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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Respondent

v.

STEVE VERMILLION & CITY OF PUYALLUP,

Appellant

REPLY BRIEF OF APPELLANT VERMILLION

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I. INTRODUCTION

This appeal is not about any right to conduct government in secret because Puyallup City Councilmember Steve Vermillion and Requestor Arthur West agree no such right exists:

“Historically, no legitimate privacy interest has been recognized in the secret conduct of the people’s business by public officials.”

Respondent West’s Amended Opening Brief at 23-24.

“Vermillion is not arguing that he or anyone else has a constitutional right to conduct city business in secret.”

Opening Brief of Appellant Vermillion at 4.

Rather, the issue on this appeal is whether the Public Records Act’s *current definition* of “public record” applies to emails maintained in an elected official’s personal email account and on his private computer. This is a question of statutory construction, not constitutional rights. If the records West requested from Vermillion’s private papers are not “public records,” then the City of Puyallup had no obligations under the PRA to produce those emails or identify any emails it had not produced.¹

The trial court ruled on summary judgment that the PRA applied to the emails maintained by Vermillion in his personal email account and private computer. Before this Court can affirm that ruling, it would have to address Vermillion’s constitutional privacy rights based on the First

¹ See *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348 n.4, 217 P.3d 1172 (2009) (“*Federal Way v. Koenig*”) (agency not required to log withheld records that because the records were not “public records”); *Zink v. City of Mesa*, 162 Wn. App. 688, 711, 256 P.3d 384 (2011) (“the prompt response requirement of the PRA does not apply until a specific request for identifiable public records has been made.”). The question of whether the requested records are “public records” is a “threshold inquiry.” *Dragonslayer, Inc. v. State*, 139 Wn. App. 433, 441, 161 P.3d 428 (2007)

Amendment and Article 1, Section 7 (not to mention his constituents' privacy rights). The Court would also have to put on its legislative hat to address the PRA's lack of any subpoena power to compel the production of records or any exemption for private political correspondence.²

If the Court rules in favor of Vermillion, on the other hand, and finds that the statutory definition of "public record" does not apply to records maintained by Vermillion because he is not an "agency" as defined in the PRA, the Court can avoid all of these constitutional issues.

It is hard to understate the importance of the constitutional rights that are threatened by the trial court's ruling. The First Amendment protects our most fundamental freedoms. These protections are at their "zenith" when political speech is involved.³ The most important type of political speech are the communications between elected officials and their constituents: "[e]ssential to the success of modern representation is the maintenance of an on-going dialogue between legislators and their constituents throughout the term of office."⁴ "[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."⁵

² See *City of Lakewood v. Koenig*, 182 Wn.2d 87, 93, 343 P.3d 335 (2014) (PRA contains no general "privacy" exemption); *Mechling v. City of Monroe*, 152 Wn. App. 830, 845, 854-55, 222 P.3d 808 (2009) (no basis for redacting personal contract information in email because the email was not an "employment related record").

³ *Buckley v. Am. Constitutional Law Found.*, 515 U.S. 182, 186 (1999)

⁴ *Gordon v. Griffith*, 88 F. Supp. 2d 38, 47 (E.D.N.Y. 2000); see also *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) (holding correspondence between elected officials and constituents were protected by First Amendment associational privacy).

⁵ *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

As long as campaign contributions are disclosed, the elected official and constituent have a right to communicate in private: “ex parte contacts between the legislator and his constituents advocating specific legislation ... is an integral part of representative government at every level.”⁶ The back and forth between constituent and elected official “embody a central feature of democracy – that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”⁷

The trial court’s ruling threatens this relationship because “[t]here can be no doubt that the compelled disclosure ... chills political speech.”⁸ As this Court recently noted, “[p]rotecting the privacy of personal communications is essential” because the “[a]wareness that the Government may be watching chills associational and expressive freedoms.”⁹

It is easy to exaggerate the consequences of a ruling in favor of Vermillion. First, this does not require the Court to declare any portion of the PRA unconstitutional¹⁰ or make any constitutional ruling at all. When

⁶ *Westside Hilltop Survival Com. v. King County*, 96 Wn.2d 171, 179, 634 P.2d 862 (1981); see also *SCIA v. Snohomish County*, 61 Wn. App. 64, 74, 808 P.2d 781 (1991) (“mere receipt of campaign contributions by a councilmember” does not create any improper financial interest or violate the appearance of fairness).

⁷ *McCutcheon v. F.E.C.*, -- U.S. --, 134 S. Ct. 1434, 1441 (2014).

⁸ (*WIN*) *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1137 (9th Cir. 2000).

⁹ *State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014) (quotations omitted). The Court did not hold that there is a constitutional right to order heroin using text messages; rather it protected Hinton’s privacy to prevent the erosion of our constitutional rights.

¹⁰ West’s assertion that the Attorney General is a necessary party “misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation. The canon is not a method of adjudicating constitutional questions by other means. Indeed, one of the canon’s chief justifications is that it allows courts to avoid the decision of constitutional questions.” *Clark v. Martinez*, 543 U.S. 371, 381

applying the doctrine of constitutional avoidance, the Court is not defining the scope of any constitutional right; rather, it is “choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the drafters of the law] did not intend the alternative which raises serious constitutional doubts.”¹¹ Because such a ruling is only statutory, it can be revised or undone by the Legislature.

Second, this ruling would not suggest that the Court (the voters in 1972) supports secret unaccountable government. Rather, it is just a recognizing that the definition of “public record” drafted 43 years ago needs to be updated to account for modern communication habits in the digital era. It can be assumed the voters in 1972 would have wanted the people, through the Legislature, rather than nine Supreme Court Justices, to perform this legislative function.

