

Amended

No. 48601-6

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

STEVE VERMILLION AND
THE CITY OF PUYALLUP,
Appellants,

v.

ARTHUR WEST,
Respondent

RESPONDENT'S
SUPPLEMENTAL BRIEFING

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Table of Contents

Table of Authorities.....	3
I Argument.....	4
A. The published precedent of the unanimous Supreme Court in <i>Nissen v. Pierce County</i> requires affirmation of the ruling of the trial court in this case.	4
B. There is sufficient State interest in ensuring the integrity of both the electoral process and the activities of elected public officers after they are elected to justify disclosure of the written communications of public officers made in the course of their public service in accord with the 1st Amendment.....	7
C. The potential for disclosure of communications related to the official duties of a public servant is a necessary adjunct to the sound governance of a democratic society and serves to promote a substantial governmental interest.....	9
D. Appellant Vermillion's refusal to follow the direction of his employer to employ a separate email address for his private communications was a voluntary action that equitably waived any good faith claim to privacy...11	11
E. Local Government functionaries are not “Legislators” or “Judges” but members of Boards addressing local issues and making local regulations and land use decisions subject to the Open Public Meetings Act and the Appearance of Fairness Doctrine	13
Conclusion.....	16

Table of Authorities

Amren v. City of Kalama,
131 Wash.2d 15, 31, 929 P.2d 389 (1997).....9

Asgeirsson v. Abbott, 696 F.3d 454 (5th Cir. 2012). 11

*Citizens United v. Federal Election
Comm’n*, 558 U. S. ____, ____ (2010).....10

Fritz v. Gorton, 83 Wn.2d 275, 517 P.2d 911, (1974).....7

Garcetti v. Ceballos, 547 U.S. 410 (2006).....11

Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001).....5

John Doe No. 1 v. Reed,
561 U.S. 186, 130 S.Ct. 2811 (2010).....9-11

New York Times Co. v. Sullivan, 376 U.S. 254,
11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964).....8

Nissen v. Pierce County,
183 Wn.2d 863, 357 P.3d 45 (2015).....5-6

State v. Hinton, 169 Wn. App. 28, 280 P.3d 476 (2012).....5

United States v. Dupree,
781 F. Supp. 2d 115, 159 (E.D.N.Y. 2011).....5

United States v. Lifshitz,
369 F.3d 173, 190 (2d Cir. 2004).....5

Waters v. Churchill, 511 U. S. 661, 671 (1994).....10

Statutes

RCW 42.56.030.....9

RCW 42.56.010(3).....5

Articles

The Declaration of Independence,
Thomas Jefferson, et al, July 4, 1776.....8

Theodore Roosevelt, Third Annual
Message to Congress, December 7, 1903.....15

A. The published precedent of the unanimous Supreme Court in *Nissen v. Pierce County* requires affirmation of the ruling of the trial court in this case.

This is an action for disclosure of public records concerning the governance of the City of Puyallup sent to or received at an ostensibly “private” email account, Steve@stevevermillion.com.

The Court has requested that the parties provide additional briefing on the impact of the ruling of the Supreme Court in *Nissen v. Pierce County* on this case.

The Supreme Court's decision in *Nissen* should be seen to be determinative of the issues in this appeal, because the issue of whether (former) Puyallup City Council Member Vermillion's emails were potentially subject to the PRA in this case was necessarily determined in the unanimous determination of the Supreme Court in *Nissen* on the virtually identical issue of the Pierce County Prosecutor's text messages.

Since the *Nissen* ruling was unanimous in regard to the potentially public nature of Pierce County Prosecutor Lindquist's text messages, there is absolutely no basis for a different result in the present case, which presents nearly identical legal issues in regard to the email communications of former Puyallup City Council Member Vermillion.

In fact, to the extent there is any difference in the issues in this case, there is an even more compelling case for the public nature of the Vermillion communications, because emails are less protected than telephone conversations¹, and, as the record demonstrates, Council Member Vermillion deliberately refused to employ a City email address and attempted to veil all of his City-related email communications under the specious claims of personal or associational privacy.

Unlike *Nissen*, in this case, the City did disclose a portion of the hundreds of withheld emails that Council Member Vermillion sent from or received at his “private” email address, and they universally involved the conduct of the public's business.

