No. 90875-3

No. 44852-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GLENDA NISSEN,

Appellant,

v.

PIERCE COUNTY, a public agency, PIERCE COUNTY PROSECUTOR'S OFFICE, a public entity,

Respondents,

v.

MARK LINDQUIST,

Intervenor.

ANSWER OF PIERCE COUNTY TO AMICI BRIEFS OF WAPA; WSAMA; WCOG, et al.; and WFSE, et al.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii-vi

A. INTRODUCTION 1

B. STATEMENT OF THE CASE 2

C. ARGUMENT 4

1. Intervenor's personal cell phone records are not public records under the PRA. 4

2. If private cell phone records were interpreted to be public records under RCW 42.56.010(3), this court must address the practical, statutory, and constitutional implications of such a decision. 8

D. CONCLUSION 14

TABLE OF AUTHORITIES

Page

State Cases

Concerned Ratepayers Assn. v. Public Util. District No. 1 of Clark County, WA, 138 Wn.2d 950, 983 P.2d 635 (1999)..... 5
Forbes v. City of Gold Bar, 171 Wn. App. 857, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1012 (2013)..... 7
Herbert v. Wash. State Public Disclosure Comm'n., 136 Wn. App. 249, 148 P.3d 1102 (2006)..... 13
Manufactured Housing Communities of Wash. v. State, 142 Wn.2d 347, 13 P.3d 183 (2000)..... 11
Mechling v. City of Monroe, 152 Wn. App. 830, 222 P.3d 808 (2009)..... 6, 7, 10
O'Neill v. City of Shoreline, 145 Wn. App. 913, 187 P.3d 822 (2008)..... 6
O'Neill v. City of Shoreline, 170 Wn.2d 138, 240 P.3d 1149 (2010)..... 6
Progressive Animal Welfare Society v. Univ. of Wash., 125 Wn.2d 243, 253, 884 P.2d 592 (1994)..... 10
West v. Thurston County, 168 Wn. App. 162, 275 P.3d 1200 (2012)..... 5

Federal and Other Jurisdiction

Denver Post Corp. v. Ritter, 255 P.3d 1083 (Colo. 2011)..... 5
Illinois v. Krull, 480 U.S. 340, 363 (1987)..... 14
McLeod v. Parnell, 286 P.3d 509 (Alaska 2012)..... 8

Constitutional Provisions

Article 1, § 16, Washington State Constitution..... 10, 11
Article I, § 7, Washington Constitution..... 5, 12
Fifth Amendment, United States Constitution..... 11
First Amendment, United States Constitution..... 13
Fourth Amendment, United States Constitution..... 12, 14

Statutes

18 U.S.C. § 2701..... 12
18 U.S.C. § 2703..... 9, 12
18 U.S.C. 2710..... 10

RCW 42.17A.555 13
RCW 42.52.150(1) 13
RCW 42.56.010(3) 4, 5, 8, 14
RCW 42.56.050 4
RCW 68.50.105(1) 10
RCW 70.02.020-900 10
RCW 9.26A.140 ..... 7, 10
RCW 9.26A.140(1)(d) 9
RCW 9.26A.140(2)(a) 10

Other Authorities

Public Records Act Deskbook: Washington's Disclosure and Open Public Meetings Laws 2006 Ed., K. Wiitala Ch. 12 (2010 supplement) 10

Codes, Rules and Regulations

RAP 10.3(a)(5) 2
RAP 10.3(e) 2

A. INTRODUCTION

Respondents Pierce County and the Pierce County Prosecutor's Office ("County") provide this answer to the amicus briefs of the Washington Coalition for Open Government, Allied Daily Newspapers of Washington, and the Washington Newspaper Publishers' Association ("WCOG"); Washington Association of Prosecuting Attorneys ("WAPA"); the Washington State Association of Municipal Attorneys ("WSAMA"); and the Washington Federation of State Employees, International Association of Fire Fighters, Washington Education Association, Washington Council of Police and Sheriffs, Washington State Patrol Troopers Association, and Pierce County Prosecuting Attorneys' Association ("WFSE").[1]

The central issue in this case is whether the private cell phone records of Intervenor Mark Lindquist – records that were prepared, owned, used and retained by his service provider Verizon, and not prepared, owned, used or retained by the County at the time of the requests – are public records within the meaning of the Public Records Act, RCW 42.56 ("PRA"). Neither the County nor Intervenor has ever had the text content records exclusively created and retained by Verizon.

