

NO. 486016-II

IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

---

ARTHUR WEST,

Respondent

v.

STEVE VERMILLION & CITY OF PUYALLUP,

Petitioners

---

**AMICUS CURIAE BRIEF  
OF THE WASHINGTON COALITION  
FOR OPEN GOVERNMENT**

Judith A. Endejan, WSBA #11016  
GARVEY SCHUBERT BARER  
Eighteenth Floor  
1191 Second Avenue  
Seattle, Washington 98101-2939  
(206) 464-3939

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. INTEREST OF AMICI.....	2
III. ARGUMENT.....	3
A. The PRA Applies With Special Force To The Conduct of Elected Officials.....	3
B. An Elected Official’s Records Are Subject To The PRA.....	5
C. If the Email Communications Are Public Records The First Amendment Does Not Prohibit Their Disclosure. ....	9
IV. CONCLUSION.....	11

## TABLE OF AUTHORITIES

	<u>Page</u>
<i>Asgeirsson v. Abbott</i> , 696 F.3d 454 (5 <sup>th</sup> Cir. 2012) .....	10
<i>Bonamy v. City of Seattle</i> , 92 Wn. App. 403 (1998).....	8
<i>Clawson v. Longview Publishing Company</i> , 91 Wn.2d 408 (1979) .....	3
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) .....	4
<i>Hangartner v. City of Seattle</i> , 151 Wn. 2d 439, 448, 90 P. 3d 26 (2004)....	6
<i>Hearst Corp. v. Hoppe</i> , 90 Wash.2d 123 (1978) .....	3, 7
<i>In re Request of Rosier</i> , 105 Wash.2d 606 (1986).....	3, 8
<i>John Doe No. 1 v. Reed</i> , 561 U.S. 186 (2010).....	10
<i>Livingston v. Cedeno</i> , 164 Wash.2d 46 (2008).....	3
<i>Metromedia, Inc. v. City of San Diego</i> , 453 U.S. 490 (1981).....	10
<i>Nissen v. Pierce County</i> , 183 Wn.2d 863 (2015).....	<i>Passim</i>
<i>Nixon v. Administrator of General Services</i> , 433 U.S. 425 (1977) .....	9
<i>O’Neill v. City of Shoreline</i> , 170 Wn.2d 138 (2010) .....	<i>Passim</i>
<i>Rhinehart v. Seattle Times</i> , 98 Wn.2d 226 (1982).....	9
<i>State v. Besola</i> , 184 Wn.2d 605 (2015) .....	9
<i>Vance v. Office of Thurston Cnty. Comm’rs</i> , 117 Wn. App. 660 (2003)....	6
<i>Westside Hilltop Survival Com. v. King County</i> , 96 Wn.2d 171 (1981)....	10
<i>Yakima County v. Yakima Herald-Republic</i> , 170 Wash.2d (2007).....	7
<i>Zhane v. Parish of Jefferson</i> , 150 P.3d 404 (Ct. App. 2014).....	9

**Statutes**

RCW 42.17A.555.....9

RCW 42.36.060 .....10

RCW 42.56 (“PRA”) ..... *Passim*

RCW 42.56.030 .....8

RCW 42.56.010(3).....1, 9

RCW 42.56.550(1).....8

**Other**

*LAWS of 1973*, ch. 1, §1(11).....7

## I. INTRODUCTION

Petitioners Steve Vermillion and the City of Puyallup (“Petitioners”) submit no principled reason to depart in this case from the Washington Supreme Court’s holding in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). If Councilmember Vermillion’s emails with his constituents from his personal computer relate to “the conduct of government or the performance of any governmental or proprietary function,” then they are public records. RCW 42.56.010(3). They must be disclosed because the First Amendment does not foreclose the disclosure of public records.

Petitioners present either a confused “as applied” constitutional attack on Washington’s Public Records Act (“PRA”) RCW Ch. 42.56 or a request to create a new PRA exemption for the undefined “political correspondence” of “elected officials.” Under either theory Petitioners’ long-winded claims fail. *Nissen* resolves this case. It added nothing new to the law with respect to the obligation of a public agency to turn over public records consisting of citizen communications with an elected official. Vermillion claims that because these communications come from “constituents” they need not be disclosed. That does not mean that they do not relate to the conduct of government. In short, Vermillion has provided no reason to assume that these emails are not public records. If

they are public records, they must be disclosed and no First Amendment analysis is required.

