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Division II
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NO. 51812-1-II

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

GLEND A NISSEN,

Plaintiff/Respondent,

v.

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

Defendant/Appellant.

RESPONDENT NISSEN'S AMENDED RESPONSE BRIEF

JOAN K. MELL, WSBA No. 21319
Attorney for Respondent Glenda Nissen
III BRANCHES LAW, PLLC
1019 Regents Blvd. Ste. 204
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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I. INTRODUCTION

Nissen II comes before Division II a second time on a privacy argument that Pierce County has no standing to make. Pierce County Prosecuting Attorney Mark Lindquist has already published from his official Pierce County website the nine text messages at issue on Pierce County's appeal, proclaiming them "trivial" and "insignificant." Per the prosecutor himself, the texts contain no sensitive subject matter that this court should declare private. His office released the texts and promised the public there would be no appeal. Pierce County has appealed to "leverage" a settlement out of Detective Nissen in her federal court employment case. Pierce County's abuse of the appellate process warrants sanctions. This appeal should be rejected outright and dismissed without publication. Sanctions should be awarded in addition to attorney's fees and costs. Nissen forgoes her cross appeal because the voters have removed Lindquist from office, resolving Nissen's concerns about his continued adverse influence on Pierce County.

II. ISSUE STATEMENTS ON APPEAL

- A. Whether Pierce County's privacy arguments are moot, and if not whether *Nissen I* precluded in camera review of text messages sent and received on personal technology?
- B. Whether the trial court's fee and penalty award against Pierce County was an abuse of discretion?
- C. Whether Pierce County must pay additional attorney's fees and costs on appeal plus a sanction of \$25,000.00?

III. STATEMENT OF THE CASE

The facts pertinent to this case date back several years to July 26, 2011 when Pierce County Sheriff's Department ("PCSD") Detective Glenda Nissen attempted to settle her whistleblower complaint against Pierce County Prosecuting Attorney ("PCPA") Mark Lindquist and his office, the Pierce County Prosecuting Attorney's Office ("PCPAO").¹

The settlement document included Pierce County's promise of no retaliation.² The parties agreed to neutral press statements.³ Pierce County's proposed a non-neutral statement prepared by the prosecutor's office violated that agreement.⁴ On August 2, 2011, PCPA Lindquist contacted Pierce County Communications Director Hunter George about

¹ CP 2647-48.

² *Id.*

³ CP 2651.

⁴ CP 2656.

proposed changes to the press statement because he wanted the negative comments, published.⁵ Pierce County's Risk Manager offered a new neutral statement that the TNT printed.⁶ On August 2, 2011 in the evening, The News Tribune first covered the settlement online. The online coverage included a sentence to the effect that the PCSD had not verified a suspect responsible for a threatening letter received by Lindquist's Chief Criminal Deputy Prosecutor Mary Robnett.⁷ At 11:51 p.m., Lindquist texted Chief Criminal DPA Robnett "tell allies to comment on tnt story."⁸ Lindquist then contacted PCSD Public Information Officer Edward Troyer to have that sentence changed to label Nissen responsible for the letter.⁹

The next morning August 3, 2011, the TNT's print publication was delivered with the sentence changed as Lindquist had requested linking Nissen to the letter.¹⁰ That same day Nissen, through counsel, made her *Nissen I* request for phone records and text messages.¹¹

⁵ CP 2663-64.

⁶ CP 2666.

⁷ CP 2693, 2672-73.

⁸ CP 2694.

⁹ CP 2693.

¹⁰ CP 2675.

¹¹ CP 3.

On August 3, 2011 at 5:23 p.m., deputy prosecuting attorney Michael Sommerfeld, posted under the pseudonym “porfirypetrovich” negative comments to the TNT website related to the coverage of the Nissen settlement.¹² Later that evening at 7:43 p.m., DPA Sommerfeld texted PCPA Lindquist at his personal cell phone “It is posted now” and PCPA Lindquist responded at 9:01 p.m. “Doesn’t come up. “What’s the name?””.¹³ Sommerfeld responded “Its there now 3rd from top.”¹⁴

On August 4, 2011, Det. Nissen’s attorney sent a preservation request to Verizon.¹⁵ Verizon preserved texts between July 29, 2011 to August 4, 2011.¹⁶ Det. Nissen’s attorney Mell sent that same day a cease and desist and preservation notification letter to PCSD Public Information Officer (“PIO”) Edward Troyer.¹⁷ Upon receipt of the Mell letter, PCSD PIO Troyer texted Lindquist at his personal cell phone: “Check your work email. Also I got a nasty letter from joan mel.” and Lindquist responded: “Call me”.¹⁸

¹² CP 2702.

¹³ CP 2718.

¹⁴ CP 2719.

¹⁵ CP 1905.

¹⁶ CP 1910.

¹⁷ CP 2723-26.

¹⁸ CP 2720-21.

On or about August 25, 2011, in response to her *Nissen I* request, Lindquist obtained and provided the County with a call log and a text log that the County produced to Nissen.¹⁹ The text log did not reveal the content of the messages, but did provide the date and time of each message and the corresponding party with some redactions.²⁰ Lindquist redacted from his text log from *Nissen I* those texts between DPA Sommerfeld and PCPA Lindquist.²¹

On August 29, 2011, Nissen filed a whistleblower retaliation complaint alleging, inter alia, that Lindquist manipulated the TNT coverage of her case.²²

On or about October 3, 2011, Pierce County retained an attorney, Lawton Humphrey, to investigate the retaliation complaint Nissen submitted wherein she claimed Lindquist and his office manipulated the TNT coverage of her case in violation of her settlement agreement.²³

¹⁹ CP 2798.

²⁰ *Id.*

²¹ *Id.*

²² *Nissen v. Lindquist et. al*, ECF Case No. 3:16-cv-05093-BHS.

²³ CP 2650-51.

On October 26, 2011, Nissen filed her initial PRA case now known as *Nissen I*.²⁴ On November 3, 2011, PCPA DPA Sommerfeld formally appeared for Pierce County and the PCPAO in *Nissen I*.²⁵

On November 7, 2011, former PCPAO DPA Clay Selby requested Det. Nissen's personal phone records.²⁶

On November 11, 2011, former PCPA John Ladenburg E-mailed PCPAO civil DPA Denise Greer that PCPA Lindquist knew that if his personal cell phone was used for work purposes it would be subject to the PRA.²⁷

On December 9, 2011 before any substantive rulings on *Nissen I*, Nissen made her, *Nissen II* request, for text messages to obtain any work related content within the seven days that the texts were preserved:

“Please produce for public inspection the text content on Verizon wireless #253-861-XXXX from July 29, 2011 to August 4, 2011 that relate to the conduct of government or the performance of any governmental or proprietary function. This request relates to the cell phone used by Mark Lindquist.”²⁸

²⁴ *Nissen I*, 183 Wn.2d 863, 37 P.3d 45 (2015).

²⁵ CP 2741-43.

²⁶ CP 2876-77.

²⁷ CP 2897-98.

²⁸ CP 2738.

