

Original

NO. 35878-6-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

KITSAP COUNTY, a political subdivision of the State of Washington

Appellant

vs.

DAVID N. SMITH, CLAYTON E. LONGACRE, CHARLES J. SHANK, and LONGACRE LAW INC., a Washington corporation,

Respondents,

FILED  
COURT OF APPEALS  
DIVISION II  
07 JUN 18 PM 2:44  
STATE OF WASHINGTON  
BY DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

APPELLANT KITSAP COUNTY'S OPENING BRIEF

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 ORIGINAL

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## **INTRODUCTION**

Public employees do not have an unfettered right to remove and appropriate for their own use public records they may have created, received, and maintained, including copies of public records. The trial court erred in granting summary judgment dismissal of Kitsap County's request for declaratory judgment that David Smith's removal and appropriation of public records violated chapters 40.14, 40.16, and 42.23 RCW, and Kitsap County Code 3.76.110.

Public employees in Washington State do not forfeit all rights to privacy in their workplace. Citizens have reasonable expectations of privacy in conversations with public employees. Washington law protects against invasions of private conversations of public employees and persons having conversations with them. David Smith's recording of private conversations of citizens and employees violated RCW 9.73.030. The trial court's denial of the County's request for declaratory judgment for lack of justiciable controversy was erroneous.

## **ASSIGNMENTS OF ERROR**

Assignment of Error No. 1: The trial court erred in granting summary judgment dismissal of Kitsap County's claims that David Smith unlawfully removed public records from Kitsap County in violation of chapters 40.14, 40.16, and 42.23 RCW, and Kitsap County Code 3.76.110.

Assignment of Error No. 2: The trial court erred in denying Kitsap County's request for declaratory relief, under chapter 7.24 RCW and Civil Rule 57, that David Smith's recording of private conversations violated RCW 9.73.030.

**ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

Issues Pertaining to Assignment of Error No. 1:

Issue 1.1: Are records removed and appropriated from Kitsap County by David Smith public records within the meaning of RCW 40.14.010 and RCW 42.17.020(36)?

Issue 1.2: If records removed and appropriated by David Smith are public records, did Smith's removal and appropriation of such records violate chapters 40.14, 40.16, and 42.23 RCW, and/or Kitsap County Code 3.76.110?

Issue 1.3: Did the trial court err in granting summary judgment dismissal of Kitsap County's claims that David Smith unlawfully removed public records from Kitsap County in violation of chapters 40.14, 40.16, and 42.23 RCW, and Kitsap County Code 3.76.110?

Issues Pertaining to Assignment of Error No. 2:

Issue 2.1: Did the trial court err in denying Kitsap County's request for declaratory relief under chapter 7.24 RCW and Civil Rule 57,

that David Smith's recording of private conversations violated RCW 9.73.030?

Issue 2.2: Did David Smith's clandestine recording of conversations with Sam Hadley, Joan Martin, Leon Thomas, Steve Johnson, Gordon Roycroft, Greg Cioc, and/or Jonathon Brand violate RCW 9.73.030?

### **STATEMENT OF THE CASE**

#### **A. Substantive Facts Pertaining to Smith's Removal and Appropriation of Public Records.**

Kitsap County is a political subdivision of the state of Washington and a municipal corporation situated in the county of Kitsap. CP 11.

From May 1990 to April 2006, David Smith (Smith) was employed with Kitsap County's Department of Public Works as the Senior Program Manager of the Transportation Division. CP 45-46, CP 535. He was also the County's traffic engineer. CP 12-13. As a County employee, Smith created, compiled, received, maintained, and used public records in connection with his work, the work of other Public Works' employees, and work performed in the Department of Public Works generally. CP 13.

In December 2004, one of Smith's subordinates, Charles Shank, filed a civil rights action against Kitsap County and certain of its employees in the U.S. District Court, Western District of Washington. CP

810-811. In compliance with federal discovery rules and district court order, the County sent a letter to David Smith requesting any records that may be relevant to the Shank lawsuit. CP 811, 817-818. Smith responded that he no longer had the records; he had given them to his attorney, Clayton Longacre (Longacre). CP 811, 820.

The County objected to Smith's removal of public records from the County, believing that such action violated chapters 40.14 and 40.16 RCW. CP 811. The County has a legal obligation to maintain and preserve public records in accordance with public records laws. *See* chapters 40.14, 40.16 RCW. The County was also concerned that records removed by Smith included ones protected from disclosure under laws governing employee privacy and attorney-client privilege. CP 811.

Counsel for the County called Longacre who represented that he had only Smith's personal records, not records belonging to the County. CP 811, 822. Because of conflicting statements by Longacre and Smith about the location and nature of the records, and in consideration of the County's discovery obligations in the pending civil rights action as well as its obligations to protect the confidentiality and privacy of County records, a subpoena duces tecum was issued to David Smith for all records in his possession or control in connection with Charles Shank or Shank's employment with the County. CP 811-812, 825-829.

After he received the subpoena duces tecum, Smith emailed counsel for the County, stating that he had gathered the Shank records that he had in his office. Smith's email indicated they did not include the records covered by the subpoena. CP 812, 833. The County's Counsel responded that the subpoena duces tecum applied to ALL records, whether Smith considered them personal or County-owned. Smith was advised that if he had questions about the scope of the subpoena duces tecum, he could consult with Longacre. CP 812, 833.

Smith did not timely respond to the County's subpoena duces tecum, and letters were sent demanding compliance. CP 813, 836, 838. Longacre admitted that he had the records, but refused to restore them to the County, asserting that the records were Smith's personal records. CP 813. The County objected to Smith and Longacre's retention of the County's records and interpretation that they were Smith's personal records. CP 12-13, 812.

Eventually, Longacre and counsel for the County agreed to an arrangement whereby the County would be permitted to copy the records that Smith had given to Longacre, on the condition that the records were returned immediately after copying. CP 813. The County's attorneys would then examine the records with County public works staff to determine which, if any, were County records and which were Smith's

personal records. As agreed, the County made a copy of the records (over 4,000 pages) and returned them to Longacre. CP 813.<sup>1</sup>

After examining the records, the County and its attorneys reached the conclusion that most of the records belong to the County. Many of the records were created using supplies owned by the County, were made during Smith's workday, and concerned County business. Some of the records removed by Mr. Smith are confidential and/or privileged. CP 813. A log of the records shows that the records include: County work-related emails, correspondence, and memoranda; drafts of and completed employee performance evaluations; personnel records; attorney-client privileged memoranda and emails; drafts of County transportation reports; notes of meetings; and day planners. All of the records were created and/or received and maintained during the course of Smith's employment with the County. CP 840-853.

Following examination of the copied records, a demand was made to Longacre to return the County-owned records in his possession. CP 794. That demand was refused. CP 792. As a result of Smith and Longacre's refusal to restore possession of the County's public records,

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<sup>1</sup> In hindsight, it may have been prudent for the County to keep the records and not return them to Longacre. However, the County's counsel felt constrained to honor the agreement with Longacre.

the County caused this declaratory judgment action to obtain recovery of them.<sup>2</sup>

**B. Substantive Facts Pertaining to Smith's Recording of Private Conversations.**

In connection with Charles Shank's civil action, the County learned that David Smith had recorded conversations with employees and citizens without their knowledge and consent. Smith admits he made the recordings with a digital voice recorder that he kept in his pocket, and that he did not inform persons whom he recorded that he was recording the conversation. CP 630, CP 732. Smith recorded thousands of conversations with citizens, CP 62, 218, 417, 631, with co-workers and supervisors, CP 128, 271, 439, 508, with human resources personnel, 677-678, and about confidential personnel matters, 681-682, 689-690, 692. He made so many recordings, he cannot remember what they were. CP 709.

Recording of Sam Hadley. Smith recorded a private conversation with Sam Hadley, a citizen who resides in Poulsbo, Washington. CP 417-

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<sup>2</sup> The County records in Smith's and Longacre's possession were also subpoenaed by Charles Shank's attorney. The County challenged Shank's right to obtain County-owned records directly from Smith, some of which included privileged, irrelevant, and confidential records. The County's counsel and Shank's attorney (Randy Loun) reached an agreement concerning the records. See Stipulation and Order Regarding Certain Discovery, U.S. District Court, W.D. Wn., Case No. 04-5843RJB (June 14, 2005), Appendix A at 3. Under the express terms of the stipulation and order, Shank and Loun withdrew the subpoena duces tecum issued to Smith and Longacre. See also CP 855-857.

