

FILED
Court of Appeals
Division II
State of Washington
9/25/2018 4:02 PM
NO. 51812-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

GLEND A NISSEN, an individual,

Respondent-Cross Appellant,

v.

PIERCE COUNTY, a Public Agency, PIERCE COUNTY
PROSECUTOR'S OFFICE, a Public Agency,

Appellant-Cross Respondents,

OPENING BRIEF OF APPELLANT-CROSS RESPONDENT
PIERCE COUNTY

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I. INTRODUCTION

In *Nissen v. Pierce County* (“*Nissen I*”), 183 Wn.2d 863, 357 P.3d 45 (2015), Plaintiff requested all August 2, 2011 records on Prosecutor Lindquist’s private cell phone. The rationale was the Prosecutor used the phone for County communications as well as private communications. Both the Court of Appeals and the Supreme Court rejected Plaintiff’s request for all private phone records. The Courts found the County correctly provided only public records identified by the phone owner. The Supreme Court concluded public employees have a privacy right to private records on their phones, so any search must be by the employee.

During Plaintiff’s *Nissen I* appeal, she made a second request for six more days of Prosecutor Lindquist’s phone records. *Nissen v. Pierce County* (“*Nissen II*”), 192 Wn. App. 1021, 2016 WL 236419, 2016 Wash. App. LEXIS 74 (Wash. Ct. App., Jan. 19, 2016). The County denied the request based on the *Nissen I* Superior Court decision finding all records on private phones are private. The Superior Court affirmed the *Nissen II* records denial and Plaintiff appealed. After the *Nissen I* Supreme Court decision, the Court of Appeals remanded the *Nissen II* appeal to the trial court with an order to apply new *Nissen I* procedures for determining whether public records reside on a private phone. Both the Supreme Court and this Court denied attorney fee and penalty awards against the County

in the *Nissen I* and *Nissen II* appeals.

On remand of *Nissen II*, the Superior Court failed to conform to the decisions of the Supreme Court and this Court. The Superior Court did not follow the *Nissen I* affidavit procedure for requests for public records on private phones. The trial court compounded its error of improperly examining records on a private phone *in camera* by failing to apply the Supreme Court's definition of public record for purposes of separating public and private records. As a result, the Superior Court wrongly found private messages were public records. Finally, the Superior Court erred by awarding fees and penalties to Plaintiff without respecting earlier denials in *Nissen I* and *Nissen II*, and by incorrectly applying collateral estoppel to an earlier decision of the trial court in *Nissen I*.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering the order of December 12, 2017 requiring *in camera* review of seventeen private text messages.

B. The trial court erred in entering the order of February 2, 2018 finding nine text messages to be public records.

C. The trial court erred in entering the order of April 3, 2018 awarding fee, costs, and penalties against Pierce County and in including findings of fact and conclusions of law with the order.

D. The trial court erred in the entry of Findings of Fact 2.3, 2.5, 2.6, 2.10, 2.11, 2.42, 2.66, 2.69, 2.82, 2.91, 2.94, and 2.95 on April 3, 2018.

E. The trial court erred in the entry of Conclusion of Law 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.15, 3.16, 3.17 on April 3, 2018.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Did the Superior Court follow the law in *Nissen I* governing the search for and identification of public records on the private phones of government employees? (Assignments of Error A, B.)

B. Can an official acting in his private capacity to identify private messages on his private phone be an agent under the direction and control of his government employer? (Assignments of Error A, C, D, E.)

C. Can fees and penalties be awarded under the Public Records Act for failure to follow procedures not adopted by the courts until after the time for which the fees and penalties were awarded? (Assignments of Error C, D, E.)

D. Can a prior court decision about denial of a record request have a collateral estoppel effect in a different court action about a different denial of a request for different records concerning a different subject? (Assignments of Error B, C, D, E.)

E. Can an attorney receive an award of attorney fees in a case in which he never appeared and did no work? (Assignment of Error C.)

F. Is entry of findings and conclusions on a public record appeal proper when there was no trial or live testimony and appellate review is *de novo* based on documentary evidence? (Assignments of Error D, E.)

IV. STATEMENT OF THE CASE

Nissen I and *II* involve related facts and their legal background is intertwined. The issues in *Nissen II* cannot be understood without understanding the history of *Nissen I*, which created the law governing this case. This Court remanded “for proceedings consistent with our Supreme Court’s instructions in *Nissen [I]*.” *Nissen II*, at *16. Therefore, this Statement of the Case includes the history underlying *Nissen I* as well as *Nissen II*.

A. The Outcome Of *Nissen II* Depends On Facts Underlying And Law Announced In *Nissen I*.

1. The County Rejected Plaintiff’s Request For All Records On Prosecutor Lindquist’s Cellphone And Provided Only Data Related To Government Functions.

On August 3, 2011, Plaintiff requested records on Prosecutor Lindquist’s private cellphone. *See Nissen I*, 183 Wn.2d at 869. The request was for all records, including text messages. *Id.*

Prosecutor Lindquist provided to the County call and text message logs. *Nissen I*, 183 Wn.2d at 870. Those logs contained records of numbers called or received, dates, times, and call lengths. *Id.* The information did not include text messages because the provider said messages were kept only a short time and were not available. CP 1978-80. The County provided call and text log data for “work-related” phone numbers, but not for private numbers. CP 2053.

2. The Superior Court Rejected Plaintiff’s Challenge To The Redaction Of Private Phone Data.

Plaintiff challenged redaction of private phone call data from the logs. *See Nissen I*, 183 Wn.2d at 581, 87-88. The Superior Court dismissed Plaintiff’s claim, finding all records on a private phone are private. *Id.* During argument on the County motion to dismiss, Plaintiff revealed she had secretly requested Verizon to preserve August 2 text messages during the short time they existed.¹ However, any issue about release of these messages became moot when the Superior Court dismissed the claim.

3. The Court Of Appeals Returned To The County’s Original Interpretation Of Producing Public Data On Private Phones But Narrowed The Records To Only Those Actually Used To Conduct Government Business.

¹ Plaintiff’s request to Verizon was to the “Law Enforcement Investigation Unit” and was apparently interpreted as a law enforcement request to preserve even though there was no law enforcement investigation. CP 1982. Pursuant to federal law, Verizon did not tell the County the records had been preserved. CP 1982-83; CP 2053.

The Court of Appeals rejected Plaintiff's claim "that all Lindquist's personal cellular phone records are public records because he used that phone to conduct public business," but also rejected the Superior Court ruling that all records on a private phone are private even if used for government business. *Nissen I*, 183 Wn.2d at 581. The Court of Appeals accepted the County's original procedure for responding, i.e., separating private records from public and producing only public records. *Id.* at 590-95. However, the Court narrowed the scope of potential public records on a private phone by emphasizing the record must have been "used" for government purposes. *Id.* at 595. The Court held records on a private phone are only public "[t]o the extent that an elected public official uses a private cellular phone to conduct government business." *Id.* at 589 (emphasis added). The County had produced phone data if the data was simply "related" to government (e.g., data about calls to government numbers), a broader disclosure standard.

4. The Supreme Court Held Private Data On Phones Is Protected By Constitutional Privacy Rights While Adopting Special Procedures For Segregating Commingled Private And Public Records.

