

No. 47831-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

SHERRY L. ESCH,

Appellant,

v.

SKAMANIA COUNTY PUBLIC UTILITY DISTRICT #1; and CLYDE
D. LEACH, in his capacity as Public Utility District Commissioner,

Respondents

APPELLANT SHERRY ESCH'S REVISED OPENING BRIEF

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I. INTRODUCTION & NATURE OF DECISION BELOW

Before the Washington Supreme Court ruled otherwise, the trial court here ruled that a public official's constitutional rights of privacy trump Washington's Public Records Act ("PRA").¹

The trial court properly found that records on a personal device are public records, but then erred when it found that Skamania County PUD No. 1 Commissioner Clyde Leach's ("Leach") privacy rights outweighed the public's rights under the PRA to access public records found exclusively on his computer and personal email account.

The Washington Supreme Court addressed this very issue in *Nissen v. Pierce County* where it rejected the government's argument that a public official's constitutional rights trump the PRA.² Because the case at hand presents the identical issues addressed in *Nissen*, this Court should reverse and remand the trial court's decision.

II. ASSIGNMENT OF ERROR

1. The trial court erred when it granted Clyde Leach's Motion for Summary Judgment and denied Esch's Cross-Motion for Summary Judgment by ruling that Leach's constitutional right to privacy trumps the Public Records Act and therefore dismissed Leach from the lawsuit.

¹ *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P3d 45 (2015).

² *Id.*

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a public official's constitutional rights to privacy trump the Public Records Act?
2. Does a public official have a constitutional privacy interest in a public record?

IV. STATEMENT OF THE CASE

This case involves a 2012 public records request made to the Skamania County Public Utility District No. 1. The PUD's bizarre handling of the PRA request is still pending before the trial court. However, this appeal only involves the trial court's ruling that PUD Commissioner Clyde Leach could, on constitutional grounds, withhold public records contained exclusively on his home computer or private email account. This Statement will therefore only address those facts relevant to Commissioner Leach.

A. Esch submits her Public Records Request on April 30, 2012.

Esch submitted a public records request to the PUD on April 30, 2012.³ Esch sought copies of public records from then Commissioner Clyde Leach's private computer and private email account because she had evidence that he had used his private devices and e-mail to conduct

³ The request included a number of keyword search terms because she understood from prior interactions with the PUD that the PUD used terms to locate responsive documents. The PUD understood her request and never sought clarification from Esch.

public business.⁴ Though the PUD had supplied him with a PUD email account, and had a policy discouraging the use of private computers to conduct public business, Leach chose to use his personal computer and private e-mail account for public business.⁵

The PUD responded on May 4, 2012 promising to provide Esch the requested records before June 15, 2012.⁶ On June 15, 2012, the PUD advised Ms. Esch that because they were “still researching [her] request for [Leach’s] e-mails” they would need until July 6th to respond.⁷

B. Leach asserts his Fifth Amendment right and refuses to allow a third party to search his computer.

Esch learned later (after this lawsuit was filed) that the PUD waited around 30 days to send Esch’s PRA request to Leach and over 60 days to visit him about how he wanted to respond.⁸ When the PUD finally conducted its meeting, Commissioner Leach invoked his **Fifth** Amendment rights and informed the PUD he would allow no one to search his computer.⁹ But his objection to providing the records was never communicated to Ms. Esch until after she filed this lawsuit.¹⁰

⁴ Commissioner Leach did not seek reelection after the lawsuit was filed.

⁵ CPs 0249, 0322, and 0347.

⁶ CP 0347.

⁷ CP 0348.

⁸ CPs 0249 and 0378-0379.

⁹ Esch believes Leach meant his “Fourth Amendment” rights.

¹⁰ CP 0148.

C. Leach offers to provide hard copies of public records on his computer to PUD, but PUD fails to communicate this to Esch.

