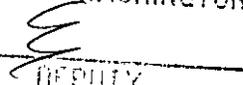


FILED
COURT OF APPEALS
DIVISION II

2017 JUN -2 AM 9: 31

STATE OF WASHINGTON

BY 
DEPUTY

No. 49857-0-II

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

**ARTHUR WEST,
appellant,**

Vs.

**THE CITY OF PUYALLUP,
respondent**

Review of decisions entered by
the Honorable Judge Culepper

**APPELLANT'S
OPENING BRIEF**

Arthur West
120 State Ave. NE # 1497
Olympia, Washington, 98501

I. TABLE OF CONTENTS

I. Table of Contents... 2

II. Table of Authorities 3

III Summary of Argument..... 4

IV Assignments of Error..... 6

V Statement of the Case.. 7

VI. Argument..... 12

 1. The Court erred in ruling that the disputed records were not public records in the absence of any substantial supporting evidence, and in failing to follow the controlling precedent of Lindquist and Vermilion in a manner that violated the doctrines of stare decisis, res judicata and collateral estoppel 12

 2. The Court erred in failing to adopt a clear and reasonable bright line standard to determine that elected municipal officers' social media postings on Facebook discussing municipal business and pending land use decisions with their constituents were subject to disclosure under the Public Records Act..... 14

 3. The Court erred in failing to find a violation of the Public Records Act when the City failed to respond as required by RCW 42 56.550 in regard to responsive public records it knew to be in existence..... 16

VII. Conclusion and relief sought..... 17

II. TABLE OF AUTHORITIES

Nissen v. Pierce County, 183 Wn 2d 863, 357 P.3d 45 (2015).....	4
State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963)..	11
State v. Williams 132 Wn 2d 248, 254, 937 P.2d 1052 (1997)....	13
West v Washington State Department of Natural Resources, 163 Wn. App. 235, 244, 258. P.3d 78 (2011).....	17
West v. Vermillion, 196 Wn App. 627, 639, 284 P 3d 634 (2016).....	7
Windust v. Department of Labor & Industries, 52 Wn.2d 33, 323 P. 2d 241, (1958).....	12

STATUTES

RCW 42.56.520.....	12
RCW 42 56.530.	4
RCW 42 56 550(3)..	11

ARTICLES

Florida AGO 2008-07.....	14
City of Bothel Social Media Policy	15
Guidelines and Best Practices for the Use of Social Media in Washington State, Office of the Governor....	15
Trautman, Claim and Issue Preclusion, 60 WASH. L REV At 831.....	13

III. SUMMARY OF ARGUMENT

This case involves the question of whether social media postings on Facebook by a City Council Member concerning City Business, and particularly concerning pending land use proposals; which postings solicited and received public comment on such City related issues, meet the definition of public records under the Washington Public Records Act.

These issues should be seen to be largely foreclosed by the rulings in *Nissen* and *Vermillion*, and by the indisputably city business related nature of a number of the postings on the City Council Member's social media site.

As the Supreme Court ruled in *Nissen v Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

If the PRA did not capture records individual employees prepare, own, use, or retain in the course of their jobs, the public would be without information about much of the daily operation of government. Such a result would be an affront to the core policy underpinning the PRA — the public's right to a transparent government. That policy, itself embodied in the statutory text, guides our interpretation of the PRA RCW 42.56.030; LAWS OF 1973, ch 1, § 1(11), *Hearst Corp.*, 90 Wash 2d at 128, 580 P2d 246 *Nissen*, at 53...

Yet the ability of public employees to use cell phones to conduct public business by creating and exchanging public records — text messages, e-mails, or anything else — is why the PRA must offer the public a way to obtain those records. Without one, the PRA cannot fulfill the people's mandate to have "full access to information concerning the conduct of

government on every level." LAWS OF 1973, ch. 1,
§ 1(11). Nissen, at 56

In light of the clear precedent in Nissen, and the undeniable circumstance that the disputed posts concerned the business of the city, conducted by an elected official within the broad scope of their duties, this case should be remanded back to the Trial Court with instructions to find that the City violated the Public Records Act.

IV. ASSIGNMENTS OF ERROR

1. The Court erred in ruling that the disputed Facebook records were not public records in the absence of any substantial supporting evidence, and in failing to follow the controlling precedent of Lindquist and Vermilion in a manner that violated the doctrines of stare decisis, res judicata and collateral estoppel.
2. The Court erred in failing to adopt a clear and reasonable bright line standard to determine that elected municipal officers' social media postings on Facebook discussing municipal business and pending land use decisions with their constituents were subject to disclosure under the Public Records Act.
3. The Court erred in failing to find a violation of the Public Records Act when the City failed to respond as required by RCW 42.56 520 in regard to responsive public records it knew to be in existence

**ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR**

1. Did the Court err in ruling that the disputed Facebook records were not public records in the absence of any substantial supporting evidence, and in failing to follow the controlling precedent of Lindquist and Vermilion in a manner that violated the doctrines of stare decisis, res judicata and collateral estoppel.? Yes
2. Did the Court err in failing to adopt a clear and reasonable bright line standard to determine that elected municipal officers' social media postings on facebook discussing municipal business and pending land use decisions with their constituents were subject to disclosure under the Public Records Act? Yes.....
3. Did the Court err in failing to find a violation of the Public Records Act when the City failed to respond as required by RCW 42 56.550 in regard to responsive public records it knew to be in existence? Yes....