[1] The County is responding to the amicus brief of the Attorney General separately.

As the amici briefs demonstrate, this issue is one of profound importance to all public servants because plaintiff's proposed interpretation of the PRA would severely violate their statutory and constitutional rights. This issue is also of profound importance to state, local, and city governments because plaintiff's proposal would result in governments paying costly fines for not disclosing records they do not possess and cannot lawfully obtain.

B. STATEMENT OF THE CASE

The various amici briefs generally do not provide a statement of the case or only very briefly touch upon the facts. *See, e.g.,* WAPA Br. at 3-5; WSAMA Br. at 4; WFSE Br. at 2. The exception to this is the WCOG brief.

Rather than providing a separate section addressing the facts and procedure in the case as required by RAP 10.3(a)(5); RAP 10.3(e), WCOG improperly buried factual assertions in the argument section of its brief labeled "Discussion." Many of those "factual" statements are either unsupported or simply untrue. This Court should disregard them.

For example, WCOG falsely claims Intervenor "prefers to use his 'personal' cell phone ... for work business," citing CP 5-8, 24. WCOG Br. at 3. The record citations do not support WCOG's allegation. Intervenor

does not "prefer" to use his private[2] cell phone over his publicly-paid telephones, CP 453, 682, but does occasionally discuss work on his personal phone, as do the vast majority of public servants, for reasons that will be explored *infra.*

WCOG also asserts, without a citation to the record, that the County "had possession of, and produced redacted versions of, Lindquist's personal cell phone records in response to two (2) PRA requests from Nissen's attorney." WCOG Br. at 4. This is untrue. Unredacted billing records were never in the County's possession. Intervenor obtained billing records and provided only redacted billing records to the County for release. Neither the County nor Intervenor has ever possessed the text content records created and retained by Verizon. In fact, Intervenor's designee was informed by Verizon that the "text content" was unavailable. CP 58, 81, 444-46, 490, 598, 616. This process of responding to the PRA request did not make the unredacted billing documents into records possessed by the County so as to be public records under the PRA. *See* Resp. Br. 22-27; Intervenor Br. 29-20; A.G. Amicus Br. 9-12.

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[2] WCOG's placement of quotation marks around "personal" with regards to Intervenor's personal cell phone falsely implies a dispute on this fact. WCOG Br. 3. There is no question from the Complaint or the record that plaintiff seeks Verizon documents regarding Intervenor's personal cell phone that he and his wife pay for with their own resources. *See e.g.*, CP 16 ¶ 24, 23, 30-31, 80-81, 454-56, 489-90.

Finally, WCOG's *ad hominem* attacks in its brief at 4-5 are untrue and unhelpful. Such unfounded accusations reveal their zeal to make everything even remotely touching government or government personnel a public record, notwithstanding the actual language of the PRA, as well as state and federal statutory and constitutional law.

C. ARGUMENT

1. Intervenor's personal cell phone records are not public records under the PRA.

For the reasons articulated in the County's brief, Resp. Br. 13-27, and Intervenor's brief, Intervenor's Br. 5-11, and in the ruling of the trial court, Intervenor's private cell phone records are not public records within the meaning of RCW 42.56.010(3). Judge Pomeroy aptly stated:

> As a matter of law, I find that no public record exists with the billing statement or the record of the private cell phone of the public employee, that being the Pierce County Prosecutor . . .
>
> I find that 42.56.050, the invasion of privacy is simply that. I go back to number one, it is not a public record. The private cell phone records of a public elected official or a public employee are not public records.

12/23/11 VRP 94-95.