438. Hadley met with Smith in a conference room in the Public Works Building in Port Orchard in late July or early August 2002 to discuss a conflict Hadley was having with his neighbors regarding a basketball hoop placed at the end of his driveway in the county right-of-way. *Id.* Hadley did not know that Smith was electronically recording the conversation, nor did he have any expectation that he would be recorded. CP 418.

Hadley is outraged that a county employee would record his conversation without permission. Hadley states that he intended and believed the conversation to be confidential and private. He would have had his legal counsel present if he had known the conversation was recorded and that it was possible his neighbors would learn about some of the statements he made during the conversation. Hadley believed state law prohibited the recording of private conversations. CP 418.

Recording of Joan Martin. In October 2002 Smith recorded a conversation with Joan Martin in her home in Hansville, Washington. CP 218-270. Martin's neighbors, Leon Thomas and Jeananne Oliphant were also present. CP 218. The front door of Martin's home was shut. CP 218-219. The purpose of the meeting was to discuss putting a sign on the road to discourage trespassers on their private beaches. *Id.* Martin did not know the conversation was being electronically recorded and she did not have any expectation it would be recorded. Martin is disappointed that a

county employee would come to her private residence and record her conversation without permission. Martin intended the conversation to be private; intended for the persons present, not others. She was concerned about retaliation by trespassers, as some retaliation had occurred in the past. CP 219.

Recording of Leon Thomas. Leon Thomas is also a resident of Hansville, Washington who was present in Joan Martin's home when Smith recorded their conversation. CP 62-114. Thomas confirms that the purpose of the meeting was to discuss putting a sign on the road to discourage trespassers on the beach. CP 62-63. Like Martin, Thomas did not know that his conversation was being electronically recorded, nor did he have any expectation it would be recorded. He, too, is disappointed that a county employee would record his conversation without permission. Thomas intended the conversation to be private, intended only for the persons present, because he was concerned about retaliation by trespassers, as some retaliation had occurred in the past. CP 63.

Recording of Steve Johnson. Steve Johnson has been employed with Kitsap County as a Traffic Investigator since March 1996. For 28 years prior to his employment with Kitsap County, Johnson was an officer with the Washington State Patrol. CP 271.

Johnson reviewed transcripts of recordings of conversations he had with David Smith, which Johnson believes took place between July and October of 2002. CP 271-416. The conversations were recorded without Johnson's knowledge or consent. CP 271. All but one of the conversations took place in Smith's office in the Public Works building. The other conversations took place in the third floor conference room of the Public Works building. CP 271.

As was the normal practice, the door to Smith's office was likely closed during at least five of the conversations that related to private and/or personnel matters. CP 272. Johnson's immediate supervisor was present in five of the recorded conversations, and a coworker was present during one of the conversations. In the remaining recorded conversations, there was no one present but Smith and Johnson. CP 272.

Likewise, the door to the conference room was closed when he was present at the conversation with citizen Sam Hadley. CP 272. Johnson did not know that any of the conversations were being electronically recorded, nor did he have any expectation he would be recorded. CP 272. He is disappointed to learn he was recorded without his knowledge. CP 272-273. Johnson intended the conversations to be private, heard only by the persons present. CP 273. Had Johnson known he was being recorded, he would have chosen his words more carefully. CP 273. Johnson

believed Washington law prohibited electronic recording of private conversations without consent of all persons present. CP 273.

Recording of Gordon Roycroft. Gordon Roycroft was employed by Kitsap County from July 2002 to October 2003 as Senior Program Manager in the Engineering Division of Public Works. CP 128. Roycroft has reviewed transcripts of recordings wherein he was having conversations with David Smith. CP 128-217. Roycroft states his conversations were electronically recorded without his knowledge or consent. CP 128.

All but one of the recorded conversations that Roycroft reviewed took place in Smith's office in the Public Works building. CP 129. As is the normal practice, the door to Smith's office was likely closed during all of the conversations that related to private and/or personnel matters. CP 129. Roycroft does not recall that any minutes or notes were being taken during the recorded conversations. Id. Other than Smith and himself, Roycroft does not believe there were any other individuals present during the conversations that were recorded. Id.

Roycroft is outraged to learn that he was electronically recorded without his knowledge. The conversations were not open or public and intended to be heard only by Smith. Had Roycroft known he was being recorded, he would have chosen his words more carefully, or not engaged

in the conversation at all. CP 129. Roycroft believed that Washington law prohibited electronic recording of private conversations without the consent of all persons present. Id.

Recording of Greg Cioc. Greg Cioc is employed as a Transportation Planner in Kitsap County Public Works Department. He has been employed with Kitsap County since July 2001. CP 439.

Cioc has reviewed and listened to transcripts of conversations that he had with David Smith which were electronically recorded without Cioc's knowledge or consent. CP 439-507. Cioc believes the conversations took place in 2002. CP 440. Most of the recorded conversations took place in Smith's office at the Kitsap County Public Works building. One recorded conversation took place in a county vehicle. CP 440. Normally, the door was shut during Cioc's conversations with Smith in Smith's office, because some of the conversations involved personnel issues. CP 440. Cioc believes it is likely that the door was closed during each of the recorded conversations he reviewed. Id.

Most of the recorded conversations Cioc reviewed were between Smith and Cioc, and no other persons were present. CP 440. Two other Kitsap County employees were present in one of the conversations. Id. Cioc states that the conversations Smith recorded were not open or in

public, to be heard only by Smith, except the one occasion that another Public Works employee was present. CP 440.

Cioc was surprised and upset to learn he had been recorded without his knowledge. In particular, discussions related to sensitive staffing issues were intended to be private conversations. CP 440. If Cioc had known he was being recorded, he would not have engaged in the conversation about such sensitive issues, or he would have spoken differently about those issues. CP 440. Cioc also believed Washington law prohibited the electronic recording of private conversation without the consent of all present. CP 441.

Recording of Jonathon Brand. Jonathon Brand is employed as Assistant Director of Roads with Kitsap County's Department of Public Works. Brand has been employed with Kitsap County since September 1994. CP 508. Brand has reviewed and listened to transcripts of conversations that he had with David Smith, which were electronically recorded without Brand's knowledge or consent. CP 508-531.

One conversation Brand had that Smith recorded occurred on or about November 15, 2004 in a conference room in the Public Works building. Among other things, the conversation is about Smith's performance evaluation and workplace and confidential personnel issues. CP 508-509. The door was closed and only Smith and Brand were

present. Brand did not take any minutes or notes, nor did he observe Smith taking notes. CP 509.

Brand did not know that the conversation was being recorded, nor did he have any expectation that he would be recorded. The conversation was not open or public and intended to be heard only by Smith. CP 509.

Brand is outraged to discover that a county employee would record conversations without his knowledge. After listening to the recording, it seems to Brand that Smith is manipulating the conversation by tailoring his statements and baiting Brand to make statements. Smith knew that he was being recorded but Brand did not. If Brand had known he was being recorded, he would have not discussed the more sensitive personnel issues, or he would have spoken about them differently. CP 509. Brand believed that Washington law prohibited electronic recording of private conversations without the consent of all persons being recorded. Id.

Without exception, the citizens and employees described above believe their conversations with Smith were private. Without exception, the conversations occurred where reasonable expectations of privacy could be expected, behind a closed door, private office, car, or private home, and the general public could not overhear the conversations. Without exception, these employees and citizens believe Washington law prohibits electronic recording of their private conversations.

**C. Procedural Facts.**

Kitsap County filed a summons and complaint for declaratory relief, injunctive relief, and damages with the Kitsap County Superior Court on June 5, 2005, to recover County records and resolve the controversy whether Smith's removal of the records and recording of private conversations violated the law. David N. Smith and Clayton E. Longacre were named as defendants. CP 1, 3.

The complaint alleges David Smith willfully and unlawfully removed public records from Kitsap County, that the County demanded return of the records, and the demand was refused. CP 5-8. The complaint also alleges that Smith willfully and unlawfully recorded private conversations in violation of chapter 9.73 RCW. CP 6-8.

