

NO. 45039-9-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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GLEND A NISSEN,

Appellant/Cross-Respondent,

v.

PIERCE COUNTY, A PUBLIC AGENCY; PIERCE COUNTY  
PROSECUTOR'S OFFICE, A PUBLIC ENTITY,

Respondents/Cross-Appellants.

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**REPLY BRIEF OF APPELLANT AND RESPONSIVE BRIEF  
OF CROSS-RESPONDENT**

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
I. INTRODUCTION.....	1
II. REPLY BRIEF FACTS.....	2
III. LEGAL ARGUMENT.....	13
(A) County Fails to Address Det. Nissen’s Right to Discovery.....	13
(B) Public Disclosure Implicates State Constitutional Rights....	15
(C) Error In <i>Nissen I</i> By Dismissal on 12(b)(6) Precludes Estoppel or Res Judicata.....	22
(D) Government Related Texts Not “Private Affairs”.....	23
(E) No Identity Between Parties County Needs to Have Standing to Make Privacy Argument and to Assert Res Judicata.....	30
IV. ISSUES ON CROSS-APPEAL.....	33
V. FACTS ON CROSS-APPEAL.....	34
VI. LEGAL ARGUMENT.....	41
VII. CONCLUSION.....	45

TABLE OF AUTHORITIES

Page

Table of Cases

*Bradburn v. North Cent. Regional Library Dist.*, 168 Wn.2d 789, 231 P.3d 166 (2010).....17

*Bravo v. Dolsen Co.*, 125 Wn.2d 745, 888 P.2d 147 (1995).....14

*Brice v. Starr*, 93 Wn. 501, 161 P. 347 (1916).....32

*City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P.2d 1094 (1992).....16

*Deja Vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 979 P.2d 464 (1999).....41

*DeLong v. Parmelee*, 157 Wn. App. 119, 236 P.3d 936 (2010).....19

*Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P. 2d 370 (1991).....13

*Fritz v. Gorton*, 83 Wn.2d 275, 283-284, 517 P.2d 911 (1974).....17

*Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 128 P.3d 627 (2006).....22

*Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange*, 4 Wn. App. 49, 480 P.2d 226 (1971).....32

*Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 202 P.3d 1024 (2009).....42

*Houchins v. KQED, Inc.*, 438 U.S. 1, 14, 98 S. Ct. 2588 (1978).....19

*In re Recall of Pearsall-Stipek*, 129 Wn. 2d 399, 918 P.2d 493 (1996).....21

<i>J.L. Cooper &amp; Co. v. Anchor Securities Co.</i> , 9 Wn.2d 45, 113 P.2d 845 (1941).....	33
<i>Landry v. Loscher</i> , 95 Wn. App. 779, 976 P. 2d 1274 (1999).....	31
<i>Los Angeles Police Dept. v. United Reporting Publ. Corp.</i> 528 U. S. 32, 120 S. Ct. 483 (1999).....	20
<i>Magana v. Hyundai Motor America</i> , 167 Wn. 2d 570, 220 P.3d 191 (2009).....	41
<i>McBurney v. Young</i> , 133 S. Ct. 1709, 1718 (2011).....	20
<i>Progressive Animal Welfare Soc. v. University of Washington</i> 125 Wn.2d 243, 884 P.2d 592 (1994).....	13
<i>State v. Goucher</i> , 124 Wn.2d 778, 881 P.2d 210 (1994).....	31
<i>State v. Hinton</i> , __ Wn.2d __, 319 P.3d 9 (2014).....	24
<i>State v. Roden</i> , WL 766681, __ P.3d __ (2014).....	24
<i>Williams v. Pierce County</i> , No. 12-2-15681-1.....	43
 <u>Statutes</u>	
RCW 42.56.010(3).....	3
RCW 42.17.020(41).....	27
RCW 42.56.100.....	28
RCW 42.56.050, .070(1).....	30

RCW 4.84.185.....40

RCW 42.17.....16

Codes, Rules and Regulations

PCC 2.04.010.....26

WAC 44-14-03001.....27

18 U.S.C. 2703(a).....11

Constitution

Wash. Const. Art. I § 7.....24

Wash. Const. Art. I § 5.....16

## I. INTRODUCTION

Equitable doctrines like collateral estoppel and res judicata were never intended for use as a shield to government accountability. The elected prosecutor relies upon equity, and ignores his statutory duties, to endorse his decision to use his private cell phone to conduct the public's business in private. A practice he likely will continue if the trial court is affirmed. The County's use of such doctrines on his behalf invades free speech and the right to seek redress through civil discovery. Affirming the trial court will result in the destruction of public records, specifically the six days of text communications not requested in *Nissen I*.

The County's cross-appeal for sanctions amounts to bullying, and is particularly offensive given its compelled retention of Det. Nissen's private cell phone records and contacts, which is information the prosecutor considers so private that in camera review would amount to an unlawful search and seizure if it were his records.

The trial court erred when it deferred to the *Nissen I* ruling without examination of the previously unrequested text messages. The trial court has the capacity to fairly review the texts in camera and make an appropriate decision regarding disclosure, just like it did when it refused to sanction Det. Nissen or her counsel for their professional conduct in this

case. Summary dismissal should be reversed so that Judge Schaller may reach the “substance of the case at hand” as intimated in her Letter Opinion.

## II. REPLY BRIEF FACTS

The County’s response and counter appeal contains significant rhetoric that is not a fair representation of the record or the position of Det. Nissen or her lawyer. Det. Nissen focuses only on select examples to make her point because a more thorough analysis of each would detract from the substantive issues to be decided on appeal like Det. Nissen’s right to civil discovery to prove her case, which the County chose not to address. And, whether her right to public records trumps any reasonable expectation of privacy the elected prosecutor could assert in work-related texts.

First, Det. Nissen and her attorney honestly represent the distinctions between the *Nissen I* request and the *Nissen II* request for public records as is evident from the plain language of the distinct requests:

*Nissen I:*

“Please produce any and all of Mark Lindquist’s **cellular telephone records** for number 253-861-[redacted] or any other cellular telephone he uses to conduct his business including text

messages from August 2, 2011.” Emphasis added. CP 1010.

*Nissen II*:

“Please produce for public inspection the **text content** on Verizon Wireless #253-861-[redacted] from July 29, 2011 to August 4, 2011 that relate to the conduct of government or the performance of any governmental or proprietary function. This request relates to the cell phone used by Mark Lindquist.” Emphasis added. CP 1010.

Det. Nissen’s public disclosure request in *Nissen II* is not a request for telephone records. CP 882, 883. Her first request is for telephone records to include texts for August 2nd. CP 1038. The County insists that Det. Nissen wants the “same cell phone and text message” records. Resp. Br. 10. But, she is not asking for phone records in *Nissen II*. The County equates the second request for texts to the first request for phone records to support the prosecutor’s preclusion arguments. Resp. Br. 1.