WSAMA's brief cogently describes how private cell phone records are not "prepared, owned, used, or retained" by a public agency. WSAMA br. at 9-11. Just as attorney billing records possessed by a

county's insurer are not public records, *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012), or a governor's cell phone records possessed by his cell phone provider are not public records, *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011), Intervenor's personal text content and billing records possessed by Verizon are not public records.

Further, WSAMA notes that such private cell phone records do not relate to the conduct of government as our Supreme Court discussed in *Concerned Ratepayers Assn. v. Public Util. District No. 1 of Clark County, WA,* 138 Wn.2d 950, 983 P.2d 635 (1999). WSAMA Br. at 11-18. Intervenor's cell phone bills and records created by Verizon are not used by county government and have nothing to do with the conduct of county government.

The WFSE brief, analyzing the language of RCW 42.56.010(3), the case law addressing it, privacy related PRA exemptions, and the language of article I, § 7 of the Washington Constitution, argues persuasively for a bright line rule, consistent with state and federal constitutions, exempting the records of public employees' private communications devices from the PRA. The County supports its analysis and conclusion.

The WCOG brief is remarkable for its misstatement of the decisions in *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149

(2010) and *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009). For example, WCOG asserts that *O'Neill* "squarely holds that communications on a government employee's private computer are disclosable public records if they relate to official city business." WCOG Br. at 5. That is an inaccurate and vast overstatement of the Court's holding. The *O'Neill* decision did not analyze whether the communication of an email to and from the deputy mayor's computer was a public record. Instead it assumed that the email was public record because it had been used for a government purpose when it was discussed at a city council meeting prior to being sent to an official's private home computer. 170 Wn.2d at 142, 147-48. *See also O'Neill v. City of Shoreline*, 145 Wn. App. 913, 187 P.3d 822 (2008) ("City does not dispute that the e-mail is a public record" because it was "'used' during the public meeting.") WCOG's further assertion that consent is not an issue here is even more obviously mistaken and is made without record support. WCOG fails to address or refute the analysis in the WAPA brief (pp. 15-17) that a limited authorization is allowed under the law, and that is all Intervenor gave

here.[3] Intervenor has clearly not consented to a warrantless search and seizure of private phone records.

Further, with regard to WCOG's characterization of *Mechling*, the court again assumed that the emails were public records. The council members sent emails from their home computers to the city administrator's public email account. 152 Wn. App. at 837. This certainly suggests that the records were used for public business, given their existence on the administrator's public account.

In sum, the amicus briefs of WFSE, WSAMA, and WAPA support the proposition that Intervenor's private cell phone records are not public records under the PRA. WCOG's analysis of the issue, based on its mistreatment of applicable case law, and disregard of constitutional law, should be rejected.

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[3] WCOG fails to cite *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1012 (2013), a case that holds public employees' private emails on their personal devices are not public records. RCW 9.26A.140 also provides that customers retain authority to withhold or authorize only a limited release of their telephone records in any case.

2. If private cell phone records were interpreted to be public records under RCW 42.56.010(3), this court must address the practical, statutory, and constitutional implications of such a decision.

Only WCOG refuses to acknowledge that a decision from this court will have profound implications beyond the parties and the particular records involved. WCOG Br. at 4, 8-10.

First, the fact that virtually every major public employee group in Washington has filed amicus briefs shows that public employees are deeply concerned about appellant Nissen's proposed violation of their statutory and constitutional rights and the scope of RCW 42.56.010(3).[4]

Second, contrary to WCOG's strange disregard for the potential precedential effect of this Court's decision, any decision will plainly impact the records of every type of private communications device of teachers, fire fighters, police officers, elected officials and other public servants. This would include personal computers, smart phones, tablets, and other devices. There is no principled basis on which to distinguish either the type of communications device or type of employment from

[4] WCOG asks the Court to disregard the County's "parade of horribles," WCOG Br. at 8, but fails to refute any of them. Instead, WCOG cites to an out-of-state decision, *McLeod v. Parnell*, 286 P.3d 509 (Alaska 2012). *Id.* at 11. In doing so, it only partially discloses that court's decision. Among other things, that court ruled a state employee's use of a private email account to conduct state business was not a *per se* violation of Alaska's PRA analog. The court, in fact, rejected the requestor's contention that every email from the governor's email account and every email from the governor's private email account that "in any way" related to state business was a public record. *Id.* at 515.

those at issue here. Indeed, WCOG seems to admit this is true when it asks the Court "to find that <u>any and all records</u> relating to the conduct of public business must be retained and disclosed, unless covered by a specific exemption" and that it "is irrelevant if the records are created by, and maintained by, a personal digital device," regardless of constitutional issues and practical issues. WCOG Br. at 11.

