

original

NO. 35878-6-II

COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON

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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,

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

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APPELLANT KITSAP COUNTY'S REPLY BRIEF

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 ORIGINAL

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Kitsap County submits this reply to the brief of Appellee David Smith and the brief of Appellees Clayton Longacre and Longacre Law Inc.

**A. The Trial Court Erred in Ruling that Smith Could Retain Records He Removed from the County and it is Sufficient that the County Has Copies of the Records Smith Removed.**

Smith and Longacre argue that the County has copies of the records that Smith removed, and that should be sufficient. The trial court agreed, granting Smith's and Longacre's motion for summary judgment dismissal because the County has copies of the records that Smith removed, and because the County did not proffer sufficient evidence that Smith removed original records. RP 15-16 (January 10, 2007).

The County concedes that not all of the records appropriated and retained by Smith and Longacre are original records in the traditional sense.<sup>1</sup> Some of the records Smith removed are original records, some are not. Smith cannot truthfully dispute that some of the records he removed and continues to possess are original records.

Moreover, the statutory definition of public records expressly covers copies. RCW 40.14.010 states:

As used in this chapter, the term "public records" shall include any paper, correspondence, completed form, bound

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<sup>1</sup> The County obtained copies of the records Smith removed from the County to determine if the records were Smith's personal records. The County has sometimes collectively referred to the records removed by Smith as "originals" to distinguish them from the copies the County obtained later.

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.

(Emphasis added). Thus, the requirement to protect and preserve public records is not limited to original records, but includes copies of records. Likewise, the willful and unlawful removal or misappropriation of public records applies to copies of public records. RCW 40.16.010; RCW 40.16.020.

In addition, what is considered a public record is to be interpreted broadly. Public records include those that have been gathered and compiled by public agencies, many of which will be copies of what would be considered “original” in the traditional sense. *Tiberino v. Spokane County*, 103 Wn.App. 680, 687, 13 P.3d 1104 (2000) (“In answering the threshold inquiry whether a document is a public record, the courts have broadly interpreted this second element of the statutory definition of public record”); *citing Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993) (documents compiled by a prosecutor for use in cross-examining a defense expert in child sexual abuse cases were documents relating to the performance of prosecutorial functions, were used by the

prosecutor's office in carrying out those governmental functions and, therefore, were public records); *Servais v. Port of Bellingham*, 127 Wn.2d 820, 828, 904 P.2d 1124 (1995) (research data--a cash flow analysis prepared by a consulting firm for the purposes of planning by the Port--was a writing which related to the conduct and performance of a governmental function and, thus, was a public record); *Oliver v. Harborview Medical Center*, 94 Wash.2d 559, 566, 618 P.2d 76, 26 A.L.R.4th 692 (1980) (medical records of a patient treated at a public hospital were public records because the records contained information of a public nature--the administration of health care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs, all of which relate to the performance of a governmental or proprietary function); *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn.App. 319, 324, 890 P.2d 544 (1995) (a settlement agreement containing information about the City's termination of an employee was a public record because termination is a proprietary function); *Limstrom v. Ladenburg*, 85 Wn.App. 524, 529, 933 P.2d 1055 (1997), *rev'd*, 136 Wn.2d 595, 963 P.2d 869 (1998) (criminal investigation files held by prosecutor and prosecutor's personnel files were public records).

Importantly, copies of many of the public records that Smith removed are exempt from inspection and copying under the Public

Records Act. RCW 5.60.060 (2)(a) (attorney-client privileged records); RCW 42.56.270 (records relevant to a controversy not available to another party under rules of pretrial discovery); *Dawson v. Daly*, 120 Wn.2d 782, 797 (1993) (performance evaluations that do not discuss specific instances of misconduct).

A log identifying the copies which the County obtained from Smith establishes that most of the records that Smith removed from the County are unquestionably public records. CP 840-853. *At no time have Smith, Longacre, or Loun disputed the accuracy of this log.* 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.

**B. There Is No Dispute that Smith Removed Public Records From the County and He or Longacre Continue to Possess Them.**

David Smith does not dispute that he removed from Kitsap County the records listed in the log and that the records he removed from Kitsap County are still in his possession and/or control. Smith Response, p. 3. He claims that the records he removed are his personal records that he created, gathered, and compiled to prove retaliation. In addition, he claims that the County failed to quash a subpoena for the records and made no effort to seal them. Smith argues that the County has never "identified a single document which it considered to be a "County record".