In its prayer for relief, the County requested judgment declaring that the records removed and appropriated by Smith are public records within the meaning of RCW 40.14.010 and RCW 42.17.020(36), and that the removal, disclosure, personal use, and failure to return the public records violated chapters 40.14, 40.16, and 42.23 RCW, and Kitsap County Code 3.76.110. CP 8-9. The County sought return of all public records removed by Smith, and damages for the detention of and/or injuries to public records. CP 9-10. The County also requested judgment declaring that Smith recorded private conversations in violation of chapter

9.73 RCW. CP 9. The County also sought an award of costs, disbursements, and attorney's fees. CP 10.

The County filed an Amended Complaint on August 18, 2005, adding Charles J. Shank and Longacre Law, Inc., as additional defendants. CP 11.<sup>3</sup> Smith and Longacre never answered either the Complaint or Amended Complaint.

The County filed a motion on May 5, 2006, seeking declaratory judgment that Smith recorded private conversations in violation of RCW 9.73.030. The motion was supported by ten declarations, including the declarations of persons whose conversations with Smith were recorded without their knowledge. CP 41-720. Defendants responded to the County's motion. CP 721, 728, 730, 731.

The County's motion for declaratory judgment on the question whether Smith's recording of conversations violated RCW 9.73.030 was heard by the superior court on June 2, 2006. The court ruled that there was no direct or substantial opposing interest between Kitsap County and

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<sup>3</sup> Charles Shank was subsequently dismissed from the action pursuant to stipulated agreement and is not the subject of this appeal. CP 20.

Smith. RP 16 (June 2, 2006).<sup>4</sup> The County moved for reconsideration of the court's decision, which was denied. CP 733, 739, 755.

Subsequently, Smith and Longacre filed for summary judgment dismissal of all claims asserted in the County's complaint. CP 757, 766, 788, 800, 801. The County responded to the motion. CP 810, 860. The trial court heard the motion on January 10, 2007, granting summary judgment and dismissing the case. CP 871. The County filed its notice of appeal on January 23, 2007. CP 872.

### **ARGUMENT**

#### **A. Smith Removed and Appropriated Public Records in Violation of Law.**

The trial court erred in granting summary judgment to Smith and Longacre, dismissing the County's claims that records removed and appropriated by Smith are public records that should be restored to the County.

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<sup>4</sup> Matters pertaining to the recording of private conversations and the removal of records were heard and considered by the trial court separately. Consequently, there are two reports of proceedings before the court in this appeal. The proceedings pertaining to the recording of private conversations occurred on June 2, 2006. The proceedings pertaining to the removal of public records occurred on January 10, 2007.

1. Summary Judgment Standards.

Review of a grant of summary judgment is de novo. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007), citing *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005); and *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Facts and reasonable inferences therefrom are viewed most favorably to the nonmoving party. Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Bostain v. Food Exp., Inc.*, 159 Wn.2d. at 708, citing CR 56(c); *Korlund*, 156 Wn.2d at 177, 125 P.3d 119; and *Berrocal*, 155 Wn.2d at 590, 121 P.3d 82.

2. David Smith Removed and Appropriated Public Records in Violation of Law.

The records Smith removed from the County are public records.

RCW 40.14.010 states:

As used in this chapter, the term "public records" shall include any paper, correspondence, completed form, bound record book, photograph, film, sound recording, map drawing, machine-readable material, compact disc meeting current industry ISO specifications, or other document, regardless of physical form or characteristics, and including such copies thereof, that have been made by or received by any agency of the state of Washington in

connection with the transaction of public business, and legislative records as described in RCW 40.14.100.

Public records are the property of the state of Washington, and must be preserved and maintained in accordance with the provisions of chapter 40.14 RCW. RCW 40.14.020 states:

All public records shall be and remain the property of the state of Washington. They shall be delivered by outgoing officials and employees to their successors and shall be preserved, stored, transferred, destroyed or disposed of, and otherwise managed, only in accordance with the provisions of this chapter.

Public records may only be destroyed in accordance with rules adopted by the state archivist. RCW 40.14.030 states:

(1) All public records, not required in the current operation of the office where they are made or kept, and all records of every agency, commission, committee, or any other activity of state government which may be abolished or discontinued, shall be transferred to the state archives so that the valuable historical records of the state may be centralized, made more widely available, and insured permanent preservation: PROVIDED, That this section shall have no application to public records approved for destruction under the subsequent provisions of this chapter.

Before destroying public records, the County must request authority from the local records committee. RCW 40.14.070 states:

(1)(a) County, municipal, and other local government agencies may request authority to destroy noncurrent public records having no further administrative or legal value by submitting to the division of archives and records management lists of such records on forms prepared by the division. The archivist, a representative appointed by the state auditor, and a representative appointed by the attorney general shall constitute a committee, known as the

local records committee, which shall review such lists and which may veto the destruction of any or all items contained therein. . . . (2)(a) Except as otherwise provided by law, no public records shall be destroyed until approved for destruction by the local records committee. . . .

Criminal penalties are imposed for removal or misappropriation of public records. RCW 40.16.010 makes the willful and unlawful removal or concealment of public records a Class B Felony. RCW 40.16.020 makes the mere appropriation of a public record is a Class C felony. These serious crimes are a clear indication that the maintenance of public records is an essential public purpose.

The Supreme Court has held that facts alleging the removal of a town's building and permit file were factually and legally sufficient to support recall charges against the town's mayor. *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 867-868, 72 P.3d 741 (2003). The court cited RCW 42.23.070(1) and 40.16.020 among others:

The facts of the second charge also support a prima facie case that Feetham committed malfeasance by committing an unlawful act. Again, RCW 42.23.070(1) prohibits a municipal officer from securing special privileges for himself or herself. In addition, RCW 40.16.020 provides that it is a crime for an elected officer to "mutilate, destroy, conceal, erase, obliterate, or falsify any record or paper appertaining to the officer's office, or who shall fraudulently appropriate to the officer's own use . . . property intrusted to the officer by virtue of the officers office . . ." <sup>5</sup> RCW

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<sup>5</sup> The court noted here that in 2003, the legislature amended RCW 40.16.020 to include that committing these acts is also a class B felony. *In re Recall Charges Against Feetham*, 149 Wn.2d at 869 n. 4.

9A.56.020 and RCW 9A.56.050 provide that a person commits third degree theft if the person intends to appropriate property not belonging to the person, when the property is valued at \$250 or less. The facts here provide prima facie evidence of these crimes because they suggest that Feetham admitted taking the town file for his own personal use, despite knowing that doing so violated the law.

*In re Recall Charges Against Feetham*, 149 Wn.2d at 868-869.

Smith removed secured special privileges for himself by removing and appropriating County-owned public records for his own use. A log identifying the records removed by Smith establishes that most of the records *are unquestionably* public records. CP 840-853. The records include work-related email to and from Smith with supervisors, co-workers, and citizens. CP 840-853. Smith removed attorney-client privileged communications and memoranda between deputy prosecutors in the civil division of the County prosecutor's office, all of which are privileged public records. (CP 840, 842-847, 850). Smith removed confidential personnel records pertaining to public employees (CP 842, 846, 848-850), subordinate disciplinary records (CP 846), employee performance evaluations (CP 840, 846), payroll records (CP 841, 849, 850, 851), and letters of reference concerning Smith's subordinates (CP 842). Smith removed correspondence (CP 845, 849, 850), interoffice memoranda (CP 840-841, 843-844, 849, 850), photographs and records of road improvements (CP 850, 852), draft transportation reports (CP 840-

841), and purchasing manuals (CP 851). These and other records removed by Smith were made or received by the County in the regular, normal course of the County's public business. Smith's removal of them without authority and refusal to restore them to the County's custody and control is a violation of law.

Smith and Longacre did not present sufficient evidence that the records removed from the County are not the County's public records. At a minimum, a genuine issue of material fact exists whether some or all of the records are public records, precluding a grant of summary judgment.

In the case before the trial court, Smith and Longacre allege that all documents were returned to the County during Shank's lawsuit. This is incorrect. *Copies* of the County's records are in the County's possession. The original records removed and appropriated by Smith are in his and/or Longacre's possession. CP 792, 794.