Third, the Court does not need to break any new ground to rule in favor of Vermillion because the Court has already faced the identical issue in *Nast v. Michaels*¹² and *City of Federal Way v. Koenig*,¹³ and those cases provide a roadmap to resolve this case.

In contrast, the Court did not address the issue in the case at bar in *O’Neill v. City of Shoreline* because it was undisputed that the email at issue

(2005). (citations omitted). Thus standards for “as applied” and “facial” challenges do not apply, and the AG is not a necessary party.

¹¹ *Clark*, 543 U.S. at 381. The Second Circuit recently employed constitutional avoidance in *ACLU v. Clapper*, -- F.3d --, 2015 WL 2097814 at *28 n.12 (2d Cir. 2015) to avoid addressing the associational privacy issues stemming from mass surveillance.

¹² *Nast v. Michaels*, 107 Wn.2d 300, 730 P.2d 54 (1986).

¹³ *Federal Way v. Koenig*, 167 Wn.2d 341.

was a public record and the councilmember had already voluntarily allowed her computer to be searched.¹⁴ The Court’s statement that “[i]f government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined”¹⁵ was only dicta, made without consideration of Washington’s myriad of other open government laws¹⁶ that would still allow the people to hold their elected officials accountable.

Thus, contrary to West’s rhetoric,¹⁷ a ruling in favor of Vermillion would not be “a virtual ‘suicide pact’ fatal to the sound administration of a free society, popular sovereignty, [and] public accountability[.]” While such a ruling will limit the PRA’s disclosure mandate, it will nevertheless further the purpose of the PRA by protecting the very freedoms that the disclosure mandate is meant to protect.¹⁸

¹⁴ *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 150 n.4, 240 P.3d 1149 (2010).

¹⁵ *O’Neill*, 170 Wn.2d at 150.

¹⁶ This includes the campaign finance and financial disclosure obligations in chapter 42.17A RCW, the Open Public Meetings Act, chapter 42.30 RCW, the Conflict of Interests statute, RCW 42.23.030, the Appearance of Fairness act, chapter 42.36 RCW, along with whistleblower provisions and anti-corruption and bribery laws. West himself just filed an OPMA lawsuit alleging the Puyallup City Council conducted an illegal serial meeting via email (which alleged occurred well after West filed this lawsuit), all without being able to use the PRA to obtain emails from any of the councilmembers’ personal email accounts. While nothing suggests records related to West’s new OPMA lawsuit would be maintained in Vermillion’s personal email account, if the facts suggested otherwise, West could obtain those records from that account using discovery. *See, e.g., Eugster v. City of Spokane*, 110 Wn. App. 212, 226-27, 39 P.3d 380 (2002) (providing for the use of discovery in an OPMA claim). Thus, the only additional information gained by applying the PRA to personal email account will occur when there is not even *prima facie* evidence of wrongdoing.

¹⁷ See Respondent West’s Amended Opening Brief (“West Br.”) at 26.

¹⁸ Moreover, the “PRA’s mandate for broad disclosure is not absolute.” *R.A.C. v. Seattle Housing Authority*, 177 Wn.2d 417, ¶15, 300 P.3d 376 (2013), republished as amended at 27 P.3d 600 (2014). “Public policy may sometimes require right to know to yield” to

It is easy to get caught up in the importance of government transparency, especially today when it seems like every other day seems to bring a story about another government official using a personal email account to dodge public accountability. Our founding fathers foresaw that future Courts would face this type of dilemma where popular sentiment runs counter to our constitutional rights and gave clear direction on how to address this dilemma in Article 1, Section 32 in the State Constitution: “A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.”

This case is the time for the Court to protect the fundamental rights embodied in the First Amendment and Article 1, Section 7 by following the dictate of the PRA to be “mindful of the rights of individuals to privacy” and rule that records maintained by Vermillion in his personal email account and on his private computer are not covered by the PRA’s definition of “public record.”

By avoiding the need to make any constitutional ruling, the Court also respects the separation of powers by allowing the legislature to determine whether records in a personal email account should be subject to the PRA. The Legislature, unlike the Courts, can seek input for all interested parties and update the PRA based on the will of the people.

serve the public interest in privacy and effective government. *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 130 P.3d 840 (2006), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007); *see also, e.g., Servais v. Port of Bellingham*, 127 Wn.2d 820, 827, 904 P.2d 1124 (1995) (noting the PRA itself recognizes that “society’s interest in an open government can conflict with its interests in protecting personal privacy rights”).

II. RESPONSE TO WEST'S STATEMENT OF THE CASE

The issue before the Court is whether the trial court erred when it ruled on summary judgment that the definition of “public record” could apply to records maintained in Vermillion’s personal email account. This is a question of statutory interpretation and thus involves a pure question of law. West has tried to backfill his argument by adding facts to the record that were not considered by the trial court at summary judgment. As noted in Vermillion’s opening brief,¹⁹ these fact are irrelevant because this case should be resolved based on the meaning of statutory term “public record.” A statutory term cannot be “render[ed] ... a chameleon, its meaning subject to change depending on” the facts in any individual case.”²⁰ Nevertheless, these facts illustrate that the world will not end if Vermillion prevails – even without access to Vermillion’s personal email account, West was able to obtain 100s of emails from that account and separately obtain evidence for his Open Public Meetings Act claim.