Third, the practical effect of WCOG's position is to make the private communication devices of public employees the property of the government for whom they work. WCOG Br. at 11. Indeed, as noted above, WCOG contends it does not matter if a public employee paid for his or her private communications device. *Id.* at 8-9. WCOG's interpretation of the PRA assumes a totalitarian state where the government can seize and search anything the government decides might relate to government.

In addition to constitutional protections, and federal statutory protections under 18 U.S.C. § 2703, *see* Resp. Br. at 40, even if personal cell service billing records were to be deemed a public record, RCW 9.26A.140(1)(d) would still require a government agency in possession of such material to exempt it from PRA production when "the customer to whom the record pertains" does not authorize release by the agency to any third party. Unauthorized disclosure of customer billing records under

RCW 9.26A.140 carries both civil and criminal liability, to include injunctive relief where such records are received without the customer's consent. Though RCW 9.26A.140(2)(a) exempts from liability any government agency that "obtain[s] telephone records in connection with the performance of the official duties of the agency,"[5] the statute does not authorize further dissemination of such telephone records to other parties without customer authorization.[6] This exemption would apply in this case to prevent disclosure of Intervenor's records even if a court concluded that any of the billing records at issue could be public records.[7]

WCOG may protest that it is not advocating a taking of public employees' private property, but that is, in fact, the effect of its position under the Washington Constitution, article 1, § 16, given our courts'

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[5] For example, a prosecutor may obtain the private telephone record data of a defendant or a witness in a criminal action pursuant to a search warrant. Such records would still be exempt from disclosure under RCW 9.26A.140 where the witness or defendant customer to whom those records belong does not authorize the agency to allow someone else to receive those records.

[6] The effect is similar to numerous other statutes. *See e.g.*, RCW 68.50.105(1) (medical examiner record statute authorizes release of autopsy records to prosecuting and other public agencies, yet operates as an exemption under the PRA in the event that record requesters seek to obtain such records from such recipient agencies); RCW 70.02.020-900 (preventing redisclosure of health care information without authorization of the patient);18 U.S.C. 2710 (prohibiting unauthorized disclosure of customer video tape rental or sales records including such data obtained by law enforcement agencies pursuant to a search warrant). *See also Public Records Act Deskbook: Washington's Disclosure and Open Public Meetings Laws 2006 Ed., K. Wiitala Ch. 12 (2010 supplement).*

[7] Agencies are permitted to assert additional exemptions in the course of Public Records Act litigation. *See Progressive Animal Welfare Society v. Univ. of Wash.,* 125 Wn.2d 243, 253, 884 P.2d 592 (1994) (agencies are not confined to list all exemptions in its initial response); *Mechling*, 152 Wn. App. at 855 (even on remand agency allowed to articulate any other applicable exemptions). *See also* Resp. Br. at 30-31.

protective interpretation of that constitutional principle. *See, e.g.*, *Manufactured Housing Communities of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000) (taking under article 1, § 16, is broader than under the Fifth Amendment and extends to a limited property right such as right of first refusal). The remedy for such a taking is likely not compensation to the affected public employees (though the cost of such compensation for PCs, private cell phones, etc. of all Washington public employees would be prohibitive), but invalidation of the PRA to the extent it exacts a taking. *Id.* at 374 (statute invalidated under article, 1 § 16).