In a recent federal court action, *Shank v. Kitsap County et al.*, United States District Court; Western District of Washington (Tacoma) Case No. 04-5843RJB, in a Stipulation and Order Regarding Certain Discovery entered in that federal action, Randy Loun, attorney for Smith here, stipulated that Smith and Longacre have the records that Smith removed from the County. Kitsap County's Opening Brief, Appendix A,

2:5-11. A portion of that Stipulation and Order Regarding Certain Discovery provides:

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

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

4. For purposes of this Stipulation and Order, the documents which are the subject of the Plaintiff's Motion to Allow in Camera Review of Documents fall into three categories as classified by Defendants: (1) records of conversations of County citizens and employees electronically recorded by David N. Smith with a device designed to record or transmit such conversations, a printed index of such recordings, and transcriptions prepared by David N. Smith of such recordings; (2) records of an investigation of a whistleblower complaint made by David N. Smith, which was investigated by the Office of the Prosecuting Attorney for the purpose of advising its client Kitsap; and (3) records that Defendants have not disclosed to Plaintiff on the grounds that the records are irrelevant to this action and to Plaintiff's claims and are unlikely to lead to admissible evidence.

Kitsap County's Opening Brief, Appendix A, 1:24-2:22.<sup>2</sup>

Subsequently, a second Stipulation and Protective Order Regarding Certain Discovery was entered in the federal court action concerning the records that David Smith removed from the County. In that second stipulation and order, the County agreed to disclose additional, non-privileged records to Randy Loun, on the condition that the records so disclosed would not be disclosed, copied, disseminated or made available except as ordered by the federal district court. That second Stipulation and Order provides:

1. The parties have been engaged in a discovery dispute regarding copies of documents that Kitsap County obtained by subpoena duces tecum to David N. Smith. These documents include non-privileged documents withheld by defendants on the grounds that the records are irrelevant to this action and to Plaintiff's claims and are unlikely to lead to admissible evidence, hereinafter, "withheld documents". Withheld documents in this Stipulation is comprised of the following non-privileged documents: (1) records of conversations of County citizens and employees electronically recorded by David N. Smith with a device designed to record or transmit such conversations, a printed index of such recordings, and transcriptions prepared by David N. Smith of such recordings; (2) the unsigned Declaration of David N. Smith with attachments prepared during the investigation of an investigation of a whistleblower complaint brought by David N. Smith; and (3) documents withheld by the defendants on the grounds that the records are irrelevant to

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<sup>2</sup> The documents that were the subject of the stipulation did not cover attorney-client privileged records because Randy Loun conceded such records were not discoverable and he did not object to the County's withholding of them.

this action and to Plaintiff's claims and are unlikely to lead to admissible evidence. .

2. In the interest of judicial economy, defendants have agreed, upon the entry of the following protective order, to disclose the withheld documents (non-privileged) to plaintiff. Plaintiff acknowledges that the defendants have released the withheld documents without waiving their objection that the withheld documents are irrelevant to this action and to Plaintiff's claims and are unlikely to lead to admissible evidence.

3. Privacy Act. Plaintiff acknowledges that defendants have released the withheld documents without waiving the following objections related to Washington's Privacy Act, Chapter 9.73 of the Revised Code of Washington: (1) that the records of conversations of County citizens and employees electronically recorded by David N. Smith were recorded in violation of RCW 9.73.030; (2) that said records are not admissible pursuant to RCW 9.73.050, and (3) that said records are the subject of litigation currently pending in Kitsap County Superior Court (Kitsap County v. Dave N. Smith, et al., Kitsap County Superior Court Case No. 05-2-01317-8) and are protected from further disclosure under Chapter 9.73 of the Revised Code of Washington.

4. Use of Protected Withheld Documents. Plaintiff agrees that that the withheld documents shall be deemed confidential and shall not be disclosed, copied, disseminated or made available to any person or entity except as provided in this Stipulation and Protective Order Regarding Discovery, and shall only be used for purposes of this litigation. Plaintiff further agrees that all withheld documents, except for filings with this court in this matter, shall be retained under the exclusive control of plaintiff's counsel during the pendency [sic] of this case, and shall be returned to defense counsel within fifteen calendar days of the date that this case is final, including any applicable appeals.