Importantly, the County never argues in *Nissen II* that the texts are not public records. CP 304. The County cannot because the texts requested are public records by definition. Her request mirrors the definition: “any writing relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency.” RCW 42.56.010(3). To circumvent the request, the County argues phone

records are not public records. The County insists the texts are equal to phone records to avoid what the Attorney General points out in its Amicus Brief in *Nissen I* and what Special Deputy Prosecutor Ramsey Rammerman acknowledges here, text messages that relate to the conduct of government are public records. CP 864 (“Also note, if someone sent a text message from a personal phone for agency business, the text message itself may be a public record, but again the bill, which doesn’t contain the content of the text, would not become a public record.”) The fact that the phone company has the texts is a discovery issue, not a public records issue.

Det. Nissen points out the distinctions in the requests to support her position that she should not be precluded from discovery of the texts in *Nissen II* by way of summary dismissal on the pleadings.<sup>1</sup> Br. 1-2. Det. Nissen contends the distinctions are real and matter for purposes of public disclosure analysis. In particular, a search for phone records ends with the phone company; a search for texts ends with the sender and recipient. Here we know Mark Lindquist is both a sender and a recipient

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<sup>1</sup> Schaller assumes Pomeroy’s error when using an estoppel argument to dismiss on the pleadings.

and that Verizon is holding the texts at his direction as the County Prosecutor. Det. Nissen never discovered who else may have the texts. Neither did the County because it never looked.

Det. Nissen's counsel correctly disclosed to the court in *Nissen II* that the *Nissen I* request for telephone records implicated any associated texts for August 2nd. In fact, the nexus is plainly stated in her complaint. CP 7-8.<sup>2</sup> The *Nissen II* court was fully apprised of the nexus between *Nissen I* and *Nissen II* to include the fact that *Nissen I* also involved texts.

“The first request was for telephone records, including text communications for August 2nd.” 02/22/2013 RP 16.

“So there's no binding effect on the first decision as to the second request, because they're different records merely in terms of scope. That's easy to see. But what is also important is the nature of the request. The first request is for telephone records, including text

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<sup>2</sup> The County's excerpt in its brief attributes a misspelling to Det. Nissen that she did not make and is not in her complaint. CP 7-8, 27.

communications that are in those records. The second request is for text content on the 861 number.” 02/22/2013 RP 17.<sup>3</sup>

The County quotes in part the *Nissen I* oral ruling by Pomeroy to convince this Court that Pomeroy ruled directly on the text issue when in fact she was commenting on the partial phone records produced, not the texts. Resp. Br. at 4. Pomeroy’s complete comment is as follows:

As a matter of law, I find that no public record exists with the billing statements or the records of the private cell phone of the public employee, that being the Pierce County Prosecutor. I do know that at the time of the request, both in August and September, the Prosecutor’s Office did not have or retain in its possession the alleged record. The **record** was given by the prosecutor to the government agency in response. I find that the mere giving of it does not waive the private purpose and does not eliminate what I find to be a right of privacy under the Public Records Act, 250(3), as a valid exemption. CP 363. (emphasis added)

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<sup>3</sup> The County says Det. Nissen’s counsel “misrepresented the dates involved”, claiming texts from both the 2nd and the 3rd were involved, not just the 2nd. Resp. Br. at 40. While texts from the 3rd were not implicated by the request, the County produced Lindquist’s personal phone records printed from his “personal online account statement” with to and from text time entries on the 2nd and the 3rd, but no text content. CP 135 - 136, 372. Why his public records officer included entries for the 3rd is unknown because there was no opportunity for discovery in *Nissen I*. It appears she may have included that date, because the request was made on August 3rd for the records from the day before. Ms. Glass claims Verizon never had text content. *Id.* The deputy prosecutor Dan Hamilton told the court the texts “don’t exist, they don’t exist after five days from the Verizon carrier.” CP 345. They were both mistaken and when they learned the texts were with Verizon like the phone records, Lindquist refused to obtain the texts like he had the phone records for examination, redaction, and production. The trial court never examined any texts, just the heavily redacted phone records when she dismissed the case indicating Det. Nissen would not get private telephone records. CP 363. The County never produced any texts and did not intend to produce any texts that were never requested for the 3rd in *Nissen I*.

The **record** she is referring to is the four redacted pages produced that Lindquist gave his public disclosure officer from his personal online account statement. CP 135-136. Lindquist refused to provide the texts to his public records officer.

The County omits the fact that Lindquist did produce select portions of his private phone records in *Nissen I*, urging this Court to believe it never produced any private phone records in *Nissen I* at all, which was the reason she sued. Resp. Br. 3 (“The County declined to produce those records, which it did not possess.”). The County cites to CP 335 to support this statement. CP 335 does not anywhere indicate the County did not produce Lindquist’s private phone records. The County did produce Lindquist’s private phone records albeit heavily redacted before Det. Nissen filed *Nissen I*. CP 335 (“You are receiving this letter as an accompaniment to receipt of our first installment of responsive records, four (4) pages.”). The four pages the prosecutor’s public records officer produced representing them to be Lindquist’s private phone records are at CP 369 - 372. The County did not similarly produce the requested text content that was also available and retained with the same source, Verizon. The County had the capacity to possess the texts the same way it possessed the phone records. To suggest it did not possess any responsive

documents is not accurate. *Nissen I* concerns redactions and omissions that are not supported by any exemption, not a rejection of her request in its entirety. Det. Nissen did not file on *Nissen II* because she got nothing in *Nissen I*. Det. Nissen filed on *Nissen II* because in *Nissen I* she learned that there was more information still in existence that she had not requested that she wanted to examine under public disclosure.

Det. Nissen filed *Nissen II* knowing *Nissen I* was not a final determination of the matter. She appealed *Nissen I* on March 27th, 2012, but did not file *Nissen II* until November. Det. Nissen had to file *Nissen II* to ensure she would get to see the texts not requested in *Nissen I*. This includes work related texts for an additional six days. Det. Nissen was not attempting to “circumvent” Judge Pomeroy’s ruling. Resp. Br. at 11. She was protecting the records Judge Pomeroy’s ruling did not effect. The prosecutor would never have produced the requested texts without a pending PRA for the texts not requested or implicated by the request for phone records in *Nissen I*. The pending PRA obligates the County to preserve the records.

Det. Nissen has never maintained that *Nissen I* has no effect on *Nissen II*. To the contrary, she asked the court in *Nissen II* to stay any

disclosures of texts to Det. Nissen implicated in *Nissen I* until *Nissen I* was finally decided. CP 489 (“The proper remedy to preserve the conclusive effect of Judge Pomeroy’s decision would be to stay disclosure of the texts from August 2nd. Dismissal on estoppel grounds is not the proper equitable remedy because it prejudices Det. Nissen’s ability to access the remaining texts that are public records. ... The court has inherent discretionary power to grant a stay where justice so requires.”) The first time she made the recommendation for a stay was before Judge Tabor on January 25th, 2013. CP 1141 (“And what I fully expected would happen once we filed this would be some sort of scenario where we would have to entertain a stay or trailing this case along with the other matter that is on appeal, because there is an issue that’s been teed up before and requested that the Supreme Court review.”) The court was correctly informed that any texts implicated in *Nissen I* would need to be withheld from disclosure in *Nissen II* until *Nissen I* was finally decided.