On further appeal of *Nissen I*, the Supreme Court reached the same conclusion as this Court about governing law, but with two significant differences. One, the Supreme Court concluded logs were not public

records because the County never possessed or used the logs for County business.² *Nissen I*, 183 Wn.2d at 882. Two, the Supreme Court concluded employees have a state constitutional privacy right in private phone information.³

The Supreme Court also set out a procedure for responding to requests for records on a private phone. The Court specified the agency should request the phone owner to segregate public records from private and provide any public records to the public agency. *Nissen I*, 183 Wn.2d at 863. For records withheld as private, the Court specified the agency should follow the federal “affidavit procedure” by requiring its employee to draft an affidavit containing “a sufficient factual basis to determine withheld material is indeed non responsive.” *Id.* The Court held that if an agency uses the procedure in good faith, the agency fulfills its responsibility to search for public records and avoids “treading on the constitutional rights of its employees.” *Id.*, at 886-87.

5. The Supreme Court Did Not Award Penalties And Fees Because The County Produced Records Based On A Good Faith Interpretation Of The Public Records Act.

² This Court had remanded the issue of disclosure of the phone logs due to lack of a record to decide whether they had been made public by government “use.” *Nissen I*, at 595. The Supreme Court’s decision on the phone logs disposed of Plaintiff’s original appeal, which had been on the grounds of improper redaction of the phone logs and failure to produce all records on private phones used by a government employee. *See Nissen I*, at 588. The text messages themselves had not been part of the County records response under appeal because Verizon had said there were no messages preserved.

³ This Court had declined to reach the constitutional issue.

The Supreme Court determined “the County responded to Nissen’s records requests and produced records in a timely manner based on what [the Court] presume[s] was its good faith interpretation of the PRA.” *Id.*, at 888. The Court did not award penalties because the County had no opportunity to comply with the new procedures. *Id.* The Court said penalties could be considered only “going forward.” The Court awarded no attorney fees.

B. The Resolution Of The *Nissen II* Public Records Request Has Depended On The Law Announced In *Nissen I*.

1. The County Denied And The Superior Court Affirmed Denial Of The *Nissen II* Request Based On *Nissen I*.

On December 9, 2011, Plaintiff requested text messages, from July 29 to August 4, 2011, on Prosecutor Lindquist’s phone “that related to the conduct of government or the performance of any governmental or propriety function.” CP 3. The County denied the request based on the Superior Court’s decision in *Nissen I*. *Nissen II*, at *4. The Superior Court affirmed the *Nissen II* denial on the grounds of issue preclusion from the *Nissen I* dismissal. *Id.*

2. The Court Of Appeals Remanded Plaintiff’s Appeal To Apply New *Nissen I* Law To Messages Unknown To The County When Making Its First Response.

The *Nissen I* decision came down while the *Nissen II* appeal was pending. The decision eliminated issue preclusion for the *Nissen II*

Superior Court decision. *See Nissen II*, at *4. The Court of Appeals remanded *Nissen II* “for proceedings consistent with our Supreme Court’s instructions in *Nissen I*.” *Nissen II*, at *6. In regard to penalties, this Court followed *Nissen I*, stating:

The issue of whether Pierce County has complied with *Nissen* or whether PRA penalties are appropriate in *Nissen* is not before us. We decline to penalize Pierce County in the present case because there is no basis under the PRA for doing so prior to it having an opportunity to comply with *Nissen*.

Id. at *2. As in *Nissen I*, the court also declined to award attorney fees for the appeal or prior Superior Court review. *Id.*

3. The County Submitted Affidavits By Prosecutor Lindquist Describing Private Records On His Phone.

After remand, the County filed the Declaration of Prosecutor Lindquist. CP 1844-55. The declaration contained a description of the request for text messages from Verizon (Decl., ¶ 1-9), a description of the Prosecutor’s understanding of the *Nissen I* definition of public record (Decl., ¶ 10-11) and a description of 153 messages (Decl., ¶ 12-18).

Prosecutor Lindquist did not find any messages used to conduct County business within the scope of his employment. CP 1841 (¶ 11). For messages found to be private, Prosecutor Lindquist listed the kind of caller or call recipients (e.g., friend, work associate, relative, etc.), the general nature of the content, the message purpose, and the date and

general times (i.e., daytime or after work hours) of the message. CP 1851-54.

The Court held a hearing on the “sufficiency or insufficiency” of the declaration. *See* VRP, pp. 1-55 (April 7, 2017). The Court took the matter under advisement, indicating it would “find at least portions of the affidavit insufficient and would issue a detailed letter opinion and an order.” *Id.*, at 52. The Court stated:

I will either immediately request that the text messages at issue be subjected to *in camera* review or I will order that any alleged deficiencies that I would be identifying in the affidavit be rectified and resubmitted as a second supplemental affidavit, and if that were to be considered insufficient, still I would then order *in camera* review. So it would either be now or it would be another chance at an affidavit and then *in camera* review would be ordered.

Id., at 13 (emphasis added).

The County objected to *in camera* review and urged the Court to follow the *Nissen I* procedure and determine whether records were public based on the information supplied in affidavits. *Id.*, at 32. The County’s position was that if the Court desired more information, the Court must follow the *Nissen I* procedure and specify additional information needed in a supplemental affidavit to decide the privacy issue. *Id.*, at 27-31; 33-36.

Almost four months later, the Court issued an Order Re:

Sufficiency Hearing without a letter opinion stating information needed. CP 2000-2. The Court reiterated the *Nissen I* procedure, but found “there is presently no guidance from Washington’s appellate courts regarding the precise form and contents required in such an affidavit.” *Id.* The Court found the declaration sufficient for some messages, but not for others. *Id.*

The July 17 Order directed the County to file a supplemental declaration putting each message as an entry in an index listing “date, time and sufficient information regarding recipient/sender, content, and context of the text message for the court to determine whether each of these text messages constitutes a public record.” CP 2002. The Court did not provide, with two exceptions, any indication of either the particular messages the Court found insufficient or the kind of information needed to enable its determination. *Id.*

The Court specified concerns about the sufficiency of information for July 29 messages to and from friends about dinner plans and a July 31 invitation to play golf. CP 2000-01. The Court sought clarification whether the dinner and golf match included discussion of public business. *Id.*

The Order stated the Court would decide sufficiency of the

supplemental declaration without a hearing. CP 2000-01. The Court would order *in camera* review of text messages for which the Court believed the supplemental declaration was insufficient. *Id.*

4. The County Submitted A Supplemental Lindquist Affidavit Providing Additional Information.

The County filed a supplemental Lindquist declaration attaching the index of the messages by date and precise time, along with generic identity of caller and person called (e.g., acquaintance, friend, county employee, relative, non-county business person, etc.). *See* CP 2031-47. The Prosecutor added additional “context” material to the original declaration itself because the material could not be placed in the index without making the listing long and repetitious. The problem was many of the messages were “back and forth” messages separated by unrelated messages, sometimes on different days, so the context needed to be in one statement and not divided. CP 2283-84. The supplemental declaration bolded additional material to distinguish it from original material. The messages in the index were numbered and every message in the declaration referenced the index numbers.

The supplemental declaration provided additional information about the only messages the Court said had insufficient

information. *See* CP 2036 (§ 18) and CP 2037 (§ 20). The July 27, 2017 order mentioned these messages (the dinner with friends and the golf match messages).