Fourth, even if a taking were not effectuated, WCOG still proposes a breathtaking intrusion into the privacy of all Washington public employees and their families. WCOG does not articulate what it means by "records relating to the conduct of public business." WCOG Br. at 11. Without defining "occasional call," WCOG inexplicably asserts that this "Court need not decide whether an occasional call incidental to public business to a public official's private cell phone means that all private cell phone records become disclosable." *Id.* at 8.[8] Nevertheless, WCOG

[8] It is curious that WCOG effectively urges the court to ignore the precedential effect of any decision reached in this case when, as an amicus, WCOG has no other interest. WCOG is equally blind to the fact that this Court's decision will affect more than public employees' cell phones. If requesters can obtain the private telephone records of public employees, they can also obtain the private records of those they call or text under WCOG's proposed new test of "the conduct of public business."

advocates that courts somehow seize and conduct *in camera* review to fish through personal and private information stored in a public employee's private communications device. *Id.* at 9.

Pared to its essence, WCOG's position is that public servants lose their constitutional rights when they become public employees. When a prison inmate, a criminal suspect, a disgruntled neighbor, overzealous lawyer, or stalker who makes a PRA request seeking personal records, a superior court judge should fish through the lives of public employees and their families – as documented in their iPhones, personal computers, tablets, or other devices – to see if there is anything that "relates to the conduct of government," a concept WCOG declines to define.

Under WCOG's disturbing interpretation of the PRA, the homes, cars, and personal effects of public employees and their families can be searched to see if anything inside relates to the conduct of government. Such a radical intrusion into the lives and private affairs of public employees and their families would violate the Fourth Amendment, Article 1, § 7, 18 U.S.C. § 2701 & 2703, and other provisions of law previously briefed by both Respondent and Amicus WAPA.

Far from the sinister motives WCOG imagines, the vast majority of public employees use their personal private communication devices to discuss work, or for work related purposes, for a variety of legitimate and

public service reasons. *See* Resp. Br. at 1, n 1. Elected public employees such as Prosecutor Lindquist have a special series of obligations that WCOG ignores. Elected officials, as a matter of law, may not use public facilities, which includes any county-issued cell phone, for activities that are political or campaign-driven. RCW 42.52.150(1) (state employees); RCW 42.17A.555 (all elected officials and their employees). *See Herbert v. Wash. State Public Disclosure Comm'n.*, 136 Wn. App. 249, 148 P.3d 1102 (2006) (teachers violated statute through use of school's internal mailing and email systems to gather ballot measure signatures). Elected officials must use private communication devices to communicate about a myriad of matters, such as contacts about endorsements for legislative, executive, or judicial races, fundraising matters for themselves and others, as well as the political ramifications of certain decisions.

Public employees, like all citizens, have a First Amendment right to participate in our democracy, but are prohibited from using government equipment for politicking. RCW 42.52.150(1) (state employees); RCW 42.17A.555 (all elected officials and their employees). Political communications relate to the "conduct of public business," but under the law may not be made on county-issued communications devices.

In sum, WCOG's proposes an unworkable, unconstitutional and unlawful overreach into the records of public employees' private

communications devices, far beyond what RCW 42.56.010(3) authorizes or could authorize. WCOG's vague analysis of what constitutes a public record answers none of the practical and constitutional questions noted in the WFSE, WSAMA, or WAPA amicus briefs.

D. CONCLUSION

The trial court correctly held that the private cell phone records of Intervenor were not subject to the PRA. The amici briefs of WAPA, WSAMA, and WFSE provide detailed case-driven discussions that support the decision reached by the trial court. In contrast, WCOG's superficial, *ad hominem* based, and authority-deficient brief fails to assist this court in evaluating the statutory and constitutional issues that must be addressed.

As Justice Sandra Day O'Connor wrote, "Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment." *Illinois v. Krull*, 480 U.S. 340, 363 (1987) (O'Connor, J., *dissenting*). WCOG asks this court to turn the PRA into a vehicle for an unconstitutional general search.

The County therefore again respectfully requests this Court to affirm the trial court's orders dismissing Nissen's complaint.

DATED this 10th day of February, 2014.

Respectfully submitted,

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PIERCE COUNTY PROSECUTOR

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