III. ARGUMENT

A. The Court Can Avoid Resolving any Constitutional Issues by Ruling Vermillion’s Personal Email Are Not Public Records

When doubts are raised about legislation that could infringe on First Amendment rights, “it is a cardinal principle that [a court] will first ascertain whether a construction of a statute is fairly possible by which the question may be avoided.” *United States v. Rumely*, 345 U.S. 41, 45 (1954). This

¹⁹ Opening Brief of Appellant Vermillion (“Vermillion Br.”) at 6 n.9.

²⁰ *Clark*, 543 U.S. at 381.

Court's decisions in *Nast* and *Federal Way v. Koenig* provide a roadmap for applying the doctrine of constitutional avoidance to resolve this case by construing the definition of "public record" to exclude emails maintained in Vermillion's personal email account.²¹ This result is supported by the plain language in the PRA and the intent of the drafters of I-276.

1. Records Maintained by a Non-Agency Such as an Elected Official Are Not Public Records

The issue in *Nast* and *Federal Way v. Koenig* is indistinguishable from the issue in the case at bar – are records maintained by a non-agency²² "public records"? The Court started its analysis in *Federal Way v. Koenig* by acknowledging that "the records at issue ... clearly meet the first part of the PRA's definition of public records – both sets of records are writings that contain information relating to the conduct of government." *Federal Way v. Koenig*, 167 Wn.2d at 346. Thus, the Court focused on the final element, whether the records had been prepared, owned, used or retained"

²¹ Contrary to West's assertions, this issue was not addressed or resolved in *O'Neill* or *Mechling*; in both cases the elected officials voluntarily produced emails and did not raise any constitutional issues. See *O'Neill*, 170 Wn.2d at 150 n.4; *Mechling*, 152 Wn. App. at 838 (facts assumed emails from personal email accounts were responsive and no one objected). In *Nissen v. Pierce County*, 183 Wn. App. 581, 598, 333 P.3d 577 (2014), the appellate court did not address the constitutional claims.

²² Courts have already ruled individuals, include public employees and elected officials, are not "agencies." See, e.g., *Tiberino v. Spokane County*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (holding RCW 42.56.550(4) is "inapplicable" because "an individual – rather than the agency – opposes disclosure of the records"); *Bellevue John Does v. Bellevue School Dist.*, 129 Wn. App. 832, 864, 120 P.3d 616 (2005), *rev'd in part on other grounds*, 164 Wn.2d 199, 189 P.3d 139 (2008) ("Interpreting the attorney fees provision to be inapplicable in legal actions when an individual rather than an agency opposes disclosure is consistent with the purpose of the attorney fees provision"); see also *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009) (no fee award when elected official opposed disclosure).

by an “agency”: “Either the entity maintaining a record is an agency under the PRA or it is not.” *Id.* Analyzing three factors, the Court held that because “the courts are not included in the definition of agency,” “the PRA does not apply to the judiciary.” *Id.* The three factors are equally applicable to elected officials and show they are also not agencies:

Courts are not agencies²³

1. “[T]he PRA did not specifically include courts” within the definition of “agency.”

2. “PRA did not provide for exceptions to public disclosure requirements” that courts have recognized pursuant to their constitutionally rooted inherent authority over court records.²⁵

3. Existing law provides for alternative methods of access.

Elected officials are not agencies

1. The PRA expressly distinguishes between elected officials and agencies.²⁴

2. The PRA does not have any general privacy exemption or any other exemption that would protect an elected official’s First Amendment associational privacy rights.²⁶

3. Washington’s other open government laws allow for the use of subpoenas for enforcement.²⁷

Thus, this case can be resolved by applying *Nast* and *Federal Way v. Koenig* – records maintained by elected officials are not public records.

²³ See *Federal Way v. Koenig*, 167 Wn.2d at 345.

²⁴ See, e.g., RCW 42.56.060 (providing immunity for “public agency, public official, public employee, or custodian” who cause public records to be disclosed); .550(3) (“Judicial review of all agency actions . . . even though such examination may cause inconvenience or embarrassment to public officials or others”).

²⁵ This inherent authority is based on the separation of powers doctrine. *Yakima County v. Yakima Herald*, 170 Wn.2d 775, 795, 246 P.3d 768 (2011) (noting court’s inherent authority over its own records stems from the separation of powers doctrine); *Nast*, 107 Wn.2d at 303-04 (stressing importance of inherent authority).

²⁶ *Lakewood v. Koenig*, 182 Wn.2d at 93 (“The PRA contains no general exemptions from disclosure to protect individual privacy or vital government functions.”)

²⁷ See *supra* note 16.

2. The Drafters of I-276 Did Not Intend the Public Records Provisions of I-276 to Apply to Documents Maintained Amongst an Elected Official's Private Papers

Not only is a ruling in favor of Vermillion consistent the plain language of the PRA, but it is also consistent with the intent of the drafters of I-276. In addition to the public records provisions, I-276 contained other disclosure requirements for financial information, campaign finance information and lobbyist information. The drafters provided for broad subpoena power to enforce the first two obligations and limited subpoena authority for to enforce the lobbyist disclosure provisions,²⁸ but no subpoena power to enforce the public records provisions.

In *Seeber v. Public Disclosure Commission*, this Court had to confront these differences in subpoena power when the PDC attempted to use the broad subpoena authority to enforce the lobbyist disclosure provision. The PDC argued its actions were justified by the purpose of the act and were useful for enforcement.