Some the records removed by Smith are copies that Smith made of public records, some are originals. Copies of records made using the County's equipment and supplies are, themselves, public records. Some of the records Smith removed from the County are exempt from inspection and copying. If the records in Smith's possession are copies that he made using County supplies and equipment, he did not pay the costs of such

copies as other persons are required to do. See Kitsap County Code 3.76.100, Appendix B.

The trial court erred in ruling that no genuine issue of material fact exists, resulting in an erroneous conclusion that Smith did not remove public records and his removal of records did not violate state law. The public interest in preserving public records requires reversal of the trial court's grant of summary judgment.

**B. Smith's Clandestine Recording of Conversations with Public Employees and Citizens Violated RCW 9.73.030.**

The trial court denied the County's motion for declaratory judgment on the grounds that "the County failed to meet the threshold requirement of demonstrating that there is a justiciable controversy." CP 755. The trial court erred. The question whether the recording of any conversation with a public employee is exempt from RCW 9.73.030 is of major public importance. The County, its employees and citizens, necessarily need to know whether conversations with public employees occurring behind closed doors, in private offices, vehicles, and private homes, outside the hearing of the general public, are protected from electronic interception. Smith contends that all conversations with public employees are exempt from RCW 9.73.030. This case presented meets all of the elements of a justiciable controversy.

1. The Trial Court Should Have Exercised Jurisdiction to Determine Whether Recording Public Employees' Conversations Violated RCW 9.73.030.

The Uniform Declaratory Judgments Act, codified at chapter 7.24 RCW, provides that courts have the power to “declare rights, status and other legal relations whether or not further relief is or could be claimed.” RCW 7.24.010. The procedure for obtaining a declaratory judgment is in accordance with the Civil Rules. CR 57. Declarations have the force and effect of a final judgment or decree, and may be either affirmative or negative in form and effect. *Id.*

A person whose rights are affected by a statute or contract “may have determined any question of construction or validity arising under” the statute or contract and “obtain a declaration of rights, status, or other legal relations thereunder.” RCW 7.24.020. *See also Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004) (Under the Act, a person whose rights, status, or other legal relations are affected by a statute may have any question concerning the construction of that statute determined by the court). The “person[s]” whose rights may be determined include municipal corporations. RCW 7.24.130.

To invoke the Uniform Declaratory Judgments Act, chapter 7.24 RCW, a plaintiff must establish: (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible,

dormant, hypothetical, speculative, or moot disagreement; (2) between parties having genuine and opposing interests; (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic; and (4) a judicial determination of which will be final and conclusive. *Coppernoll v. Reed*, 155 Wn.2d 290, 300, 119 P.3d 318 (2005); *citing To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), *and Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). The Act “is to be liberally construed and is designed to clarify uncertainty with respect to rights, status, and other legal relations.” *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn.App. 927, 935, 121 P.3d 95, 99 (2005), *citing DiNino v. State*, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984).

A good summary of the law of declaratory judgments is found in *Burman v. State*, 50 Wn.App. 433, 439, 749 P.2d 708 (1988):

To enable a trial court to assume jurisdiction and render a declaratory judgment, it must be presented with a justiciable controversy . . . A justiciable controversy requires that parties have existing and genuine, not theoretical, rights or interests. The controversy must be one upon which the judgment of the court may effectively operate. A justiciable controversy is one in which the judicial determination will have the force and effect of a final judgment in law or be of great and overriding public interest. Finally, the proceedings must be genuinely adversarial in nature . . . In addition to the requirements listed above, a case which is moot does not meet the test of justiciability. A case is moot if the court's resolution of the issue will not affect the rights of the litigants

before the court . . . However, an issue is not deemed moot if it capable of repetition, yet evading review.

In *Burman*, the court concluded that a class action challenge to certain traffic fines was not rendered moot by the fact that the named plaintiff had settled her case. *Id.*, at 440.

In applying the Uniform Declaratory Judgments Act, the courts have consistently held that a court's jurisdiction may be invoked to resolve issues of major public importance. *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 918, 949 P.2d 1291 (1997), citing *Nollette v. Christianson*, 115 Wn.2d 594, 598, 800 P.2d 359 (1990) (“a person whose rights are affected by, inter alia, a statute or municipal ordinance may obtain a declaration of rights thereunder”).

The court's jurisdiction under the Act may also be invoked to determine the construction of a statute. *State ex rel. Lyon v. Board of County Com'rs of Pierce County*, 31 Wn.2d 366, 196 P.2d 997 (1948) (“The declaratory judgment act, Rem.Rev.Stat. (Sup.), §§ 784-1 to 784-17, is likewise available where the parties are concerned with the construction of a statute”). In *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 422 P.2d 754 (1967); affirmed *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 88 S. Ct. 1725, 20 L.Ed.2d 689 (1968), the state Departments of Game and Fisheries brought a declaratory judgment

action for the purpose of determining whether certain named individuals had, as members of the Puyallup Indian Tribe, any privileges or immunities from the application of state conservation laws. *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 246-247, 422 P.2d 754 (1967). The tribe contended that the question whether its members were immune from fish conservation laws should be raised in individual criminal actions brought against Indians who violate the food fish and game fish conservation laws or the regulations promulgated thereunder. *Id.*, at 248. The court held that the Departments of Game and Fisheries were entitled to maintain an action against the tribe and others under Uniform Declaratory Judgments Act for declaratory judgment:

A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent hardship to them and their families, seems to us the unnecessarily hard way of determining whether they have immunity from certain fishing regulations.

Since the Indians who claim immunity from these regulations claim them under treaties between the United States and various Indian tribes, it seems to us that the state Departments acted wisely in seeking an interpretation of those treaties and a delineation of the rights of the members of the different tribes in a series of actions under the Uniform Declaratory Judgments Act.

*Id.*, at 248. *See also Sorenson v. Bellingham*, 80 Wn.2d 547, 496 P.2d 512 (1972) (Where issue of validity of requirement that candidates for election to board drafting new city charter be freeholders was unsettled and issue

was likely to reoccur in future, Supreme Court would decide merits of declaratory judgment proceeding attacking validity of such requirements even though plaintiff had not sought to restrain election which was held during pendency of appeal from judgment upholding provision).

2. Judicial Determination is Necessary to Determine Scope of Privacy Rights of Public Employees and Citizens Who Have Conversations with Public Employees.

The County's application for declaratory judgment presents a true justiciable controversy. RCW 9.73.030(1) provides that "it shall be unlawful for any individual . . . or the state of Washington, its agencies, and political subdivisions to intercept, or record any . . . private conversation." No question exists that David Smith recorded the conversations described earlier in this brief. Rather, he contends recording public employees' conversations during their workday and/or at their workplace can never violate Washington's Privacy Act.

Smith's contention, and the County's efforts to address it, presents an actual controversy. The controversy here is not about the legal consequences of some act that may or may not occur. All of the acts that create liability under the Privacy Act have already occurred: David Smith electronically recorded conversations without consent. The court is being

asked, as in any litigation, to determine the legal consequences of Smith's acts: did his acts violate RCW 9.73.030?

The other elements being present, it is enough if the controversy concerns "the mature seeds" of any actual, present and existing dispute, "as distinguished from a possible dormant, hypothetical, speculative, or moot disagreement." *Ackerley Communications, Inc. v. City of Seattle*, 92 Wn.2d 905, 912, 602 P.2d 1177 (1979), citing *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137, 139 (1973). Public agencies are entities, not individuals. They can act only through their officers, officials, managers and employees. If the County's interpretation of RCW 9.73.030 is correct, then public employers can be held civilly and criminally liable when public employees record private conversations without the consent of all persons being recorded. The County is often sued and sometime found liable for the acts of its officers, officials, managers and employees. David Smith was in upper management and a speaking agent of the County at the time he recorded private conversations. Thus, the recording of private conversations of officials and employees who speak and act on behalf of the County fall within "the zone of interests to be protected or regulated by the statute." See *Biggers v. City of Bainbridge Island*, 124 Wn.App. 858, 864, 103 P.3d 244 (2004); *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d

791, 802, 83 P.3d 419 (2004). It is immaterial that it may be the one allegedly liable -- the County as Smith's employer -- rather than the person to whom the County would be liable who asks for the judicial determination.