On December 9, 2011, counsel faxed Nissen's request to the PCPAO's Public Records Officer ("PRO") Joyce Glass.²⁹

On December 20, 2011, at the direction of Lindquist through his special deputy Michael Patterson, the County instructed Verizon to retain texts from July 29, 2011 to August 4, 2011.³⁰

On February 17, 2012, PRO Glass sent a final letter closing the *Nissen II* request without producing any responsive texts.³¹

On March 12, 2012, Nissen entered into an agreement with the Pierce County Sheriff to put her phone records in the custody of PCPA special DPA Ramerman who had been appointed a special DPA to represent Pierce County and the Sheriff in responding to the Selby PRR.³²

On April 9, 2012, PCPAO special deputy Ramsey Ramerman sent an E-mail to Selby notifying him and the Pierce County's Public Records Ombudsman that work related text messages on private technology would be public records.³³

²⁹ *Id.*

³⁰ CP 2700.

³¹ CP 2738.

³² CP 2882.

³³ CP 2879-2880.

Det. Nissen filed *Nissen II* on November 30, 2012.³⁴ Mark Lindquist did not intervene in a personal capacity like he did in *Nissen I*.

On January 11, 2013, Pierce County and its PCPAO answered the complaint.³⁵ On January 18, 2013 Det. Nissen moved to strike the allegations that she was responsible for criminal wrongdoing.³⁶ On January 25, 2013, the Court granted her motion.³⁷ On February 14, 2013 Pierce County's special deputy Patterson filed additional pleadings with the same allegation that she was responsible for criminal misconduct.³⁸ On March 1, 2013, Det. Nissen moved for and was granted an order on contempt compelling Pierce County and its PCPAO and its representatives from any further use of the content.³⁹

On March 26, 2013, the parties held a discovery conference wherein Pierce County and its PCPAO refused to search for and produce any text messages.⁴⁰ Pierce County never produced, and the County never

³⁴ CP 1-10.

³⁵ CP 11-20.

³⁶ CP 79-80.

³⁷ CP 81-82.

³⁸ CP 93, 173.

³⁹ CP 675-76.

⁴⁰ CP 2872.

adopted, any policy regarding the use of text messages or personal electronic devices.⁴¹

On April 22, 2013, the Court entered an order dismissing *Nissen II* on estoppel grounds.⁴² Nissen appealed the dismissal.⁴³

On June 19, 2013, Pierce County cross-appealed the denial of its motion for sanctions.⁴⁴

On September 9, 2014, Division II ruled in favor of Det. Nissen in *Nissen I*. Pierce County appealed. On August 27, 2015, the Supreme Court issued its opinion in *Nissen I*, unanimously holding that the PRA applies to private devices and that records on such devices can be public records subject to the PRA.⁴⁵ On November 5, 2015, the Supreme Court issued its mandate in *Nissen I*.⁴⁶

On remand Pierce County Executive Pat McCarthy objected to Lindquist's obvious conflicts, and attempted to replace him with independent counsel for Pierce County. The Council did not support her

⁴¹ CP 2842-43.

⁴² CP 1185-1189.

⁴³ CP 1318-20.

⁴⁴ CP 1429-30.

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

⁴⁶ 3105-06.

efforts, and Lindquist was entitled to appoint counsel of his own choosing.⁴⁷ Although the trial court noted that the conflict issue may arise in the future, the issue of removing Lindquist was not raised again in the trial court.⁴⁸

On January 9, 2016, former Chief DPA Robnett disclosed to Special Deputy Mike Tardif the “tell allies” text message that Lindquist’s texted to her.⁴⁹

The *Nissen I* court permitted PCPA Lindquist to appoint Michael Tardiff and Jeffrey Freimund and their firm as the special deputies for Pierce County.⁵⁰ Mark Lindquist as intervener in a personal capacity continued to be represented by Stewart Estes and his firm.⁵¹ In *Nissen II* on remand, Michael Tardiff and Jeffrey Freimund substituted in for Michael Patterson to represent Pierce County and its PCPAO.⁵² On January 19, 2016, Division II ruled in favor of Glenda Nissen in *Nissen II*.

⁴⁷ CP 2467-68.

⁴⁸ CP 2468.

⁴⁹ CP 2690.

⁵⁰ CP 2467.

⁵¹ CP 2461.

⁵² CP 1442-43.

On February 9, 2016, the *Nissen I* trial court issued a letter opinion on in camera review that the “tell allies” text was a public record.⁵³

On February 19, 2016, the Division II *Nissen II* opinion became final. Division II issued its mandate on *Nissen II* on March 22, 2016.⁵⁴

On February 19, 2016, the *Nissen I* court entered its final Order on SMS Messages Transcript finding the text from PCPA Lindquist to PCPAO DPA Robnett at 11:51 p.m. “tell allies to comment on tnt story” a public record.⁵⁵

On March 18, 2016, the *Nissen I* court declared Glenda Nissen the prevailing party and awarded her attorney’s fees, costs, and penalties.⁵⁶ On April 1, 2016 it entered its final order.⁵⁷ Neither party appealed these orders after the Supreme Court declined to recall its mandate on June 1, 2016.⁵⁸

On January 11, 2017, having heard nothing from Pierce County, Det. Nissen moved to compel discovery and in camera review of the text

⁵³ CP 3024-25.

⁵⁴ CP 1445-46.

⁵⁵ CP 3027-28.

⁵⁶ CP 2946.

⁵⁷ CP 3052-56.

⁵⁸ CP 3108.

transcripts in *Nissen II*.⁵⁹ Her motion was not granted.⁶⁰ The Court entered an order setting a briefing schedule regarding the sufficiency of the Lindquist declaration.⁶¹

On July 17, 2017, the Court found the 03/28/2016 Declaration of Prosecutor Mark Lindquist insufficient. The insufficiencies included (i) the failure to provide an explanation of each individual text sufficient to explain the communication as private and not public; (ii) the failure to indicate whether each text was from or to a public employee; and, (iii) that PCPA Lindquist “largely relies on his own determination that none of the records meet his articulated standard with minimal additional information regarding the text message at issue.”⁶²

On August 15, 2017, Pierce County filed the supplemental declaration of PCPA Lindquist.⁶³

On August 22, 2017, Counsel for Nissen submitted briefing showing that the August 4, 2011 text message between Lindquist and Troyer was a reference to the letter that Counsel for Nissen sent to Troyer

⁵⁹ CP 1556.

⁶⁰ CP 1720-21.

⁶¹ *Id.*

⁶² CP 2000-02.

⁶³ CP 2031-47.

on that very day.⁶⁴ Nissen also explained that there was likely a text between Sommerfeld and Lindquist on the TNT coverage. The County continued to oppose production of these work related texts on the same content as the *Nissen I* text.⁶⁵

On December 12, 2017, the trial court ruled that the 08/15/17 Supplemental Declaration of Mark Lindquist re: SMS Transcripts was still insufficient and ordered seventeen texts produced for in camera review by January 5, 2018.⁶⁶

On January 5, 2018, Pierce County filed text transcripts for seventeen text messages under seal for in camera review.⁶⁷ On January 12, 2018, the Court ordered the parties to appear before it on January 19, 2018 for hearing on the Court's in camera review.⁶⁸

On January 19, 2018, the Court ruled nine out of seventeen text messages reviewed in camera were public records and set a status

⁶⁴ CP 2083.