This Court rejected the PDC's argument based on the plain language of the statute: "It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent." *Seeber*, 96 Wn.2d at 139. But the Court also rejected the PDC's claim that the act's broad mandate for disclosure demonstrated an intent to allow broader subpoena powers. Instead, the Court found that the absence of broader subpoena powers reflected the people's intent:

²⁸ See *Seeber v. Public Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981) (noting differences in subpoena power for disclosure obligations)

[I]t is reasonable to state that it was not the intention of the people to require such disclosures. Indeed, it is reasonable to assert that the people were aware of the dangers of inquiring into the private affairs of a lobbyist. Just because the information demanded is claimed to be for purposes of investigation or audit does not justify obtaining information beyond that authorized by the statute.

Seeber, 96 Wn.2d at 142-43. Although it may have been easier to enforce the requirements of I-276 with the broader power, that alone did not justify the PDC's position: "government arguably might be more efficient if it could get whatever it wanted at its pleasure. Fortunately, the citizens of this state do not subscribe to that doctrine, and government is limited in its reach by the constitution and laws of this state and of the United States." *Seeber*, 96 Wn.2d at 141.

The Court's decision in *Seeber* compels the conclusion that there is no implied subpoena power in the PRA to obtain records that are maintained amongst an elected official's private papers. Moreover, based on the complete absence of any subpoena power to enforce the public records provisions, it is also reasonable to presume "the people were aware of the dangers of inquiring into the private affairs" of elected officials and did not intend the PRA to apply to private papers of elected officials.²⁹

²⁹ West suggests no subpoena is needed because under chapter 40.14 RCW, the City "owns" any public records in Vermillion's email account. If the retention statute was intended to turn private property into public property, that would be an unconstitutional takings. Because the City does not have an ownership interest in these emails, they could not be obtained from Vermillion using a replevin action. Contrary to West's claim, the Court's decision in *Concern Ratepayers v. PUD No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999) does not stand for the proposition that an agency's access to a record is irrelevant. Rather, in that case, the agency had control of the record and the time of the request and then chose to lose control after the request was made. Vermillion is not arguing that he can turn records that are already public records into non-public records by transferring them to his personal email account.

B. West's Arguments Minimize the Scope of the Constitutional Right to Privacy

West's three primary arguments regarding privacy are recycled from his trial court briefing and are refuted in Vermillion's opening brief: West argues that (1) Vermillion did not have an expectation of privacy because the emails were public records³⁰; (2) no search of Vermillion's personal email account was required because Vermillion could be ordered to produce any such emails³¹; and (3) Vermillion had no expectation of privacy because he is a public employee.³²

West also expands on four waiver arguments, but these fail because he cannot show a knowing and intelligent waiver. *See City of Seattle v. Klien*, 161 Wn.2d 554, 565-66, 166 P.3d 1159 (2007); *State v. Elliott*, 121 Wn. App. 404, 409, 88 P.3d 435 (2004) (holding courts will "indulge every reasonable presumption against the waiver of fundamental rights.") (quotation omitted). Any waiver will be limited to its express terms and any ambiguity will be construed against a finding of waiver. *Elliott*, 121 Wn. App. at 409.

West first claims Vermillion waived his right to privacy in his personal email account when he took his oath of office and swore to uphold

³⁰ Privacy rights are based on the locations searched, not the item sought. Persons have a privacy right under Article 1, Section 7 in locations where they store private papers, including personal electronic devices and personal email accounts. Storing public records in the same locate does not eliminate that right to privacy. Vermillion Br. §VI(B)(1)-(2) at 12-18 and (C)(2)(b) at 27-30.

³¹ An order requiring a person to produce items stored in locations protected by Article 1, Section 7 is a "search." Vermillion Br. §VI(C)(2)(c) at 30-31.

³² The reduced expectation of privacy in the workplace does not reduce Vermillion's expectation of privacy in his personal email account or private computer. Vermillion Br. §VI(B)(3) at 18-21.

the laws of the state, which include the PRA. This claim begs the question because if the PRA does not apply, an oath cannot amend the statute. Moreover, Vermillion's oath to uphold the constitution cannot be interpreted as a waiver of his constitutional rights. Finally, a generic oath to uphold all laws cannot be turned into a knowing and intelligent waiver based on an inferred duty in one act.

Second, West asserts Vermillion waived his right to privacy in his personal email account because he deliberately chose to use that account after being "warned" that "[u]sing your personal email will open you to records requests as well. I would re-think using personal devices." West Brief at 6. The meaning of "public record," however, is fixed, and if it does not apply to personal email accounts, this inaccurate warning cannot result in a waiver. Moreover, this evidence is at best ambiguous and would not qualify as a valid waiver of constitutional rights.

Third, West claims that Vermillion waived his constitutional rights by violating the City's social media policy. But as the trial court found, the policy does not apply to city councilmembers. CP 184. Moreover, nothing in that policy could be interpreted as creating a knowing and voluntary waiver of Vermillion's constitutional right to privacy.

Fourth, West asserts Vermillion waived his right to privacy by failing to exhaust his remedies under the PRA because he did not seek an injunction under RCW 42.56.540. The PRA does not contain any "exhaustion of remedies" requirement. *Greenhalgh v. Dep't of Corr.*, 170 Wn. App. 137, 153 & n.9, 282 P.3d 1175 (2012). Thus a person does not

even waive statutory privacy protections, much less constitutional privacy protections, by failing to seek an injunction under RCW 42.56.540. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 410-11, 259 P.3d 190 (2011). Moreover, the City of Puyallup could not disclose emails located in Vermillion’s personal email account, so there was no reason for Vermillion to obtain an injunction.

C. The Need for Accountability Does Not Justify Subjecting Private Papers to the PRA’s Broad Disclosure Mandate

West responds to the argument that “an elected official is not an agency” by noting that an agency can only “act” through its agents and an elected official is an agent. The PRA’s disclosure obligations are not limited to records that show agents acting on behalf of the agency, so this reasoning cannot justify the result West seeks.