Although the Superior Court did not respond to the County's request to specify the kind of information needed, the Prosecutor took the hint provided by the Court's dinner/golf comments, adding information showing messages were not part of any County business. For instance, the declaration, with the supplemental information in bold, states the following about the July 30 message concerning the rumor of a job applicant:

The ninth is a humorous comment to me **made at 8:12 PM** about a "rumor" that a person may apply to the Prosecutor's Office. I did not respond. The person is not someone who would apply, **and I never encouraged or discouraged this person to apply as I assumed it was a rumor/humor. I don't believe I've ever spoken to this person, certainly not about employment in the Prosecutor's Office, and the person never did apply and therefore there is no nexus to the decision-making process of the office.**

CP 2037-38. The first declaration stated the subject of the rumor was not someone who would apply to the Prosecutor's Office and never did. The supplemental declaration made the lack of connection to pending or anticipated County business more patent by adding the person had never been encouraged or discouraged from applying to the office and the Prosecutor had never spoken to the person about employment.

In response to the declaration, Plaintiff primarily argued the declaration was insufficient because the alleged failure to provide certain kinds of information was in bad faith. CP 1856-88; CP 1985-99. Plaintiff did not directly argue the description of messages in the declaration showed they were part of government conduct or decision-making, but only that the messages were public because they were from or to a public employee, or mentioned government matters. CP 1862-61, CP 1989-92. The County's response again objected to Plaintiff's request for *in camera* inspection, to her broad "related to government" definition of public record, and to her misplaced arguments on bad faith. CP 1963-71.

5. The Superior Court Ordered *In Camera* Inspection And Denied The County Request To Identify The Court's Perceived Affidavit Insufficiencies.

On December 12, 2017, the Court issued an Order Re: Sufficiency of Second Lindquist Affidavit. CP 2323-34. The Order rejected Plaintiff's bad faith arguments as immaterial and impliedly rejected her broad "related to government business" definition of public record by quoting *Nissen I* language requiring a record to be a document actually used for government business. CP 2325. The Order found descriptions of 130 of 147 messages sufficient to conclude the messages were private. *Id.* The Court found descriptions of 17 messages insufficient to determine privacy and ordered *in camera* review for those messages. *Id.*

The Prosecutor provided the messages on the condition the County preserve its objection to *in camera* review. CP 2339. The County restated its objection *Nissen I* did not provide for *in camera* review, and that RCW 42.56.550, and cases interpreting the statute relate to *in camera* inspections of acknowledged public records to determine if a statutory exemption applies, not to determine if they are private. CP 2339-40.

The Court held a hearing to discuss *in camera* inspection and for the Court to ask the parties legal questions. CP 2355. The County again stated *Nissen I* required the private record issue to be decided on the affidavit(s) of the phone owner, and required the Court to ask for more information if more was needed. VRP, pp. 5-9 (January 28, 2018). The County also emphasized communications described in the affidavits were not conduct of County business as defined by *Nissen I. Id.*, pp. 9-11.

6. The Superior Court Concluded Nine Messages Were Public.

The court ruled nine of seventeen messages reviewed *in camera* were public. VRP, pp. 11-17 (January 19, 2018). The messages were: (1) four messages on July 30 and August 1 in which the Prosecutor and one of his friends joked about a rumor a particular person might apply for employment; (2) three messages on August 3, 2011, in which the Prosecutor and a friend discussed on-line comments related to a

newspaper article; and (3) two messages on August 4, 2011, one suggesting Prosecutor Lindquist check his e-mail and stating the sender had received a letter, and the second a Lindquist response to call him. *Id.* The Court found the first and third groups of messages public because they related to government conduct and were prepared by government employees. *Id.* The Court considered the second group of messages public because they were “linked” to an August 2 message found to be public in *Nissen I*. *Id.* The Court based its ruling on both affidavits and *in camera* review. *Id.*, pp. 16-17.

Plaintiff moved for an award of attorney fees, costs, and penalties. The County objected to awards for the time before the Prosecutor filed affidavits because this Court already denied fees and penalties for this period, allowing them only “going forward” if merited after an opportunity to comply with *Nissen I*. CP 2973-74. The County also objected to penalties because *Nissen I* held an agency conducts an adequate search for records on private phones if the agency secures an affidavit describing the private records. CP 2977-82.

The Court awarded attorney fees and costs in the amount of \$175,590.55, with over \$100,000 of that amount being for fees and costs for the first appeal and the preceding trial court activity. CP 3246-47; CP 2637-45. The Court based the fee and cost award for the prior appeal and

trial court proceedings on the collateral estoppel effect of the fee and penalty award in the remanded *Nissen I* case. In that case, the trial court actually denied appellate fees and awarded only 33% of the pre-appeal trial court fees. VRP, pp. 64-65 (March 9, 2018); CP 2990.

Regarding penalties, the Superior Court awarded \$11,160 for the period preceding the *Nissen II* mandate and \$165,900 for the post-mandate period. *Id.*, pp. 67-73. The Court concluded the Prosecutor drafted his affidavit concerning his private records as a County agent, so the County was liable as principal. *Id.*, pp. 71-73.

The Court entered Findings of Fact and Conclusion of Law. CP 3215-3245. The County objected to their use in a case decided on documents without witness testimony and reviewed de novo in any appeal. CP 3153-3158. The County also objected to many facts in the Findings and Conclusions insofar as they inaccurately stated the content of documents and the Court's transcribed oral decisions. *Id.*

V. ARGUMENT

This matter was a judicial review of a government response to a public records request. The court process consisted of the presentation of evidence by document and affidavits, with legal arguments before the Court about application of public records law to the facts shown in the documents. There was no witness testimony or trial proceedings. The

appellate review of public records decisions of this kind is *de novo* and the standard of review for the issues raised by the County in this case is error of law, except for one attorney fee award issue for which the standard for the issue raised is abuse of discretion. *West v. Puyallup*, 2 Wn. App. 2d 586, 591-92, 410 P.3d 1197 (2018).

In its arguments, the County will cite to the Court's written orders and transcribed oral decisions on various issues under appeal. For unknown reasons, the Court entered findings and conclusions that are unnecessary and not provided for in public record review proceedings. *See Dragonslayer v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 441-42, 161 P.3d 428 (2007). The County objected to the findings and conclusions as unnecessary and containing immaterial or inaccurate statements about the evidence, proceedings, and Court orders and decisions. CP 1353-58. Entry of the findings and conclusions was error in this kind of proceeding. The County will not specifically cite to them in presenting its arguments about errors in the Court's various written orders and oral decisions.

A. The Superior Court Failed To Follow The *Nissen I* Procedures To Separate Private Records From Public.

In *Nissen II*, this Court remanded Plaintiff's appeal with a mandate to apply new *Nissen I* procedures to separate private from public records

on a private phone. *Nissen II*, at *16-17. The Superior Court failed to apply those procedures correctly. The Court erroneously concluded Pierce County improperly searched for nine purported public records on a private phone.

In *Nissen I*, the Supreme Court determined employees have a constitutional right to privacy in their private phone communications. *Nissen I*, 183 Wn.2d at 883-884. The Court directed searches for public records comingled with private records must be done by the employee rather than the employer. *Id.* at 886-887. *Nissen I* did not authorize agencies to search for and seize public records on private phones. *Id.*

The Supreme Court adopted federal records procedures for comingled private/public records, noting the PRA allows courts to resolve disputes based on affidavits, without *in camera* review and a search violating privacy rights. *Nissen I*, 183 Wn.2d at 885-86.

The PRA allows a trial court to resolve disputes about the nature of a record “based solely on affidavits,” RCW 42.56.550(3), without an in camera review, without searching for records itself, and without infringing on an individual’s constitutional privacy interest in private information he or she keeps at work.

Federal courts implementing the Freedom of Information Act (FOIA, Pub L. No. 89-487, 80 Stat. 250), allow individual employees to use the same method to self-segregate private and public records.