⁶⁵ CP 2082.

⁶⁶ CP 2323-34.

⁶⁷ CP 2339.

⁶⁸ CP 2355.

conference for March 2, 2018.⁶⁹ Pierce County had been withholding ten public records.⁷⁰

On January 31, 2018, PCPA Lindquist had his office post the text message content for the nine texts ruled public records on the County's official PCPA Facebook page without providing them to Nissen and before the Court had unsealed the transcript.⁷¹

On February 2, 2018, the Court ordered these texts unsealed and further ordered the Pierce County Prosecuting Attorney to provide the texts to Nissen by 5:00 p.m on February 2, 2018.⁷²

On February 2, 2018 at 4:51 p.m., Det. Nissen received text transcripts for nine of the ten texts via e-mail from special deputy Tardif's office that were filed with the trial court. The County did not include the "tell allies" text with its e-mail of the other nine.⁷³

The County made no attempts to prevent future PRA violations by Lindquist or his deputies, and it did not take any action adverse to

⁶⁹ RP 01/19/18 at 14-20.

⁷⁰ CR 3215-45. Nine from dates not implicated in *Nissen I*, plus the one from *Nissen I*.

⁷¹ CP 2940-42.

⁷² CP 2417-19.

⁷³ CP 2420-29.

Lindquist regarding these issues.⁷⁴ Twice the County relied on facially insufficient declarations from Lindquist.⁷⁵

On February 2, 2018, the parties stipulated to a briefing schedule on the penalty phase.⁷⁶ On February 27, 2018, the Court requested supplemental briefing on any collateral estoppel effect from Judge Tabor's ruling regarding penalties. The parties responded accordingly to the briefing schedule. The parties appeared for a hearing on penalties without live testimony on March 9, 2018. The trial court set the penalties fees and costs and entered findings in support of its award.

One thousand eight hundred sixty (1,860) days passed from the date of Nissen's request and the date of the mandate.⁷⁷ Six hundred eighty eight (688) days passed from the date of mandate to the date Pierce County provided the public records to Nissen.⁷⁸ Nissen's total attorney's fees were \$185,697.50.⁷⁹

⁷⁴ CP 3230

⁷⁵ *Id.*

⁷⁶ CP 2430-31.

⁷⁷ CP 3235.

⁷⁸ *Id.*

⁷⁹ *Id.*

Pierce County did not contest Nissen's proposed findings in its briefing.⁸⁰ Nissen assigned no error to the trial court's findings.

Pierce County did not submit any declarations from its Public Records Ombudsman or its PRO or any other official or employee at Pierce County other than the two insufficient declarations of PCPA Mark Lindquist.⁸¹

On April 6, 2018 the court issued a judgment awarding Nissen \$341,550.55 for penalties and Attorneys Fees and Costs.⁸² The total penalties awarded were \$165,960.00 (1,860 days x 3 sets of texts x \$2.00 per day = \$11,160.00) pre mandate + (688 days x 3 sets of texts x \$75.00 per day = \$154,800) post-mandate.⁸³

On May 4, 2018 Pierce County filed its Notice of Appeal.⁸⁴

IV. ARGUMENT

None of the issues raised on appeal have merit or warrant treatment in a published opinion. This case is not ripe for post *Nissen I* analysis about what to do when a recalcitrant employee refuses access to

⁸⁰ CP 3231.

⁸¹ CP 3232.

⁸² CP 3246-47.

⁸³ CP 3235.

⁸⁴ CP 3248.

public records created on personal technology. In this case, the at-fault employees were Pierce County's own attorneys who had actual knowledge of the records at issue, and the County was repeatedly warned that it should not have allowed Lindquist to control this litigation. But Pierce County chose to ignore those warnings, and now the County attempts to overturn a discretionary award of penalties and attorney's fees that it caused Nissen to incur. This appeal is frivolous under RAP 18.9 and Pierce County should be sanctioned for pursuing it.

A. Pierce County Relies Upon Incorrect Standard of Review

1. Discretionary Review - Not De Novo Review

Pierce County incorrectly asserts this appeal should be decided de novo.⁸⁵ A trial court's decision to grant in camera review under the PRA is reviewed for abuse of discretion.⁸⁶ A trial court's fee and penalty determination under the PRA is similarly reviewed for abuse of discretion.⁸⁷ Pierce County has failed to show any abuse of discretion.

2. Unchallenged Findings Verities on Appeal

⁸⁵ Appellant's Brief ("App. Br.") at 18.

⁸⁶ *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 867, 288 P.3d 384 (2012); *King County Dept. of Adult and Juvenile Detention v. Parmelee*, 162 Wn. App. 337, 254 P.3d 927 (2011), citing *Harris v. Pierce County*, 84 Wn. App. 222, 235-236, 928 P.2d 1111 (1996); *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 796-797, 810 P.2d 507 (1991).

⁸⁷ *Yousoufian v. King County Executive*, 152 Wn.2d 421, 430-431, 98 P.3d 463 (2004).

Pierce County argues entry of findings was erroneous. A trial court must enter findings in a PRA case specific to the *Yousoufarian* factors.⁸⁸ The trial court's entry of findings was not erroneous.

Pierce County incorrectly claims that it may challenge de novo for the first time on appeal the trial court's factual findings without taking exception to any particular finding at the trial level.⁸⁹ Pierce County never offered any findings of its own to the trial court.⁹⁰ Pierce County did not take exception to the trial court's findings before entered. And, Pierce County did not take exception to any particular findings in its post argument pleading entitled "Defendants' Objections To Plaintiff's Findings of Fact...".⁹¹ Even on appeal, Pierce County still fails to explain error in any specific fact.⁹² Pierce County simply argues such findings were not needed in a PRA case, citing *Dragonslayer* and another PRA case involving the attorney general's office.⁹³ Both cases hold that where

⁸⁸ *Hoffman v. Kittitas County*, 4 Wn. App. 2d 489, 422 P.3d 466 (2018).

⁸⁹ App. Br. at 17 - 18.

⁹⁰ CP 3231.

⁹¹ CP 3254-3255; CP 3153, RP 3/9/18 at 77-78.

⁹² App. Br. at 17; CP 3154-56.

⁹³ CP 3154; *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 441-42, 161 P.3d 428 (2007); *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719-720, 328 P.3d 905 (2014).

there are no findings in a PRA case, de novo review is proper. Neither case prohibits findings in a PRA case.

An appellate court considers unchallenged findings of fact as verities on appeal and reviews conclusions of law de novo.⁹⁴ De novo review should not be used to reverse the unchallenged factual findings of the trial court. The trial court's findings stand. All findings are supported by substantial evidence in the record anyway even though such a determination is unnecessary because they are unchallenged verities on this appeal.⁹⁵

B. No Standing - Pierce County Has No Privacy Interest To Assert

Pierce County has no standing to make a personal privacy challenge to in camera review. Unlike *Nissen I*, Lindquist did not intervene in these proceedings. He is not a party to this case. Pierce County may not assert any individual privacy claims for him.⁹⁶ Furthermore, Pierce County waived any theoretical privacy argument when Lindquist published the nine texts on his Pierce County official

⁹⁴ *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005); *Francis v. DOC*, 178 Wn. App. 42, 313 P.3d 457 (2013).