V. STATEMENT OF THE CASE

This case concerns the issues of whether, or under what circumstances, the online social media postings of an elected municipal officer, in this case a Puyallup City Council Member, should be subject to disclosure under the Public Records Act.

It is clear from the transcript of the September 9, 2016 hearing (See page 23-24) that the honorable Judge Culpepper was unfamiliar with, and had not even read either the Supreme Court's decision in *Nissen* or the ruling of Judge Rumbaugh in *West v. Vermillion*, (subsequently sustained on appeal by this Court at 196 Wn App 627, 639, 284 P.3d 634 (2016).

The Trial Court, having an admittedly secondhand, superficial understanding of the nature of the rulings in *Nissen* and *Vermillion*, understandably failed to follow them, and instead based its ruling largely on its own formulation, which, unfortunately, had very little to do with any established precedent (Transcript of September 9, 2017, at page 23-24)

This case originates in a request under the *Public Records Act* to the City of Puyallup of March 25, 2016, for the following records...

"All city related public records sent to or received at Council Member Door's "Friends of Julie Door" Facebook site, 2014-2016, or any such records in the possession of the City" (CP at 4)

The City responded on April 6th as follows

Thank you for your public records request, and after conducting a diligent search I located a responsive record. Please note that the provisions of Chapter 42.56 RCW pertain only to existing records and do not require the city to respond to questions or create records. (CP at 4)

Numerous postings on the site that the City declined to identify or produce concerned City related business, such as City Council Agendas and related City information, but in particular a number of the posts, including those below, concerned land use issues pending before the council upon which citizens commented. (See CP at 50-62, 110-120)

Friends of Julie Door shared a link.

May 22 ·

Massive warehouse development proposal outrages Puyallup leaders A proposal to create an 11-building, 3 million-square-foot warehouse park adjoining Puyallup's eastern boundaries has the City Council up in arms WWW.THENEWSTRIBUNE.COM

Bob Door Another shameful waste of beautiful farmland to be covered by warehouses...ick

Like Reply · 2 · May 23 at 6:42am

Cindy Olson □ Anjovon Alhadeff

Like Reply · May 24 at 4:36am

Annie Carpenter □ Lets stop this craziness. It does not make since to cover that beautiful land/soil with ugly concrete

Like Reply · 2 · May 24 at 5:50am

Amy Moreno-Sills □ Thanks for sharing this. What can be done?

Like Reply · May 24 at 7:36am (See CP at 50-62, 110-120)

Friends of Julie Door

May 20 ·

If you are curious about the proposed warehouse

development of the NE corner of Shaw / Pioneer, information can be found by clicking this link.
[http://www.cityofpuyallup.org/.../puyallup-valley-industrial.](http://www.cityofpuyallup.org/.../puyallup-valley-industrial/) /

Gary Rider What are your thoughts?

Why aren't those putting them in paying for road widening and intersection updates so the trucks can turn without going into oncoming lanes? Let alone beefing them up to handle the weight? What about business roads specific to t...See More

Like Reply 1 May 20 at 6:36pm

John Batts (Granted I am not a resident in Puyallup but live in Graham and I hope you don't mind me commenting on a concern I would have about a development like this) I'm surprised the county at this time isn't concerned with how this may impact the Puyallup River water quality given that the wild fish in our system are about to be listed as endangered and the stocks of our wild fish are at unbelievably low levels. Surely placing an industrial park there would have some affect on the systems water quality and the future of these fish..

Like Reply · May 21 at 11:29am

Jennifer Go Hawks Welch My good friends just bought their first home next door to this and are devastated by this plan. They were told by Pierce County there is nothing they can do. I think it's terrible. (See CP at 50-62, 110-120)

Friends of Julie Door June 7, 2015 ·

SHAW ROAD WIDENING UPDATE: Please mark your calendars for June 30th, 2015, 4.30 pm - 8 30 pm There will be an informational Open House pertaining to the Shaw Road Project.
<http://www.cityofpuyallup.org/.../shaw-road-23rd-to-manorwood/>...See CP at 50-62, 110-120)

Comments react-text: 37 View 2 more comments ..**Tim Dust** /react-text ... Bike lanes please No safe way up or down the hill currently.