Id., at 885 (citations omitted) (emphasis added). The procedure allows an agency responding to a records request for records on a private phone to rely on affidavits for its search. Federal courts have long held:

An agency cannot require an employee to produce and submit for review a purely personal document when responding to a FOIA request.

Ethyl Corp. v. EPA, 25 F.3d 1241 (1994) (4th Cir.). *In camera* inspections are inconsistent with privacy rights for private phones.

The Supreme Court commented that its reliance on employee judgment might be criticized as too deferential. *Nissen I*, 183 Wn.2d at 887. However, the Court then noted responses to records requests always depend on the judgment of employees who do the searches, so the private device search is no different. *Id.*

In compliance with *Nissen I*, the County submitted the Declaration of Prosecutor Lindquist Re: SMS Transcripts. CP 1844-55. After reviewing the declaration, the Court stated it needed more information on some messages and the Court would issue an order identifying alleged information deficiencies to be rectified in a supplemental affidavit. VRP, pp. 13, 29, 62 (April 7, 2017). The Court later ordered a supplemental affidavit, but gave only broad direction to provide “sufficient information regarding recipient/sender, content, and context of the text message to determine whether each of these text

messages constitute a public record.” CP 2002. The Court failed to identify messages considered problematic and the kind of information needed to make its decision about those messages.⁴ CP 2000-01.

The County filed a second Lindquist affidavit with additional detail. CP 2031-2047. The Court found the affidavit sufficient to decide 130 out of 147 messages were private. CP 2323. The Court then ordered *in camera* inspection of seventeen messages because the Court did not have enough information to decide. CP 2323-34.

The Superior Court erred by refusing to decide the privacy of the phone records based on affidavits as *Nissen I* directed. The Supreme Court adopted the affidavit procedure as the proper method for public record requests of this kind because the procedure could be done “without infringing on an individual’s constitutional privacy interest in private information.” *Nissen I*, 183 Wn.2d at 885. The Superior Court was obligated to comply with the Supreme Court’s affidavit procedure. This included informing the County about additional information needed to decide the private record issue.

The Court justified its failure to use affidavits to decide the

⁴ There were two exceptions. The Court identified two particular messages (the dinner party and golf game messages described *supra*, at 11-13), and said what information was needed to rule on those messages. The County provided that information in the supplemental affidavit and the Court found that information sufficient to show no public business.

privacy issue by relying on RCW 42.56.550, a statute establishing procedures for a court to review agency actions denying access to records. This statute allows *in camera* review of “public” records, but does not speak to examination of records in which the owner asserts a right of privacy under the State Constitution. RCW 42.56.550 speaks only to whether refusal to permit public inspection “is in accordance with a statute that exempts or prohibits disclosure....” RCW 42.56.550(1) (emphasis added). *See, e.g., Limstrom v. Ladenburg*, 136 Wn.2d 595, 615, 963 P.2d 869 (1998) (*in camera* review used to determine whether *public* records are exempt from disclosure under statutory exemption for agency work product). The statute does not apply to a purported public record residing on a private phone, which is protected by the State Constitution from examination by government.⁵

After the Superior Court ordered *in camera* inspection of Prosecutor Lindquist’s private phone records,⁶ the Court of Appeals issued a decision contrary to the Superior Court’s decision and later

⁵ When the voters adopted RCW 42.56.550 as part of an initiative in 1972, the Washington Supreme Court had not explicated the broad privacy rights granted to Washington State citizens under Article I, § 7 of the State Constitution. *See* Law 9 of 1973, c. 1, § 34 (Initiative Measure No. 276, approved Nov. 7, 1972). The first Supreme Court decision applying the right of privacy for telephones was not until 1986. *See State v. Gunwall*, 106 Wn.2d 54, 63, 720 P.2d 808 (1986) (citizens’ records possessed by a telephone company are private records that cannot be obtained “without a search warrant or other appropriate legal process first being obtained”). Therefore, the issue in this case would not have been in the contemplation of RCW 42.56.550 drafters.

⁶ VRP, 13 (April 7, 2017); CP 2002 (July 17, 2017 Order).

order: *Wash. Pub. Empl. Assn. of UFCW Local 365 v. Wash. St. Ctr. For Childhood Deafness and Hearing Loss*, 1 Wn. App. 2d 225, 404 P.3d 111 (2017). In *Local 365*, the Court held the Public Records Act (PRA) is not authority of law that justifies “intrusion into a constitutionally protected privacy interest.” *Id.*, at 236. Therefore, the Superior Court was wrong to determine the *in camera* inspection statute in the PRA gave the Court the authority to inspect messages on a private phone before the Court made the foundational decision those messages were public based on the *Nissen I* procedure. Under *Nissen I* and the PRA, there is authority of law for a court to use the affidavit procedure to identify public messages on a private phone and order their production. There is no authority to put the cart before the horse by intruding into the content of those ostensibly private messages by ordering them disclosed to the court to determine if any are public.

There are two possible remedies for the Superior Court’s error in failing to follow Supreme Court procedures regarding the segregation of public and private records. One would be to remand the case with directions that it be assigned to a judge who would be directed to follow the Supreme Court affidavit procedure strictly, without *in camera* review unless necessary after the record is determined to be public and an exemption is alleged. The second remedy would be for this Court to

decide the issue on its merits. Since appellate review of a public records request appeal is *de novo*, this Court has authority to review the affidavits and legal authorities. This Court can itself determine whether the nine messages found to be public by the Superior Court are indeed records of the conduct of government business within the scope of employment as defined in *Nissen I*.⁷ The next section discusses that issue.

B. The Superior Court Failed To Apply The Supreme Court's Definition of Public Record.

On the merits of the Superior Court's review of the County public record search, the Court's primary error was its failure to apply the Supreme Court's definition of public record to decide whether messages described in affidavits are public or private. *Nissen I* required a public record to be a document embodying the conduct of government business. The Superior Court incorrectly concluded three groups of messages were public records even though they were not part of any government action or decision, but were simply personal discussions between government officials about matters that were in the past, never occurring, or strictly ministerial.

1. The Supreme Court Defined Public Records For Purposes Of Separating "Public" From "Private" Records.

⁷ If the Court agreed with the Superior Court that more information is needed, perhaps a remand might be necessary.

Nissen I defined the kind of records subject to disclosure if they are comingled with private records on a private phone. This definition is a foundation for determining whether an affidavit describing records on a private phone shows that records are public or private.

The Supreme Court defined a public record in the context of this case as:

For information to be a public record, an employee must prepare, own, use, or retain it within the scope of employment. An employee's communication is "within the scope of employment" only when the job requires it, the employer directs it, or it furthers the employer's interests. *Greene v. St. Paul Mercury Indem. Co.* 51 Wn.2d 569, 573, 320 P.2d 311 (1958) (citing *Lunz v. Dep't of Labor & Indus.*, 50 Wn.2d 273, 310 P.2d 880 (1957); *Roletto v. Dep't Stores Garage Co.*, 30 Wn.2d 439, 191 P.2d 875 (1948).

Nissen I, 183 Wn.2d at 878-79 (emphasis added). The first element of the definition is the four criteria of "prepare, own, use, or retain." The paramount criterion must be "used" because the other criteria cannot resolve the issue of alleged public records on a private phone. A record on a private phone and not on a government device cannot be said to be government "owned" or "retained" when the record has never been in a government device. A record cannot be considered "prepared by" government if the employee acted privately and not for government when making or receiving the record. Thus, whether a record on a private phone is public or private necessarily turns primarily on whether it meets

the definition of “used” by government.