## II. INTEREST OF AMICUS

Washington Coalition for Open Government (WCOG) is a non-profit statewide organization dedicated to promoting and defending the public's right to know about the conduct of public business. This nonpartisan organization regularly advocates for public access to government records as part of government accountability, including lobbying the Legislature and participating as amicus parties in open government appeals.

Amicus has a strong interest in clarifying that the holding in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), applies to the public records in this case. That holding says that public records of public employees and officials maintained on a personal electronic device should be disclosed. There is no reason for this holding to not apply to similar records maintained on a private computer, device, email account, or cloud storage of an elected official.

Amicus' members often use the Public Records Act to gather information of importance to the general public. The ability to fully and timely inform Washington residents about government operations would be impaired if public officials could keep public records stored on a

private computer or other private storage location from the public simply because they involve a public official.

### III. ARGUMENT

#### A. The PRA Applies With Special Force To The Conduct of Elected Officials.

The PRA is a tool to enable citizens to monitor their government. “The primary purpose of the public records act is to provide broad access to public records to ensure government accountability.” *Livingston v. Cedeno*, 164 Wash.2d 46, 52, 186 P.3d 1055 (2008) (en banc); see also *In re Request of Rosier*, 105 Wash.2d 606, 611, 717 P.2d 1353 (1986) (the basic purpose and policy of the PRA is to allow public scrutiny of government); *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 580 P.2d 246 (1978) (the purpose of public disclosure is the “efficient administration of the government.)”

Vermillion is an elected official, a member of government. As such, he is accountable to the people he serves and his conduct in office and the performance of his public duties should always be subject to public scrutiny. The Washington Supreme Court noted in *Clawson v. Longview Publishing Company*, 91 Wn.2d 408, 416, 589 P.2d 1223 (1979):

An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society’s interest in the officers of government is not

strictly limited to the formal discharge of official duties . . .  
(T)he public's interest extends to "anything which might  
touch on an official's fitness for office. . ." (quoting *Gertz*  
*v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974)).

The type of email correspondence at issue clearly has a bearing on the performance of Vermillion's duties. It involves communications between citizens and an elected representative about matters involving their government and community. For example, a constituent might write to inquire about fixing a pothole or about police misconduct. This type of communication and Vermillion's response relate to matters of public concern and reveal how well or poorly Vermillion is performing his duties as a Councilmember. This is not "political correspondence" even though it comes from a citizen – whom Vermillion chooses to label a "constituent" – which is a distinction without a difference. If these communications occurred through a public email system, generated by a public computer, there would be no question that they should be disclosed. The fact that "constituent" communications reside on Vermillion's private computer should be irrelevant under *Nissen* and *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010).

However, it appears that Vermillion has abandoned the argument that he should not have to turn over emails residing on his personal computer because of where they reside, and now argues they are protected because of who he is (an elected official) and the nature of the

communications (“constituent communications”).<sup>1</sup> Rather, his appeal now tries to argue that emails between an elected official and a citizen should be exempt from disclosure under the First Amendment to the U.S. Constitution. When such emails are public records, there is no reason for *Nissen* and *O’Neill* not to apply.

To agree with Vermillion would create a new “elected official” exemption in the PRA. Even considering such an exemption would violate the very purpose and intent of the PRA expressed in RCW 42.56.030:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

**B. An Elected Official’s Records Are Subject To The PRA.**

Petitioners argue that *Nissen* may not apply to Vermillion because he is an elected official as opposed to a public employee.<sup>2</sup> Not so. *Nissen* involved the text records of the Pierce County Prosecutor, an elected official. *O’Neill* also involved a communication from a constituent on the private computer and to a private email address of an elected official.

Indeed, in *O’Neill* the court said, “Our broad PRA exists to ensure that the

---

<sup>1</sup> Joint Supplemental Brief of Petitioners to address *Nissen v. Pierce County* (“Pet. Supp. Br.”), p. 4.

<sup>2</sup> Pet. Supp. Brief., pp. 5-6.

public maintains control over their government and we will not deny our citizenry access to a whole class of possibly important government information.” 170 Wn.2d at 147.

In both *O’Neill* and *Nissen* the Supreme Court held that communications about public business of elected officials conducted by means of a private electronic medium must be disclosed. Vermillion claims that the “scope of employment” test of *Nissen* excludes records of elected officials.<sup>3</sup> *Nissen* cannot be interpreted to yield such a skewed result. This makes no sense because the City Council *is* the government and council members work as agents or employees of the government. If the basic purpose and policy of the PRA is to allow public scrutiny of government<sup>4</sup> then it would be undermined by excluding from public scrutiny the records of members of the government. Under Vermillion’s reasoning a citizen could get records of an “employee” but not of those an “elected official.” Both are subject to scrutiny to assure his public accountability to the electorate. Courts avoid PRA interpretations leading to absurd results. *Hangartner v. City of Seattle*, 151 Wn. 2d 439, 448, 90 P. 3d 26 (2004).