⁹⁵ The earlier recitation of facts tracks with the trial court's findings with citations to the supporting evidence in the record.

⁹⁶ *State v. Walker*, 136 Wn.2d 678, 685, 965 P.2d 1079 (1988)(only person whose privacy interests are at stake may claim privacy right under state and federal constitutions.)

website on January 31, 2018.⁹⁷ Pierce County gave the unredacted texts to Nissen and filed them unredacted.⁹⁸

C. In Camera Review Appropriate

1. Pierce County Attempts to Relitigate *Nissen I*

Pierce County revisits its losing argument from *Nissen I* when arguing against in camera review of texts created on private technology.

Nissen I rejected their privacy argument:

“We hold that text messages sent and received by a public employee in the employee’s official capacity are public records of the employer, even if the employee uses a private cell phone... We do not read the PRA as a zero-sum choice between personal liberty and government accountability.”⁹⁹

This Court has pointed out that the County’s claim that article I, section 7 categorically prohibits searching a government employee’s private devices for public records is not the *Nissen I* holding: “there is no categorical constitutional protection for public records that are contained on private devices.”¹⁰⁰ Pierce County misconstrues this Court’s reasoning from its *Washington Public Employees Association* decision. Pierce County

⁹⁷ CP 2940-42.

⁹⁸ CP 3230 and CP 2420.

⁹⁹ *Nissen I*, 183 Wn.2d 863, 869, 884, 357 P.3d 45 (2015).

¹⁰⁰ *Wash. Public Employees Assoc. v. Washington State Center for Childhood Deafness & Hearing Loss*, 1 Wn. App. 2d 225, 235, 404 P.3d 111 (2017), cert. granted March 7, 2018.

presupposes that all of the texts have the same expectation of privacy as an individual's name and birthdate. But work related texts carry no expectation of privacy and there was no need for the trial court to "justify" its limited intrusion into a constitutionally protect privacy interest when conducting in camera review. Even so, the trial court was extremely cautious, limiting the number of texts it reviewed in camera.

The County uses flawed logic when assigning error to the trial court for "refusing to decide the privacy of the phone records based on affidavits as *Nissen I* directed." The trial court was not deciding whether the texts were private. The trial court was deciding whether the texts were public records. *Nissen I* did not mandate the trial court rely exclusively on affidavits to make a public records determination. Nor is there a federal process that so restricts a trial court.¹⁰¹

¹⁰¹ CP 1695-98 (FOIA Update Vol. V, No. 4 at 3-4). *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999) (rejecting agency affidavit concerning "personal" records as insufficient and remanding case for further development through affidavits by records' authors explaining their intended use of records in question); *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1247-48 (4th Cir. 1994); *Kempker-Cloyd v. United States Dep't of Justice*, No. 5:97-253, 1999 U.S. Dist. LEXIS 4813, at **12-13 (W.D. Mich. Mar. 12, 1999) (determining that agency acted in bad faith because it failed to review responsive records that agency official asserted were "personal"); cf. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999) (rejecting agency affidavit concerning "personal" records as insufficient, and remanding case for further development through affidavits by records' authors explaining their intended use of records in question).

When the *Nissen I* court suggested a public record determination may be decided on affidavits alone, the Supreme Court did not rule out in camera review. Whether a trial court would have sufficient information via affidavit to decide whether a record was public would ultimately depend largely upon the agency and its declarants. Here, the County and Lindquist could not provide adequate information to preclude in camera review because the fact of the matter was the texts were public records. Pierce County attempted to avoid its PRA liability by insisting it had no obligation to prepare or provide an adequate affidavit. Yet, Pierce County did not take this hands off position with Nissen when her private phone records were requested.¹⁰² Pierce County ordered her to turn over her private phone records and she did. The County's deference to Lindquist was wholly inconsistent with its obligations under the PRA wherein an agency must offer the "fullest assistance" to a requestor.¹⁰³

2. Trial Court Correctly Concluded Texts Were Public

The public character of certain texts was self evident from Lindquist's Second Declaration.¹⁰⁴ Using his declarations and information

¹⁰² CP 2882.

¹⁰³ RCW 42.56.100.

¹⁰⁴ CP 2113 - 2129.

she gleaned outside discovery, Nissen argued that 45 texts out of 153 may be reviewed in camera because the texts had a work nexus.¹⁰⁵ The trial court elected to examine 17 texts.¹⁰⁶ All texts reviewed in camera were to or from another County employee.¹⁰⁷ The following nine were public:

Group One - “public defender related texts”¹⁰⁸

1. Saturday 07/30/11 DPA B. Nelson to Lindquist at 20:10:43: There’s a rumor going around that this d-bag DAC attorney A. Morrison [n]et w/Benton to try and get us to hire him. Don’t do it. !!!!!!!
2. Monday 08/01/11 DPA B. Nelson to Lindquist at 14:55:01: I was talking to Neil and told him that Morrison supposedly met with Benton. Neil’s head basically exploded. It was awesome.
3. Monday 08/01/11 DPA B. Nelson to Lindquist at 14:56:52: “An evil harry potter” is the phrase I believe neil coined
4. Monday 08/01/11 DPA B. Nelson to Lindquist at 14:57:43: Neil thinks he’d try and work here to sabotage us from the inside

The above exchange pertained to a possible employment application with the prosecutor’s office.¹⁰⁹ Whether the application was just “rumored” or actual was not relevant because in either case the

¹⁰⁵ CP 1783 - 1798; CP 1723.

¹⁰⁶ CP 2328 - 2332.

¹⁰⁷ CP 2126 - 2129, 2095 - 2109.

¹⁰⁸ RP 03/09/18 at 67.

¹⁰⁹ RP 01/19/18 at 14.

content involved “the employment practices of the prosecutor’s office.”¹¹⁰ The records relayed information that could be of possible “use” to a public agency and it was “prepared” by a public employee to another public employee.¹¹¹ Lindquist controlled who the office hired and could act on the information.

Group Two - “Joan Mell letter - related texts”¹¹²

5. Wednesday 08/03/11 DPA Sommerfeld texts Lindquist at 19:43:05: It is posted now
6. Wednesday 08/03/11 Lindquist to DPA Sommerfeld 21:01:46: Doesn’t come up. What’s the name?
7. Wednesday 08/03/11 DPA Sommerfeld to Lindquist 21:30:46: Its there now 3rd from top

These three texts were linked to the *Nissen I* public record “tell allies to comment on tnt story”.¹¹³ The TNT story was the coverage of Nissen’s settlement against Lindquist’s office. DPA Sommerfeld texted Lindquist to point out the anonymous comment Lindquist requested. The trial court concluded that the relationship of these texts to the existing public record was sufficient to declare the texts public records via estoppel. Pierce County had not challenged the *Nissen I* public record determination.

¹¹⁰ *Id.*

¹¹¹ RP 01/19/18 at 14-15.