In *Nissen*, our Supreme Court answered the core issue of the underlying PRA complaint, whether a public employee’s text messages on work-related matters sent and received from a private cell phone may be public records.

¹ See *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (holding that, like letter writers, whose expectation of privacy ends upon delivery of the letter, individuals do not possess a legitimate expectation of privacy “in transmissions over the Internet or e-mail that have already arrived at the recipient”); *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (a sender of an e-mail “would lose a legitimate expectation of privacy in an e-mail that had already reached its recipient”); *United States v. Dupree*, 781 F. Supp. 2d 115, 159 (E.D.N.Y. 2011) (holding that defendants could not claim a legitimate expectation of privacy in e-mails that they gave an employee permission to access and view). *State v. Hinton*, 169 Wn. App. 28, 280 P.3d 476 (2012).

“Records that an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be ‘public records’ of the agency under RCW 42.56.010(3).” Nissen v. Pierce County, 183 Wn.2d 863, 357 P.3d 45 (2015).

In the context of the dispute between Pierce County and *Nissen*, the *Nissen* court held that...

“text messages sent or received by Lindquist in his official capacity can be public records of [Pierce] County, regardless of the public or private nature of the device used to create them.” *Nissen*, 183 Wn.2d at 873.

As to Nissen’s 2011 complaint under the PRA, the Supreme Court held that her complaint sufficiently alleged that “at least some” of the text messages sent from Lindquist’s private cell phone may be public records. *Nissen*, 183 Wn.2d at 888.

However, the Supreme Court could not determine whether or not the text messages at issue were, in fact, public records because Pierce County and Lindquist had not yet produced the text of five messages Nissen requested. *Nissen*, 183 Wn.2d at 888. The Court directed the parties as follows:

Lindquist must obtain a transcript of the content of all the text messages at issue, review them, and produce to the County any that are public records consistent with our opinion. The County must then review those messages—just as it would any other public record—and apply any applicable exemptions, redact information if necessary, and produce the records and any exemption log to Nissen. As to text messages that Lindquist in good faith determines are not public records, he must submit an affidavit to the County attesting to the personal character of those messages. The County must

also produce that affidavit to Nissen. *Nissen*, 183 Wn.2d at 888.

By coincidence, the ruling of the Superior Court in this case requiring the City to produce the Vermillion email records exactly conformed to the procedure set forth by the Supreme Court in *Nissen*. Further, since Vermillion, unlike Pierce County Prosecutor Lindquist, had refused to employ any other email address for his public related communications in violation of the policy and direction of the City, and since several hundred records were produced that demonstrated the account was routinely used to conduct the public's business, there is absolutely no good faith basis for the City or former Council Member Vermillion to assert that the records were entirely or legitimately "private".

B. There is sufficient State interest in ensuring the integrity of activities of elected public officers after they are elected to justify disclosure of the written communications of public officers made in the course of their public service in accord with the 1st Amendment.

Appellants, in their briefing, make reference to privacy interests and the 1st Amendment, apparently attempting to improperly maintain a constitutional challenge to the PRA as a whole. Even if the appellants had not waived their rights to challenge the constitutionality of the Act, these arguments profoundly misunderstand the role of the 1st Amendment in a democratic society and the black letter precedent of *Fritz v. Gorton*, *New York Times Co. v. Sullivan*, and *Doe v. Reed*.

Significantly, in *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911, (1974) the Supreme Court expressed a view of privacy and the 1st Amendment that required disclosure rather than concealment of information concerning the conduct of public officials

The right of privacy, as with other rights, is not an absolute. There are inherent limitations of a unique and significant nature regarding any claim to the right of privacy on the part of candidates and incumbent public officials. It seems almost too obvious for argument that the candidate who enters the public arena voluntarily presents or thrusts himself forth as a subject of public interest and scrutiny. While there are many intimate details which may be beyond the scope of legitimate public interest, information which clearly and directly bears upon the qualifications and the fitness of those who seek and hold public office is unquestionably in the public domain. *Fritz v. Gorton*, 83 Wn.2d 275, at 294-5

Ironically, the appellants' novel beliefs concerning the 1st Amendment are directly in contrast to the holdings of both Supreme Courts that the 1st Amendment interests of the public to information concerning the conduct of government outweigh the competing interest of the appellant or any individual that such information be concealed...

