precedent of Rental Housing Association v. Des Moines as it relates to the requirement of a valid privilege log.

By refusing to disclose records or produce a reasonably specific privilege log the City silently withheld public records and made it impossible to assess the propriety of their claimed exemptions or identify what records were being withheld, thus silently withholding records in a manner prohibited by PAWS II.

By failing to assert exemptions, the City violated RCW 42.56.520[2] and contributed to further unreasonable delays in disclosing public records. This failure continued until after suit was filed, and when the personal privacy exemption was employed in violation of the operational realities of both public service and the PRA.

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2 Within five business days of receiving a public record request, an agency.... must respond by either (1) providing the record;... (3) acknowledging that the agency,... has received the request and providing a reasonable estimate of the time the agency,... will require to respond to the request; or (4) denying the public record request.

Recently in Predisik, this Court clearly expressed that a public official's "right to privacy" is limited to the type of private facts described in the Restatement of Torts...

> Therefore, a person has a right to privacy under the PRA only in "'matter[s] concerning the private life.'" Id. at 135 (quoting§ 652D). To explain how that standard is applied in practice, we looked to the Restatement's summary of the right to privacy:
>
> "Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget." Id. at 136 (quoting § 652D cmt. b, at 386).
>
> This comment "illustrates what nature of acts are protected by this right to privacy," id. (emphasis added), and taken in context makes clear that the PRA will not protect everything that an individual would prefer to keep private. The PRA's "right to privacy" is narrower. Individuals have a privacy right under the PRA only in the types of "private" facts fairly comparable to those shown in the Restatement. Predisik v. Spokane School District No. 81, ___ Wn.2d ___ (4/2/2015)

Neither Puyallup City Council Member Vermillion, nor the City itself can demonstrate this level of a "personal" privacy interest in the non-disclosure of records concerning the conduct of the people's business. Any intrusion resulting from an electronic search of Council Member Vermillion's City related Email account is reasonably necessary for the City to produce responsive documents, and such search would not, in any event require physical entry into or a search of, Mr. Vermillion's Home.

No one disputes that man's home is his castle, but when he enters into the service of the sovereign, certain limited conditions are imposed upon his activities due to the operational necessities of our democratic system. The government's powers as an employer overseeing the acts of a public servant simply exceed those of a sovereign governing the citizenry.

F. Under the facts of this case, Puyallup City Council Member Vermillion's email records concerning the transaction of City business can be produced.

West does not adopt the appellant's statement of facts but relies upon the following undisputed facts:

- Puyallup warned Appellant Vermillion that his use of personal devices and email to communicate with the City, but he preferred to use his "personal" email to communicate concerning with City agents concerning City business, and did so literally hundreds of times (CP 331)
-
- On November 29, 2011, Vermillion was warned by the City that "using your personal email will open you to records requests as well. I would re-think using personal devices" (CP 332)
- Vermillion wrote to Ralph Dannenberg of the City that...I understand the legal obligations if we are sued and folks want to review my phone record. (CP 332).
-

- Pierce County had possession of records, and, after being order to produce them by the Court, failing to comply with the Order, until being faced with a motion for contempt, the City produced nearly 400 emails concerning City business it had sent to or received from Vermillion's "private" email account. (CP 330-334)

Vermillion and Puyallup argue many factual scenarios not consistent with those in this case to support their privacy-based arguments, seeking a ruling far broader than necessary from this Court. Under the admitted facts of this case, however, this Court can resolve this appeal by finding the appellants lack standing to make their challenge or holding squarely that when a public official deliberately employs an email account as his primary means of communication to conduct the business of their government employer, the email records documenting these communications of such a public official about his public employment are disclosable under the PRA.

G. Vermillion Relinquished Any Right to Claim Privacy as a Basis to Withhold His Email Records When He Chose to Use a Personal Email address for Public Business Instead of a City Provided Address.

This court should be as alarmed and outraged as the taxpayers of Puyallup by Vermillion's conduct and intransigence, which has wasted the taxpayer's money to defend a situation that could have been prevented and that undermines government transparency.

Vermillion, as a publicly elected official and public servant, should be deemed to have full knowledge of his duties under the PRA. He should know that records that relate to the conduct of public business are public records. Therefore his deliberate choice to use his personal email address for his public work, instead of a public address, can only be construed as an effort to thwart government transparency under the guise of a privacy interest that he abandoned and waived when made his fateful choice.

Vermillion and his employer the City have the burden-- both under the PRA and as a matter of basic equity--to remedy the loss of transparency that Vermillion willfully created.

To hold otherwise would reward Vermillion for his conduct and signal to all Washington public officials that the best way to avoid public scrutiny is to do their jobs via private email accounts. All public officials need to be put on notice that choosing to use personal electronic devices for official communications does not protect them from public disclosure.

H. Personal devices used by public officials to conduct public business can be and have been searched for public records.

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

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

Id.