¹¹² RP 03/09/18 at 67.

¹¹³ RP 01/19/18 at 15.

Other texts about other comments not apparently from the prosecutor's office were ruled not public records because they were "humorous comments about other comments ... simply an observation of actions that are not related to governmental conduct."¹¹⁴

Pierce County claims it was error for the trial court to rule the above three texts public records based upon estoppel under the *Nissen I*, but Lindquist conclusively and finally decided the additional texts, some of which directly related to the same content, were public records when he published them on his official website anyway so its point is entirely moot.

Pierce County ignores the weight of the evidence showing these three texts are public records. Chief Criminal Deputy Robnett understood Lindquist wanted her to instruct subordinates to comment on the media coverage.¹¹⁵ DPA Sommerfeld did so and then directed Lindquist to his anonymous post.¹¹⁶ These public disparagements were precisely the type of retaliatory conduct Nissen described in her PRA complaint.¹¹⁷

¹¹⁴ RP 01/19/18 at 16.

¹¹⁵ CP 2691-94.

¹¹⁶ CP 2718-19.

¹¹⁷ CP 2.

Additionally, these texts between Lindquist and Sommerfeld were the kind of content the Supreme Court thought established a sufficient nexus with government activity to rule in Nissen’s favor in *Nissen I*:

“Nissen sufficiently alleges that Lindquist sent and received text messages in his official capacity “to take actions retaliating against her and other official misconduct.”¹¹⁸

The trial court did not err when deciding the above texts were public records.

Group Three - “texts related to comments on the newspaper story”¹¹⁹

8. Thursday 08/04/11 PCSD PIO Ed. Troyer texts Lindquist at 12:49:32: Check your work email. Also I got a nasty letter from joan mel
9. Thursday 08/04/11 Lindquist responded to Troyer 12:52:08: Call me

These two texts were deemed public records because both were prepared by public employees and relate to governmental conduct.¹²⁰ This exchange concerned the cease, desist and preservation letter sent to Troyer from Mell.¹²¹ Lindquist’s office responded.¹²² Thus the texts were “prepared” by government employees and were about work, showing a

¹¹⁸ *Nissen I*, 183 Wn.2d at 882-883.

¹¹⁹ RP 03/09/18 at 67.

¹²⁰ RP 01/19/18 at 16.

¹²¹ CP 2225, 2227.

¹²² CP 2229.

relationship to the conduct of the PCPAO towards Nissen. Additionally, these texts were “used” to respond to Nissen’s cease, desist, and preservation notice. Pierce County essentially concedes the public character of these texts when it describes them as “just bureaucratic correspondence providing or seeking information on the location or existence of documents or availability for discussion.”¹²³ “Routine ministerial” records are still public records. Pierce County incorrectly argues that the texts are not public because they played no “role in the conduct of government in a meaningful operational sense.”¹²⁴ Pierce County cites no authority for supposition that a court must weight the importance of the content when making a public records determination. PRA case authority holds to the contrary: “its is not up to an agency to decide which records are consequential or inconsequential.”¹²⁵ The significance of the record has no relevance to a public records determination.¹²⁶ However, an agency's intransigence on an issue of public importance like Nissen raised is relevant.¹²⁷

¹²³ App. Br. at 36.

¹²⁴ App. Br. at 36-37.

¹²⁵ *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 728, 354 P.3d 249 (2015).

¹²⁶ RCW 42.56.080.

¹²⁷ *Yousoufian*, 168 Wn.2d 444, 462, 229 P.3d 735 (2015).

Pierce County is wrong when arguing the exclusive criteria for distinguishing between a public and private record is how the writing is used.¹²⁸ In *Nissen I* the Supreme Court identified the multiple alternative criteria spelled out in the PRA.¹²⁹ The trial court did not err when considering the criteria other than “use,” like “prepared.”

Pierce County also misinterprets the “nexus” element. The second prong to the statutory definition of “public record” requires a writing to contain information “relating to the conduct of government or the performance of any governmental or proprietary function.”¹³⁰ Pierce County supposes that the above texts do not relate to the conduct of government and have no nexus to any governmental or proprietary function even though Lindquist sent and received the texts within the scope of his employment to his subordinate DPAs and to Troyer.¹³¹ A writing is “within the scope of employment” when “the job requires it, the employer directs it, or it furthers the employer’s interests.”¹³² The Supreme Court relied upon language from respondeat superior case law

¹²⁸ App. Br. at 25.

¹²⁹ *Nissen I*, 183 Wn.2d at 881-82.

¹³⁰ RCW 42.56.010(3).

¹³¹ App. Br. at 29.

¹³² *Nissen I*, 183 Wn.2d at 878-79.

involving lower level employees than the elected prosecutor when offering this descriptor in *Nissen I*.¹³³ Use of these three criteria are less useful when the sender and recipient is the top official. Top officials can bind the corporation under agency theories without applying these criteria.¹³⁴ Communications to and from an elected official have much longer retention requirements because they reflect upon the conduct of the office and the elected official is considered the office.¹³⁵

Pierce County insists that for a record to be public, the official must have evaluated, reviewed or referred to the content in the course of its business.¹³⁶ Then Pierce County fails to show how the disparaging exchange about a potential applicant did not meet these three criteria. Lindquist certainly reviewed these texts. Pierce County argues the absence of Morrison's actual application meant the text was not public. Lindquist never testified that Morrison was not in fact an applicant. The trial court was unconcerned about the actual application because the exchange revealed employment criteria for working in the prosecutor's

¹³³ *Id.* at 876.

¹³⁴ *Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008)

¹³⁵ CP 2886-2892.

¹³⁶ App. Br. at 26.

office, whether or not the applicant actually sought employment. The record was “used” by the prosecutor to make him aware of the potential applicant, and why his subordinates did not want Lindquist to consider an applicant from the defense bar.¹³⁷

Pierce County cites to *West v. City of Puyallup* as if Lindquist’s texts to other employees equate to a social media post by a councilmember to the general public.¹³⁸ The texts to and from Lindquist involve other specific employees, mostly subordinates, revealing a definite nexus to work that social media posts to the community at large do not. There was nothing speculative about Lindquist’s conduct being within the course and scope of his employment. He was the hiring authority for the office and he was the attorney for Pierce County handling Nissen’s case and the cease and desist letter to Troyer. Pierce County has defended Lindquist in his personal capacity in Nissen’s damages case, which it could only do if his conduct had a recognizable nexus to work.¹³⁹

¹³⁷ RP 01/19/18 at 14.

¹³⁸ App. Br. at 32, citing *West v. City of Puyallup*, 2 Wn. App. 2d 586, 410 P.3d 1197 (2018).

¹³⁹ RCW 4.96.041 Indemnification for defense to action “arising from acts omissions while performing or in good faith purporting to perform his or her official duties.”