First amendment freedom of the press has been dramatically construed to encourage and protect public discourse regarding the conduct of public officials. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964),... "The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information."

(Italics ours.) *Fritz*, supra, citing *New York Times Co. v. Sullivan*, at 272.

As Thomas Jefferson observed in one of the primary documents establishing American democracy²....

“governments are instituted among men, deriving their just powers from the consent of the governed”

The appellants in this case attempt to obscure the basic and fundamental requirement of democratic society that for the people to grant the consent necessary for the just exercise of the powers of government it is necessary for them to know what their public officials like Mark Lindquist and Steve Vermillion are doing to exercise those powers.

C. The potential for disclosure of communications related to the official duties of a public servant is a necessary adjunct to the sound governance of a democratic society and serves to promote a substantial governmental interest.

The courts have consistently recognized that the Public Records Act is essential to the fundamental necessity of the preservation of democratic institutions and the people’s sovereignty. *See Amren v. City of Kalama*, 131 Wn.2d 15, 31, 929 P.2d 389 (1997): The purpose of the PDA is to “ensure the sovereignty of the people and the accountability of the

2 See The Declaration of Independence, Thomas Jefferson, et al, July 4, 1776

governmental agencies that serve them” by providing full access to information concerning the conduct of government.

As the intent section of RCW 42.56.030 expressly provides...

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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

In *Doe v. Reed*, the federal Supreme Court, in conformity with these fundamental principles, rejected, by an 8-1 majority, a 1st Amendment challenge to the Washington State Public Records Act, holding that...

Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we reject plaintiffs’ argument and conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process.

It would be irrational to conclude that the public interest in transparency and accountability ceases when a public official is elected. If anything, these interests are more compelling in regard to an elected official exercising the duties of public office than a candidate for office.

Another critical distinction ignored by the appellants in this case is that the disclosure requirements of the PRA do not punish or prohibit speech, or prevent anyone from speaking...

Also pertinent to our analysis is the fact that the PRA is not a prohibition on speech, but instead a disclosure requirement. “[D]isclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking.” Citizens United v. Federal Election Comm’n, 558 U. S. ___, ___ (2010) (slip op., at 51) (internal quotation marks omitted).

Clearly, the appellants’ 1st Amendment arguments ignore the basic reality that...

To begin with, even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. *Waters v. Churchill*, 511 U.S. 661 (1994)

As the Supreme Court of the United States has recognized, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006),

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, e. g., *Waters v. Churchill*, 511 U. S. 661, 671 (1994)

The arguments of the appellants in this case attempt to make a simple matter overly complex, and deny the basic realities of the just exercise of the powers of democratic government and of responsible public service. See *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012) cert denied, 133 S. Ct. 1634-2013.

D. Appellant Vermillion's refusal to follow the direction of his employer to employ a separate email address for his private communications was a voluntary action that equitably waived any good faith constitutional claim.

This is an action for disclosure of public records concerning the governance of the City of Puyallup sent to or received at an ostensibly “private” email account, Steve@stevevermillion.com.

Appellant Puyallup City Council Member Vermillion, in his declaration in support, (CP 71-2) certified that the City possessed copies of numerous records sent to, and received by him at his ostensibly “private” email address, which address was apparently his preferred mode of contact with the City for his work as a City Council Member.

When the City was finally compelled by the Court to produce the records in its possession sent to or received from this address, it produced **literally hundreds of emails City employees sent to Steve@stevevermillion.com or which were forwarded to various City employees and officers from Council member Vermillion's ostensibly “private” email account.** (CP at 331)

This pattern of communication was no inadvertent accident, as the email appearing at CP 332 demonstrates that Vermillion refused to employ a City email for communications and was expressly warned by Puyallup City Manager Ralph Dannenberg that

Using your personal email will open you to records requests as well. I would re-think using personal devices. (CP 332)

Vermillion's counsel on page 3 of his motion for summary judgment, (CP 45) lines 1-4, also states that records were sent by City employees to Vermillion's "private" internet address and records were forwarded to the City from Vermillion's "private" address. These known responsive records were not identified, disclosed or exempted by the City of Puyallup, and no privilege log was been prepared until a motion for contempt was noted and set on September 2nd, 2014. (CP 330-334)

The City and Vermillion not only failed to produce records within their control, but instead advanced a series of creative red herring "personal privacy" related issues to attempt to obscure their deliberate withholding of records in their possession: records which were of substantial interest to the public. Under these circumstances, it can readily be seen that these spurious constitutional issues have been raised merely to obstruct the disclosure of records showing how the Puyallup City Council conducts the publics' business in smoky back room conclaves.