Shortly after the meeting, Commissioner Leach, without Esch's knowledge (until after the lawsuit was filed), performed a search of his own computer using the search terms provided by Esch's PRA request.¹¹ Leach testified that he located approximately 600 pages of public documents that he believed were responsive to Esch's PRA request.¹²

Leach claims that, while he offered to provide these documents to the PUD, the staff refused them because they lacked the metadata requested by Esch.¹³ In fact, the PUD's attorney, through the PUD's auditor, advised Leach to not deliver hard copies of the records because they might then become public records.¹⁴ The PUD further failed to ask Leach to email the documents to the PUD or save them electronically, even though he testified that he would have complied with this request; he simply was not going to allow the PUD to search his computer.¹⁵

The PUD therefore provided no hard copies of the documents that Commissioner Leach was willing to print-out from his private computer or

¹¹ CPs 0148 and 0250.

¹² CP 0148.

¹³ CPs 0377 and 0378.

¹⁴ CPs 0389, 0416, and 0418.

¹⁵ CPs 0250-0252, 0389, and 0390.

e-mail account.¹⁶ Again, the PUD chose not to keep Ms. Esch in the dark on Leach's offer to provide hard copies of the requested documents.¹⁷ They also failed to ask Commissioner Leach if he would provide electronic copies.¹⁸

The PUD instead sent Esch a June 29, 2012 letter stating it would produce the remaining records on July 20, 2012.¹⁹ On July 20, 2012, the PUD produced several more records from the PUD's server, but none of the records were from Leach's personal computer or personal email account.²⁰ The PUD also declined to state any reasons why it could not produce any records from Commissioner Leach's private e-mail account.²¹

D. PUD ignores Esch's repeated requests for clarification.

Esch wrote to the PUD on July 24, 2012 to ask what steps the PUD had taken to obtain the records from Leach and what steps the PUD had taken to ensure the public records in his possession were being preserved.²² The PUD once again ignored Esch's letter because it felt like it had no obligation to respond.²³

¹⁶ CP 0252 and 0416. The PUD did provide documents obtained from Leach's official PUD email account on June 29, 2012 but did not provide those documents Leach offered from his personal computer.

¹⁷ CP 0148.

¹⁸ CP 0416.

¹⁹ CPs 0253, 0349, and 0350.

²⁰ CPs 0253, 0351, and 0352.

²¹ CPs 0253, 0351, and 0352.

²² CPs 0253 and 0353.

²³ CPs 0253, 0254, 0329, and 0330.

On August 10, 2012, the PUD issued its final PRA response.²⁴ The letter vaguely advised that it had “requested access to Commissioner Leach’s embarq e-mail account but were unable to obtain the access necessary to perform the requested search.”²⁵ Because the letter failed to answer her previous questions and left her wondering why the PUD could not produce the requested records, Esch again wrote the PUD and asked:

1. Whether Commissioner Leach was refusing to provide the PUD access to his private computer or private e-mail account;
2. Whether Commissioner Leach was denying that he was in possession of public records;
3. Whether Commissioner Leach had taken any steps under the PUD’s Public Records Policy (Resolution #2372) to seek a protection order;
4. What steps the PUD had taken to compel Commissioner Leach to turn over the public records;
5. What legal basis the PUD believed existed to not produce the documents; and,
6. What steps the PUD planned to take to fulfill its obligation to provide the requested documentation.²⁶

Ms. Esch also repeated her request that the PUD take whatever steps were necessary to protect the records from being lost or destroyed.²⁷

However, the PUD again ignored Ms. Esch clarification request.²⁸

²⁴ CPs 0253, 0254, and 0354.

²⁵ CPs 0254 and 0354.

²⁶ CPs 0359 and 0360.

²⁷ CP 0360.

²⁸ CPs 0255, 0332, and 0333.

It was not until she received information through discovery that Ms. Esch learned of the communications that had occurred between the PUD and Commissioner Leach, Leach's assertion of his Fifth Amendment Right or his attempt to tender at least some of the requested public records to the PUD's attorney.²⁹

E. Totally ignored and left with no options, Esch files this PRA lawsuit.³⁰

Esch therefore filed her lawsuit on August 7, 2013 against the PUD and Commissioner Leach in his official capacity as PUD Commissioner.³¹ Leach was afforded separate counsel by the PUD.³² Leach's counsel provided the PUD with a majority of the 600 pages of documents that he had tried to give to the PUD the year before.³³

The PUD produced a majority of these over several months time to Ms. Esch, with the final production occurring in December 2014 after the PUD's attorney discovered he had not produced a batch of Leach's records.³⁴ No production/redaction log was ever provided to Esch.