Pierce County also cites to *SEIU Local 925 v. U of W*, a case where a union member prepared e-mails at work related to union activities.¹⁴⁰ These e-mails were not public records because the University could not control or direct union activities as a matter of law.¹⁴¹ The texts here were between Lindquist and other public employees over work related matters that Lindquist could control and direct.¹⁴² In his role as prosecutor, Lindquist controlled who he hired, he controlled the Nissen litigation and the press coverage about it. The response Lindquist's office gave to the Nissen cease, desist, and preservation letter directed Nissen's attorney to the prosecutor's office, showing the PCPAO was in charge.¹⁴³ The trial court did not err when concluding the nine texts plus the *Nissen I* text were public records, and the trial court was abundantly conservative when selecting only those texts for in camera review that were sent to or from other county employees beholden to the elected prosecutor.

3. In Camera Review Authorized Under PRA

¹⁴⁰ *SEIU Local 925 v. U of W*, 4 Wn. App. 2d 605, 423 P.3d 849 (2018).

¹⁴¹ *SEIU Local 925*, 4 Wn. App. at 620.

¹⁴² RCW 36.27.020.

¹⁴³ CP 2229.

The PRA expressly authorizes courts to review documents in camera: “Courts may examine any record in camera in any proceeding brought under this section.”¹⁴⁴ *Nissen I* did not invalidate this statutory authorization. The statutory authorization to examine documents in camera is not limited to a “public record.” Courts may review “any record” even private ones in camera to decide public disclosure issues.¹⁴⁵ In camera review “enhances the trial court’s ability to **assess the nature of the documents**, decide applicable exemptions, and perform necessary redaction.”¹⁴⁶ When the trial court is faced with two characterizations of the requested documents, judicial economy and the public interest in disclosure is better served when the trial court reviews in camera the records.¹⁴⁷ In camera review is an appropriate vehicle to sort out what records must be disclosed as public records despite the presence of any privileged content contained within the record.¹⁴⁸ In *Mechling*, the court dealt with the public versus private character of e-mail messages. The trial

¹⁴⁴ RCW 42.56.550(3).

¹⁴⁵ *Doyle v. F.B.I.*, 722 F.2d 554, 556 (9th Cir. 1983); *Harris v. Pierce County*, 84 Wn. App. 222, 235, 928 P.2d 1111 (1996)(Emphasis added).

¹⁴⁶ *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 577, 983 P.2d 676 (1999)(Emphasis added).

¹⁴⁷ *Overlake Fund*, 60 Wn. App. at 797.

¹⁴⁸ *Mechling v. City of Monroe*, 152 Wn. App. 830, 853 - 855, 222 P.3d 808 (2009).

court conducted in camera review, which was not deemed improper. Furthermore, courts employ in camera review in contexts other than PRA cases.¹⁴⁹ Pierce County has not even attempted to explain why the Court should not use in camera review just like in an ordinary civil case.¹⁵⁰

4. In Camera Review Protects Privacy

A trial court has the discretion to review a document like a text message to ascertain the true character of the text message.¹⁵¹ The federal courts have “grave reservations” about affidavits that may lead the court “astray.”¹⁵² Courts must “assure itself of the “factual basis and bona fides” of an agency’s claim of exemption, rather than rely solely upon an affidavit.”¹⁵³ Categorical determinations of privacy are rarely proper under public disclosure laws.¹⁵⁴ In camera review protects privacy rather than invading it because it allows for review of limited content outside the purview of the adverse party.¹⁵⁵ Privacy is a conditional privilege that is

¹⁴⁹ CR 26(b)(6).

¹⁵⁰ See, *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 105, 117 P.3d 1117 (2005) (PRA cases are ordinary civil cases.)

¹⁵¹ CR 26; *Favish v. Office of Independent Counsel*, 217 F.3d 1168 (2000).

¹⁵² *Doyle*, 722 F.2d 554, 556 (9th Cir. 2004).

¹⁵³ *Id.*

¹⁵⁴ *Yonemoto v Dept. of Veterans Affairs*, 686 F.3d 681 (2012).

¹⁵⁵ *Pappas v. Miller*, ECF Case No.: 16-55191, 2018 WL5729051 *3 (9th Cir. Oct. 23, 2018).

not absolute.¹⁵⁶ A court may make a better decision only after the specific materials are available for review, rather than deciding in abstract.¹⁵⁷ Private records may be reviewed in camera when the public affidavits or representations are insufficient. In camera review may supplement an “otherwise sketchy set of affidavits.”¹⁵⁸ In camera review of phone records does not violate privacy.¹⁵⁹

Lindquist invited in camera examination of text transcripts of text messages sent to and from his personal phone because he used his personal phone for work purposes. Lindquist retained the work content in his official capacity on text transcripts and no where else. He refused to produce the work related texts upon request. Lindquist’s privacy interests were not compromised by in camera review because the review affirmed that he was indeed withholding from disclosure public records for which he had no privacy interest. Lindquist also invited in camera examination of text transcripts because he failed to adequately describe the texts when

¹⁵⁶ *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 736 P.2d 249 (1987).

¹⁵⁷ *Estate of Murphy v. Alaska*, DOC, ECF: 1:17-cv-00010 JWS, 2016 WL3848803 (D. Alaska. August 12, 2018).

¹⁵⁸ *Church of Scientology of California v. U.S. Dept. of Army*; 611 F.2d 738, 743, (9th Cir. 1979), reversed on other grounds.

¹⁵⁹ *Henneberry v. City of Newark*, ECF Case No.: 13-cv-05238 MEJ *1, 2018 WL827927 (N.D. Cal. Feb. 12, 2018); *Bedetti v. City of Long Beach*, ECF Case No.: CV 14-9102 DMG, 2016 WL10570245 (C.D. Cal. April 6, 2016).

given more than one opportunity to do so. The trial court found Lindquist's affidavits insufficient twice.

The County lodges unwarranted criticism at the trial court as if it were a party litigator or an agency obligated to explain what was missing from the Lindquist affidavits.¹⁶⁰ The trial court had no obligation to explain more than once what was needed in Lindquist's declarations. The trial court directed the County to submit a declaration in a Vaughn index format or privilege/exemption log format with details that Lindquist chose to leave out. He did not line item each text message. Lindquist knew exactly what he was omitting and obfuscating, which was the public character of the texts. He offered replete and distracting conclusory opinions that were deceptive.¹⁶¹

Pierce County posits in footnote five that Washington Citizens had no expectation of privacy in telephone or digital communications prior to the *Gunwall* decision of 1986.¹⁶² And, therefore had no appreciation that in camera review of phone records would raise privacy considerations. Washington's citizens have had privacy protections for telephone

¹⁶⁰ App. Br. at 21.

¹⁶¹ RP 03/09/18 at 70-71.

¹⁶² *State v. Gunwall*, 106 Wn.2d 54, 63, 720 P.2d 808 (1986).

communications since 1967.¹⁶³ Pierce County briefs this case as if the trial court searched Lindquist’s phone. It did not. No search or intrusion into private affairs has ever occurred because Nissen never sought to examine Lindquist’s mobile phone. Nissen requested seven days of work related texts the entirety of which Verizon had reduced to a transcript where the work content could be readily distinguished from any private text given the context. A privacy interest in one’s digital communications to and from a cell phone is not absolute. Cellular communications and the associated data are discoverable even when private.¹⁶⁴

D. Trial Court’s Award of Penalties, Fees and Costs Not An Abuse of Discretion

Pierce County’s arguments on the penalties, fees and costs awarded do not show the trial court abused its discretion. An “abuse of discretion” occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.¹⁶⁵ A trial court acts on untenable grounds if the record does not support its factual findings, and it acts for untenable reasons if it uses “an incorrect standard, or the facts do

¹⁶³ 1967 ex.s. c 93 § 1.