The PRA’s disclosure obligation would be subject to “exacting scrutiny,” which requires the provision to be narrowly tailored so that there is “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *Doe v. Reed*, 561 U.S. 186, 196 (2010).³³ It must also “employ[] means closely drawn to avoid

³³ Note, *Doe v. Reed* considered associational privacy for signers of a referendum, which conveys very little about the signer’s substantive views and thus was treated like other cases dealing with lists of names, which are subject to a risk of harm analysis. *Doe*, 561 U.S. at 194-95. Where substantive communications are involved, the harm comes from disclosure itself. See *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) (noting difference when substantive communications rather than lists are at issue). Moreover, when a court applies the doctrine of constitutional avoidance, no proof of an actual violation is required – just constitutional doubt. *Clark*, 543 U.S. at 180 (noting this point and citing to a law review article that lists cases where the Court had applied constitutional avoidance in one case and later confronted the constitutional issue and found no violation). In *Doe v. Reed*, the PRA clearly applied so there basis for avoiding the issue.

unnecessary abridgement of associational freedoms.” *McCutcheon*, 134 S.Ct. at 1444. The disclosure obligation cannot be overbroad or vague. *PDC v. Rains*, 87 Wn.2d 626, 630-31, 555 P.2d 1386 (1976).

Under exacting scrutiny, the Court must “assess the fit between the stated governmental objective and the means selected to achieve that objective.” *McCutcheon*, 134 S.Ct. at 1445. “In the First Amendment context, fit matters.” *Id.* at 1446. Under this level of scrutiny, the “fit” need not be “perfect,” but it must still be “narrowly tailored to achieve the desired objective.” *Id.* at 1447. A law that “does not avoid unnecessary abridgement of First Amendment rights ... cannot survive” exacting scrutiny. *Id.* at 1446.³⁴ With the PRA, there is no “fit.”

“The purpose of the PRA is to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them by providing full access to information concerning the conduct of government.” *Kitsap County Pros. Att’y Guild v. Kitsap County*, 156 Wn. App. 110, 118, 231 P.3d 219 (2010). As demonstrated in Vermillion’s opening brief, however, the PRA’s broad disclosure mandate is in no way tailored to serve accountability. Vermillion Br. at 21-24. Instead, “[a]ny member of the public can demand any public record from any public agency at any time for any reason[.]” *Soter*, 131 Wn. App. at 900.

³⁴ See, e.g., *Buckley*, 515 U.S. at 202 (requirement that signature gatherers disclose amounts paid was unconstitutional because it was not tailored to public’s legitimate informational interest).

This bad fit only gets worse when the limited authority of a single councilmember is taken into account. *See* Vermillion Br. at 41-41; *see also* *Citizens for Des Moines, Inc. v. Petersen*, 125 Wn. App. 760, 769, 106 P.3d 290 (2005) (“Although the manager reports to the city council, the city manager is the sole person vested with authority to supervise the administrative affairs of the city” so councilmember could not direct staff to use his company to tow illegally parked cars) (citing RCW 35A.13.080 and .120). Because of these limitations, if Vermillion tried to use his personal email account to conduct city business, his actions would be void *ab initio* and could subject him to recall.³⁵

West, however, argues that he needs the PRA to see Vermillion’s correspondence with campaign donors or else “secret concaves and cabals” will take over government. West. Br. at 8. The Court of Appeal addressed a similar argument in *Barry v. Johns* and held that long as campaign contributions are reported and the other open government laws are followed, the “integrity of our democratic system” is not “threatened if elected municipal officers are allowed to influence decisions that will benefit” their political supporters. *Barry v. Johns*, 82 Wn. App. 865, 870, 920 P.2d 222 (1996). “[I]n a representative democracy, we elect our legislators precisely to carry out agendas and promote causes with full knowledge that their own personal predilections and preconceptions will

³⁵ *See Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (2001) (email exchange between school board violated the Open Public Meetings Act); *In re Recall of Ward*, 175 Wn.2d 429, 438-39, 282 P.3d 1093 (2012) (OPMA violation legally sufficient to support recall).

affect their decisions.” *Barry*, 82 Wn. App. at 879. “As long as these predilections do not lead them to line their pockets or otherwise abuse their offices, we leave the wisdom of their choices to the voters. If the voters do not like their representatives’ agendas or voting decisions, they are free to vote them out of office.” *Evergreen Sch. Dist. v. Clark County Comm. on Sch. Dist. Org.*, 27 Wn. App. 826, 833, 621 P.2d 770 (1980). The “evil” West sees is not corruption, it’s representative democracy.³⁶

D. There Is No Simple Fix Under the PRA to Protect First Amendment Rights If the PRA Applies

West proposes a two “solution” that he claims Vermillion could have used to protect his right to privacy:

- “had Puyallup City Council Member Vermillion really wished to secure his ‘privacy interests’ he could have done so by the simple expedient of conducting all City business at his City address” West Br. at 28.
- “Vermillion was merely directed, as every public officer should reasonably be, to disclose the public records of his duties as a Puyallup City Council Member taken on behalf of the public.” West Br. at 43.

West’s two solution, however, would only work with the current definition of “public record” if the Court accepts West’s assertion that the doctrine of constitutional avoidance means courts should pretend the constitutional issues don’t exist.³⁷ Avoid does not mean ignore.

³⁶ Ironically, what would be improper is if Vermillion used his city email account to solicit these contributions. Under West’s theory, however, the City would be required to expend public resources to distribute those emails to anyone who asked for them.