²⁹ CP 0148.

³⁰ CP 0258.

³¹ CPs 0001-0035.

³² CPs 0258 and 0428.

³³ CP 0259.

³⁴ CPs 0259-0262 and 0433-0434.

F. Parties file cross-motions for summary judgment.

The parties filed cross-motions for summary judgment and argued the case on March 12, 2015.³⁵ Judge Brian Altman took the case under advisement.³⁶

G. Esch and Leach reach oral settlement agreement at mediation.

While waiting for the court's ruling, the parties engaged in mediation on May 20, 2015 with mediator and retired judge Richard Strophy.³⁷ Judge Strophy succeeded in getting Esch and Leach to settle their dispute as follows:

Dr. Leach would, within 120 days, and under his attorney's direction, arrange for a third-party computer expert to assist Dr. Leach in the search of Dr. Leach's home computers and e-mail account for all documents that included the search terms were modified from Mrs. Esch's April 30, 2012 public records request.

Dr. Leach and Mr. Wolfe would then (1) produce all of the public records, (2) identify and log those documents that they did not believe met the definition of public records under the Public Records Act and (3) identify and log those documents that were public records, but which Dr. Leach and Mr. Wolfe believed were protected from disclosure under an exception to the Public Records Act.

Dr. Leach and Mr. Wolfe would then provide their "production log" to Mrs. Esch. If Mrs. Esch disagreed with Dr. Leach's classification or decision to withhold certain documents as described on the production log, she would need to try and resolve the issue with Dr. Leach or Mr. Wolfe. If she and Dr.

³⁵ CPs 0175-0245, 0246-0282, and 0287-0289.

³⁶ CPs 1580-1585.

³⁷ CPs 1535-1542 and 1586-1588.

Leach could not agree, then Mrs. Esch could petition the Skamania County Superior Court to review the documents in camera to determine if they should or should not be provided.³⁸

Before the end of the mediation session, Leach, Esch and their two attorneys met with the mediator to confirm the above settlement terms.³⁹ The parties confirmed the agreement and both parties accepted the settlement terms.⁴⁰ Leach's attorney asked that his client be permitted to go home before the agreement could be placed in writing.⁴¹ Esch's attorney only agreed to this request upon the promise that Leach's attorney (Brian Wolfe) would send an e-mail setting forth the terms of their agreement the following day.⁴²

Leach's attorney complied by sending the required e-mail the next day.⁴³ His e-mail expressly stated its purpose was to "establish a written record of the agreement."⁴⁴ Neither Leach nor his attorney ever indicated that Leach's agreement was conditioned upon his reviewing the agreement in writing.⁴⁵

Upon receiving the e-mail, Esch's counsel (Brad Andersen) prepared a more formal settlement agreement and Stipulated Motion and Order of Dismissal, which was forwarded to Mr. Wolfe and subsequently

³⁸ CPs 1468-1471 and 1485-1488.

³⁹ CPs 1535-1542.

⁴⁰ CPs 1535-1542.

⁴¹ CP 1470.

⁴² *Id.*

⁴³ CPs 1470 and 1475.

⁴⁴ CP 1475.

⁴⁵ CP 1536.

approved by him.⁴⁶ The attorneys then sought their clients' signatures to the written agreement.⁴⁷

H. Leach get's cold feet and refuses to sign written settlement agreement.

Esch approved the agreement, but Leach changed his mind five days after receiving the written agreement.⁴⁸ Mr. Wolfe notified Mr. Andersen that, despite his (Wolfe's) belief that the parties had agreed, Leach would sign nothing because his wife was upset.⁴⁹ The two lawyers continued to work on getting Leach to sign, but he refused and stated that he would sign nothing, irrespective of what had occurred at the mediation.⁵⁰

Even the mediator testified that the parties had agreed and that both attorneys confirmed that their respective clients had agreed to the terms.⁵¹

I. Judge denies Motion to Enforcement Settlement Agreement but, after this Appeal was filed, Leach submitted a Declaration purporting to have produced all of the public records from his computer.