¹⁶⁴ *Hensen v. Turn, Inc.*, ECF Case No.: 15-cv-01497-JSW, 2018 WL5281629 (N.D. Cal. Oct. 22, 2018).

¹⁶⁵ *Zink v. City of Mesa*, 4 Wn. App. 2d 112, 124, 419 P.3d 847 (2018).

not meet the requirements of a correct standard.”¹⁶⁶ A trial “court’s decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.”¹⁶⁷ As long as some factual basis exists to support a trial court’s decision, the abuse of discretion standard is met and further scrutiny is unwarranted, regardless of how the trial court chooses to articulate its decision.¹⁶⁸ A trial court is in the best position to make an individual fact-driven inquiry into what PRA penalties are necessary to achieve the penalty provision’s goal of deterring unlawful nondisclosure.¹⁶⁹ A penalty award of \$143,740.00 at \$70.00 per day has been deemed reasonable and not an abuse of discretion where the city corrected its wrongful withholding of the requested e-mail by producing it.¹⁷⁰ A trial court’s choice of how to label an agency’s noncompliance with the PRA should not be a basis for affirming or reversing a penalty decision; instead it is sufficient for a trial court to recognize that

¹⁶⁶ *Francis v. DOC*, 178 Wn. App. 42, 65- 66, 313 P.3d 457 (2013).

¹⁶⁷ *Id.*

¹⁶⁸ *Hoffman v. Kittitas County*, 4 Wn. App. 2d 489, 422 P.3d 466 (2018).

¹⁶⁹ *Id.* at 129.

¹⁷⁰ *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015).

culpability exists in matters of degree and that more culpable conduct merits a higher penalty than less culpable violations.¹⁷¹

1. Reasonable Attorney's Fees Awarded

Pierce County's first argument on attorney's fees cites to a non-dispositive portion of this Court's decision to deny fees when this matter was previously before it.¹⁷² Pierce County omits the actual holding wherein the Court declined an award "at this time", meaning before Nissen established Pierce County's PRA violations.¹⁷³ The trial court had full discretion to award attorney's fees and costs retroactively upon finding Pierce County violated the PRA. The trial court found Pierce County violated the PRA as supported by its factual findings.

Pierce County next argues the trial court relied incorrectly on estoppel from *Nissen I*. In its estoppel argument, Pierce County asserts that the trial court failed to follow *Nissen I*.¹⁷⁴ The trial court followed the guidance of *Nissen I* precisely giving Pierce County the opportunity to adequately describe the texts via affidavit. When the first declaration was

¹⁷¹ *Hoffman v. Kittitas County*, 4 Wn. App. 2d 489, 422 P.3d 466 (2018).

¹⁷² App. Br. at 38.

¹⁷³ *Nissen II*, 192 Wn. App. at *4 (emphasis added).

¹⁷⁴ App. Br. at 39.

inadequate, the trial court gave Pierce County a second opportunity. The *Nissen I* court never addressed what happens when an affidavit is insufficient.

Another factual error with Pierce County's argument is that it contends the trial court thought that the *Nissen I* trial court awarded fees on appeal.¹⁷⁵ Pierce County is wrong. The trial court did not have an incorrect factual understanding of the fee award in *Nissen I*. The trial court understood that the fee award in *Nissen I* was for fees and penalties for the work at the trial level before the mandate associated with the appeal was issued.¹⁷⁶ The rationale that supports an award of appellate fees on *Nissen II* distinct from *Nissen I* is that Nissen prevailed on all appellate issues in *Nissen II*. And, the *Nissen II* trial court did not have before it a separate Supreme Court order on appellate fees, like the trial court had in *Nissen I*.¹⁷⁷

Another baseless argument Pierce County makes is that the trial court erroneously applied estoppel because the cases involved "different

¹⁷⁵ App. Br. at 40.

¹⁷⁶ RP 03/09/18 at 65.

¹⁷⁷ Nissen moved for fees before the Supreme Court following the opinion. The Clerk denied her motion.

histories regarding response [sic] to different public records requests.”¹⁷⁸ With regard to the different histories, Pierce County knew at the outset of the request that there were responsive texts that were work related. Pierce County was knowingly violating the PRA to prevent Nissen from obtaining the texts that implicated Lindquist, his office, and Pierce County in her employment case. The case “histories” were of Pierce Counties own making. With regard to differences between the requests, on the past appeal here, Pierce County was adamant that the requests were “identical” and demanded on cross-appeal sanctions against Nissen.¹⁷⁹ Pierce County has always maintained there is an estoppel effect between the two cases.

Pierce County’s argument about wasted judicial resources is a problem it created.¹⁸⁰ Pierce County refused early on to stay *Nissen II* or consolidate it with *Nissen I* until after the appeal was fully briefed.¹⁸¹ Nissen had no final order to appeal in *Nissen II* until the trial court dismissed the matter on Pierce County’s estoppel theory. Pierce County

¹⁷⁸ App. Br. at 39.

¹⁷⁹ *Nissen II*, 192 Wn. App. at *5.

¹⁸⁰ App. Br. at 41.

¹⁸¹ Resp./Cross App. Reply On Its Motion For Stay, *Nissen v. Pierce County*, Div. II Case No. 45039-9-II, Filed October 27, 2014.

was advised prior to any litigation that work related texts were public records.¹⁸²

Pierce County attempts to dissect the briefing to attribute a substantial portion to discussions of bad faith. The trial court expressly found the entirety of the briefing helpful to it, rejecting any segregation of the briefing addressing bad faith.¹⁸³ The fee award was proper.

2. Fee Award to Crittenden Within Trial Court's Discretion

Pierce County appeals the trial court's award of attorney's fees to Nissen's attorney William Crittenden. Pierce County fails to show any abuse of the trial court's discretion in awarding Nissen the fees she incurred for the work performed on the penalty phase of her case. Lawyers are entitled to a fee award on fee applications.¹⁸⁴ An award of fees is mandatory even where an agency has acted in good faith.¹⁸⁵

The only authority Pierce County cites is a non-binding federal Fourth Circuit decision with substantially distinct facts.¹⁸⁶ In *Goodwin*,

¹⁸² CP 2879-80.

¹⁸³ RP 03/09/18 at 64.

¹⁸⁴ *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 110 S. Ct. 2316 (1990); .

¹⁸⁵ *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997).

¹⁸⁶ App. Br. at 43, *citing Goodwin v. Metts*, 973 F.2d 378, 383-84 (4th Cir. 1992).

the court found fees inflated where six attorneys on appeal held multiple conferences among themselves performing duplicative work.