Det. Nissen did not file suit on her *Nissen II* request at the same time as her *Nissen I* request because she did not make the requests at the same time. She did not make the requests at the same time because she was looking for evidence on August 2nd when she made her request on August 3rd, 2011. CP 122, 882. She requested the phone records and text

content from the day before only, which was August 2nd.

On August 4th, she requested Verizon preserve any records from the 2nd. CP 67.<sup>4</sup> On the 8th, Verizon responded acknowledging preservation of texts for a seven day period, July 29th to August 4th. CP 68. She did not immediately request these additional texts because she did not want any further delay in getting the records from the 2nd. So, she retained counsel and proceeded with her request for judicial review expecting a prompt decision in her favor in *Nissen I*.<sup>5</sup>

Later, Det. Nissen thought it wise to also submit a formal PRA for the other texts to ensure their preservation before Verizon or the County destroyed them. She then made her request for the additional texts on December 9th, before the dismissal decision in *Nissen I* on December

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<sup>4</sup> The prosecutor's brief suggests that Nissen's counsel knowingly contacted Verizon's "Law Enforcement Resource Team" and posed as law enforcement. Det. Nissen's counsel contacted Verizon and fully disclosed that she requested preservation of records that were the subject of an "ongoing investigation at this office", on III Branches Law Office letterhead, an apparent civil law firm. CP 67. In addition, counsel disclosed she intended to obtain a subpoena, not a warrant. She did not mislead anyone into believing she was working on a criminal matter.

<sup>5</sup> The *Nissen I* request was made on August 3rd, 2011, she filed on October 26th, 2011, the prosecutor asked Verizon to preserve the texts on December 20th, 2011 (CP 72) and the court dismissed the case on Dec. 23rd, 2011, reconsideration was denied on February 28th, 2012 and a timely appeal filed March 27th, 2012. CP 120, 122. Det. Nissen requested *Nissen II* records on December 9th, 2011, which the prosecutor rejected on February 17th, 2012. CP 28, 29. Det. Nissen filed her *Nissen II* case on November 30th, 2012; the court dismissed on May 24, 2013, and she filed an appeal on May 30th, 2013. CP 3, 75.

23rd. When she made the *Nissen II* request she did not know her case was going to be dismissed. The prosecutor closed her *Nissen II* request on February 17th, 2012, after Pomeroy dismissed *Nissen I*, but while reconsideration was still pending. Det. Nissen then filed on November 30th, 2012, within the one year limitation she has to challenge the County's failure to disclose public records. She did not have the ability to further delay filing while *Nissen I* was appealed. She had no opportunity to consolidate the requests in one action because *Nissen I* was dismissed and on reconsideration when the prosecutor closed the request. She could not file on *Nissen II* before the prosecutor refused to produce the records.

In its notice of preservation, Verizon made reference to the Stored Communications Act provision that requires a warrant for any release of content stored for under 180 days: "18 U.S.C. 2703(a) requires that disclosure of electronic communication content stored for under 180 days to a law enforcement agency be made pursuant to a SEARCH WARRANT." CP 68. Within 180 days on December 20th, 2011, the prosecutor's special deputy requested Verizon "preserve all records referenced in Case 953993 until otherwise notified by me." CP 72. Verizon has presumably stored the texts as requested for more than the requisite 180 time period for which a warrant would be required. The

texts should now be accessible via court ordered subpoena. A subpoena Det. Nissen is requesting from the Court in this matter pursuant to the rules of civil discovery.

The County's brief includes a footnote criticizing Det. Nissen for arguing the prosecutor is devoting public resources to protect his individual privacy interests while invading Det. Nissen's privacy by compelling the retention of Det. Nissen's private cell phone records of a year with his special deputy prosecutor. Resp. Br. at 3 ft. 3. The prosecutor's criticisms are unwarranted because Det. Nissen does cite to and support in her brief the record related to the prosecutor's retention of her private cell phone records, to include compelling her to provide the names of the people she called to the specially appointed deputy. Resp. Br. at 14.<sup>6</sup>

The County unfairly labels Det. Nissen's narrow requests (one day of phone records and seven days of work related texts) as obsessive, when

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<sup>6</sup> "Because of the contentious nature of this dispute, we expect significant push back from the requestor [former prosecutor Clay Selby on behalf of Mary Robnett] Thus, additional due diligence is required. We are asking for the names to simplify the verification process to determine that these are actually employees. We could simply have Captain Bombkamp call the numbers to determine the identities, but it would [be] easier to have Detective Nissen inform us who they are." CP 858, see also CP 856, 861.

in reality she simply would like to see the prosecutor uphold his public obligation to be transparent. Resp. Br. at 3, CP 477.

### III. LEGAL ARGUMENT

Transparency in public office is an important virtue an elected prosecutor should uphold:

“The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely the sovereignty of the people and the accountability to the people of public officials and institutions. (citations omitted) Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.” Letter to W.T. Barry, Aug. 4 1822, 9 *The writings of James Madison* 103 (Gaillard Hunt, ed. 1910).”

*Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994).

#### A. The County Fails To Address Det. Nissen’s Right to Discovery

The right of access to seek redress is an inherent component to civil justice. *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P. 2d 370 (1991). The civil rules of discovery are broad with relatively narrow exceptions:

“The broad right of discovery is necessary to ensure access to the party seeking the discovery. It is common legal knowledge that

extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense. Thus, the right of access as previously discussed is a general principle, implicated whenever a party seeks discovery. It justifies the limited nature of the exceptions to the broad discovery found in CR 26(c). Plaintiff, as the party seeking discovery therefore has a significant interest in receiving it." Id. at 772.

The County does not address Det. Nissen's arguments regarding her constitutional rights to civil discovery. In a footnote, the County labels her assertion that summary dismissal on the pleadings violated her rights to seek redress by denying her needed civil discovery is "strange." Resp. Br. at 15 fn 11. The courts disfavor summary dismissal on the pleadings because the need for discovery to prove the elements of a case is not novel. Motions to dismiss should be granted only sparingly and with care. *Bravo v. Dolsen Co.*, 125 Wn.2d 745, 888 P.2d 147 (1995).

Det. Nissen's argument is well grounded in fundamental constitutional principles. She was denied the opportunity to prove the matters distinct because the County did not produce the requested discovery. Her motion to compel production of the requested documents was pending when the court dismissed. CP 743, 756. The County suggests that a CR 56(f) motion would have been proper on a 12(b)(6) motion to dismiss on the pleadings. Yet the rules do not permit Det. Nissen to introduce evidence on a motion to dismiss; a motion to

dismiss is on the pleadings.