³⁷ To borrow an analogy from West, he considers this doctrine like the “Jedi Mind Trick”: “these are no the constitutional issues you are looking for.”

1. Vermillion Could Not Simply Use a City Email Address for All of His City-Related Communications

West's first solution fails because Vermillion is prohibited by RCW 42.17A.555 from using his city email account for many of his private politically emails. While that statute likely does not apply to prohibit sending any political communication, there is no *de minimis* exception so elected official are encouraged to err on the side of using personal accounts.³⁸ Moreover, the distinctions between what is prohibited and what is not prohibited under that statute is too fine of a line to pass First Amendment constitutional muster. For example, the PDC has suggested³⁹ communications are political in nature and should not be sent using public resources if the communication contains:

- statements that “convey a tenor of support” for a campaign
- references to “outside sources of information, which could include editorial content and political campaign” information.
- “emotionally-laden language”
- “an urgent tone ... that may be perceived as an attempt to promote” a campaign

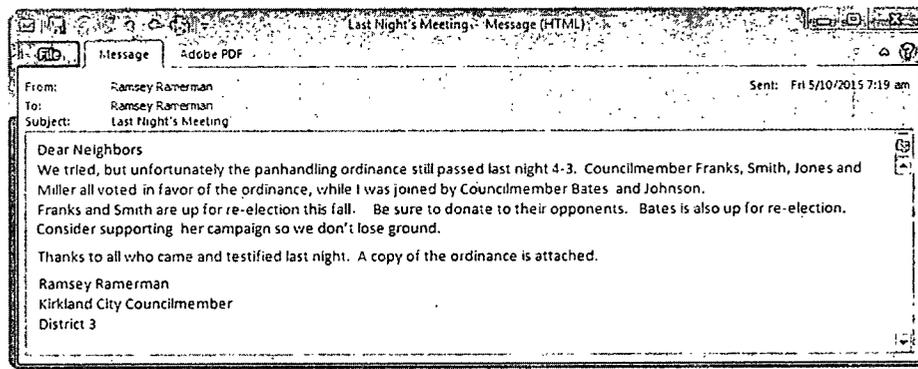
No one has a right to use public resources to support campaign activities so the subtleties in RCW 42.17A.555 can be avoid by erring on the side of

³⁸ See, e.g., *Getting into Office: Being Elected or Appointed into Office in Washington Counties, Cities, Towns, and Special Districts* at 19 (MRSC 2013) (“prudence would suggest that, if the legal authority to use a public facility is not clear, the decision be in favor of nonuse.”), available at: <http://mrsc.org/getmedia/865D9DE0-1EE5-45AC-8F82-0B4B773D0A79/gio13.aspx> (Last visited April 26, 2015). See also *Herbert v. PDC*, 136 Wn. App. 249, 148 P.3d 1102 (2006) (no *de minimis* exception so single email violated prohibition).

³⁹ The bulleted examples are quotations taken from sample guidance letters found in PDC's January 12, 2015 memorandum entitled “Election-Related Communications by Local Government Agencies” available at <http://www.pdc.wa.gov/archive/filerassistance/manuals/pdf/Fact.Sheets.pdf> (last visited May 15, 2015).

using private resources. But these subtleties would threaten to chill First Amendment rights if it governed what was and what was not a “public record.” See *WSRP v. PDC*, 141 Wn.2d 245, 265-66, 4 P.3d 808 (2000) (campaign regulations must be sharply drawn and give “wide latitude”).

Consider the following fictitious email:⁴⁰



This email would likely fall within the prohibition in RCW 42.17A.555. Likewise, it would fall outside of that prohibition if it only contained the first and last sentence with the attached a copy of the ordinance. The problem comes when you try to determine when the email crosses the line. What if the email just contained the first two sentences noting how the councilmembers voted? What if the two sentences urging support in the campaigns were removed? Does timing make a difference? What if elections were 15 months away instead of 3 month? If an elected official simply errs on the side of using a personal email account, these questions

⁴⁰ This fictitious email is based on an actual email at issue in a case that involves this exact issue currently being litigated in Skamania Superior Court: *Esch v. PUD No. 1 of Skamania County*, No. 13-2-00109-0. The author of this brief is defending the PUD in that case. The trial court will issue a ruling on this issue May 28, 2015.

become less relevant. But if an elected official had to navigate these subtle distinctions to protect his First Amendment rights, those subtleties become unconstitutionally vague restrictions.⁴¹

2. Vermillion Could Not Produce All City-Related Emails Without Sacrificing His First Amendment Rights

The absence of a bright-line distinction between political and public business also makes West's second "simple" solution unworkable. The definition of "public record" is too vague to allow Vermillion to confidentially distinguish between public records that "contain information relating to the conduct of government" and political emails that by definition are emails "of or relating to ... the conduct of government."⁴² This vagueness threatens First Amendment rights. Moreover, the *in camera* review process currently in the PRA does not solve this First Amendment problem⁴³ because it would require Vermillion to hire an attorney and file a lawsuit, which if he lost could result in agency liability.

This is the exact type of situation that can create a chilling effect on First Amendment rights. "The First Amendment does not permit laws that

⁴¹ Moreover, it cannot be said that the public's interest in the email decreases based on the addition of campaign-related statements. "The creation of meaningless distinctions between permitted and nonpermitted political activity is [an] absurd consequence" and the Court should not construe the PRA in a manner that creates such distinctions. *Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748, 754, 675 P.2d 592 (1984) (refusing to adopt a limiting construction that created meaningless distinctions to preserve an ordinance limiting political activities of city employees).