Here Nissen hired one additional attorney who had specialized knowledge and information specific to issues of Pierce County's actual knowledge of Lindquist's conduct, its refusal to heed repeated warnings about Lindquist's conduct, and its unjustifiable alignment with Lindquist despite obvious conflicts of interest. Crittenden prepared a detailed declaration affixing various documentation, explaining the efforts that were made to make Pierce County aware of the fact that Lindquist was litigating this case in a way that was likely to increase the County's PRA liability, which is exactly what happened. The trial court specifically found Crittenden's declaration helpful in making his penalty phase determinations.¹⁸⁷ The County's assertion that Crittenden's declaration "had nothing to do" with this case is simply false. The trial court's express appreciation of Crittenden's contribution was not an abuse of discretion. Pierce County has not challenged the hours Crittenden work, his hourly rate or the sufficiency of his fee declaration. Crittenden's

¹⁸⁷ RP 03/09/18 at 64.

contribution was not a duplication of work performed by Mell and it should not be discounted. Pierce County's remaining arguments about the fee award frivolous.

3. Penalties Properly Assessed.

A trial court has considerable discretion when awarding penalties under the PRA.¹⁸⁸ A penalty of \$75.00 per day where an agency has refused the requestor's repeated demands for public records will be upheld.¹⁸⁹ Consistent with its obligations under *Yousoufian*, the trial court considered a myriad of factors when imposing its penalties.¹⁹⁰ The trial court independently assessed a pre-mandate penalty at \$2.00 per day "given the unsettled area of law."¹⁹¹ The trial court increased the penalty after the mandate to \$75.00 per day. The trial court found it particularly compelling that Pierce County offered nothing "in terms of conduct, actions, or words that have happened since *Nissen I* to determine that matters have improved or that compliance with the Public Records Act will be better."¹⁹²

¹⁸⁸ *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010).

¹⁸⁹ *Lindell v. City of Mercer Island*, 833 F.Supp.2d 1276 (W.D. Wash. 2011).

¹⁹⁰ RP 03/09/18 at 67-68.

¹⁹¹ RP 03/09/18 at 68.

¹⁹² RP 03/09/18 at 69.

Pierce County expects to avoid PRA penalties under a respondeat superior or agency theory when the doctrine does not apply to top elected officials like Mark Lindquist.¹⁹³ Lindquist was not a low level employee whose conduct is not directly attributable to Pierce County. As a county officer, the prosecuting attorney exercises the county's delegated power and his actions are the actions of the county itself.¹⁹⁴ The elected prosecutor more than any other elected official must understand, adhere to, and have the County comply with the PRA for he is the legal advisor for Pierce County.¹⁹⁵ The elected prosecutor was Pierce County and the total deference afforded him at his high level position equates to County liability.¹⁹⁶ When it comes to liability, an agency's "weakest link" can cause a PRA violation.¹⁹⁷ The trial court carefully considered the agency arguments of Pierce County and dispensed with them with a quote from defense counsel: "when you're dealing with an elected official, the boss is the voters and then the voters get to decide whether or not they think that

¹⁹³ Br. at 49.

¹⁹⁴ *Broyles v. Thurston County*, 147 Wn. App. 409, 428, 195 P.3d 985 (2008).

¹⁹⁵ RCW 36.27.020(2) and (3).

¹⁹⁶ *Arishin v. King County*, 103 Wash. 176, 173 P. 1020 (1918); *Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008).

¹⁹⁷ *Hoffman v. Kittitas County*, 4 Wn. App. 2d 489, 498, 422 P.3d 466 (2018).

this is something that they want to have happen.” Thus liability is absolute and the remedy is Lindquist’s removal.

With regard to actions Pierce County could have taken, Pierce County could have conceded specific texts were related to the TNT coverage of Nissen’s case, but even on this appeal it refuses to do so. Pierce County chose to litigate *Nissen II* rather than produce the similar texts from *Nissen I*. Pierce County could have disclosed and conceded that the “letter from an attorney” was the letter from Nissen’s attorney to Troyer, but it did not. Pierce County merely needed to ask Lindquist and Troyer to confirm it and add such content about the work related nexus in affidavits. Pierce County offered no evidence of any effort it made to ascertain the subject matter of the text messages. Pierce County was not “in the dark” as claimed. Pierce County chose to allow its top officials to deceive the trial court. Pierce County is liable for penalties.

The penalty award was not limited to Pierce County’s failure to conduct a reasonable search, but was also related to its failure to disclose

responsive public records, all of which was within Pierce County's control.¹⁹⁸ The penalty award was not an abuse of discretion.

E. Nissen Entitled to Penalties, Fees, and Costs On Appeal

A PRA requestor may be awarded fees and costs on appeal.¹⁹⁹ A PRA penalty award in the trial court supports an award of costs or attorney's fees on appeal.²⁰⁰ An appellate court may award fees and costs on appeal under RAP 18.1. Nissen requests an award of attorney's fees and costs on appeal.

Nissen also requests sanctions because Pierce County is forcing her to litigate the PRA to no beneficial end. Pierce County has shown by this frivolous appeal that it has no intention of complying with the PRA in the future even though Lindquist has been rejected by the voters.

An appellate court may award damages resulting from a frivolous appeal under RAP 18.9(a). An appeal is frivolous where there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no possibility of reversal.²⁰¹ Lack of

¹⁹⁸ RP 03/09/18 at 70.

¹⁹⁹ *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 469, 229 P.3d 735 (2010); *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 389 P.3d 677 (2016).

²⁰⁰ *Francis v. DOC*, 178 Wn. App. 42, 313 P.3d 457 (2013).

²⁰¹ *State ex. rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 969 P.2d 64 (1998).

standing to make an argument on appeal has been deemed frivolous entitling the respondent to an award.²⁰²

Pierce County has no standing to appeal the trial court's determination that certain texts were private and not public records as set forth previously. This case does not warrant further appellate review. Nissen requests \$25,000.00 in sanctions separate from an award of attorney's fees and costs. A typical sanction awarding her fees and costs has no deterrent effect upon Pierce County because the PRA entitles Nissen to a fee and costs award anyway.

VI. CONCLUSION

For the reasons stated above, the trial court's orders should be affirmed. Nissen should be awarded sanctions for Pierce County's frivolous appeal, plus her attorney's fees and costs on appeal.

Dated this 28th day of November, 2018 at Fircrest, WA.

III Branches Law, PLLC



Joan K. Mell, WSBA No. 21319
Attorney for Glenda Nissen

²⁰² *Id.* at 73.

CERTIFICATE OF SERVICE

I, Joseph Fonseca, certify as follows:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On the 28th day of November, 2018, I caused to be filed and served true and correct copies of the above Respondent Nissen's Amended Response Brief, and this Certificate of Service; on all parties or their counsel of record, as follows:

Via E-service:

Jeffrey A.O. Freimund
Michael E. Tardif
Freimund Jackson & Tardif, PLLC
711 Capitol Way S., Suite 602
Olympia, WA. 98501
jefff@fjtlaw.com
miket@fjtlaw.com

Original E-filed with:

Washington State Court of Appeals: Division II
950 Broadway, Suite 300
Tacoma, WA 98402
Div-2eDocManagers@courts.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 28th day of November, 2018 at Fircrest, WA.



Joseph A. Fonseca, Paralegal

III BRANCHES LAW, PLLC

November 28, 2018 - 2:16 PM

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