Instead, Det. Nissen properly urged the court to assume discovery may reveal other locations where the texts could exist. CP 477 (“These answers may reveal additional sources for obtaining the texts. ... In this matter, discovery is needed to learn who sent the texts, who has the texts, where the texts can be located, what the texts communicate, whether the texts were acted upon, the capacity of any person who acted on the texts and his or her association with Pierce County, among other relevant factual information for the court to make a proper legal determination de novo that the texts are public records or are properly withheld or redacted.”), 894, and 03/01/2013 RP 9. The *Nissen II* court erred because it adopted the *Nissen I* court’s erroneous assumption that the records requested were phone records, only at Verizon. CP 887, 983. Judge Pomeroy’s decision has no application to texts identified with a source other than Verizon. The *Nissen II* court failed to assume the facts in favor of Det. Nissen as requested.

#### B. Public Disclosure Implicates State Constitutional Rights

The two constitutional rights at issue here are Det. Nissen’s right to seek redress, which includes a meaningful opportunity to obtain discovery

as expressed in the previous section. Det. Nissen argued this interest below. CP 493, 984 Second, Det. Nissen has a constitutional right to access the public records requested here, which she also argued below. CP 896, 909, 985.

The County ignores the two state cases cited by Det. Nissen and instead urges this Court to decide public disclosure is purely a statutory right without constitutional implications based upon a federal law comparison. State public disclosure law does implicate constitutional interests in accessing information. *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P. 2d 1094 (1992). The PRA guarantees public access to information that the Legislature has decided is public. *Id.* at 151 (“The press’ right to such information is no more and no less than what the legislature has chosen to grant by statute, and in RCW 42.17 the legislature expressly authorized public agencies and courts to consider whether information should be disclosed.”) Det. Nissen urges this Court to recognize the constitutional implications of Det. Nissen’s request for the elected prosecutor’s texts that relate to the conduct of government. Det. Nissen’s public disclosure request in this case does implicate her Washington State constitutional interests of free speech. Wash. Const. art.

I § 5.

The court in *Bradburn* acknowledges that Washington's Constitution, art. I § 5, protects the right to receive information and ideas. *Bradburn v. North Cent. Regional Library Dist.*, 168 Wn.2d 789, 231 P.3d 166 (2010). "It has been said time and again in our history by political and other observers that an informed electorate is an essential ingredient, if not the *Sine qua non* in regard to a socially effective and desirable continuation of our democratic form of representative government." *Fritz v. Gorton*, 83 Wn.2d 275, 283-284, 517 P.2d 911 (1974). The case law emphasizes public disclosure is an essential component of free speech:

"We accept as self evident the suggestion in the brief of intervenors (The League of Women Voters) that the right to receive information is the fundamental counterpart of the right to free speech. The broad protections accorded the speech of public officials and the criticism of such speech, are essential to ensure that debate on public issues should be uninhibited, robust, and wide open... The constitutional safeguards which shield and protect the communicator perhaps more importantly also assure the public the right to receive information in an open society. Freedom of speech without the corollary-freedom to receive-would seriously discount the intendment purpose and effect of the first amendment" *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974) (citations omitted).

The *Fritz* court specifically rejects the County's position that Lindquist's privacy interests are fundamental and constitutionally protected while

Det. Nissen's right to access information is not.

"The right of the electorate to know most certainly is no less fundamental than the right of privacy. When the right of the people to be informed does not intrude upon intimate personal matters which are unrelated to fitness for public office, the candidate or office holder may not complain that his own privacy is paramount to the interests of the people." *Fritz* at 298.

Government does not have the discretion to exercise restraints on access to information in a manner that is "narrowly partisan or political." *Id.* at 803. Yet that is precisely what the prosecutor is doing. He is having the County protect his privacy, while he invades Det. Nissen's. He has retained her personal phone records, which he claims are not public records. At the same time, he is hiding his text messages that are public records. His conduct seriously compromises Det. Nissen's rights. As is apparent from the County's briefing, the prosecutor objects to any unflattering characterization of himself so much so that he wants Det. Nissen sanctioned. Det. Nissen is apparently not entitled to express her beliefs or concerns that the prosecutor is abusing the power of his office and is retaliating against her. He objects to production of the texts she believes will show she is right, and he has spared no expense in his efforts to stop her.

The County cites to one state case that addresses constitutional due

process, not the free speech interest argued here. Resp. Br. at 17. *DeLong v. Parmelee*, 157 Wn. App. 119, 236 P.3d 936 (2010). Thus, the case is not on point.

The federal cases do not address Washington's state statute that originated in an initiative by the people. Resp. Br. at 17, and *Fritz* at 278. The County rephrases the quote from *Houchins*, which is correctly cited as follows: "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14, 98 S. Ct. 2588 (1978). In *Houchins*, the press wanted access to video the jail. There was no discussion about any particular public disclosure law that would guide the application of the constitutional interest implicated. The Supreme Court rejected the notion that the constitution authorizes access to all things governmental. However, the Court did recognize the "Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution at least in some instances, through carefully drawn legislation." *Id* at 15. Thus, constitutional free speech is implicated when the request implicates public records under state statute.

Det. Nissen's request mirrors the definition of public records. She is indeed requesting public information that the PRA and the retention laws describe as public and accessible. Her constitutional free speech

rights are implicated.

The *McBurney* case cited concerns the claims of non-citizens, not the citizens of Virginia who do have a right to access public records. *McBurney v. Young*, 133 S. Ct. 1709, 1718 (2011). The court explained that “Virginia’s FOIA exists to provide a mechanism for Virginia citizens to obtain an accounting from their public officials; noncitizens have no comparable need.” Here the whole reason Det. Nissen requested the text is to hold Lindquist accountable. Her rights are implicated.

Finally, the County relies upon a case involving the disclosure of arrestee’s addresses. Resp. Br. at 17. A commercial enterprise made a facial challenge under the federal 1st Amendment claiming it could not be compelled to limit use of the requested information for non-commercial reasons. *Los Angeles Police Dept. v. United Reporting Publ. Corp.*, 528 U.S. 32, 120 S. Ct. 483 (1999). The Supreme Court rejected the facial challenge because the requestor relied upon the effect of the statute on parties not before the court. *Id.* at 40. The requestor did not attempt to qualify to receive the information requested. The Court considered the personal address of an arrestee information the state could elect to withhold from public disclosure without implicating the 1st Amendment.

Here, Det. Nissen does not request private information about non-

governmental persons. In fact, she specifically instructed the County and the Court to withhold any personal communications. 03/01/2013 RP 12. Here, Det. Nissen requests the text communications of the elected prosecutor that relate to the conduct of government. It is impossible to imagine how her request does not implicate free speech. She requests information that is by definition public and must be retained and archived. She is not making a subjective inquiry into what she believes might be public; she is requesting the texts that are public. To date, the County will not produce the public texts it knows exist. Its refusal directly interferes with her constitutional free speech interests.

The County cites to one of Dale Washam's recall cases to contend res judicata applies even though constitutional interests are at stake. Resp. Br. 16. Of significance, the Supreme Court decided that for purposes of res judicata in the context of multiple recall petitions, the earlier petition must have been found to be insufficient. *In re Recall of Pearsall-Stipek*, 129 Wn.2d 399, 918 P.2d 493 (1996). There is no discussion in the case regarding free speech. There is a limited discussion regarding equal protection that does not compare to the constitutional claims here.