E Local Government functionaries are not "Legislators" or "Judges" but members of Boards addressing local issues and making local regulations and land use decisions subject to the Open Public Meetings Act and the Appearance of Fairness Doctrine.

The appellants also seek to improperly evade the clear writing on the wall of *Nissen* by attempting to establish a spurious and unworkable distinction between municipal officials for the purpose of disclosure.

Such overly officious quibbling over the technical duties of municipal officials would not only undermine the clear standard set forth by the Supreme Court in *Nissen*, it would make disclosure under the PRA dependent upon a case specific analysis of every different public official in every single records request. This type of uncertainty in the law would spawn a proliferation of unnecessary litigation and erode the clear precedent and bright line standard set by a unanimous Supreme Court.

Municipal officials like former Puyallup Council Member Vermillion are not “Legislators” or “Judges”, although they may at times act in both of these capacities in the conduct of their duties on behalf of the public. However, as members of boards making final decisions as to local land use issues, the correspondence of elected City and County Council Members on these subjects is necessarily public if compliance with the Open Public Meetings Act and the Appearance of Fairness Doctrine is to be assured.

This reality is underscored by the records appearing at CP 337-364. As these records demonstrate, the Puyallup City Council, and appellant Council Member Vermillion, despite the existence of these laws that (according to the brief filed by appellant Vermillion) “Rigorously

promote transparency and accountability” blatantly violated the OPMA by means of serial email communications. (CP 337-364)

If constituents and political supporters could communicate covertly with their elected representatives, political corruption, ward healing, and violations of the Appearance of Fairness Doctrine and the Open Public Meetings Act like those recently perpetrated by Appellant Vermillion and the Puyallup City Council would go unknown and undetected.

Development projects could be pre-approved for favored political contributors, bribes could be secretly tendered, votes could be gerrymandered, and City resources could be misdirected to the benefit of political supporters instead of the general public, all without any fear of discovery.

Under such circumstances, the corrupt practices of Huey Long in Louisiana and Boss Tweed in Tammany Hall would be the model for elected officials in the State of Washington under the rubric of the appellant's expansive view of complete freedom of association, even when such “freedom” is employed by the people's public servants for manifestly corrupt and improper purposes.

Yet, as the Supreme Court ruled in *John Doe No. 1 v. Reed*, 561 U.S. 186, 130 S.Ct. 2811 (2010), in upholding the PRA against a personal privacy and 1st Amendment based challenge, the State has a compelling interest in preventing fraud and in the integrity of elected officials.

CONCLUSION

As Teddy Roosevelt observed³..

No man is above the law and no man is below it: nor do we ask any man's permission when we ask him to obey it. Obedience to the law is demanded as a right; not asked as a favor."

The primary defect in appellants' arguments is that public servants like former Puyallup City Council Member Vermillion, like Pierce County Prosecutor Mark Lindquist, (and the rest of us), are not above the law, but are subject to reasonable and necessary requirements attendant upon the just exercise of the powers of government in a democratic society.

The primary rights we should be concerned with in this case are those of the public to the just exercise of the powers of government in a democratic society.

There is absolutely no reasonable basis for drawing any valid distinction between the potentially public status of Pierce County Prosecutor Lindquist's work-related text messages and the City-related emails of Appellant Vermillion, and this Court should reject the creative but profoundly mistaken arguments advanced by the Appellants to the contrary by affirming the decision of the Superior Court.

3 Theodore Roosevelt, Third Annual Message to Congress, December 7, 1903.

Respectfully submitted this 4th day of March, 2016.

By /s/ Jon E. Cushman

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Supplemental Brief of Respondent, by **Email** with backup by **regular U.S. Mail** on the 4th day of March, 2016, to the following counsel of record at the following addresses:

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Respondent, Arthur West, submits this Errata to include an additional cite on page 11 of Respondent's Supplemental Briefing: *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012), cert. denied, 133 S.Ct. 1634-2013.

Λ corrected brief is attached.

Respectfully submitted this 4th day of March, 2016.

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