## II. ORDER

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

1. Plaintiff may use withheld documents for only purposes of this litigation. Plaintiff shall not be [sic] disclose, copy, disseminate or made available to any person or entity any withheld documents except as provided in this Stipulation and Protective Order Regarding Discovery. All withheld documents, except for documents filed with this court in this matter, shall be retained under the exclusive control of plaintiff's counsel during the pendency [sic] of this case, and shall be returned to defense counsel within fifteen calendar days of the date that this case is final, including any applicable appeals.

2. 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 withheld documents disclosed under the terms of this Stipulation and Protective Order Regarding Discovery.

3. The terms of the Protective Order may be modified by Court Order.

CP 855--859.

The two stipulations and orders entered in the federal action prove that Randy Loun has stipulated that David Smith removed records from the County, that "originals" of the records are being held by Smith and his then-attorney Longacre, that the County was seeking return of those records, that the County had copies of the records--and provided copies of some of those records to Loun for the federal action, that the County sought to protect privileged and irrelevant records from disclosure. Loun agreed to the protective order, and withdrew the subpoena duces tecum to David Smith for the County's records which were in Smith's and Longacre's possession.

In addition, the documents which are the subject of this state court action are also covered by a protective order issued by the federal district court.<sup>3</sup> By issuing an order protecting the records, the federal district court recognized that many of the records possessed by David Smith were privileged and confidential. That the records were disclosed to Randy Loun in the federal court action pursuant to a protective order does not alter the fact that Smith appropriated the records and continues to possess them in violation of law. For Randy Loun to now argue on behalf of David Smith that the County failed to quash a subpoena for the records, made no effort to seal them, and the County has never “identified a single document which it considered to be a “County record”, are frivolous arguments and contrary to facts that Loun previously stipulated to.

**C. There is No Dispute that Smith Removed and Continues to Possess The Records That are at Issue Here.**

Longacre claims that Smith removed the County’s records at the direction of counsel for the County and in compliance with the subpoena issued in the Shank case. Longacre Response, pp. 1-2. He also claims that the records were returned to the County. Longacre Response, pp. 4-5.<sup>4</sup>

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<sup>3</sup> At the conclusion of the Shank action, Randy Loun returned to the County his copies of the records covered by the protective order.

<sup>4</sup> Longacre also claims that Smith no longer worked for the County at the time this action was instituted. He is incorrect. This action was instituted on June 7,

Counsel for the County did not consent or direct David Smith to remove the County's records. The County, through its counsel, has expended considerable effort for the return of the records that Smith removed from the County. *See* CP 1-19; 817-818; 820, 822, 825-829; 831, 833, 836, 838, 794-796. In addition, the County has gone to considerable effort to preserve the privilege and confidentiality of records that are exempt from public disclosure. CP 855-859; Appellant Kitsap County's Opening Brief, Appendix A.

Longacre alleges that the County's records have been returned. This is not true. The County concedes that it has obtained *copies* of the records removed from the County by Smith. The arrangement was made with Longacre because Longacre had contended that the records removed by Smith were "his personally." CP 792. The County obtained copies of the records and examined them to determine if they were indeed Smith's personal records. Some are, but many are not. All of the records were created and/or received and maintained during the course of Smith's employment with the County. They concern County business, and were created during Smith's workday from supplies owned by the County. The records removed by Smith include County work-related emails,

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2005. CP 1. As acknowledged by Longacre, Smith was discharged on April 19, 2006. Brief of Appellees Att. Longacre and Longacre Law, p. 3.

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. CP 813, 840-853.

At the time David Smith was served with the subpoena duces tecum by Randy Loun on behalf of Charles Shank in the federal district court case, Smith was a County employee, a speaking agent of the County, and represented in his official capacity by the Kitsap County Prosecutor's Office. Smith had no authority to appropriate County records and give them to his private attorney.