To date, no court has ever issued any findings regarding the content of the text messages requested. Mark Lindquist filed a declaration

affirming at least a portion of the texts are related to work. There is no comparator factual determination that would allow for the application of either res judicata or collateral estoppel. Thus, the Washam case is not dispositive nor helpful here.

C. Error In *Nissen I* By Dismissal On a 12(b)(6) Precludes Estoppel or Res Judicata

A CR 12 motion should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 128 P.3d 627 (2006). “Usually, dismissal is granted...only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Id.* at 629.

*Nissen I* is under review. The County incorporates by cross reference its argument in *Nissen I* into its brief in *Nissen II*.<sup>7</sup> By doing so, the County necessarily concedes the outcome in *Nissen I* affects *Nissen II*. However, the County fails to explain how Det. Nissen’s rights will be restored if her case is dismissed on equitable grounds. Without resolution

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<sup>7</sup> To the extent such cross reference is permitted, Det. Nissen also includes by cross-reference her briefing on *Nissen I* and the briefing of amici to include the Attorney General and WACOG. To the extent the court is disinclined to permit such briefing, Det. Nissen moves to strike the cross references to the County’s *Nissen I* briefing. Most importantly, Det. Nissen objects to any effort to obtain standing by cross reference on the privacy issues.

to this inequity, the County's application of res judicata and collateral estoppel must fail because both doctrines work an injustice. If the County had in its possession the texts at issue and would affirm that it will produce them upon reversal the factual scenario would be different. The absence of such facts precludes summary dismissal here.

The County further does not recognize nor address in its brief that Pomeroy's errors are Schaller's errors. Specifically, Judge Pomeroy decided facts not in evidence and in a manner most favorable to the moving party. Judge Schaller's decision necessarily incorporates that same error. In essence, without review of the texts, Judge Schaller assumes the texts are phone records at Verizon and cannot be found in another location. The court should have decided the texts are independent of the phone records and may be accessible elsewhere. This error works a substantial injustice on Det. Nissen because in essence she is denied access to public records.

D. Government Related Texts Not "Private Affairs."

Det. Nissen cited two Division II cases, *Hinton and Roden*, for the proposition that text messages sent to or shared with others are not secret. CP 499. The Supreme Court recently reversed Division II in both cases,

providing a meaningful discussion about privacy under the state constitution's privacy provision, article I, section 7<sup>8</sup>. *State v. Hinton*, \_\_\_ Wn. 2d \_\_\_, 319 P.3d 9 (2014), and *State v. Roden*, WL 766681, \_\_\_ P.3d \_\_\_ (2014). In *Hinton*, the court decided text messages sent and delivered, but not received may still be private. Law enforcement took an arrestee's phone and read and then responded to texts sent to him as if it were him from Hinton. The court explains a search occurs when the government disturbs "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Hinton*, at 12. Private affairs may be ascertained based upon the "nature and extent of the information which may be obtained as a result of the government conduct" and the historical treatment of the interest asserted. The court underscored voluntary disclosures, as distinguished from incidental disclosures, are not "private affairs." If an individual voluntarily discloses information to a stranger, the information is not private. *Hinton* at 15. The court looked for any conduct that would show the suspect exposed the text messages at issue in a way that

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<sup>8</sup> **SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED.** No person shall be disturbed in his private affairs, or his home invaded, without authority of law. WASH. CONST. ART. I § 7.

extinguished his privacy interest in the text conversation from government intrusion.

The court also addressed standing to assert privacy under the constitution. *Hinton* at 6. Constitutional privacy “may be enforced by the exclusion of evidence only at the instance of one whose own privacy right were infringed by government action.” *Id.* at Ftnt. 2. Standing was found to challenge texts he sent that were not read or disseminated further, but not in texts he received.

A prosecuting attorney who chooses to conduct government business by text on a personal phone is not conducting his “private affairs” in private. Instead, he is conducting public affairs in private, which is a voluntary act that extinguishes any privacy interests in the texts. The elected prosecutor voluntarily consents to a limited government intrusion without a warrant to provide to his public records officer for public disclosure text communications to and from him that relate to the conduct of government. Lindquist has no privacy to assert in texts sent to him as the public’s elected prosecutor and further the County has no privacy to assert any privacy at all.

The *Roden* case involves the same arrestee’s phone as in *Hinton*. The officer posed as the arrestee, intercepted various communications, and

arranged a drug deal then arrested *Roden* when he arrived for the transaction. The court analyzed these facts under the state's privacy act that precludes warrantless interceptions of private communications. The court concluded the use of the arrestee's phone to send and receive texts posing as the phone owner violated the state's privacy act. The analysis of the state's privacy act is not on point here where there has been no interception of any texts. However, the court does explain that there are several factors it will consider when deciding whether a communication is private: 1) the subjective intention of the parties; 2) factors that bear on the reasonableness of the parties expectations, such as the duration and subject matter of the communication; 3) the location of the communication; and 4) the presence of potential third parties.

Mark Lindquist cannot have a reasonable subjective intention that his work related texts are private. He has been on notice since he was a mere deputy that government related communications on private technology must be transferred to back the county for production if requested. According to Pierce County Code, public disclosure officers are to be "mindful of individuals' privacy rights." PCC 2.04.010, CP 380. Pierce County adopted rules in 2007 related to public disclosure that the County wrote to "incorporate best practices for compliance with the Act

and are based upon and organized according to Model rules promulgated by the Attorney General of the State of Washington.” CP 380. As of 2007, the Attorney General’s Model Rules since 2005 included an admonishment that private technology may contain “public records.” WAC 44-14-03001.<sup>9</sup> and <sup>10</sup> Pierce County elected officials like Lindquist have less privacy than working professionals like Nissen because elected officials are governed by strict retention standards to ensure transparency while in office. CP 539, 541. All “internal and external communications to, from, and/or on behalf of the agency’s governing bodies, elected official(s)...that are made or received in connection with the public business” must be retained for two years and then transferred to State archives for appraisal and retention. CP 420.

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<sup>9</sup> “Sometimes agency employees work on agency business from home computers. These home computer records (including e-mail) were “used” by the agency and relate to the “conduct of government” so they are “public records.” RCW 42.17.020(41). However, the act does not authorize unbridled searches of agency property. If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee. Yet, because the home computer documents relating to agency business are “public records,” they are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely blind carbon copy (“bcc”) work e-mails back to the employee’s agency e-mail account. If the agency receives a request for records that are solely on employees’ home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency’s computers.”

<sup>10</sup> Det. Nissen also requested the County produce its electronic communications policy, but it did not do so. CP 778 - 782.

The PRA contains a preservation provision to obligate preservation of a requested record.<sup>11</sup> Of concern, the prosecutor has demanded continued retention of Det. Nissen's private phone records within his control, while objecting to retention of his own anywhere other than at Verizon.