The Supreme Court provided a definition of “used”:

Used. We previously addressed what it means for an agency to “use” a record. We broadly interpreted the term in *Concerned Ratepayers Ass’n v. Public Utility District No. 1 of Clark County*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999), holding that the “critical inquiry is whether the requested information bears a nexus with the agency’s decision making process.” A record that is prepared and held by a third party, without more, is not a public record. But if an agency “evaluat[es], review[s], or refer[s]” to a record in the course of its business, the agency “uses” the record within the meaning of the PRA.

Nissen I, 183 Wn.2d at 962 (emphasis added). Under the Supreme Court’s definition of “used”, a message on an employee’s phone is public only if it plays an operational role in a decision made or action taken by the employee’s agency. The Court emphasized the critical question in determining “use” is whether the record has a “nexus with the agency’s decision making process.” The Court further emphasized “use” of a record means it is “evaluated, reviewed or referred to in the course of its business.” The Supreme Court distinguished situations in which employees discuss, comment on, or mention public matters in communications with others, but the communications are not part of a government action. *Nissen I*, 183 Wn.2d at 879-881.

A final element of the Supreme Court’s definition of public record is the requirement a public record be a record used within “scope of

employment.” *Nissen I*, 183 Wn.2d at 878-79. The Court describes a communication as within scope of employment as “only when the job requires it, the employer directs it, or it furthers the employer’s interests.” *Id.* This is a reiteration that a record on a private phone is public only when the record is part of a government decision or action, not simply a communication mentioning or discussing government.⁸

2. The Superior Court Erred In Finding Nine Text Messages To Be Public Records.

The Superior Court erred in its interpretation of the law set out in *Nissen I* to govern the Court’s analysis of whether records on a private phone are public records. The Court, relying on its mistaken reading of *Nissen I*, and other incorrect legal principles, then erred in concluding nine of the Prosecutor’s messages were public records.

In the Superior Court’s Order Re: Sufficiency of Second Lindquist Affidavit, the Court initially follows the Supreme Court correctly by emphasizing the requirement a public record must relate to the “conduct” of government and be “prepared, owned, used, or retained” by

⁸ The definition of public record relied upon by the Supreme Court for separating public and private records is essentially the same as that used by the federal courts in deciding whether records held by federal agencies are public or non-public. Under federal law, the circumstance that a record “relates” to a public agency or the conduct of government is not the standard governing whether a record is public. *Judicial Watch v. Clinton*, 880 F. Supp. 1, 11 (DC. DC, 1995); *Bloomberg, L.P. v. U.S. SEC*, 357 F. Supp.2d 156, 168 (DC. DC, 2004). To be public, a record must be a document an agency relies on to conduct its business or facilitates the performance of official duties. *Id.*; *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir., 1994).

government. *See* CP 1225-26. The Order also correctly notes a public record must have been created by a public employee “within the scope of employment.” *Id.* However, the ultimate decision by the Superior Court did not follow this law and misapplied other legal principles to reach the Court’s conclusion about the nine messages. *See* VRP, pp. 11-21 (January 19, 2018) (Court’s oral ruling).

Before the Superior Court stated its decision, the Court stated its principles used in reviewing the affidavits and the messages viewed *in camera*. VRP, pp. 12-14 (January 19, 2018). The Court made two fundamental errors analyzing the law governing its ruling.

The first error was rejecting the Supreme Court’s requirement a record must have a “nexus with the agency’s decision-making process” in order to be a “used” by the agency in a sense that makes it a public record.

See Nissen I, 183 Wn.2d at 882. The Superior Court stated:

While there are other definitions of “used” that refers to a nexus of decisionmaking, I believe a strict following of the most strict interpretation of that expression [nexus with decisionmaking] is not consistent with the spirit or the proper construction of the Public Records Act. It is not such that a record must be part of a decision file so to speak before government conduct is engaged in for an agency to be considered using a record, as the Supreme Court indicated by noting that Lindquist used text messages by reviewing and replying to them within the scope of his employment. That is consistent with the common understanding of “used” under the Public Records Act. That is the standard the Court is using in this case.

VRP, p. 13, l. 14-17 (January 19, 2018) (emphasis added). The Superior Court was obligated to apply the Supreme Court holding that a record's "nexus" with agency decision making is necessary to support the conclusion a record is public based on an agency's "use" of the record.

The Court's nexus error is significant. The removal of the nexus requirement broadens the public record definition by removing the need for the record to be used in the conduct of government business. *See* VRP, p. 13, l. 20-23, p. 14, l. 10-16 (January 19, 2018). This makes all documents mentioning a government matter public records. The Superior Court's rejection of the Supreme Court's nexus requirement also prejudiced the Court's consideration of the sufficiency of the affidavits. One of the Court's reasons for finding the affidavits insufficient was the Prosecutor's statement he relied on *Nissen I*, including the nexus requirement, to determine what information should be provided concerning the messages. *See* CP 2002, VRP, p.70, l. 20 – p. 71, l. 5 (March 9, 2018).

The Superior Court's error on the nexus requirement was driven by another error in its reading of Supreme Court statements about Prosecutor Lindquist acting within the scope of employment while sending or receiving messages. The Court stated:

I am going to quote from the Supreme Court’s opinion in *Nissen I* with respect to this issue: “When acting within the scope of his employment, Lindquist prepares outgoing text messages by putting them into written form and sending them. Similarly, he used incoming text messages when he reviewed and replied to them while within the scope of his employment.”

VRP, p. 12, l. 20 – p. 13, l. 2 (January 19, 2018). The Court read this language as a finding Prosecutor Lindquist acted within the scope of employment in sending and reviewing the messages at issue.

The Court overlooked the procedural posture of this case before the Supreme Court and the full context of the language. *Nissen I* was before the Court of Appeals and the Supreme Court on Plaintiff’s appeal of the order granting a County CR 12(b)(6) motion to dismiss. *See Nissen I*, 183 Wn.2d at 595-96. The Supreme Court and Court of Appeals reversed the trial court CR 12(b)(6) dismissal because they concluded the PRA could reach public records on a private phone, with the Supreme Court adding the federal affidavit procedure as the means to make such determinations. Both the Court of Appeals and the Supreme Court then considered whether Plaintiff’s complaint made *allegations* of public records on the Prosecutor’s phone sufficient to defeat a CR 12(b)(6) motion to dismiss for reasons other than the reason the Court rejected. *Nissen I*, 183 Wn.2d at 882-83.

The part of *Nissen I* quoted by the Superior Court, with

surrounding language showing its CR 12(b)(6) context is:

¶32 We now apply those definitions to decide if the complaint sufficiently alleges that the call logs and text messages are “public records.”

...

Though they evidence the acts of a public employee, the call and text messages logs played no role in County business as records themselves. We hold that the complaint fails to allege the call and text message logs are “public records” of the County within the meaning of RCW 42.56.010(3) because the County did nothing with them.

¶33 We reach a different conclusion as to text messages. Nissen sufficiently alleges that Lindquist sent and received text messages in his official capacity “to take actions retaliating against her and other official misconduct.” CP at 14. When acting [**56] within the scope of his employment, Lindquist “prepares” outgoing text messages by “putting them into written form” and sending them. Similarly, he [**883] “used” incoming text messages when he reviewed and replied to them while within the scope of employment. Since the County and Lindquist admit that some text messages might be “work related,” the complaint sufficiently alleges that those messages meet all three elements of a “public record” under RCW 42.56.010(3).