This is not a case where the court is being asked to render an advisory opinion or pronouncement upon abstract or speculative questions as in *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) (citizens' action challenging initiative measure was dismissed because the initiative measure had not yet taken effect). The rights afforded by RCW 9.73.030, and Smith's violation of those rights, affect public employees and citizens' fundamental rights of privacy. These public interests are direct and substantial. If Smith and Longacre are correct that conversations of public employees are never private, then indiscriminate, clandestine recording of conversations can occur without restriction. Examples:

- A public employee may surreptitiously record a citizen complaint about a neighbor's violation of zoning codes.
- A supervisor may surreptitiously record a conversation with a public employee about the employee's job performance.
- A human resources officer may record a confidential conversation with a public employee seeking protection from unlawful harassment and retaliation.
- A conversation with a public employee seeking accommodation for a disability or leave for a serious health condition could be recorded.

- A judge's disgruntled office staff could record a conversation with the judge concerning non-judicial administrative matters.

If Smith and Longacre are wrong -- and considering our state's long history protecting private conversations, we think they are -- then the trial court's refusal to interpret RCW 9.73.030's application to public employee's conversations left unresolved the real, direct, and substantial risk that indiscriminate recording of public employees' conversations will occur. Without a judicial determination of RCW 9.73.030, then Smith and others may continue to engage in indiscriminate, surreptitious recording of public employees' conversations without restrictions, resulting in the disclosure of confidential information and the invasion of privacy interests.

A judicial determination whether public employees have a reasonable expectation of privacy in their place of work, and whether the recording of the conversations at issue in this action violates RCW 9.73.030, will be final and conclusive. If a conversation by a public employee can never be private, then public employees, public employers, and citizens having conversations with public officers and their deputies may record without fear of liability. However, if situations exist where some conversations with or by public employees are private, then a

judicial pronouncement in this case will serve to avoid repetition of the controversy here.

In Washington Practice, it is stated: “In view of the nature of the device, a declaratory judgment should be proper if it is reasonably certain that coercive litigation will ultimately take place between the parties unless a declaration is given.” 15 Wn. Prac., Civil Procedure § 42.4. Coercive litigation continues to take place between the County and Smith and Longacre. On June 7, 2006, five days after the trial court announced its decision on the County’s Motion for Declaratory Judgment, Smith and Longacre filed claims for damages against the County and individual employees alleging this declaratory judgment action by the County was “malicious prosecution.” Without judicial interpretation, coercive litigation between other parties is inevitable.

Even if a litigant is itself barred from declaratory and injunctive relief, the court may still grant declaratory relief where the “real merits of the controversy are unsettled and the continuing question of great public importance exists.” *Ackerley Communications, Inc. v. City of Seattle*, 92 Wn.2d 905, 912, 602 P.2d 1177 (1979), quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512, 518 (1972), and 1W. Anderson, *Actions for Declaratory Judgments* at p. 126, Et seq. (2d ed. 1951), citing *1183 State ex rel. Yakima Amusement Co. v. Yakima County*, 192 Wn.

179, 73 P.2d 759 (1939). In *Ackerley Communications, Inc.*, the court recognized the prudence of resolving controversies through declaratory judgments to avoid delay and expense:

“We will retain an appeal and decide issues, even though moot, if they present matters of substantial public interest, particularly where final determination of the issue is essential in guiding the conduct of public officials”. This court is more likely to decide the issues raised “where it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and to the other branches of the government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation”.

*Id.*, at 912, quoting *DeFunis v. Odegaard*, 84 Wn.2d 617, 628, 529 P.2d 438, 444 (1974), and *Distilled Spirits Inst. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012, 1014 (1972).

The County, on behalf of County citizens and employees, has a statutory legal right capable of judicial protection. Those rights, among others, include the right to prevent the disclosure of private and/or confidential information of employees, volunteers, and citizens who conduct business with the County, to be free from certain litigation for taking action against employees and individuals who record private conversations in violation of the Privacy Act, and to prevent economic harm resulting from defending itself against claims and charges made against the County for violations of the Privacy Act by its officers and employees. These are important public interests. Indeed, it is difficult to

contemplate that any public interest will be harmed if the Court decided the substantial issues presented here.

3. Washington's Privacy Act Prohibits the Recording of Private Conversations Without Consent.

Our state has a long history of statutory protection of private communications and conversations. *State v. Clark*, 129 Wn.2d 211, 222, 916 P.2d 384 (1996). In 1909, the Legislature first penalized the opening of a sealed letter or divulging the contents of a telegram. *Id.*, citing RCW 9.73.010, .020. In 1967, the Legislature made it unlawful, with some statutory exceptions, to intercept or record by any device any private conversation or communication transmitted by telephone, telegraph, radio, or other device without the prior consent of all participants or a court order. *State v. Clark*, 129 Wn.2d at 222, citing RCW 9.73.030.

Washington's Privacy Act makes it illegal to record a private conversation without first obtaining the consent of all persons in the conversation. RCW 9.73.030 provides:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

... (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

. . . (3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

Under RCW 9.73.030, the protections of the Privacy Act apply only to private communications or conversations. *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996), *citing Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 189, 829 P.2d 1061 (1992). Generally, the question of whether a particular communication is private is a question of fact, but may be decided as a question of law where the facts are undisputed. *State v. Christensen*, 153 Wn.2d 186, 192-193, 102 P.3d 789 (2004), *citing State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (*citing State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996)); *Clark*, 129 Wn.2d at 224 (“Whether a particular conversation is private is a question of fact, but where the facts are undisputed and reasonable minds could not differ, the issue may be determined as a matter of law”), *citing Kadoranian*, 119 Wn.2d at 190.

The term “private” is not defined in RCW 9.73. Washington appellate courts have addressed that term by analyzing under the circumstances of a particular case whether a given conversation or

communication was private. In *Kadoranian v. Bellingham Police Dep't*, the Washington State Supreme Court determined the “intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case” controls as to whether a conversation is private. *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996), quoting *Kadoranian*, 119 Wn.2d at 190, 829 P.2d 1061 (quoting *State v. Forrester*, 21 Wn.App. 855, 861, 587 P.2d 179 (1978), review denied, 92 Wn.2d 1006 (1979)). The term “private” is to be given its ordinary and usual meaning: “belonging to one’s self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public. *State v. Clark*, 129 Wn.2d at 224-225, quoting *Kadoranian*, 119 Wn.2d at 189-90, 829 P.2d 1061.

“In deciding whether a particular conversation is private, we consider the subjective intentions of the parties to a conversation.” *Clark*, 129 Wn.2d at 225, citing *State v. Faford*, 128 Wn.2d 476, 910 P.2d 447 (1996). Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party. *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d

789, 792 (2004), *citing Clark*, 129 Wn.2d at 225-27. “To record a conversation behind a closed door usually would entail prying or intrusion into a person’s home, workplace, automobile or other private zone.” *State v. Clark*, 129 Wn.2d 211, 230, 916 P.2d 384 (1996) (emphasis added).

4. The Recording of Employees’ Private Conversations in the Workplace Violates Washington’s Privacy Act.

Courts have recognized that within the workplace context, employees may have a reasonable expectation of privacy in their place of work. In *O’Connor v. Ortega*, 480 U.S. 709, 716-718, 107 S.Ct. 1492, 1497-1498, 94 L.Ed.2d 714 (1987), the U.S. Supreme Court rejected the contention that public employees can never have a reasonable expectation of privacy in their place of work. “As with the expectation of privacy in one’s home, such an expectation in one’s place of work is ‘based upon societal expectations that have deep roots in the history of the Amendment.’” *O’Connor v. Ortega*, 480 U.S. 790, at 716, *quoting Oliver v. United States*, 466 U.S. 170, 178, n. 8, 104 S.Ct. 1735, 1741, n. 8, 80 L.Ed.2d 214 (1984).

A particularly relevant case of workplace privacy is *U.S. v. McIntyre*, 582 F.2d 1221 (9th Cir. 1978). In that case, a city’s chief of police and a lieutenant approved of a plan to “bug” the assistant chief by placing a microphone and transmitter in a briefcase in the assistant chief’s

office. At the chief's direction, two police officers monitored the assistant chief's conversations. At no time did any of the participants seek a court order or the assistant chief's consent for the surveillance. *U.S. v. McIntyre*, 582 F.2d 1221, at 1223. The chief of police and lieutenant were convicted of violating and conspiring to violate Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which prohibits, inter alia, the electronic interception of an oral communication made under circumstances justifying an expectation the communication would not be intercepted.