Alarming at oral argument on *Nissen I*, Deputy Hamilton stated on appeal that he did not know whether Verizon still has the texts because it is his understanding that Verizon limits its retention period to one year.<sup>1</sup> This directly conflicts with the promises the County made to contest preservation of the texts in *Nissen II* on March 1st, 2013, which was already more than a year after the prosecutor requested preservation of the

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<sup>11</sup> "If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency...shall retain possession of the record, and may not destroy or erase the record until the request is resolved." RCW 42.56.100.

<sup>12</sup> <http://www.courts.wa.gov/content/OralArgAudio/a02/20140225/448521%20-%20Nissen%20v.%20Pierce%20County.mp3>

texts. CP 132<sup>13</sup>, The County never told the Court that it suspected Verizon may no longer have the texts the prosecutor asked it to retain.

The court never considered these privacy factors to include ascertaining whether the texts were made during working hours, involving work matters, and involving other public employees who also had no reasonable expectation of privacy. Privacy was never properly analyzed by either court *Nissen I* or *Nissen II* to decide whether the text implicate private affairs under the state constitution or privacy interests contemplated by the state's privacy act. Both cases were dismissed prematurely.

The County disingenuously summarily concludes Prosecutor Lindquist never prepared, owned, used, or retained his own texts communications related to his work. When the prosecutor typed out a text, he was preparing it. When he sent it, he was using it. When he

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<sup>13</sup> (“They have not lost any data that had been requested to be preserved.”), 3/1/13 RP 26 - 27 (“I sent a letter, and Ms. Mell, on behalf of her client, sent a letter—as it relates to the preservation of those records. ... I think we’ve done what we can. ... I am hoping [Verizon] have taken my letter and Ms. Mell’s letter into consideration in not, you know, destroying those records. ... As an officer of the court, I’ll tell you I will not retract my letter on behalf of my client. ... C: And so can you make assurances on behalf of your clients by some written document that indicates they won’t take any affirmative action to have these records deleted or destroyed? P: We most definitely can, and I’ve already taken steps on behalf of the client to do that by my letter last year.... And I would make this assurance that I will direct my client not to instruct anybody to destroy or otherwise discard records. And I’m talking about the Verizon records which are the subject of the issues in play here.” )

created it he owned it. And, when he had Verizon retain the texts in his capacity as Pierce County's Prosecutor, the County was retaining it. The County fails to acknowledge the request is for work related content, not personal content. It is true, Det. Nissen is not entitled to personal information, and she has never asked for it. She is entitled to the elected prosecutor's text messages that relate to the conduct of government. She should be provided them here.

The *Nissen II* court should not have deferred to the *Nissen I* court because Mark Lindquist never appeared in *Nissen II*. The County has no standing to argue the elected prosecutor's individual privacy is violated under the PRA. The agency's duties are to produce public records unless the records are exempt. Privacy has never been a stand alone exemption for an agency to assert to withhold disclosure of the requested text messages. RCW 42.56.050, .070(1). The County never reviewed the texts to make any argument that the texts are private. The trial court needs to see the texts, conduct an in camera review, and produce the texts that relate to the conduct of government.

E. No Identity Between Parties County Needs to Have Standing to Make Privacy Argument and to Assert Res Judicata

The County not only misconstrues the requests as identical, but it

also misconstrues the parties as identical. Resp. Br. at 12, 20. The requests are not identical and the parties are not identical. Mark Lindquist intervened and appeared in *Nissen I*. CP 476. He is not a party in *Nissen II*, yet Lindquist has the County asserting his individual privacy interests. CP 52. This he cannot do. He cannot ask the County to assert his individual privacy interests for him when his position then conflicts with his mandated duties to retain his communications as an elected official for public disclosure. The County lacks the necessary standing. The County cannot have any expectation of privacy in government related texts. See, *State v. Goucher*, 124 Wn. 2d 778, 881 P.2d 210 (1994) (“Defendant was without standing because he had no expectation of privacy in the apartment. Indeed he had never been there and did not know the address”). Here the County claims it has never received, nor reviewed the requested texts. The County has no standing to argue any privacy interest attaches to them to prevent the disclosure. The County may not bootstrap on to *Nissen I* to obtain standing it does not have here.

The claim splitting authority cited by the County refers to tort claims. Resp. Br. at 18, citing *Landry v. Loscher*, 95 Wn. App. 779, 976 P. 2d 1274 (1999). The County does not cite any application of res judicata

to public disclosure cases. PRRs are often duplicitous. Media organizations make the same requests daily or weekly without waiving their right to seek judicial review.

In *Landry*, the court explains the importance of an identity between the parties. The party to the first suit must have privity with the party to the second suit. Lindquist has no privity with the County to have the County make his privacy claims for him. Not unless, he also concedes he is the agency, which so far he refuses to do. Thus, there is no identity of parties for purposes of res judicata. Also, there is no identity of the subject matter other than the texts from August 2nd. There are six other days of work product the prosecutor expects to erase from history by allowing Verizon and anyone else who retains them to destroy them and not archive them as required.

*Landry* also raises an issue of waiver by the defense of any claim splitting affirmative defense. Claim splitting defenses may be voluntarily waived. *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange*, 4 Wn. App. 49, 480 P.2d 226 (1971). The defense must timely assert res judicata in the first action to estop later relief in the second. *Brice v. Starr*, 93 Wn. 501, 161 P. 347 (1916). If the County believed the two requests were the same, the County was obligated to notify Det. Nissen and ask

that she consolidate judicial review of her second request with her first request. The County did not assert the defense before the trial court dismissed in *Nissen I*. The County had the second request for two weeks before Judge Pomeroy entered her original order of dismissal. The County could have denied the request and notified her that if she intended to seek judicial review, she would need to move to consolidate it or join it with pending action. The County did not assert these defenses, instead the County asked for more time to respond to the request. CP 8-9. It did so three times, until finally rejecting the request on February 17th, 2012. The County cannot rely upon a defense it waived by failing to assert it when it knew about the existing cause of action. Furthermore, the County actually made affirmative representations about its response upon which Det. Nissen relied and that prevented her from filing earlier. A party may not seek affirmative equitable relief with "unclean hands." *J.L. Cooper & Co. v. Anchor Securities Co.*, 9 Wn. 2d 45, 113 P.2d 845 (1941). The County waived its claim splitting defense and may not now insist that it can deny access to public records through a defense it failed to assert when the requestor could have acted on it. Claims splitting defenses are improper here.

#### IV. ISSUE ON CROSS - APPEAL

Has the trial court properly exercised its discretion in rejecting the

County's demand for sanctions when she found that Det. Nissen and her attorney presented this case with the candor it expected and the factual and legal support required?