Nissen I, 183 Wn.2d at 882 (emphasis added). The Supreme Court stated only that Plaintiff made sufficient allegations of public records on a private phone, not that those allegations had merit. The merit of Plaintiff’s allegations is judged on remand by applying the definition of public record to the Prosecutor’s affidavit describing the messages and their content. The Superior Court failed to perform this function properly because it

misunderstood the procedural posture of *Nissen I*. The Court took language related to the CR 12(b)(6) issue and used it to adjudicate the substantive issue in the case.

The Superior Court stated there is no appellate guidance on the form and content of the affidavits. CP 2000 (July 17, 2017 Order). This was a hardship to both the Court and County. However, there are now helpful appellate decisions, still not on the content of affidavits, but at least speaking to the *Nissen I* definition of public record. These decisions are contrary to the Superior Court's mistaken reading of *Nissen I*.

In *West v. City of Puyallup*, 2 Wn. App. 2d 586, 410 P.3d 1197 (2018), a city council member had a private social media account for communications about city and campaign issues. Although the Court found the social media communications concerned government, the Court held the communications were not public records because they were only "informational" and did not, under *Nissen I*, "address the conduct or performance of government functions." *Id.* at 599-600. In *SEIU Local 925 w. U.W.*, 2018 Wn. App. Lexis 1786 (2018) (motion to publish granted), university professors used university e-mail for union communications which related to the university's labor relations and thus to the conduct of a government. Again applying the *Nissen I* definition of public record, the Court of Appeals held the records were not public

because they were not records generated within the scope of employment as part of the conduct of government or performance of government functions. *West* and *SEIU Local 925* are inconsistent with the Superior Court's reading of *Nissen I*, which underlays the Court's erroneous decision on the nine messages on the Prosecutor's private phone.

The Superior Court's decision about the three groups of messages is affected both by the Court's incorrect analysis of *Nissen I* and by mistakes unique to the circumstances of each of the three message groups. If the correct law is applied to the messages, none of them are public records under *Nissen I*.

The first of the three groups of messages are four messages (on July 29 and August 1), three from a County employee to Prosecutor Lindquist, and one in response, joking about a rumor a person might apply for a job with the Prosecutor's Office. The Superior Court, consistent with its mistaken reading of *Nissen I*, found the messages to be public because they "related" to governmental conduct and were "prepared by" government employees. VRP, pp. 14-15 (January 19, 2018). The Court did not think the messages had be "used in any very strict sense," indicating it did not matter that the subject of the rumor was not a job applicant at the time of the messages or any time thereafter. *Id.*

Under *Nissen I*, the lack of a nexus to a government decision,

action or business does matter. Discussion about a person rumored to be a potential applicant remains just discussion and not conduct of business in the absence of a job application. The Superior Court's conclusion messages prepared by a public employee were public because they related to a matter that might involve, but never did involve, a government action was rejected in *West*, 2 Wn. App. 2d at 598 (social media discussions by a city council member about a city project Plaintiff asserted might require a future city council decision).

The second group of three messages (on August 3) are messages to and from Prosecutor Lindquist and one of his employees about the location of an online comment concerning a news article. CP 2039. Plaintiff contends the comment was by a Prosecutor's employee concerning the August 2, 2011 settlement of one of Plaintiff Nissen's earlier claims against the County. *See* CP 1890, 1901-02. The Superior Court based its conclusion the three messages were public on the idea that the messages were "linked" to an August 2 message found to be a public record in the remanded *Nissen I* records case. *See* VRP, p. 15 (January 19, 2018). The Court decided collateral estoppel required the conclusion that three messages allegedly resulting from the August 2 "directive" message were also public records. *Id.*

The Superior Court's conclusion is wrong on several counts.

Collateral estoppel requires an issue in a second case be identical to an issue in an earlier case. *Thompson v. Department of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999). The issue whether the August 2 message was public and the issue whether the August 3 messages are public are different. Under *Nissen I*, the question whether a message on a private phone is public depends on whether the particular message conducts government business by making a government decision or directing government action. *See Nissen I*, at 875-83. Whether either the August 2 message or the August 3 messages conducted government business depends on the nature of each message and their factual context, so the ultimate issue of whether each is a public record cannot be identical unless the contents and their context are identical, which they were not.

Although Prosecutor Lindquist thought his August 2 message was a request for his personal or political allies to comment (at that time they included the recipient of the message) (*see* CP 2060-2063), the *Nissen I* trial court apparently took the message as a directive to County employees to act on behalf of County government. This made the message a public record. There is no evidence the August 3 messages were part of a government decision or were any kind of directive to take government action. Messages and their context must be analyzed on their own merits under *Nissen I*. The Superior Court failed to do so. The Court also made

an unsupported assumption the August 3 comment being sought was the product of the August 2 message. There was no evidence the August 2 recipient conveyed the August 2 message to the author of the on-line comment (or anyone else) or that the on-line comment flowed from the August 2 message. *See* CP 1504-1506 (Robnett Declaration).

The third group of messages is two August 4 messages, one requesting the Prosecutor check his e-mail and noting the sender received a nasty letter, and the second was a response “call me.” CP 2039. Plaintiff’s evidence showed there was an August 4, 2011 complaint letter from Ms. Mell to the Sherriff’s Department concerning alleged incorrect statements made about Ms. Nissen being a suspect in an investigation. CP 2723-24.

The Superior Court found the messages were public because “they are prepared by a government employee and relate to government conduct.” VRP, p.16 (January 19, 2018). Under *Nissen I*, these circumstances do not indicate the August 4 records are public absent a nexus to a government decision or some substantive role in the conduct of government. *Nissen I*, 183 Wn.2d at 874-83; *West*, at 593-99; *SEIU Local 925*, at *11-20. The two messages were just bureaucratic correspondence providing or seeking information on the location or existence of documents or availability for discussion. The messages had no role in the

conduct of government in a meaningful operational sense, but only in a routine ministerial sense.

The nine messages found to be public are not public under *Nissen I* criteria and subsequent case law. Appellate review of this issue is *de novo* based on law and documentary evidence. The Court should reverse the Superior Court's decision finding the messages to be public.

C. The Superior Court Improperly Awarded Fees, Costs, And Penalties.

If this Court agrees with the County's arguments in Section B (the messages are not public under the *Nissen I* standard), then the fee, costs and penalty issues raised in this section are moot. If this Court agrees with the County's arguments in Section A (failure to follow *Nissen I* procedure) and the case is remanded, the fee, cost, and penalty issues are also moot for this appeal, but the Court might consider resolving the legal issues raised (such as the interpretation of the Court's earlier mandate and the asserted *respondeat superior* liability) in the interest of eliminating the need for a possible second appeal.

If the Court does not rule in favor of the County on its Section A and B arguments, then the Court should review the Superior Court's errors in its award of fees, costs, and penalties. The County raised only legal errors in the award, which require *de novo* review, with one exception,

which will be identified below.

1. **The Superior Court Erred In Awarding Fees And Costs To Plaintiff.**
 - a. **The Superior Court Is Bound by the Court of Appeals Decision Denying Fees, Costs and Penalties for the Prior Superior Court Proceedings and Appeal.**

Plaintiff previously asked the Court of Appeals to award penalties, attorney fees and costs pursuant to RCW 42.56.550(4). The Court of Appeals denied this request, stating:

Nissen argues that she is entitled to penalties, fees, and costs at trial and on appeal for Pierce County's failure to comply with the PRA. Following the Supreme Court's reasoning, we disagree. In *Nissen [I]*, the Supreme Court presumed that Pierce County acted pursuant to a good-faith interpretation of the PRA when it denied Nissen's first request, and Pierce County had not yet had an opportunity to comply with the opinion. [Citation omitted.] Thus, the Supreme Court declined to impose PRA penalties, fees, and costs against Pierce County in favor of Nissen.