One of the issues on appeal was whether the assistant chief had a reasonable expectation of privacy. *U.S. v. McIntyre*, 582 F.2d at 1223. Guided by the U.S. Supreme Court's decision in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Ninth Circuit's inquiry concerned whether the communications overheard by the two officers acting at the chief's direction were uttered by a person (1) who has a subjective expectation of privacy, and (2) whose expectation was objectively reasonable. *U.S. v. McIntyre*, 582 F.2d at 1223, citing *United States v. Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976).

The Ninth Circuit held that "[t]here is no question that [the assistant chief] had a subjective expectation of privacy. At trial [the assistant chief] testified that he believed that normal conversations in his

office could not be overheard, even when the doors to his office were open.” The Court went on to state that “[a] police officer is not, by virtue of his profession, deprived of the protection of the Constitution. This protection extends to warrantless eavesdropping to overhear conversation from an official’s desk and office. *McIntyre*, at 1224, *citing Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), and *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967).

The court in *McIntyre* recognized that an established regulatory scheme or specific office practice may, under some circumstances, diminish an employee’s reasonable expectation of privacy. *McIntyre*, at 1224, *citing United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United States v. Speights*, 557 F.2d 362 (3d Cir. 1977). But defendants failed to show a regulatory scheme or specific office practice which would have alerted the assistant chief in that case to expect random monitoring of his conversations.

In *McIntyre*, the defendants argued that the physical characteristics of the assistant chief’s office made his expectation of privacy unreasonable. Evidence was introduced that at the time of the “bugging” the assistant chief’s office doors were open, and that a records clerk worked fifteen feet away in an adjacent room. The Ninth Circuit rejected the argument that an open door made the assistant chief’s expectation of

privacy unreasonable. It was significant that the assistant chief “believed his office conversations to be private. A business office need not be sealed to offer its occupant a reasonable degree of privacy.” *McIntyre*, at 1224. The Ninth Circuit concluded that the assistant chief had a reasonable expectation of privacy in his office. *Id.*

Another instructive case is *Walker v. Darby*, 911 F.2d 1573 (11th Cir. 1990). Three postal supervisors, pursuing a personal vendetta against a postal worker, electronically intercepted the worker’s conversations at his workstation, transmitting them to one of their offices. The plaintiff worker alleged a violation of the same federal anti-wiretapping law at issue in *McIntyre*. *Walker v. Darby*, 911 F.2d at 1577. Although the plaintiff’s workstation was in a shared space rather than a private office, the appellate court found a triable issue of fact as to whether the plaintiff had a reasonable expectation of privacy from electronic interception. “We agree that there is a difference between a public employee having a reasonable expectation of privacy in personal conversations taking place in the workplace and having a reasonable expectation that those conversations will not be intercepted by a device which allows them to be overheard inside an office in another area of the building. “. . . The [workstation] was located in an area shared with other workers. But while Walker might have expected conversations uttered in a normal tone of

voice to be overheard by those standing nearby, it is highly unlikely that he would have expected his conversations to be electronically intercepted and monitored in an office in another part of the building.” *Walker v. Darby*, 911 F.2d at 1579, fn. omitted. As in *McIntyre*, the court in *Darby* treated aural privacy as a relative, rather than absolute, characteristic of the workplace.

In *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal.4th 907, 912, 978 P.2d 67, 70, 85 Cal.Rptr.2d 909, 912 (Cal., 1999), a television news reporter obtained employment with a telepsychic marketing company. The reporter wore a small video camera hidden in her hat, and covertly videotaped her conversations with several coworkers at the telepsychic marketing company. *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal.4th at 910, 978 P.2d at 69, 85 Cal.Rptr.2d at 910 - 911. The California Supreme Court granted review to determine whether the fact that a workplace interaction might be witnessed by others on the premises necessarily defeats any reasonable expectation of privacy the participants have against covert videotaping by a journalist. The court concluded it does not: “In an office or other workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television

reporters, even though those conversations may not have been completely private from the participants' coworkers." *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal.4th 907, 911, 978 P.2d 67, 69, 85 Cal.Rptr.2d 909, 911 (Cal.,1999).

The above cases are persuasive. Even when one or more of the participants to a conversation is a public employee, even when the conversation occurs at public employee's workplace, if the public employee's subjective intention that the conversation is private is a reasonable one, then the recording of that conversation without consent violates Washington's Privacy Act.

5. The Presence of a Third Person Who Is a Needed Participant Does Not Undermine the Privacy of the Conversation.

It may be instructive to examine the law of privileges to determine whether private communications in presence of another lose their private nature. Under the law of privileged communications, the general rule is that a spoken conversation between two persons is not confidential if it is made in the presence and hearing of a third party. *State v. Clark*, 129 Wn.2d 211, 225-229, 916 P.2d 384 (1996), *citing State v. Barnhart*, 73 Wn.2d 936, 442 P.2d 959 (1968) (spousal privilege did not attach to husband's communications with wife over telephone in the presence of

sheriff's secretary; husband made no objection to secretary's presence); *Ramsey v. Mading*, 36 Wn.2d 303, 312, 217 P.2d 1041 (1950) (attorney-client privilege did not attach to statements made by vendees of residential property to their attorney when vendor of property who was adverse party was present); *Redding v. Virginia Mason Medical Ctr.*, 75 Wn.App. 424, 428, 878 P.2d 483 (1994) (in litigation between husband and wife, psychologist was free to disclose wife's statements made in joint therapy session with husband).

While the presence of a third person overhearing a communication will ordinarily vitiate and undermine the viability of a privilege, "if the third person is present as a 'needed' participant in the consultation, the circle of confidence may be reasonably extended to include the third person without compromising the privilege. *State v. Martin*, 91 Wn.App. 621, 634, 959 P.2d 152 (1998), citing *State v. Gibson*, 3 Wn.App. 596, 599, 476 P.2d 727 (1970), review denied, 78 Wn.2d 996 (1971); *In re Grand Jury Investigation*, 918 F.2d 374, 385 (3rd Cir. 1990) (presence of third parties, if essential to and in furtherance of the communication, does not vitiate the requisite confidentiality for the clergy member privilege). "Courts have applied this rule in a number of contexts." *State v. Martin*, 91 Wn.App. at 634, citing *State v. Orfi*, 511 N.W.2d 464, 469 (Minn.Ct.App. 1994) (clergy privilege applied although mother of

defendant's girlfriend talked with clergy member and defendant together for a while after clergy member had already separately met with defendant); *Nicholson v. Wittig*, 832 S.W.2d 681, 685-86 (Tex.Ct.App. 1992) (clergy-communicant privilege was not waived by fact that conversations between hospital chaplain and patient's wife took place in front of other persons; intermittent presence of hospital personnel did not destroy confidentiality); *In re Grand Jury Investigation*, 918 F.2d at 386 (presence of non-family members did not necessarily destroy privilege if their presence was essential to and in furtherance of the communication). Thus, if other persons present are necessary participants to the conversation, then the privacy of the conversation is not lost.

6. David Smith's Recording of Conversations Violated Washington's Privacy Act.

The conversations described in the declarations of citizens Hadley, Martin, and Thomas, and County employees Brand, Cioc, Johnson, and Roycroft were private conversations. The conversation with citizen Sam Hadley was in a County conference room with the door closed, Sam Hadley, David Smith, and Steve Johnson were present. As a County employee, Steve Johnson's presence was in furtherance of the conversation to resolve an issue concerning Hadley's basketball hoop in the County right-of-way. Neither Hadley nor Johnson had any expectation

that Smith would record the conversation. Hadley and his neighbors were having conflicts about the location of the basketball hoop, and he did not want his neighbors to learn about some of the things he said to Smith and Johnson. Hadley's subjective expectation that the conversation was private was reasonable.

The conversation that Smith had and recorded with Joan Martin and Leon Thomas occurred in Martin's private residence. These citizens intended their conversation with Smith to be private because they were concerned about retaliation from trespassers, as some retaliation had occurred in the past. That the conversation took place with a public employee does not undermine the reasonable, subjective expectation that that the conversation was private.