#### V. FACTS ON CROSS APPEAL

Early on in this case, the County pled facts not warranted by the complaint. CP 17. Det. Nissen's first strategy was to depose Det. Denny Wood, a Pierce County Sheriff's Dept. detective whom Det. Nissen understood would discredit the false accusations. CP 181, 1210. The County immediately objected and moved to strike the deposition notice. Id. Det. Nissen responded and moved to strike the superfluous and offensive content from the County's answer. CP 1105. She agreed to cancel the Wood declaration if the offensive content were stricken. The court granted her the relief she requested. CP 190-191. As soon as the court granted her the relief she requested, the County turned around and pled the stricken content right back into the record. Det. Nissen moved for contempt. CP 196. The court again ordered the County to stop making improper references to Det. Nissen in the record. CP 302. The court declined to grant the County mutual relief, and was direct with counsel that she would take up any further violation by the County. 03/01/13 RP 52 by Patterson ("it needs to have in there that Ms. Nissen will not refer to Prosecutor Lindquist, that he's retaliating against her or annoying and

harassing her,...”) RP 54 - 56 by the court (“Well, he [Lindquist] would consider her claim of retaliatory conduct on her behalf as impugning him. So, no, I’m not going to use that language.”)

The court understood and recognized the purpose for Det. Nissen’s request to obtain evidence of retaliation was helpful in understanding the request:

“But I understand the argument that there will be some argument about retaliation potentially as it relates to if I get to the substance of whether or not they’re public records, and that’s the only context in which I would be considering those types of statements.” 03/01/13 RP 54.

The court’s ruling on contempt is the reason the Lawton investigation report includes redacted portions. Resp. Br 36-37. These portions use the terms the court ordered out of the record. The court was well informed as to these issues and that there was nothing misleading about the filing. 03/01/2013 RP 55 - 57.

In support of its request for sanctions, the County repeats an abundance of hearsay content from the Farina declaration that the court indicated it did not consider in its ruling. 06/07/2013 RP 3. From that, the County incorrectly claims Det. Nissen and her attorney filed “twelve complaints” against members of the prosecutor’s office. Resp. Br. at 37. Det. Nissen and her attorney have not filed twelve complaints of any kind.

CP 1209. Det. Nissen filed one claim against the County. At the same time, she pursued administrative relief through a whistleblower complaint and ethics complaint that she filed together. CP 1210. She settled these joint claims before filing the complaint amicably, accepting a settlement that included compensation to her that was not nominal. CP 1211 (“Nearly \$40,000.00). In that settlement, she fully disclosed that she was not dropping her bar complaint. CP 1209. She was represented by Professor Strait before the Washington State Bar in one matter, not multiple matters. *Id.* The County erroneously counts each submission to the Bar of responsive materials as a separate Bar Complaint, which it was not. In addition, it cites to the bar complaint to support an award of sanctions when Det. Nissen was promised immunity from the bar for filing her bar complaints. CP 1210. Similarly, she is promised the same immunity from retaliation for filing a whistleblower complaint and her ethics complaint. CP 1211. She is promised this by statute, and contractually by the settlement agreement she entered. CP 1093. The County’s sanction request violates these promises when it is based upon her prior case.

The County also claims Det. Nissen is responsible for “16 adverse actions (all dismissed)”, yet Det. Nissen settled her initial claims for

meaningful consideration to include a retraction of Lindquist's oddly scripted ban from his office, without any adjudication on the merits. Resp. Br. 38. CP 1227. No one other than Det. Nissen dismissed them. Further, she has never filed suit on her retaliation claim, so that one has never been adjudicated or "dismissed" either.

In addition to grossly mischaracterizing Det. Nissen's claim history, the County similarly accuses her and her counsel of making "inflammatory unsupported charges" of criminal conduct. Resp. Br. 36. The County offers a string cite that does not support its accusation. At page 8, Det. Nissen recites the fact that Washington's retention laws include a provision for criminal penalties for concealing any record "appertaining to the officer's office." Br. 8. She makes no accusation there. At page 18, she argues Lindquist should not be permitted to hide his work texts at Verizon, without mentioning any criminal implications. At page 28, she also mentions the word "hide", but she does not mention criminal implications. At page 34, she references the statutes that include criminal consequences for the concealment of public records. At page 42, she states the purpose for her request is to hold Lindquist to the high standard applicable to public officials to judge performance and to safeguard against corruption. At page 44, she concludes stating

Lindquist's deliberate abuse of power and blatant disregard of his obligations to transparency while in public office should be sanctioned. Det. Nissen has fairly represented her side of the case, which she is entitled to do. Det. Nissen does not believe the elected Prosecutor can hide public records, and she has cited the relevant authority that supports her position.

The County sets forth a series of bullet points beginning on page 35 and continuing to page 36 of its brief. The County characterizes each bullet point as "unsupported, unnecessary, unprofessional, inflammatory, and improper." The County's pleadings factually support her concerns as expressed in the bullet points. She believes Mark Lindquist has a hostile animus towards her and he is retaliating. In its answer, the County accuses Det. Nissen of far worse criminal misconduct than hiding public records. CP 17. She knows these assertions are not true. CP 1087. Yet, the County refused to voluntarily strike this inflammatory material. CP 1088. The court had to order it stricken. And when it pled the material right back into the record after the court's ruling, the court had to order it again to stop making the improper references that accuse Det. Nissen of criminal behavior. The County's insistence upon sanctions further evidences the hostile animus she describes.

Det. Nissen's statements are factually based upon the record. It is an undisputed fact that Mark Lindquist will not produce the texts he admits are public and that there is a criminal statute that prohibits the concealment of public records.

Judge Schaller was very familiar with the underlying record in this case. Very early on, Judge Schaller understood the parties were arguing about the distinctions between the requests. 02/22/2013 RP 5, 16, 23. Det. Nissen never informed any court that *Nissen I* "concerned only phone records and not text messages." The County's limited misprinted quote is taken out of context and does not fairly represent the much more extensive discussion before the court cited above from the 22nd. Resp. Br. at 40.

When the County cites the record claiming counsel "falsely told Judge Tabor that *Nissen I* did not involve "text messages", counsel is actually telling Judge Tabor that the request is for texts for a "timeframe that is much broader and extensive than the records that are at issue in the matter that is on appeal." CP 1141, Resp. Br. 31 fnt 24. There is no affirmative statement to the court that *Nissen I* did not involve text messages, to the contrary the representation was that it did. When the County cites the record claiming counsel "falsely told Judge Schaller that *Nissen I* did not involve "text content," counsel is actually telling the

Judge that *Nissen II* does not concern phone records. CP 1169. Resp. Br. 31 fnt 25. There is no affirmative statement that *Nissen I* did not involve “text content.”

In response to the County’s motion for sanctions, Judge Schaller did not even allow Det. Nissen any argument. She dismissed the motion for sanctions noting Det. Nissen and her attorney had not misrepresented the case to the court and did not act frivolously:

I’m very familiar with this case. I have some knowledge of what I’ll call *Nissen I* as well, and clearly, I ultimately dismissed this case on collateral estoppel. I thought I explained by way of my letter ruling why the Court was compelled, required, to do that under the law, and it, of course, in my view, was the correct ruling in this case because of Judge Pomeroy’s previous ruling.

In no way did I believe this was a frivolous lawsuit. Certainly, there is no evidence in this record to support that Ms. Mell has acted in bad faith or that she signed documents or submitted documents that were frivolous. This lawsuit, from this Court’s perspective, was not brought to harass or cause unnecessary delay or increased costs to the defendants. There were facts to support the lawsuit.