Although Judge Altman denied Esch's Motion to Enforce the Settlement Agreement on June 11, 2015,⁵² Leach has since submitted a sworn Declaration indicating that he has completed the search and has

⁴⁶ CPs 1470 and 1479-1488.

⁴⁷ CPs 1490-1496.

⁴⁸ CPs 1470-1471 and 1490-1496.

⁴⁹ CPs 1471 and 1490-1496.

⁵⁰ *Id.*

⁵¹ CPs 1535-1542.

⁵² CPs 1575-1576.

produced the public records contained on his computer as envisioned by the parties' Settlement Agreement.⁵³ No production log was produced and Esch has not been able to verify the adequacy or credibility of the search.

J. Trial Court dismisses Leach from lawsuit because his privacy rights trump the PRA.

The trial court denied the PUD and Esch's cross-motions for summary judgment but granted Leach's motion and dismissed him from the case.⁵⁴ The court ruled that Commissioner Leach's privacy rights under the state and federal constitutions trumped the public's rights under the PRA.⁵⁵ The Judge also ruled there was no judicial mechanism to compel Leach to produce the records from his private computer.⁵⁶ The trial court therefore entered a Final Judgment of Dismissal and certified its ruling under CR 54(b).⁵⁷

Esch timely filed her Notice of Appeal on July 10, 2015.

After the appeal commenced, Leach purportedly conducted a search of his computer and provided what he believes to be public records from his computer.⁵⁸ Esch requested and was granted permission to file this Revised Opening Brief to remove the argument that the trial court erred when it failed to enforce the parties' CR 2A Agreement.⁵⁹

⁵³ See February 8, 2016 *Declaration of Matthew J. Segal in Support of Motion to Dismiss Appeal as Moot, Ex A (Declaration of Dr. Clyde Leach)* filed in this Appeal.

⁵⁴ CPs 1580-1585.

⁵⁵ CP 1584.

⁵⁶ CP 1584.

⁵⁷ CPs 1577-1579.

⁵⁸ See footnote 53.

⁵⁹ Commissioner's February 8, 2016 Ruling.

V. ARGUMENTS

A. The Standard of Review is *De Novo*.

Whether Commissioner Leach's constitutional rights trump the Public Records Act is purely a question of law and therefore the standard of review is *de novo*.⁶⁰

B. A public official has no constitutional privacy right to public records he permits to be placed or stored onto his private computer or e-mail account.

1. *A Public Official does not have a right to claim privacy in public records that he allows to be placed, stored or maintained exclusively upon his private computer.*

The trial court ruled that Commissioner Leach's constitutional rights trumped the PRA and therefore relieved him of any obligation to turn over public records from his private computer or e-mail account. He made this ruling before the Supreme Court announced its decision in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

As an initial matter, the trial court correctly followed the court of appeal's holding in *Nissen v. Pierce County*⁶¹ when it ruled that documents do not lose their classification as public records simply because they are on a public official's private device. But the trial court went awry when it then declared that a public official's privacy rights trumped the PRA.

⁶⁰ *Klem v. Washington Mutual Bank*, 176 Wn. 2d 771, 782, 295 P.3d 1179 (2013).

⁶¹ 183 Wn. App. 581, 584 n.15 (2014), *review granted*, 182 Wn.2d 1008 (2015). The Washington Supreme Court affirmed this part of the opinion. *Nissen*, 183 Wn.2d 863, 877, 357 P.3d 45 (2015).

2. *Nissen mandates reversal and remand to trial court for further proceedings consistent with Nissen's mandates.*

In *Nissen*, the Washington Supreme Court held that public officials and employees have no privacy right to public records that they allow to be placed or stored on their private devices.⁶² The Court also held that the PRA “must offer the public a way to obtain those records” when they choose to conduct public business on their private computers.⁶³ So while they may have a privacy right in the device, they don't have a privacy right to the public documents they allow to be placed on those devices.