The conversations described by County employees Steve Johnson, Greg Cioc, Gordon Roycroft, and Jon Brand were private. Most of the conversations occurred in Smith's office with the door closed and without the presence of a third person. One of the conversations took place in a county vehicle with only Cioc and Smith present. A conversation between Smith and Brand occurred in a conference room with the door closed. Some of the conversations concerned sensitive personnel issues. Johnson, Cioc, Band, and Roycroft did not believe their conversations would be overheard, and practically speaking, could not be repeated word for word.

They had a subjectively reasonable expectation that these workplace conversations were private and would not be electronically recorded.

Smith's surreptitious recording of conversations gave him an unfair advantage. Smith was able to monitor his words carefully to ensure that he made no statement that might bring embarrassment and ridicule on him. At the same time, he could, and did, manipulate conversations. Smith baited participants into engaging in a conversation they might not otherwise have engaged in. Smith wiled them into making statements they might not otherwise have made if they had known it was being recorded.

Nothing in Washington's Privacy Act excludes from its protections the conversations of public employees occurring at the workplace during the performance of public duties. If RCW 9.73.030 does not protect the conversations Smith had with Sam Hadley, Joan Martin, Leon Thomas, Jonathan Brand, Greg Cioc, Gordon Roycroft, and Steve Johnson, then publicly employed supervisors like Smith will be free to surreptitiously monitor the workplace by recording any and all conversations. Such an interpretation of RCW 9.73.030 will substantially erode the privacy rights of public employees and citizens who have conversations with them.

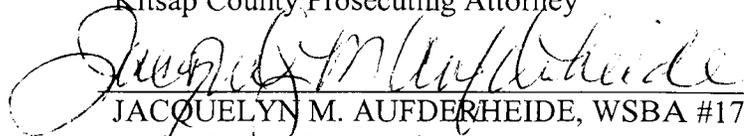
### **CONCLUSION**

For all the forgoing reasons, the County respectfully submits that the trial court erred in denying the County's request for declaratory

judgment as stated in the County's complaint and dismissing the County's declaratory judgment action.

Respectfully submitted this 18th day of June, 2007.

RUSSELL D. HAUGE  
Kitsap County Prosecuting Attorney



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JACQUELYN M. AUFDERHEIDE, WSBA #17374  
Senior Deputy Prosecuting Attorney  
Attorney for Appellant Kitsap County  
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Phone: 360-337-4973; Fax: 360-337-7083  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHARLES SHANK,

Plaintiff,

NO. C04-5843RJB

v.

STIPULATION AND ORDER  
REGARDING CERTAIN  
DISCOVERY

KITSAP COUNTY, a Washington state  
municipal corporation; RON YINGLING;  
RANDY CASTEEL; CHRIS ENDRESEN;  
JON BRAND; BURT FURUTA; and  
MALCOLM FLEMING,

Defendants.

**I. STIPULATION**

1. Based upon this stipulation, Plaintiff agrees to withdraw Plaintiff's Motion To Allow in Camera Review of Documents

2. On or about May 31, 2005, Plaintiff filed Plaintiff's Motion To Allow in Camera Review of Documents requesting in-camera review of documents "to determine whether the production of the documents...[would] violate RCW 9.73, whether the production of the documents would violate the

1 work-product rule, or whether the documents are not relevant to this case." The documents subject to  
2 the motion, now withdrawn, were part of records provided to Defendants in response to a subpoena  
3 duces tecum to David N. Smith, who is a traffic engineer employed by Kitsap County.  
4

5 3. The Parties acknowledge that originals of the above-described records are being held by  
6 David N. Smith and his attorney Clayton Longacre; that Kitsap County has copies of said records  
7 obtained pursuant to subpoena duces tecum to David N. Smith; and that Kitsap County on or about  
8 June 7, 2005 filed an action against David N. Smith and his attorney Clayton Longacre in Kitsap County  
9 Superior Court for, inter alia, return of the originals of said records (Kitsap County Superior Cause No.  
10 05-2-01317-8).  
11

12 4. For purposes of this Stipulation and Order, the documents which are the subject of the  
13 Plaintiff's Motion to Allow in Camera Review of Documents fall into three categories as classified by  
14 Defendants: (1) records of conversations of County citizens and employees electronically recorded by  
15 David N. Smith with a device designed to record or transmit such conversations, a printed index of such  
16 recordings, and transcriptions prepared by David N. Smith of such recordings; (2) records of an  
17 investigation of a whistleblower complaint made by David N. Smith, which was investigated by the  
18 Office of the Prosecuting Attorney for the purpose of advising its client Kitsap; and (3) records that  
19 Defendants have not disclosed to Plaintiff on the grounds that the records are irrelevant to this action  
20 and to Plaintiff's claims and are unlikely to lead to admissible evidence.  
21  
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23 5. By June 24, 2005, Defendants will submit a brief to the Court as to (1) the applicability  
24 of chapter 9.73 RCW to certain conversations of County employees recorded by David N. Smith with a  
25 device designed to record or transmit such conversations, including an index of such recordings, and  
26 transcriptions of such recordings prepared by David N. Smith; and (2) whether any or all of the tape-  
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1 recorded conversations are subject to Plaintiff's request for discovery. To assist the Court, Defendants  
2 will submit transcribed excerpts of the recordings for the Court's in camera review at the time  
3 Defendants submit their brief as described in this paragraph. Plaintiff may submit a responsive brief on  
4 June 30, 2005 and Defendants may submit a reply brief on July 8, 2005. After consideration of the  
5 matter, the Court may issue an order on whether discovery of the records described in this paragraph  
6 will be allowed.  
7

8  
9 6. In addition to the briefing described in Paragraph 5, the parties, upon the schedule set  
10 forth above, the applicability of the attorney-work-product privilege to the whistleblower investigation  
11 conducted by the Office of the Kitsap County Prosecuting Attorney. To assist the Court, Defendants  
12 shall submit a copy of the whistleblower- investigation report and witness statements for the Court's in  
13 camera review at the time Defendants submit their brief as described in this paragraph. After  
14 consideration of the matter, the Court may issue an order on whether discovery of the records described  
15 in this paragraph will be allowed.  
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17 7. The parties have reached agreement as to documents that Defendants contend are not  
18 relevant to this action, and these documents at this time will not be subject to either in-camera review or  
19 briefing by the parties. The parties agree that Kitsap County shall request that David N. Smith review  
20 the documents identified as irrelevant to this action as soon as practicable after Mr. Smith retains  
21 counsel in the state-court matter.  
22

23 8. Plaintiff withdraws his subpoena duces tecum directed to David N. Smith and Clayton  
24 Longacre dated January 24, 2005, and within two (2) days of the issuance of the Court's Order in this  
25 Stipulation and Order, Plaintiff's counsel will notify Mr. Smith and Mr. Longacre that the subpoena  
26 duces tecum has been withdrawn.  
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1           9.       If this litigation proceeds to trial, nothing contained in this Stipulation and Order affects  
2 in any way or to any degree the admissibility or non-admissibility of any discovery material or  
3 information disclosed under the terms of this Stipulation and Order or in the Court's subsequent Orders  
4 on whether the discovery of records described in Paragraphs 5 and 6 will be allowed.  
5

6           10.       Nothing in this Order shall infringe upon the right of any party to object to providing  
7 information which is subject to the attorney-client privilege, or which is non-discoverable on any other  
8 legitimate ground.  
9

10           Stipulated to this 13th day of June, 2005 by:

11                                   RUSSELL D. HAUGE  
12                                   Kitsap County Prosecuting Attorney

13                                   s/

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14                                   JACQUELYN M. AUFDERHEIDE, WSBA #17374  
15                                   Senior Deputy Prosecuting Attorney  
16                                   Attorneys for Plaintiff Kitsap County  
17                                   614 Division Street, MS-35A  
18                                   Port Orchard, WA 98366  
19                                   Phone: 360-337-4973  
20                                   Fax: 360-337-7083  
21                                   E-mail: [jaufderh@co.kitsap.wa.us](mailto:jaufderh@co.kitsap.wa.us)

22           Stipulated to this 13th day of June, 2005 by:

23                                   Law Office of Randy W. Loun

24                                   s/

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25                                   RANDY LOUN, WSBA # 14669  
26                                   Attorney for Plaintiff  
27                                   The Law Office of Randy Loun  
28                                   509 Fourth St., Ste. 6  
                                  Bremerton, WA 98337  
                                  Phone (360) 377-7678  
                                  Fax (360) 792-1913