RCW 4.84.185 indicates that the Court would basically need to find that it was frivolous and advanced without reasonable cause, and I don’t find that, either. And I don’t believe that the facts of the *Deja Vu* case, as it related to the ruling in that case and the other case supplied by defendants, is controlling. They are distinguishable from the facts of this case. And I am denying the motion. 06/07/2013 RP 14-15.

There are no grounds for sanctions against Det. Nissen or her

attorney in this case.

## VI. LEGAL ARGUMENT

Appellate courts afford the trial court significant deference with regard to any award of fees as sanctions because the trial court is in the best position to decide the issue. *Magana v. Hyundai Motor America*, 167 Wn. 2d 570, 220 P. 3d 191 (2009). A decision on sanctions must be clearly unsupported by the record for the appellate court to reconsider the trial court's ruling. *Id.* The trial court's order must be manifestly unreasonable or based on untenable grounds. *Id.* This requires evidence that the court relies upon unsupported facts or applies the wrong legal standard.

The court's oral ruling shows it did neither. The trial court was very familiar with the parties positions.

The court applied the proper legal analysis to the facts it understood well. The court recognized the *Deja Vu* case cited is distinguishable from this case. *Deja Vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 979 P.2d 464 (1999). *Deja Vu* is not on point in this matter because in that case there was no argument regarding the identity of issues, claims, or parties. It was not a public records case. The case was decided on both collateral estoppel and res judicata grounds

when the underlying federal case was never appealed. There was a final binding determination that was controlling and the plaintiff could not split her claims between federal and state court. Here there is no forum shopping. This case does implicate public records not at issue in *Nissen I*. There is no identity of the parties because Lindquist is not present and the County has no standing to raise his privacy issues.

The County also relies upon the *Racy* case without providing the citation to argue sanctions. *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 202 P.3d 1024 (2009). The court in *Racy* was motivated to award sanctions because there was no dispute between the parties that the same arbitration provision was at issue in a binding and final Supreme Court decision. Here we do not have a final binding Supreme Court decision on the questions arguably of first impression before the Court here. *Racy* does not provide a fact pattern or legal theory that warrants sanctions here.

The County relies heavily on cases brought by former Assessor-Treasurer Dale Washam to support its procedural bad faith argument for sanctions. Resp. Br. 39. Det. Nissen and her counsel do not compare to

Dale Washam.<sup>14</sup> The Washam cases refer to not just one, but years of repeated identical recall petitions with express final rulings on the merits based upon factual determinations that were indeed identical.

Here there are only two cases. There is a dispute about the degree to which the requests are similar, with the express concession that they are not identical. 02/22/2013 RP 5 (by Patterson “if you take a look at the public records requests, they’re **almost** identical, except for a few days extra....”). Det. Nissen conceded the link between the cases and asked the court to connect the cases by way of a stay, knowing she would have to wait to receive the requested records. Pierce County argued against a stay and forced the separation, not Det. Nissen. Further, the County precipitated two proceedings rather than one by delaying a decision on the second request rather than inviting consolidation. Pierce County has equal responsibility if not more responsibility than Det. Nissen for the existence of two distinct suits. In fact when appealed, the County objected to consolidation of the cases, not Det. Nissen. Talmadge Ltr. dated July 26th, 2013, (“We have received your July 22nd, 2013 letter regarding consolidation of the above - referenced cases. Pierce County does not

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<sup>14</sup> Counsel represented another County employee in an action against Mr. Washam, and has personal experience with Mr. Washam regarding the matters cited. *Williams v. Pierce County*, No. 12-2-15681-1

believe that consolidation of the two appeals is advisable....Pierce County is mindful of this Court's desire to treat cases with intertwined facts simultaneously, but, here, the two appeals present distinct legal issues that merit separate briefing, argument time, and treatment by the Court." ) Thus, there is no basis to sanction Det. Nissen because there are two actions instead of one.

The County highlights while misciting the *Rogerson Hiller Corp.* case. Resp. Br. 38. *Rogerson* is a case where the court did not award sanctions; thus, it supports Det. Nissen. The court indicated that the issues were "hard fought," which is not the same as a determination that the claim was either frivolous or brought to harass or for any other improper motive.

The County basis its bad faith contention argument on erroneous citations and opinionated conclusions that are not supported by the record. In fact, they are expressly rejected by the trial court who was directly involved in the proceedings. If the trial court concluded, Det. Nissen and her attorney did not lie to it; it seems implausible that this Court could decide they did absent new evidence not before the trial court. The County has not identified any new evidence here.

Finally, with regard to the accusations that this case is frivolous,

the amici briefing in *Nissen I*, in particular the briefing from the Attorney General indicates Det. Nissen should have the texts she requested because texts that relate to the conduct of government are indeed public records. She has not made a frivolous complaint. Judge Schaller recognized this. Thus, she denied sanctions accordingly.

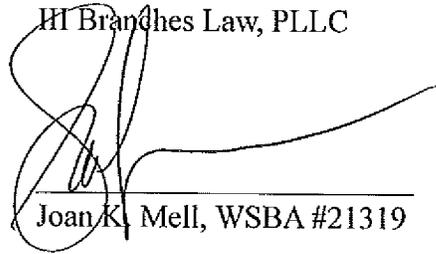
The County cannot meet its burden to support a reversal of the trial court's order denying it sanctions. The decision should not be reversed because Det. Nissen should prevail on appeal and she should be awarded fees and costs under the PRA.

## VII. CONCLUSION

Det. Nissen respectfully requests the Court reverse the order on summary dismissal and remand this case back to the trial court. She has made a proper public records request for public records not implicated by the request in *Nissen I* that the County should disclose. The trial court properly denied sanctions and exercised its discretion consistent with the facts and the law. The trial court's order on fees should be affirmed. Det. Nissen should be awarded her fees and costs on appeal, and at the trial level where she should have been granted access to the requested records.

Dated this 26th day of March, 2014

HI Branches Law, PLLC

A handwritten signature in black ink, appearing to read 'Joan K. Mell', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a long, sweeping tail that extends to the right.

Joan K. Mell, WSBA #21319

### Declaration of Service

I, Tess Hernandez, make the following declaration:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On March 26, 2014, I caused to be served true and correct copies of the foregoing: Reply/Responsive Brief of Appellant/Cross-Respondent, and this Declaration of Service by Electronic mail through the Washington State Court of Appeals Div. II filing system as follows:

Philip A. Talmadge  
18010 Southcenter Parkway  
Tukwila, WA 98188  
phil@tal-fitzlaw.com

Michael A. Patterson  
2112 3<sup>rd</sup> Ave., Ste. 500  
Seattle, WA 98121  
map@pattersonbuchanan.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 26th day of March 2014 at Fircrest, WA.

  
Tess Hernandez, Paralegal

### III BRANCHES LAW

March 26, 2014 - 3:48 PM

#### Transmittal Letter

Document Uploaded: 450399-Reply Brief.pdf

Case Name:

Court of Appeals Case Number: 45039-9

Is this a Personal Restraint Petition? Yes  No

#### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

#### Comments:

No Comments were entered.

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