Nissen II, at *10 (emphasis added). The *Nissen I* Court left open the question of penalties, fees, and costs "going forward," i.e., for actions occurring after remand. *Nissen I*, 183 Wn.2d at 888.

An appellate court mandate "is binding on the Superior Court and must be strictly followed." *Harp v. American Surety*, 50 Wn.2d 365, 366, 311 P.2d 988 (1957). The mandate governs all subsequent

proceedings. RAP 12.2. The trial court must obey any direction given by an appellate court and also give effect to the appellate court's decisions on the particular issues on which the appellate court ruled. *Robert Morton Organ Co. v. Armour*, 179 Wash. 392, 38 P.2d 257 (1934); *Kolatch v. Rome & Sons*, 137 Wash. 268, 242 P. 38 (1926).

The Court of Appeals rejected Plaintiff's request for penalties, fees and costs, for both the original trial court proceedings and all appellate proceedings in this case. On remand, this is the law of the case. Under the mandate, the trial court should have rejected, but did not, Plaintiff's renewed request for penalties, fees, and costs for the first appeal and for the pre-remand trial court proceedings.

The rationale for the Superior Court's award was that the trial court, on the remand in *Nissen I*, awarded fees and costs for prior appellate and trial court proceedings. VRP, pp. 65-66 (March 9, 2018). The Court found the County collaterally estopped by the prior *Nissen I* trial court decision. *Id.* There are flaws in the Superior Court's collateral estoppel ruling. One, the Court failed to follow most of the *Nissen I* trial court's ruling and, two, the issues before the Court here are different from *Nissen I* because the cases had different histories regarding response to different public records requests.

In *Nissen I*, the trial court refused to grant appellate fees because the Court lacked authority to second-guess the Supreme Court in its denial of appellate fees and costs. CP 2988-91. The Superior Court in this case was wrong in believing the *Nissen I* trial court awarded appellate fees on remand. Moreover, the *Nissen I* trial court allowed only a fairly small amount of the fees for pre-remand trial court proceedings (one third). *Id.* The Superior Court's application of collateral estoppel was faulty because it failed to follow the *Nissen I* fee order in regard to both the appellate fees and the pre-remand trial court fees.

A larger flaw in the collateral estoppel ruling is that it is wrongly applied to this fee issue because the fee issue is not identical to the *Nissen I* fee issue. The circumstances in this case differ from the circumstances in *Nissen I*. The County responded to Plaintiff's *Nissen II* request after the *Nissen I* trial court categorically ruled messages on an employee's private phone were not public records. *Nissen II*, at *3-5. As a result of this ruling, the County never searched for records responsive to the *Nissen II* request and never made a response providing records. In light of the *Nissen I* trial court ruling, the County had no basis to demand Prosecutor Lindquist "search" his private phone for public records. *See id.* In contrast, there was no similar judicial precedent binding the County when responding to Plaintiff's *Nissen I* record request. The reasons supporting

the County's denial of Plaintiff's second record request in *Nissen II* are not identical to the circumstances existing when the County denied Plaintiff's request in *Nissen I*. Thus, the pre-remand fee issue in *Nissen I* is not identical to the fee issue in *Nissen II*.

After the trial court ruling dismissing the *Nissen I* public record review, there was no reason for Plaintiff to do anything on *Nissen II* other than file an appeal of the County's failure to provide records responsive to her *Nissen II* request, and then await the result of her *Nissen I* appeal. *Nissen I* would have also decided *Nissen II*, as it is doing now. Instead, Plaintiff pursued *Nissen II* trial court litigation, (*see e.g.* CP 50-58; 173-76; 186-92) forcing an unnecessary (and successful) County motion to dismiss, followed by unnecessary appellate proceedings. Plaintiff should not be rewarded for wasting her resources, County resources, and trial and appellate court resources on unnecessary trial and appellate court proceedings.

b. Plaintiff Is Not Entitled To Fees And Costs For Extensive Unsuccessful Arguments That Prosecutor Lindquist's Affidavits Should Be Rejected As In Bad Faith.

The Superior Court properly disallowed almost \$15,000 in post-remand fees for Plaintiff's unsuccessful motions to compel discovery and for opposing a two-week time extension to complete the second affidavit.

VRP, p. 64 (March 9, 2018). The Court erred by not also disallowing fees for repetitive unsuccessful briefing exhorting the Court to decide the records privacy issue based on tort theories of bad faith and retaliation, rather than on the *Nissen I* criteria.

Plaintiff's briefing on the sufficiency of the affidavits, which was the issue on remand, presented argument almost solely based on accusations the Prosecutor "acted in bad faith out of self-interest to hide his retaliatory antics." *See* CP 2090 (*Nissen's* Brief on Insufficiency); *see also* CP 1856-1888. Plaintiff made little or no argument on the actual issue under *Nissen I*. The Superior Court correctly rejected Plaintiff's extensive arguments on bad faith as immaterial to the issue before the Court, stating "Either the affidavit is sufficient to determine whether public records must be disclosed or it is not. Bad faith does not enter into analysis and the Court will not address it further." CP 2325 (Order Re: Sufficiency of Second Lindquist Affidavit).

Counsel's time records indicate that from March 7 to April 7, 2017 counsel billed \$12,559 for tasks related to briefing and hearing her arguments on bad faith, and from August 17 to September 5, 2017 billed \$16,082 preparing the brief and attachments making her bad faith arguments a second time in response to the Prosecutor's supplemental declaration. CP 2641-2643 (Mell Decl. at Ex. 1, pp. 15-16). This

briefing and preparation of materials supporting it, for combined billings of \$28,641.00, was off-point, so time should be discounted at least 50%. Counsel is not entitled to bill for work on issues on which she did not prevail and that did not bear on the issues to be decided by the Court. The Superior Court abused its discretion by allowing full reimbursement for very substantial time spent pursuing inflammatory and unsuccessful arguments and legal theories the Court correctly found were immaterial to the issue remanded by this Court.

c. Plaintiff Is Not Entitled To Fees For a Lawyer Who Did Not Represent Her In This Public Records Appeal And Performed No Work On The Case.

Plaintiff requested \$5,560.00 in attorney fees generated by William Crittenden, who is not an attorney of record for Plaintiff. The work he performed between February 5, 2018 and February 12, 2018 was after the Superior Court decided the case. CP 2459-7 at Ex. 2. *See* Crittenden Decl. and Ex. Z thereto. The Superior Court (and Plaintiff) offered no explanation why a second lawyer, who is not Plaintiff's lawyer, was necessary for her to prevail, especially since that lawyer did no work until after Plaintiff prevailed. *See Goodwin v. Metts*, 973 F.2d 378, 383-84 (4th Cir. 1992).

Mr. Crittenden sought fees in this case for his declaration

describing a case dismissed on its merits in June 2017. *See* CP 2459 at Ex. W. Mr. Crittenden’s request should have been denied. His declaration is a recounting of his unsuccessful claims that Pierce County and Prosecutor Lindquist had conflicts of interest in defending the *Nissen* public records appeals. *Id.* The declaration had nothing to do with the private records issues remanded to the Superior Court by this Court pursuant to *Nissen I*.