Like Reply · June 12, 2015 at 6:43pm...

React-text: 89 Stacy Buras /react-text React-text.
92 /react-text Unfortunately this wouldn't make the
"hill" any safer, this Project is only for 23rd right at
the top of the hill to Manor wood (by the fire
station) Like · Reply June 12, 2015 at 7:37pm (See
CP at 50-62, 110-120)

Ten days after the City denied that any City related information was on the site, on or about April 16, 2016, Council Member Door belatedly placed the following message on her facebook page:

I realize that many of you have questions relating to City business. I am prohibited from answering your questions in this forum. Please direct your questions to me at jdoor@cipuyallup.wa.us or at (253) 320-5826 and I will be happy to address them. (CP at 4)

Plaintiff filed Suit on May 24, 2016. (CP at page 3-5)

On September 9, 2016 a hearing was held on defendant's Motion for Summary Judgment. (Transcript of Sept. 9)

At the September 9, 2016 hearing, the Court admitted it had not read either the Vermillion or Nissen rulings, and instead based its ruling largely on its own formulation, which had very little to do with any established precedent in either Nissen or Vermillion.

.. I don't believe the Facebook page of Ms. Door is a public record, it is not prepared, owned, used, or retained by the City of Puyallup. My understanding of this is they don't have any control over this. If they did, if they helped set it up, if they helped maintain it, it might be a different issue. All the material facts before me, that's not what happens here. . (Transcript, of September 9, 2016, at page 23, lines 4-11)

Certainly, if the city or an agency was helping set this up or, I don't know, if it costs anything, paying the fees could have a different issue, but from what I understand, that's not the case here. And I don't know the details of the Vermillion Facebook. I did hear a lot about the Nissen case. That was talked about quite a bit in the County-City Building Transcript of September 9, 2016, at page 23 line 24-Page 24 line 6

On September 19, 2016, Plaintiff filed a Motion for Reconsideration (CP at 104-198)

On October 21, 2016, the Court held a hearing and entered an Order denying reconsideration (CP at 199)

On November 21, 2016, Plaintiff filed a timely notice of appeal (CP at 202-206)

STANDARD OF REVIEW

This Court reviews questions of law and statutory construction de novo. Likewise, judicial review of all agency actions under the Public Records Act chapter is de novo, as is the question of construction and interpretation of statutes. RCW 42.56 550(3); State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). This Court should review all issues de novo.

ORDERS ON APPEAL

Appellant seeks review of the Order Granting Summary Judgment of September 9, 2016 (CP 102-103) Appellant also seeks review of the Court's November 20, 2016 Order Denying Reconsideration (CP 199)

VI. ARGUMENT

1. The Court erred in ruling that the disputed Facebook records were not public records in the absence of any substantial supporting evidence, and in failing to follow the controlling precedent of *Lindquist* and *Vermillion* and in ruling in a manner that violated the doctrines of *stare decisis*, *res judicata* and *collateral estoppel*.

In issuing the Orders of September 9 and October 21, the Court erred in failing to make the factual determination that social media posts of City business related content and the receipt of comments thereon constituted public records and in failing to follow the controlling precedent of *Nissen* and *Vermillion* to require disclosure of such City related content generated within the broad scope of a city council member's duties

Stare Decisis is defined as . .

"Literally, to stand by decided matters, . . as implying the doctrine or policy of following rules or principles laid down in previous judicial decisions unless they contravene the ordinary principles of justice. This principle had an important part in the development of the English common law" *Windust v. Department of Labor & Industries*, 52 Wn 2d 33, 323 P. 2d 241, (1958)

It was reversible error for the Trial Court to refuse to recognize the *collateral estoppel* effect of the Trial Court's ruling in *Vermillion*, (see *State v Williams* 132 Wn 2d 248 , 254, 937 P.2d 1052 (1997); *Trautman*, *Claim and Issue Preclusion* , 60 WASH L REV. At 831) and the *stare decisis* and *res judicata* effects of the express language and holdings of the Supreme Court in *Nissen* and the Court of Appeals in *Vermillion*.

A fair reading of both Vermillion and Lindquist leads to the inexorable conclusion that records such as the City business related Facebook posts of Council Member Door are public records. It cannot be reasonably disputed that the posting of City Council Agendas or information on land use proposals before the City, in combination with the receipt of comments on such posts, as council member Door undeniably did, constitute activities within the scope of the duties of a City Council Member and concern City business.

Therefore, the Court in this case ruled improperly against the non-moving party on disputed factual matters when there was a reasonable dispute over material facts and when the sufficiency of evidence undeniably supported the conclusion that at least a portion of the postings on Facebook concerned city business and were within the scope of the duties of the office of a City Council Member.