⁴² Merriam-Webster Dictionary on line, definition "1(a)" of "political." (Available at <http://www.merriam-webster.com/dictionary/political>) (last visited April 25, 2015).

⁴³ *In camera* review can violate associational privacy right. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 167, 786 P.2d 781 (1990) (that "*in camera* review of associational materials is not a course to be routinely undertaken in a First Amendment cases.").

force speakers to retain a campaign finance attorney ... or seek declaratory rulings before” exercising their First Amendment rights. *Citizens United v. FEC*, 558 U.S. 310, 325 (2010). Restrictions on First Amendment rights that involve “the drawing of fine distinctions” and require “substantial litigation over an extended time” to set those lines create a “serious risk of chilling” First Amendment rights. *Citizens United v. FEC*, 558 U.S. 310, 326-27 (2010). “First Amendment freedoms need breathing space to survive” and any regulation that “requires intricate case-by-case determinations to verify” whether it applies will have the opposite result, creating a chilling effect from uncertainty. *Citizens United*, 558 U.S. at 329 (citations omitted).

Without any clear direction on how to distinguish between private political emails and public records, West’s second solution would require Vermillion to guess what emails qualified as a public record, with the wrong answer potentially leading to significant liability for his agency. This would unconstitutionally chill Vermillion’s First Amendment rights.

3. There Is No Way to Protect Vermillion’s First Amendment Rights by “Construing” the Phrase “Relating to the Conduct of Government”

While courts will often avoid First Amendment challenges by adopting a limiting construction for a statute, that will not save the statute if the limiting construction itself makes the statute unconstitutionally vague. *See Baggett v. Bullitt*, 377 U.S. 360, 371-74 (1964). In addition, “a limiting construction is only appropriate if the statute is readily susceptible to the limiting construction; rewriting a law to conform it to constitutional

requirements would constitute a serious invasion of the legislative domain.” *State v. Strong*, 167 Wn. App. 206, 212-13, 272 P.3d 281 (2012); *see also State v. Ries*, -- Wn.2d --, 2015 WL 2145986 (2015) (if court used codified intent section to re-write a statute to fulfill that intent, “it would be a clear judicial usurpation of legislative power”) (quotation and alteration omitted).

The most logical way to limit the application of the phrase “relating to the conduct of government” would be to look at the role the email has played in agency business or to look at whether the agent was serving in an official capacity or a personal capacity when the email was sent or received.⁴⁴ The first distinctions might help explain why a purely personal email that related to an agency is not a public record, and the second might be useful when applied to a public employee, but in the case of elected officials and their political roles, these distinctions do not provide the guidance needed to protect First Amendment privacy.

The simple fact is that an elected official’s political emails will relate to agency business. Thus, if the current version of PRA applied to Vermillion’s personal email account, he would be put in the impossible situation of determining which of his political emails “of or relating to ... the conduct of government” do not contain “information relating to the

⁴⁴ Courts have in fact looked at these two factors when determining rights under the PRA. *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989) (looking at “the role the documents played in the system” to determine if it relates to the conduct of government. (citing *Cowles Publ’g Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981)); *Cornu-Labat v. PHD No. 2*, 177 Wn.2d 221, 240, 298 P.3d 741 (2013) (distinguishing between person’s role as an employee and as a citizen); *see also Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 77, 265 P.3d 956 (2011) (records held by board member in his personal capacity were not records within the control of the non-profit).

conduct of government.” Short of rewriting the statute, the only way to construe the PRA to avoid the constitutional issues in this case is to rule that the PRA does not apply to records maintained in Vermillion’s personal email account.

IV. CONCLUSION

Ultimately, the problem in this case is much bigger than the vague wording of the definition of “public record.” The biggest problem is that the PRA’s “strongly worded mandate for broad disclosure of public records”⁴⁵ is too strong to turn on an elected official’s private papers without violating the constitution. Moreover, the PRA with its broad mandate is supposed to be a tool to limit government power, but the trial court’s ruling would place the power of the PRA into the hands of those who control government, which could then be used to harass whistleblowers and dissident politicians who won’t toe the government line. “It is important to good government that public employees be free to expose misdeeds and illegality in their departments. Protecting such employees from unhappy government officials lies ... at the core of the First Amendment.”⁴⁶

History shows that our privacy rights are rooted in the need to protect a dissent politician from those who controlled the government. In 1763, the anonymous North Briton No. 45 was declared seditious libel for criticizing the King’s secrecy in signing a peace treaty: “The ministry are not ashamed of doing the thing in private; they are only afraid of its

⁴⁵ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

⁴⁶ *Myers v. Hasara*, 226 F.3d 821, 826 (7th Cir. 2000).

publication.”⁴⁷ King George correctly believed it was written by parliament member John Wilkes. To prove this and punish Wilkes for seditious libel, King George used a general warrant to seize all of Wilkes’ papers and all of the publisher’s private papers. These warrants were subsequently declared illegal in the pair of cases entitled the “*Cases of the Seized Papers*.”⁴⁸ Wilkes’ struggle and these two cases helped inspire the American Revolution and the First and Fourth Amendments. If King George could have used the PRA, he would not have needed a general warrant.

This Court should not turn the PRA’s broad disclosure mandate into a general warrant. Instead, it should conclude that records maintained by elected officials, like records maintained by courts, are not public records because they are not maintained by public agency.

This resolution avoids the need to address any of the constitutional issues in this case and leaves it to the Legislature to update the PRA to reflect the communication habits of the modern politician that could not have been contemplated in 1972, taking into account the politician’s constitutional rights.⁴⁹ One possible option on how this could be achieved is attached to this brief as an appendix.