In O'Neill, the Supreme Court said that the City could inspect an employee's private computer to see if it was used for public business, at least if she consents. In this case, the City has already turned over the bulk of the email records to West. Thus, as in O'Neill, there is no legitimate "consent issue," as the Court can decide that Vermillion's dual use of his "personal" email account for public business waived any possible privacy interests as these are defined in Predisik and exposed records reflecting such dual usage to public scrutiny, just as with O'Neill's personal computer.

I. Email messages containing information about public business, can, and should, be disclosable.

Mechling v. City of Monroe, 152 Wn.App. 830, 222 P.3d 808 (2009), held that private e-mail addresses used by public officials discussing City business are not exempt under the PRA. In Mechling, the Court said "E-mail messages of public officials or employees are subject

to a public records request if the e-mails contain information related to the conduct of government." *Id.* at 843-44, citing Tiberino v. Spokane County, 103 Wn.App. 680, 688, 13 P.3d 1104 (2000).

The same logic applies in this case: If the email is related to City business, then it must be disclosed.. This information meets the definition of a public record, which is to be broadly defined. ("[N]early any conceivable government record related to the conduct of government is liberally construed in Washington." O'Neill, 170 Wn.2d at 147.)

The PRA defines a "public record" as:

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

RCW 42.56.010(2).

The PRA defines a "writing" as:

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

RCW 42.56.010(3).

Email records such as the 399 emails disclosed by the City that it sent to or received from Vermillion's ostensibly "private" account relate to

the conduct of government because they document government business. So do the remaining unknown records that appellant Vermillion seeks to hide behind a specious smokescreen of personal privacy.

Accordingly, the remaining records on Vermillion's email account that concern City Business can, and should be, disclosable. Otherwise, the logic and holdings in O'Neill and Mechling would be undermined by carving out an artificial, arbitrary distinction for cellular communications records.

Vermillion and the City paint a parade of horribles, alleging countless – and baseless – privacy violations if Vermillion's cell phone records must be disclosed.

These arguments ignore the fact that Vermillion knowingly chose to use an ostensibly "private" email address to do a public job, rather than use an address dedicated to City business that was not commingled with other matters. By making this deliberate choice and flaunting the express warning he received from the City Vermillion lost any reasonable expectation of privacy in those email records, because he knowingly intermingled personal and public business, which, as he was warned, (CP 332) exposed his email records concerning city business to public scrutiny.

Just so, if a priest were to deliberately take a collection plate with him when he committed a bank robbery, he could not rely upon religious freedom to immunize him from search, since he would have deliberately

commingled both the "religious" donations from his parish along with "private" bank robbery related materials in one pile of swag on the same collection plate.

Thus the Court need not, and should not, decide under the factual circumstances of this case whether an occasional email incidental to public business to a public official's private email account means that all private email records become disclosable, because this case does not involve such occasional or inadvertent mistakes, but literally hundreds of emails from a public servant who chose to use his "private" email account as his primary informational conduit to conduct the public's business.

Whether email records are "public records" or "private records" because Vermillion personally paid his email account bills does not matter.[3] What matters is the fact that Vermillion's email account was primarily and routinely used to conduct public business, and records relating to that public business must be disclosable.

The public's overarching concern in this case is with the necessary disclosure of records documenting the communications of public officials about the conduct of their duties as public servants. That is exactly the information that the public is entitled to have under manifest intent of the People in adopting Washington's PRA as Initiative 276. The statement for the initiative in the 1974 Voter's Guide started with this paragraph:...

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

The People Have the Right to Know

Our whole concept of democracy is based on an informed and involved citizenry. Trust and confidence in governmental institutions is at an all time low. High on the list of causes of this citizen distrust are secrecy in government and the influence of private money on governmental decision making. Initiative 276 brings all of this out into the open for citizens and voters to judge for themselves.

In light of the manifest intent of the People in adopting I-276, it is evident that the Superior Court correctly required the City and Vermillion to produce responsive records concerning the conduct of the people's business.

If constituents and political supporters could communicate covertly with their elected representatives, political corruption, ward healing, and violations of the Appearance of Fairness Doctrine and the Open Public Meetings Act like those recently perpetrated by Appellant Vermillion and the Puyallup City Council would go unknown and undetected.

Development projects could be pre-approved for favored political contributors, bribes could be secretly tendered, votes could be gerrymandered, and City resources could be misdirected to the benefit of political supporters instead of the general public, all without any fear of discovery.

Under such circumstances, the corrupt practices of Huey Long in Louisiana and Boss Tweed in Tammany Hall would be the model for elected officials in the State of Washington under the rubric of the appellant's expansive view of complete freedom of association, even when

such "freedom" is employed by the people's public servants for manifestly corrupt and improper purposes.