David Smith and Clayton Longacre do not dispute that they continue to possess the set records that David Smith removed from the County, which are listed in the log appearing at CP 840-853. Indeed, Longacre admits that Smith removed the documents to Longacre's office. Longacre Response, p. 9. These records, and particularly the privileged and confidential records, should be restored to the County. Public employees who have access to public records have no legal authority to appropriate them and provide them to their private attorneys. This applies especially to records that are exempt from inspection and copying. Smith and Longacre should have returned the County's records upon demand. The County offered to allow Smith to retain his personal records, such as

his notes and his own performance evaluations. CP 795. The Court should not reward Smith's unlawful removal of public records by allowing him to retain them, including confidential and privileged public records. At a minimum, a genuine issue of material fact exists whether Smith and Longacre misappropriated records that are privileged and confidential, covered by a protective order, and whether they may retain them.

In sum, the following facts cannot be disputed: (1) Smith removed records from the County; (2) the records that Smith removed are accurately described in the log appearing at CP 840-853 and 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; (3) the records that Smith removed were created and/or received and maintained during the course of Smith's employment with the County; (4) the records that Smith removed concern County business, and were created during Smith's workday from supplies owned by the County; (5) Smith and Longacre continue to possess the records that Smith removed--the County obtained copies of the records Smith removed.

Smith committed malfeasance by committing an unlawful act. He secured special privileges for himself by appropriated for his own use

records that were entrusted to him by virtue of his office. The public interest in preserving public records requires reversal of the trial court's grant of summary judgment.

**D. There is No Dispute that Smith Surreptitiously Recorded Conversations, and the Cases Cited By Smith Do Not Support His Argument that the Conversations He Recorded Were Not Private.**

There is no dispute that Smith surreptitiously recorded the conversations which are at issue in this action. Smith Response, p. 2. Smith characterizes the conversations as "business meetings concerning the administration of the Public Works Department." Smith cites *Kadoranian by Peach v. Bellingham Police Dept., a Div. of City of Bellingham*, 119 Wn.2d 178, 184, 829 P.2d 1061 (1992), in support of his argument that the conversations he recorded were not private. *Kadoranian* concerned an exception to the Privacy Act created by 1989 amendments to the Act. "The amendments, which are part of the Omnibus Alcohol and Controlled Substances Act of 1989, create a special procedure for the interception of conversations when the interception is part of a bona fide criminal investigation involving the manufacture, delivery or sale of illegal drugs. Such interceptions may be accomplished without prior judicial approval, if they are based on the consent of one of the parties to the conversation and if designated procedures are followed."

*Id.* The *Kadoranian* case does not stand for the proposition that conversations by and between public employees are business conversations that can never be private.

Smith cites *State v. Slemmer*, 48 Wn.App. 48, 53, 738 P.2d 281 (1987) for the proposition that conversations that take place at a meeting where one who attended can reveal what transpired can never be considered private. But the *Slemmer* case does not go so far as to say that any meeting where the contents of the meeting could be revealed can never be held private. Such a holding would undermine the Privacy Act as to almost any conversation between two or more individuals. Instead, the court in *Slemmer* focused, on “the inherent or reasonable expectations of the participants as manifested by the facts and circumstances of each case.” *Id.*, at 52, citing *State v. Forrester*, 21 Wn.App. 855, 861, 587 P.2d 179 (1978). In *Slemmer*, the court concluded that the parties to the conversation did not have a reasonable expectation that the conversation was private. A group comprised of several persons attended a meeting that one of the members recorded. Minutes of the meeting were taken on a large legal-sized yellow pad, the minutes were part of the public business records of the group, all of the participants knew that the minutes were available to anyone within or outside of the group, and all of the participants of the meeting knew that. The court concluded that the

participants did not have a reasonable expectation of privacy in the meeting. *State v. Slemmer*, 48 Wn.App. at 52-53.

In contrast, the conversations that David Smith recorded which have been introduced into evidence in this case were private. Only David Smith and one or two other persons were present. As explained in the County's opening brief, "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); *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). Thus, if other persons present are necessary participants to the conversation, then the privacy of the conversation is not lost.

In several of the conversations that Smith recorded a third person was not present. No third person was present during conversations that Smith recorded with Steve Johnson, Gordon Roycroft, Greg Cioc, and Jonathan Brand. CP 272, CP 129, CP 440, CP 509. These persons had a reasonable expectation that their conversation with David Smith was private. So, even if the presence of a third person eliminates the protections of the Privacy Act, Smith's recording of conversations he had with Johnson, Roycroft, Cioc and Brand, where no third person was present, violated their rights under the Privacy Act.