Court also refuse to enter into “hypertechnical interpretations,” *Vance v. Office of Thurston Cnty. Comm’rs*, 117 Wn. App. 660, 668, 71 P. 3d 680 (2003), *review denied*, 151 Wn. 2d 1013 (2004). For instance,

---

<sup>3</sup> Pet. Supp. Brief pages 7, 14.

<sup>4</sup> *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 580 P.2d 246 (1978).

*Nissen* rejected the argument that Prosecutor Lindquist’s records are not covered by the PRA because he is an individual and not a public “agency.” The Supreme Court said that political bodies operate “through their employees and other agents” and therefore records from those individuals are public records. 182 Wn.2d at 876. *Nissen* does not mean that only public employees are subject to the PRA, because it applies to all those who operate a political body, which clearly encompasses the governing body. The Supreme Court said:

The definitions of “agency” and “public record” are each comprehensive on their own and, when taken together, mean the PRA subjects “virtually any record related to the conduct of government” to public disclosure. *O’Neill*, 170 Wash.2d at 147, 240 P.3d 1149. This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government. *See LAWS of 1973*, ch. 1, §1(11). As we so often summarize, the PRA “is a strongly worded mandate for broad disclosure of public records.” *Yakima County v. Yakima Herald-Republic*, 170 Wash.2d Public Co., 162 Wash.2d 716, 731, 174 P.3d 60 (2007) (quoting *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 127, 580 P.2d 246 (1978)).

Vermillion tries to exempt what he labels as “constituent communications” or “political communications” from the broad definition of “public record.” Vermillion does not define these terms even though he asks this Court to interpret “public record” to add a “needed nuance

regarding the political correspondence of elected officials.”<sup>5</sup> *Nissen* is very straightforward and no such “nuanced” interpretation is needed. Petitioners’ plea, in effect, concedes that “public records” include communications with elected officials because the PRA contains no provision exempting such records. Courts cannot invent new exemptions that do not appear in the PRA. *See, i.e., In re Request of Rosier*, 105 Wn.2d 606, 609, 717 P.2d 1353 (1986). Courts should keep in mind that the PRA requires liberal construction promoting disclosure, and narrow construction of exemptions. RCW 42.56.030. Courts should “view with caution any interpretation” that frustrates the PRA purpose of disclosure. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 408-09, 960 P.2d 447 (1998) *review denied* 137 Wn.2d 1012 (1991).

Applying the foregoing principles this Court should reject Vermillion’s request for a “nuanced interpretation of the PRA.”

Petitioners bear the burden of proving why Vermillion’s public records should be withheld. RCW 42.56.550(1). Claiming, in conclusory fashion, that they do not constitute a “public record” because they are “constituent communications” does not suffice. On the contrary the Court should assume that they relate to the “conduct of government” and fall

---

<sup>5</sup> Pet. Supp. Brief, p. 18.

within the definition of a “public record” under RCW 42.56.010 (3)

because Vermillion has not proven otherwise.<sup>6</sup>

C. **If the Email Communications Are Public Records, The First Amendment Does Not Prohibit Their Disclosure.**

Vermillion cites no case that supports his theory that the First Amendment prohibits the disclosure of his emails.<sup>7</sup> In fact, the cases he does cite support the contrary conclusion. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Court found the government’s interest in disclosure outweighed Nixon’s interest in protecting Nixon’s “political correspondence.” Nixon lost his attempt to prevent disclosure. Vermillion cites *Zhane v. Parish of Jefferson*, 150 P.3d 404, 414, 416 (Ct. App. 2014). This case was overruled by the Supreme Court of Louisiana. *Zhane v. Parish of Jefferson*, 2015 WL 8225830, \_\_\_ So.3d \_\_\_ (2015). The Louisiana Supreme Court held that the emails of an employee of a public agency, via that agency’s email system, about private political matters with private individuals are subject to disclosure under Louisiana’s PRA. Such disclosure did not violate the citizen’s right to privacy or right to association.

---

<sup>6</sup> Some communications could relate to strictly political matters, but nothing presented by Vermillion allows the Court to make this determination. The Public Disclosure Act prohibits use of public facilities “for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition.” RCW 42.17A.555. This is not a PRA exemption but it illustrates the type of communications that be considered strictly political communications.