This constituted reversible error and this matter should be remanded with instructions for the Court to find a violation of the PRA for and for further proceedings in accord with these binding precedents.

2. The Court erred in failing to adopt a clear and reasonable bright line standard to determine that elected municipal officers' social media postings on Facebook discussing municipal business and pending land use decisions with their constituents were subject to disclosure under the Public Records Act.....

The Court further erred in failing to adopt a clear and reasonable bright line standard when it issued the Orders of September 9 and October

21, 2016

Admittedly, there is not a lot of case law on the subject of social media and public disclosure, but this lack only serves to make the necessity of there being a clear and reasonable bright line rule even more critical.

There is ample basis for such a reasonable bright line rule. For example, the attorney General of the State of Florida, in AGO 2008-07 found as follows..

To the extent that the council member is publicly posting comments relating to city business, this office cannot conclude that such postings are not made in connection with the transaction of official business. Accordingly, I am of the opinion that such postings would be subject to the requirements of the Public Records Law. When considered with the discussion above, it would appear that the postings and emails of a city council member relating to his public duties would be public records subject to the provisions of Chapter 119, Florida Statutes. Florida AGO 2008-07, at page 4

While there is certainly a lack of existing precedent clearly defining the status of social media under the PRA, all indications and the best analysis to date strongly support a finding that Social Media communications such as those of Council Member Door concerning the conduct of municipal government by elected municipal officials are public records.

The City of Bothel, for one example, has a social media policy that states .

According to a report issued by the law firm Davis

Wright Tremaine, "Posts by public entities and their employees in the state of Washington should be considered to be public records if they are made or received in connection with the agency's public business." (City of Bothel Social Media Policy)

Similarly, the Clark County Prosecutor has a form declaration as to what records are exempt from disclosure, as being unrelated to the business of the agency.

The Governor of the State of Washington, in the publication Guidelines and Best Practices for the Use of Social Media in Washington State, available at

<http://www.governor.wa.gov/sites/default/files/documents/GuidelinesAnd%20BestPracticesForSocialMedia.pdf> states...

Agencies should consider the following regarding the retention of public records of posts to social networking websites:

- The agency recognizes that all content published and received by the agency using social media in connection with the transaction of the agency's public business are public records for the purposes of Chapter 40.14 RCW (Preservation and destruction of public records).

All of these entities have come to similar and highly persuasive conclusions as to the status of such records, and the Trial Court erred in failing to adopt a clear and reasonable bright line standard to determine when a public officials' social media posts were subject to disclosure under the Public Records Act. This was reversible error justifying an Order of Remand from this Court

3. The Court erred in failing to find a violation of the Public Records Act when the City failed to respond as required by RCW 42.56.520 in regard to responsive public records it knew to be in existence.. ..

The Court, in issuing the Orders of September 9 and October 21, erred in failing to find a violation of the Public Records Act when it was undisputed that the City had failed to respond as required by RCW 42.56.520 in regard to responsive public records it knew to be in existence or which a reasonable search would have revealed.

RCW 42 56 520 imposes clear responsibilities on agencies...

Within five business days of receiving a public record request, an agency...must respond by either (1) providing the record, (2) providing an internet address and link on the agency's web site to the specific records requested...(3) acknowledging that the agency...has received the request and providing a reasonable estimate of the time the agency...will require to respond to the request; or (4) denying the public record request RCW 42 56 520

The City has nowhere disputed that it failed to comply with RCW 42.56.520 in regard to any public records that existed on Council Member Door's Facebook site¹, and has not asserted any form of reasonable search defense, so to the extent that there were responsive such public records, (which the appellant asserts to be the case) the City violated the PRA by not identifying them See West v. Washington State Department of Natural Resources, 163 Wn. App 235, 244, 258. P.3d 78 (2011). This, too, was reversible error justifying an Order of Remand

¹Significantly, as West's Supplemental Declaration attested, the City itself lacked confidence in the Trial Court's ruling, because it subsequently adopted a policy of disclosing council members' city related social media postings

VII. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, appellant respectfully requests that this Court reverse the Trial Court's rulings in every respect and remand this matter back to the Superior Court with instructions to find that the City committed a violation of the PRA, and to issue such further relief in the form of costs and penalties as may be appropriate.

Respectfully submitted this 2nd day of June, 2017.


ARTHUR WEST

FILED
COURT OF APPEALS
DIVISION II

2017 JUN -2 AM 9:31

STATE OF WASHINGTON

CERTIFICATE OF SERVICE


DEPUTY

I hereby certify that on June 2nd, 2017, I caused to be served a true and correct copy of the preceding document on the party listed below at their addresses of record via Email:

Attorneys for Respondent City of Puyallup

Joe Beck, jbeck@ci.puyallup.wa.us
Shawn Arthur, SArthur@ci.puyallup.wa.us


ARTHUR WEST