2. The Superior Court Erred In Awarding Penalties Against The County.

The Superior Court awarded large penalties against the County because the court concluded nine messages out of the 147 described in the Prosecutor’s affidavit were public rather than private. The Court based penalties on its conclusion that both the County record search (the affidavits) was “insufficient,” and the County was liable in *respondeat superior* for the act of Prosecutor Lindquist in describing as private messages the Court viewed as public.⁹ The Superior Court committed legal error in failing to follow the Supreme Court’s direction about the adequacy of agency searches that must rely on the affidavits of employees about private information on private phones. In addition, the Court erred in ruling that the County has *respondeat superior* liability for the private

⁹ The Court stated its decision was based on the “totality of the circumstances” presented in the affidavits and *in camera* review. VRP, p. 16 (January 19, 2018).

acts of an elected official not subject to County direction and control.¹⁰

a. The County Complied Precisely With The Supreme Court's Directions Regarding Searches For Public Records On Private Phones.

Under *Nissen I* procedures, the question of whether the County should be penalized is limited to the adequacy of the County's record search. Since the records sought are not owned or retained by the County, but are on a private phone of a County official, the only role of the County is for the County to request the phone owner to provide the records or provide an affidavit with information about why any records are private. The County itself does not search for records or decide what is public or private. The adequacy of a search for public records is not determined by "whether responsive documents do in fact exist, but [by] whether the search itself was adequate." *Neighborhood Alliance v. Spokane*, 172 Wn.2d 702, 719, 261 P.3d 119 (2011).

The Superior Court's decision nine messages out of 147 were public records after conducting an *in camera* inspection does not establish the County's "search" for public records was inadequate. The *Nissen I* Court held the reasonableness of a search for records contained within a constitutionally protected private phone is determined by

¹⁰ These arguments apply to both the pre and post-remand penalties. Pre-remand penalties are also improper for the reasons stated in the County argument above concerning fees. The Court of Appeals previously denied pre-remand penalties, which is now law of the case.

whether an agency complies with the Supreme Court's procedure for having the employee review his or her records to segregate private from public records.

The Supreme Court provided clear instructions governing the County's actions. The County precisely followed those instructions. There is no basis for awarding penalties because the County took all actions that it could take within the authority granted by *Nissen I*.

The Superior Court concluded the affidavits were insufficient and the County could be penalized for failing to send it back for "additional work," but declined to specify what additional work was needed. VRP, p. 70 (March 9, 2018). When the Court first stated it thought the original affidavit was insufficient regarding some messages the County offered to ask the Prosecutor for a supplemental affidavit providing the additional information the Court needed, but the Court refused to say what it thought was insufficient or what additional information was needed. VRP, pp. 27-36 (April 7, 2017). Nevertheless, the County, "in the dark" so to speak, did provide a supplemental affidavit with more detail in an attempt to give the Court what was needed for a decision. *See* CP 2031. The Court found the affidavit adequate for decision on 130 of 147 messages.¹¹

¹¹ As noted previously, the Court did briefly comment on information needed for the decision of two groups of messages (not the nine messages later found public) and the

The Superior Court acknowledged the *Nissen I* procedure was new and there was no appellate guidance for the County and Prosecutor to follow on the details of the affidavits. CP 2000. Since the Court refused to provide that guidance, it was wrong for the Court to fault the County for not knowing the unknown. Moreover, because the Court attached the nine messages reviewed *in camera* to its order, they can now be compared to the affidavits. *See* CP 3237-42. The messages are exactly as described generally in the affidavits: the first group being a short back and forth about a rumor of a job application that never materialized; the second group, a back and forth about the location of an on-line comment; and the third group, an inquiry about a document and a notation a letter was received. The information in the affidavits was adequate to show these messages were not a part of a past or pending County decision or action. The Superior Court could and should have resolved the *Nissen I* question based on the information provided in the affidavits.

Since 2011, courts have had discretion to award no penalty for purported PRA violations. RCW 42.56.550(4) *as amended by* Laws of 2011, ch. 273 § 1. The Court should exercise its discretion accordingly based on the unique factors in this case.

The issue of the application of state constitutional privacy

County supplied that information, putting those messages within the 130 found private based on the affidavits.

provisions to commingled public/private records is an issue of first impression. There was no statutory or case law to guide the County in its search for public records on private phones initially or under the new procedure adopted in *Nissen I*. The search issues in this case were legal and constitutional, not the typical factual questions concerning timeliness, diligence or completeness of a records search. This is especially true where, as here, the ability for the County to “search” for a record is limited by Supreme Court decision to placing the search into the hands of an official who was acting on the matter in his private capacity.

3. The County Does Not Have *Respondeat Superior* Liability For The Elected Prosecutor’s Private Acts.

The Superior Court’s ultimate basis for penalizing the County was its conclusion the County was liable in *respondeat superior* for the Prosecutor’s judgment that the records the Court identified as public were private under the Supreme Court’s definition of public record. VRP, p. 71 (March 9, 2018). The Court’s analysis was:

There is no privacy interest in public records. Public records belong to the public in Washington State, and to the extent that an individual is being directed to author an affidavit about public records that turn out in fact to be public records, that is something that that individual is doing within the scope of his or her agency as a public employee.

VRP, pp. 72-73 (March 9, 2018) (emphasis added).

The problem with the Court's analysis is that it creates a kind of "catch 22" situation in which the rules governing the outcome are inherently contradictory and no solution is ever possible. *Respondeat superior* liability for a servant's acts can exist only where the master has the right to control particular activities from which a harm flows. *Charlton v. Day Island Marina*, 46 Wn. App. 784, 732 P.2d 1008 (1987). Under *Nissen I* and the State Constitution, only an employee can review messages on the employee's private phone to separate private from public messages; a government employer cannot control this activity. However, under the Superior Court's reasoning, if a Court later concludes a message on the phone is public, then the employer had the right to oversee the search of the phone records because the records were not protected by constitutional privacy. Thus, the employer is liable for not locating the public records. This is either "catch 22" or *ex post facto* liability. There is no way for government agencies to escape this trap.

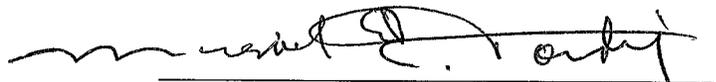
The County did not have the right to see the messages on the Prosecutor's private phone to make the private record decision, or the ability to dictate the Prosecutor's description of the messages and his personal opinions about their public or private nature. Under this circumstance, there can be no *respondeat superior* liability for the County.

VI. CONCLUSION

The County respectfully asks the Court of Appeals to reverse the Superior Court's decision that Pierce County failed to produce public records to Plaintiff and dismiss Plaintiff's public records appeal. If the Court does not reverse and dismiss, the County requests the case be reversed and remanded to the Superior Court with instructions to decide Plaintiff's appeal strictly under the *Nissen I* affidavit procedures without *in camera* review. If this case is not reversed, the County requests that the award of attorney fees, costs, and penalties be reversed and that fees, costs, and penalties not be awarded. If any fees, cost, and penalties are allowed, the County respectfully requests that the Court correct the Superior Court errors in the amount of its award as identified by the County in this appeal.

RESPECTFULLY SUBMITTED this 25th day of September,
2018.

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CERTIFICATE OF SERVICE

On said day below I emailed and e-served via the Washington State Appellate Court's Portal the Opening brief of Appellant-Cross Respondent Pierce County to the following parties:

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I declare under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 25th day of September, 2018, at Olympia, Washington.



KATHRINE SISSON

FREIMUND JACKSON & TARDIF P.L.L.C

September 25, 2018 - 4:02 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51812-1
Appellate Court Case Title: Glenda Nissen, Respondent v Pierce County, et al, Appellants
Superior Court Case Number: 12-2-02452-6

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