<sup>7</sup> The cases he cites do not deal with PRA obligations but concern matters such as search warrants (*State v. Besola*, 184 Wn.2d 605, 611, 359 P.3d 799 (2015)) or the civil discovery rule issues (*Rhinehart v. Seattle Times*, 98 Wn.2d 226, 654 P.2d 673 (1982) *aff’d* 467 U.S. 20 (1984)).

The United States Supreme Court has found no PRA violation of First Amendment association rights from disclosure of the names on a petition needed to place a referendum against gay marriage on the ballot. *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010). This is consistent with the view that disclosure obligations do not unduly burden First Amendment rights. *Asgeirsson v. Abbott*, 696 F.3d 454, 463 (5<sup>th</sup> Cir. 2012).

Petitioners claim that communications between a legislator and a constituent are critical to a representative government, citing *Westside Hilltop Survival Com. v. King County*, 96 Wn.2d 171, 179, 634 P.2d 862 (1981). However, that case dealt with whether *ex parte* contacts *should be allowed* not with whether they are *disclosable*. In situations involving *ex parte* contacts with decision-makers, disclosure of those contacts is required. *See, e.g.*, RCW 42.36.060.

In sum, Petitioners have provided no reason to depart from *Nissen*'s holding that public records maintained by a public official on a private device must be disclosed. Vermillion's emails are public records if he is communicating about the conduct of government with citizens/constituents. PRA obligations do not violate his First Amendment associational rights. "At times First Amendment values must yield to other societal interests." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981). The societal interest in government transparency and

accountability embodied in the PRA outweigh any minimal burden from the disclosure obligations at issue here.

**IV. CONCLUSION**

Petitioners fail to establish any lawful basis for interpreting *Nissen* to exempt Vermillion's emails with citizens on his personal computer from disclosure. To do so would create an enormous exemption for public records of government officials who are the intended object of public scrutiny under the PRA.

Dated: April 18, 2016

*M. Endejan, WSBA No. 35764,  
for*

---

Judith A. Endejan, WSBA #11016  
GARVEY SCHUBERT BARER  
Eighteenth Floor  
1191 Second Avenue  
Seattle, Washington 98101-2939  
(206) 464-3939

*Michele Earl-Hubbard*

---

Michele Earl-Hubbard  
WSBA #26454  
ALLIED LAW GROUP  
6351 Seaview Avenue NW  
Seattle, WA 98107  
(206) 443-0200

## CERTIFICATE OF SERVICE

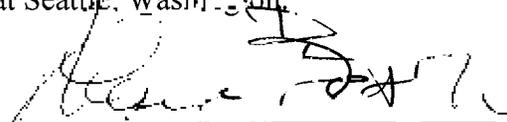
I certify under penalty of perjury under the laws of the State of Washington that on April 18, 2016, I caused the foregoing document to be efiled with the Court of Appeals, Division II, and served by email, pursuant to the agreement of counsel on:

Ramsey Ramerman  
Ramerman Law Office PLLC  
218 Main Street #319  
Kirkland, WA 98033  
[RamseyRamerman@gmail.com](mailto:RamseyRamerman@gmail.com)  
(206) 949-6234

Kathleen Haggard  
Porter Foster Rorick LLP  
800 Two Union Square  
601 Union Street  
Seattle, WA 98101  
[kathleen@pfrwa.com](mailto:kathleen@pfrwa.com)  
(206) 622-0203

Arthur West  
120 State Avenue NE #1497  
Olympia, WA 98501  
[awestaa@gmail.com](mailto:awestaa@gmail.com)

Dated this 18th day of April, 2016, at Seattle, Washington.



Leslie Boston, Legal Assistant

**ALLIED LAW GROUP LLC**

**April 18, 2016 - 1:33 PM**

**Transmittal Letter**

Document Uploaded: 2-486016-Amicus Brief.pdf

Case Name: West v. Vermillion

Court of Appeals Case Number: 48601-6

**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: Amicus

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.

Sender Name: Michel Earl Hubbard - Email: [michele@alliedlawgroup.com](mailto:michele@alliedlawgroup.com)

A copy of this document has been emailed to the following addresses:

[lboston@gsblaw.com](mailto:lboston@gsblaw.com)

[jendejan@gsblaw.com](mailto:jendejan@gsblaw.com)

[ramseyramerman@gmail.com](mailto:ramseyramerman@gmail.com)

[kathleen@pfrwa.com](mailto:kathleen@pfrwa.com)

[awestaa@gmail.com](mailto:awestaa@gmail.com)

[michele@alliedlawgroup.com](mailto:michele@alliedlawgroup.com)