3. *The Trial Court must order Leach to conduct an adequate search of his computer.*

The *Nissen* Court was concerned about balancing a public official's privacy rights in their computers with the public rights to obtain public records. It therefore announced that “an employee's good-faith search for public records on his or her personal device can, if properly conducted, satisfy an agency's obligations under the PRA.”⁶⁴ But an employee or official must be properly trained on document retention and public records or otherwise try to conduct a reasonable search.

Here, the trial court refused to require Leach to turn over records or perform a search of his computer because it was worried about Leach's privacy rights. This case must be remanded with instructions to follow the procedure in *Nissen* for searching public records. And while Leach *may*

⁶² *Nissen*, at 883.

⁶³ *Id.* at 884-85.

⁶⁴ *Id.*

have subsequently complied with these requirements, this court should still overturn the trial court's decision and remand for further proceedings to ensure that Leach and the PUD have complied with the law.

Further, steps must also be taken to educate Leach about the definition and meaning of public records as Leach testified he was “not knowledgeable about what a public record is and what isn't.”⁶⁵ Leach testified that he knew the definition of a public record, “but can I look at a record and say it is a public record, no.”⁶⁶

The “onus is instead on the agency—necessarily through its employees—to perform an ‘adequate search’ for the records requested.”⁶⁷ Therefore, to satisfy the requirements described by the Supreme Court in *Nissen*, Leach must first be properly trained on what records to search for, and then he must provide a “reasonably detailed, non-conclusory affidavit” attesting to the nature and extent of his search. If Leach withholds personal records from the PUD, then he must submit an affidavit with facts sufficient to show the information is not a public record under the PRA.⁶⁸

Ironically, but not by accident, the procedures described by the Supreme Court in *Nissen* are nearly identical to those procedures set out in

⁶⁵ CPs 0373(pages 9-10 of the Leach Deposition, 9/19/14) and 0388 (pages 70-71 of Leach Deposition, 9/19/14).

⁶⁶ CP 0388 (page 70 of Leach Deposition, 9/19/14).

⁶⁷ *Nissen*, 183 Wn.2d at 885, citing *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 720-21, 21 P.3d 119 (2011).

⁶⁸ *Nissen*, 183 Wn.2d at 886.

the Esch/Leach settlement agreement. So enforcing the parties' settlement agreement would have actually furthered the purpose of the PRA.

C. Esch is entitled to her attorneys' fees and costs on appeal

Because she has been required to pursue this appeal to enforce her rights under the PRA, and because she is fighting both the PUD and Commissioner Leach, Esch is entitled to recover her legal fees and costs against the PUD under RCW 42.56.550.⁶⁹

VI. CONCLUSION

The PRA was enacted to ensure that Washington citizens had ready means to ascertain the actions of their elected officials and governmental agencies. As highlighted by the *O'Neill and Nissen* rulings, Sunshine is the best disinfectant—and interpreting the PRA in a manner providing the fullest disclosure is in the state's and citizens best interests. Allowing public officials to avoid disclosure of public records by their voluntary decision to use private devices and emails for public business eviscerates the PRA and public accountability.

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⁶⁹In addition to its own participating in this appeal, the PUD is using public funds to pay for Leach's defense in this case creating what essentially amounts to a double team.

Because the trial court incorrectly held that a public official's constitutional right to privacy trumps their legal obligations under the PRA, its decision should be reversed and remand for further proceedings to assure compliance with the *Nissen* ruling. The court should also award Esch her legal fees under the PRA.

DATED this 29th day of March, 2016.

Respectfully Submitted,

LANDERHOLM, P.S.

/s/ Bradley W. Andersen
BRADLEY W. ANDERSEN, WSBA #20640
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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Heather A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 29th day of April, 2016, a copy of the foregoing **APPELLANT SHERRY ESCH'S REVISED OPENING BRIEF** was delivered via first class United States Mail, postage prepaid, to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: March 29, 2016
At: Vancouver, Washington

/s/ Heather A. Dumont
HEATHER A. DUMONT

LANDERHOLM PS

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Appellant Sherry Esch's Revised Opening Brief

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