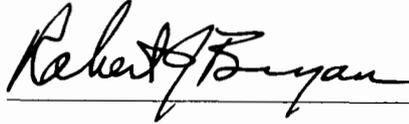
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## II. ORDER

BASED UPON THE FOREGOING STIPULATION, the Court orders the following:

- (1) By June 24, 2005, the Defendants shall submit briefing to the Court regarding the following
  - A) The applicability of chapter 9.73 RCW to certain conversations of County employees recorded by David N. Smith with a device designed to record or transmit such conversations, including an index of such recordings, and transcriptions of such recordings prepared by David N. Smith; and whether any or all of the tape-recorded conversations are subject to Plaintiff's request for discovery. To assist the Court, Defendants shall submit transcribed excerpts of the recordings for the Court's in camera review at the time Defendants submit their brief. After consideration of the matter, the Court may issue an order on whether discovery of the records described in this subparagraph will be allowed.
  - (B) The applicability of the attorney-work-product privilege to the whistleblower investigation conducted by the Office of the Kitsap County Prosecuting Attorney. To assist the Court, Defendants shall submit a copy of the whistleblower-investigation report and witness statements for the Court's in-camera review at the time Defendants submit their brief.
- (2) Plaintiff may submit a responsive brief on June 30, 2005 and Defendants may submit a reply brief on July 8, 2005. After consideration of the matter, the Court may issue an order on whether discovery of the records described in subparagraph 1 of this Order will be allowed.
- (3) Within two (2) business days of the issuance of this Order, Plaintiff's counsel shall notify Mr. Smith and Mr. Longacre that the Plaintiff's subpoena duces tecum to David N. Smith and Clayton Longacre dated January 24, 2005 has been withdrawn.
- (4) If this litigation proceeds to trial, nothing contained in this Stipulation and Order shall affect in any way or to any degree the admissibility or non-admissibility of any discovery material or information disclosed under the terms of this Stipulation and Order or in the Court's subsequent Orders on whether the discovery of records described in Paragraph 1 of this Order will be allowed.
- (5) Nothing in this Order shall infringe upon the right of any party to object to providing information which is subject to the attorney-client privilege, or which is non-discoverable on any other legitimate ground.

1 Dated this 14<sup>th</sup> day of June, 2005 by:  
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6 ROBERT J. BRYAN  
7 United States District Judge  
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### **3.76.080 Responses to requests for public records.**

(1) The public records officer shall promptly deliver public records requests to the department where the record is maintained. The public records officer shall assist departments with responses as needed.

(2) The department where the record is maintained shall promptly respond to requests for public records. Within five business days of the date a request is received in accordance with this chapter, the department must respond by either (1) providing the record; (2) acknowledging that the records request has been received and providing a reasonable estimate of the time the department will require to respond to the request; or (3) denying the public records request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the requests. If a requestor fails to clarify their request when asked to do so in writing, then responses are not required. A written statement of the specific reasons for the denial must accompany denials of requests.

(Ord. 279 (2002) § 1 (part), 2002)

### **3.76.090 Exemptions.**

(1) The county reserves the right to determine that a public record requested in accordance with this chapter is exempt from disclosure under the provisions of Chapter 42.17 RCW or other state or federal law.

(2) Pursuant to Chapter 42.17 RCW, the county reserves the right to delete identifying details when it makes public records available for inspection or copying in any case where there is reason to believe that disclosure of identifying details would be an invasion of personal privacy protected by Chapter 42.17 RCW. The person responding to the request

shall state the reasons for the deletion in writing.

(3) Each denial of a request for a public record must be accompanied by a written statement specifying the reason for the denial including, if appropriate, a statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

(Ord. 279 (2002) § 1 (part), 2002)

### **3.76.100 Fees for inspection and copying.**

(1) No fee shall be charged for the inspection of public records or for locating public documents and making them available for copying.

(2) The department shall collect the following fees or costs or both:

(a) The department may impose a reasonable charge for providing copies of public records and for the use by any person of agency equipment if the department has established and published the per page cost or other costs necessary to reimburse the department for actual costs incident to providing copies of public records; or

(b) The department may charge fifteen cents per page for paper copies of public records.

(c) The cost of mailing documents, including postage, shipping, and shipping materials, if any, shall also be charged.

(3) Nothing contained in this section shall preclude the department from agreeing to provide copies of reports or records to federal, state, or local agencies without charge whenever doing so is in the best interests of Kitsap County.

(Ord. 279 (2002) § 1 (part), 2002)

### **3.76.110 Protection of public records – Penalties, fines, and enforcement.**

(1) No person shall knowingly alter, deface, or destroy public records.

(2) Original public records shall not be removed from the premises where maintained.

(3) The care and safekeeping of public records furnished pursuant to a request for inspection and copying shall be the sole responsibility of the requestor.

(4) Records furnished for public inspection or copying shall be returned in the same condition and in the same file sequence or organization as when furnished.

(5) The department shall take all reasonable steps and impose appropriate conditions on the inspection and copying of public records so as to protect records and to preserve the integrity of other proper activities of the department. Inspection or copying shall be denied and records shall be withdrawn if the person inspecting or copying the records is engaging in conduct likely to damage or substantially disorganize them or so as to interfere excessively with other essential functions of the department or in disregard of conditions imposed by the department.

(6) Any violation of this section by knowingly altering, defacing, or destroying public records, or removing original public records from the premises where maintained, shall be deemed a class 2 civil infraction.

(7) The Kitsap County sheriff's office shall enforce this chapter by issuing a notice of civil infraction pursuant to and in accordance with Chapter 7.80 RCW, and citing to this county code chapter.

(8) Any violation of this chapter for which a notice of civil infraction is issued shall be disposed of in the same manner as provided for civil infractions under Chapter 7.80 RCW, as now or hereafter amended.

(9) All fines or forfeitures collected upon enforcement of this chapter shall be paid into the general fund of Kitsap County.  
(Ord. 279 (2002) § 1 (part), 2002)

### **3.76.120 Review of denials of public records requests.**

(1) Any person who objects to the denial of a request for a public record may petition

for prompt review of the decision by tendering a written request for review to the public records officer. The written request for review shall specifically refer to the written statement denying the request.

(2) By the close of the next business day after receiving a written request for review of a decision denying a public record, the public records officer shall refer it to the county administrator. The county administrator shall promptly consider the matter and either affirm or reverse the denial or refer the matter to the clerk of the board of county commissioners for the board's review. The county administrator and the board shall use their best efforts to issue a final decision within ten business days following the administrator's receipt of the written request for review.

(3) Administrative remedies shall not be considered exhausted until the administrator or the board issues a decision.  
(Ord. 279 (2002) § 1 (part), 2002)

### **3.76.130 Exemption from requirement to maintain a current records index.**

(1) The board of county commissioners finds that it would be unduly burdensome and costly to Kitsap County taxpayers, and would interfere with effective and timely county office operations, to develop an index of all current records as specified in RCW 42.17.260. County office operations are complex, diverse, and changeful, and the board and its departments and divisions receive and produce volumes of correspondence, reports, surveys, studies, and other records. The board and its departments and divisions will make available for public inspection and copying all indexes prepared pursuant to other authority.  
(Ord. 279 (2002) § 1 (part), 2002)

### **3.76.140 Liberal construction.**

This chapter shall be liberally construed to promote full access to public records so as to assure continuing public confidence, and to

CERTIFICATE OF SERVICE

I, Carrie Bruce, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On June 18, 2007, I caused a copy of the foregoing document to be served in the manner noted on the following:

Randy Loun [ ] Via U.S. Mail
Attorney at Law [ ] Via Fax: 360-792-1913
509 Fourth Street, Ste. 6 [X] Via Hand Delivery
Bremerton, WA 98337-1401 [ ] Via E-mail:

Clayton E. Longacre [ ] Via U.S. Mail
Attorney at Law [ ] Via Fax: 360-876-0204
569 Division Street, Ste. F [X] Via Hand Delivery
Port Orchard WA 98366 [ ] Via E-mail:

DATED this 18th day of June, 2007, at Port Orchard, Washington.

Carrie Bruce
CARRIE BRUCE

COURT OF APPEALS
DIVISION II
07 JUN 18 PM 2:44
STATE OF WASHINGTON
BY DEPUTY