Smith's reliance on *State v. Wojtyna*, 70 Wn.App. 689, 694, 855 P.2d 315 (1993) is also misplaced. In the *Wojtyna* case, the court of appeals held that constitutional rights were not violated when police intercepted a phone number that was transmitted to pager. The *Wojtyna* case does not stand for the proposition that public employees have no expectation of privacy in their workplace.

There is no genuine issue of material fact that David Smith surreptitiously recorded the conversations in evidence in this action with a concealed tape recorder without the knowledge or consent of the persons

so recorded. We submit that the conversations at issue in this action were private and Smith's recording of them violated the Privacy Act.

**E. Longacre's Response Pertaining to the Smith's Recording of Conversations Should be Stricken in its Entirety--Longacre Does Not Represent Smith in this Action and Longacre is Not the Subject of this Part of the County's Action.**

Section D, pp. 12-22 of Longacre's response to the County's Opening Brief concerning Smith's recording of conversations should be stricken and not considered. Randy Loun is representing David Smith in this action, not Longacre or Longacre Law, Inc. Furthermore, Longacre is not a party to the County's declaratory judgment action against Smith for Smith's recording of conversations in violation of the Privacy Act. CP 5-6, 8, 14, 16. The County has never contended that Longacre or Longacre Law Inc., are liable for Smith's recording of private conversations.

Longacre is not representing David Smith in this action, but if he is, he and Randy Loun should not both be permitted to respond on behalf of David Smith. Longacre's response concerning the Privacy Act, pp. 12-21, should be stricken in its entirety.

**F. Appellees' Claims For Sanctions Are Wholly Without Merit.**

Smith, Longacre, and Longacre Law Inc., argue that sanctions should be imposed on the County for filing the declaratory judgment

action and this appeal. Smith Response, p. 9, Longacre Response, p. 8.<sup>5</sup>

The Rules of Appellate Procedure allow terms to be imposed if a party files a frivolous appeal or uses the appellate rules for delay. RAP 18.9(a) states in part:

The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

In addition, Rule 11 of the Civil Rules states in part:

. . . The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under that circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the

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<sup>5</sup> Neither Smith nor Longacre or Longacre Law Inc., ever answered the County's complaint or Amended Complaint. Thus, no affirmative defenses or counterclaims for sanctions appear in any answer in this action, only as part of their arguments in briefing.

amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a). *See also Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 223, 829 P.2d 1099 (1992) (holding that under RAP 18.7, CR 11’s certification requirement applies to proceedings in the appellate courts as well as the superior courts).

In determining whether an appeal is brought for delay, the courts inquire whether, when considering the record as a whole, the appeal is frivolous, i.e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Carrillo v. City of Ocean Shores*, 122 Wn.App. 592, 619, 94 P.3d 961 (2004). “In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, courts are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not for that reason alone frivolous; (5) an appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.” *Id.*, *citing*

*Streater v. White*, 26 Wn.App. 430, 434-435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980).

The court must make explicit findings as to which pleadings violated CR 11 and as to how such pleadings constituted a violation of CR 11. *North Coast Elec. Co. v. Selig*, 136 Wn.App. 636, 649, 151 P.3d 211(2007).

The County's declaratory judgment action and this appeal presents debatable issues and are not frivolous. Debatable issues exist whether a public employee's conversations with a supervisor, a co-worker, or a member of the public can never be private. Controverted facts exist whether some or all of the records removed by David Smith are his personal records, whether he had a right to remove them from the County. Attorneys fees and CR 11 sanctions are not appropriate here.

#### **G. CONCLUSION**

The trial court erred in holding that no genuine issues of material fact exist whether some or all of the records removed by David Smith are his personal records, whether he had a right to remove the records from the County, whether the fact that the County has copies of the records that Smith removed make the declaratory action and this appeal moot. The trial court erred in holding that there is no justiciable controversy whether

the conversations Smith recorded were private and violated the Privacy Act.

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, and to protect public records from unlawful misappropriation and inappropriate disclosure. 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.

DATED this 11th day of October, 2007.

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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 October 11, 2007, I caused a copy of the foregoing document to be served in the manner noted on the following:

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DATED this 11th day of October, 2007, at Port Orchard, Washington.

CARRIE BRUCE (with handwritten signature)

Handwritten signature and stamp: RUSSELL D. HAUGE, Kitsap County Prosecuting Attorney