⁴⁷ The North Briton No. 45 was published April 23, 1763 and is available in The North Briton, Volumes 1-2 at pages 261-69, which can be found at Google books at [http://books.google.com/books?id=xr8BAAAAYAAJ&dq=The%20North%20Briton%](http://books.google.com/books?id=xr8BAAAAYAAJ&dq=The%20North%20Briton%20) (last visited May 24, 2015). The quote above is on page 267

⁴⁸ See *Stanford v. Texas*, 379 U.S. 476 (1965) (citing *Entick v. Carrington* and *Wilkes v. Wood*); see also *Vermillion Br.* at 12-13.

⁴⁹ The Legislature could even determine that the current definition should apply to personal email accounts, which would then require the Court to address the constitutional issues. But if those are addressed now, it will limit the Legislature’s authority.

RESPECTFULLY SUBMITTED this 27th day of May, 2015.

A handwritten signature in black ink, appearing to be 'R. Ramerman', written in a cursive style.

By: _____
Ramsey Ramerman
Ramerman Law Office PLLC
WSBA # 30423
*Attorneys for Appellant Steve
Vermillion*

Appendix

The following draft statute seeks to address the constitutional concerns as follows

1. **Bright Line:** The disclosure obligation is keyed to an objective fact – does the communication contemplate an agency employee other than the official taking some action? This objective standard, when combined with the presumption regarding constituent communications and the risk-free in camera review option provide clear guidance and allow the official the wide latitude to err on the side of protecting privacy.
2. **Narrow Tailoring:** Disclosure obligation is limited to communications with an elected official that contemplate someone from the agency other than the official taking some action. These communications are the most likely to involve the use of agency resources and therefore are need for accountability.
3. **Search authority.** By making an intentional violations a crime, it allows a magistrate to issue a search warrant based on probable cause.

Section 1: Disclosure requirement for elected officials' communications

Elected official who sends or receives emails for "agency business" shall either

- (1) uses an official agency email account; or
- (2) complies with the copy or forward requirement if using private email account.

An elected official has complied with the "copy or forward requirement" if the agency is copied on the email or the email is forwarded to the agency promptly but no later than 20 days of the elected official sent or reviewed the email.

Section 2: Definitions

1. Definition of "public record" includes records maintained in elected official's private email account that was sent or received for agency business if that email was not copied or forwarded to the agency

2. An elected official sends or receives a communication for "agency business" if the communication contains information relating to the conduct of the agency and:
 - (a) the communication evidences any past transaction, other than legislative action, involving at least one other agency employees; or
 - (b) the communication would require at least one other employee to take action on behalf of an agency in the future, other than legislative actions or duties resulting from legislative action passed after the communication is sent; or
 - (c) the communication was sent to or receive by the elected official on behalf of the agency pursuant to a duty that has been expressly delegated to the elected official.

A communication is presumed NOT to have been sent or received for "agency business" if the communication is between an elected official and a non-agency employee including constituent or supporter that does not reference any future action by an agency employee other than actions resulting from future legislation.

3. An action is taken by an "agency employees" if the action was done or will be done by an agency employee or volunteer while that person is acting in their official agency capacity and the action relates to the conduct of the agency.

Section 3: Sanction and Subpoena Authority

It shall be a misdemeanor for an elected official to knowingly and intentionally fail to forward an email from the elected official's personal email account that was sent or received for agency business and has not been copied to the agency. An elected official who determined in good faith that a record was not sent or received for agency business shall have a complete defense to such an action.

A court may issue a subpoena upon a showing of probable cause to believe that the elected official has failed to forward an email sent or received for agency business that was not copied to the agency. Unless the purpose of the request is fully disclosed, any such

subpoena must provide specific parameters for responsive emails including one or more of the following pieces of information: the full name or email address of a recipient; a specific date or date range that the email was sent or received; or search terms that are specific enough to identify specific responsive records.

Section 4: In camera review

Whether or not a subpoena has been issued, an elected official or agency may submit emails maintained in a personal email account to a neutral magistrate to determine if the records qualify as public records and whether any privacy-based exemption applies.

Any records submitted for in camera review shall be sealed in the court file unless the court determines the record is subject to disclosure and all appeals have been exhausted.

Anyone with a pending public records request must be given timely notice and may intervene but a requestor is not a necessary party unless the person had already obtained a subpoena.

No penalties or attorney fees shall be awarded against an agency using this in camera review process unless a subpoena had already been issued and the official is found to have acted in bad faith by withhold the record in the first instance.

CERTIFICATE OF SERVICE

I, Ramsey Ramerman, certify under penalty of perjury that true and correct copies of the above attached document were delivered via email, with the parties' agreement to accept email service:

Arthur West awestaa@gmail.com
Kathleen J. Haggard: kathleen@pfrwa.com

Executed at Kirkland, Washington, this 27th day of May, 2015.



Ramsey Ramerman

OFFICE RECEPTIONIST, CLERK

To: Ramsey Ramerman
Cc: Arthur West; Kathleen J. Haggard; Steve Kirkelie
Subject: RE: West v. Vermillion No. 90912-1 REPLY Brief of Appellant Vermillion

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Cc: Ramsey Ramerman; Arthur West; Kathleen J. Haggard; Steve Kirkelie
Subject: West v. Vermillion No. 90912-1 REPLY Brief of Appellant Vermillion

90912-1 West v. Vermillion & City of Puyallup

Reply Brief of Appellant Steve Vermillion

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NOTE, because I can only have one "official" email address, my city of Everett email address is listed with the Bar.

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