Yet, as the Supreme Court ruled in John Doe No. 1 v. Reed, 561 U.S. 186, 130 S.Ct. 2811 (2010), in upholding the PRA against a personal privacy political association related challenge, the State has a compelling interest in preventing fraud and the integrity of elected officials. It is extremely unlikely that the sound reasoning of Doe v. Reed would ever be overturned in a test case deliberately precipitated by a public officer such as appellant Vermillion who deliberately refused to perform a series of public duties in a transparent attempt to undermine the sound public policy of the Public's Disclosure Act.

In this case, no search was ordered, and no "home" or "private affairs" were invaded. Vermillion's domestic "castle" was not ordered to be sacked by the Hunnish hordes of State Troopers run amuk.

In contrast to the appellants' Munchhausen-esque depiction of the depredations wreaked upon the poor Puyallup poster-child for government secrecy described by the appellants in their briefs, Puyallup City Council Member Vermillion was merely directed to comply with the PRA in as unobtrusive a manner as was reasonably possible.

No storm troopers were dispatched by the evil empire to kick down his door with their jackboots and trample upon Vermillion's spine and civil rights with the sharp rusticulated hobnails contained thereon. Puyallup

City Council Member Vermillion was merely directed, as every public officer should reasonably be, to disclose the public records of his duties as a Puyallup City Council Member taken on behalf of the public.[4]

No disclosure of any truly "private" information was ordered. Even in the unlikely event a review was ordered of the adequacy of the disclosure, it would not implicate the associational interests identified in Eugster or chill anyone's exercise of legitimate association or speech.

While a Superior Court may have to conduct an in camera review under RCW 42.56.660(3) to satisfy itself that any redacted "private" information is truly "private", a public officer's Email records should be found to be covered by the PRA, and not be exempt exempt, when these records document public activity.

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

Increasingly, government officials are using "private" technology such as personal e-mail accounts, cell-phone texting or Blackberry devices to conduct public business to avoid state open records laws. Recently in New Jersey, a top aide to Governor Chris Christie used a private e-mail account to ask an official of the Port Authority to shut down three lanes on

4 The City's claim that it does not "own" Lindquist's cell phone records is irrelevant because Vermillion is an agent of the City when he acts on behalf of the City to conduct City business.

the busy George Washington Bridge for political purposes.[5] New York Governor Andrew Cuomo used an untraceable Blackberry message system to conduct public business, creating no written e-mail of how he conducts business.[6]

Health and Human Services Secretary Kathleen Sebelius used secret, unpublished email accounts for her work.[7] In San Jose, California, city council members took instructions during council meetings on how to vote based upon text messages sent by representatives of unions and other special interests.[8]

The potential to wreak havoc to government transparency due to new digital technologies cannot be underestimated as new tools emerge that could allow public officials to skirt public records laws, unless constrained by the courts. How will the public know if their elected officials act in the public interest if secret text messages direct their actions?

The only way to prevent certain harm to the public's right to open and transparent government is to find that any and all records relating to the conduct of public business must be retained and disclosed, unless

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

6 *Id.*

7 *Id.*

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

covered by a specific exemption. It is irrelevant if the records are created by, and maintained by, a personal digital device.

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

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

Similarly, here, Vermillion had a duty to preserve email records related to his job and to disclose them and no amount of fanciful claims of official-personal privacy can alter this basic reality.

IV. CONCLUSION

The Supreme Court of the United States, in John Doe No. 1 v. Reed, 561 U.S. 186, 130 S.Ct. 2811 (2010), recognized that "Public disclosure also promotes transparency and accountability...to an extent other measures cannot." Conversely, the City's obstructive conduct in this case and its litigious evasions have subverted the policy of the Public Records Act to an extent that prudent actions in conformity with the

provisions of CR 11 and RCW 42.56 could not. As a result, the proceedings in this case appear to have have taken on aspects of both the tragedy and farce described by James Madison in his letter to Mr. Barry of 1822.

This court should **avoid** or reject the wanton and unnecessary attack on the public's right to know deliberately precipitated by the many defaults of the appellants and remand this case back to the Court of Appeals for a determination as to whether the Email records that document communications relating to Vermillion's public service as a Puyallup City Council Member should be disclosed under the Public Records Act.

No new legal ground need be harrowed and no difficult constitutional questions need be considered in order to resolve this simple issue.

Respectfully submitted this 30th day of April, 2014.

By: s/Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Brief of Respondent, and motion to amend **by Email** with backup **by regular U.S. Mail** on the 29th day of April, 2015, to the following counsel of record at the following addresses:

This document was electronically served upon counsel on April 30, 2015

Ramsey Ramerman
City of Everett 319 Main St. #319
2930 Wetmore Avenue Kirkland WA
Everett, WA 98204-4067 98033
RRamerman@everettwa.gov

Kathleen Haggard
Steve Vermillion
PORTER FOSTER RORICK
800 Two Union Square,
601 Union Street
Seattle, Washington 98101

kathleen@pfrwa.com

Dated this 30th day of April, 2015.

S/ Arthur West
Arthur West