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**SUPREME COURT OF THE
STATE OF WASHINGTON**

GLENDANISSEN, an individual, Respondent

v.

PIERCE COUNTY, a public agency; PIERCE COUNTY
PROSECUTOR'S OFFICE, a public agency, Petitioner

v.

PROSECUTOR MARK LINDQUIST, Petitioner

PETITIONER LINDQUIST'S ANSWER TO AMICI BRIEFS

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ORIGINAL

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I. INTRODUCTION

This suit concerns only: 1) partial redactions of personal telephone call logs that were unrelated to work and purely private; and 2) personal texts that at most "may be work related," which were not possessed by Petitioners Mark Lindquist or Pierce County at the time of the Public Records Act (hereinafter "PRA") request, and were unavailable to them at the time of the PRA response.

As the record indisputably shows, all phone records for Mr. Lindquist in the County's possession were disclosed, and Mr. Lindquist and the County also disclosed personal records that "may be work-related" in the interest of openness and transparency. CP 81, 234, 444-46, 681-83. Three briefs of amici¹ supporting *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014), however, grossly mischaracterize this case as a refusal to provide "public" records rather than a request to fish through personal records of public employees. ACLU Br 2; LWV Br 3-4, 9; WCOG Br 5, 13, 16.² In fact, Ms. Nissen and her supporting amici want the em-

¹ See Attorney General of Washington (hereinafter "AG"), American Civil Liberties Union (hereinafter "ACLU"), League of Women Voters of Washington (hereinafter "LWV"), Washington Coalition for Open Government, *et. al* (hereinafter "WACOG").

² These amici also make numerous other assertions that are contrary to the facts established by the complaint and the documents it quotes, as well as contrary to sworn declarations that were part of Mr. Lindquist's injunction action. *E.g. compare* LWV Br 17-18 (claiming County did nothing to search for, obtain and preserve records) *with* CP 58, 81, 251, 444-46, 490, 598, 616, 801 (showing County worked with Mr. Lindquist to authorize release of call logs and when the County learned after suit was filed that his texts secretly were being held by Verizon without his knowledge, Verizon was asked to preserve

ployer or courts to unconstitutionally and unlawfully seize personal records from public employees and decide later if any are subject to the PRA.

The irrefutable facts of record confirm that when Ms. Nissen made a PRA request for "work related" records from Mr. Lindquist's personal telephone, he obtained relevant call logs from his private service provider, reviewed them with legal counsel, and provided to Pierce County all personal call logs "that may be work-related" for release.³ See CP 16, 18, 32-36, 40, 81, 86, 334-38, 340-349, 445-46. Mr. Lindquist also attempted to obtain texts from his private phone for the requested period but was advised by his service provider they no longer existed. See CP 58, 81, 444-46, 490, 598, 616. When she was advised the County was obtaining these personal work-related records, Ms. Nissen made a second request for all Mr. Lindquist's non-work related personal telephone records for the period, and the County again obtained and provided those logs that "may be work related." See *id.*; CP 17, 190.

Though under the PRA Mr. Lindquist had no duty to provide possibly

those texts – which Nissen's counsel agreed was "appropriate"); compare WACOG Br 3 (claiming use of private phone "was not occasional, but an intentional preference") with CP 234, 453, 681-83 (showing instead that Mr. Lindquist "conducted ... most of his government related communications" on "two County land line telephones assigned for his use" and only "occasionally used my personal cellular telephone for county business").

³ Records that "may be work related" is a far broader category of records than that listed in the PRA's narrow definition under RCW 42.56.010(3) of records having a "nexus between the information at issue and an agency's decision-making process" and that are "a relevant factor in the agency's action" so as to meet one of the requirements of a "public record." See e.g. *Concerned Ratepayers Ass 'n v. Pub. Util. Dist. No. 1 of Clark County*, 138 Wn.2d 950, 960-61, 983 P.2d 635 (1999).

work-related personal records but did so in the spirit of transparency and openness, he redacted those call logs that were purely private so as to protect the rights of his family and others with whom he communicated. *See* CP 81, 490.⁴ These are the only records that were redacted.

In summary, Mr. Lindquist was open and transparent and provided phone records that "may be work related" even though they were not public records. He also attempted to obtain and review text messages that were not public records, but was told by the service provider that the text messages did not exist. Ms. Nissen seeks the unconstitutional seizure and "scrutiny" of personal records and, in effect, asks the Court to find that the PRA is superior to federal law and our constitutions.

II. STATEMENT OF THE CASE

Amici supporting reversal⁵ of *Nissen* all agree the trial court's dismissal of the suit should be reinstated and affirmed because the PRA does not apply to personal records held by public employees and – if the PRA was held to apply to them – statutory and constitutional rights would be violat-

⁴ Applying amici's analogy concerning the era of "pen and paper" and "note pads" to these facts, *see* LWV Br 5; WACOG Br 2 n. 2, the equivalent of Ms. Nissen's suit for the redacted call logs would be a requester who is given pages of all notes of any telephone calls that "may be work related" from a public employee's personal notepad resting on his home nightstand but who then sues demanding the contents of the rest of that personal note pad from his home solely because she does not trust public employees.

⁵ *See* Brief of Washington Federation of State Employees, Washington Education Association, Washington State Patrol Troopers Association, International Association of Firefighters, Pierce County Prosecuting Attorney's Association (hereinafter "WFSE"); Washington Association of Prosecuting Attorneys (hereinafter "WAPA"), Washington State Association of Municipal Attorneys ("WASAMA")

ed. *See* WFSE Br 2-20, WAPA Br 3-17, WSAMA Br 6-20. In contrast, all amici opposing *Nissen's* reversal disagree with one another over both analysis and the result.

For example, the AG agrees with Mr. Lindquist, the County and their supporting amici, that this case raises "enormous implications" for constitutional rights, but asserts those implications should not be addressed and the trial court should develop the record to determine if any records may pertain to the conduct of government business. AG Br 3, 10-13. In light of the unrefuted record, no factual development is needed to resolve the legal issue of what PRA provision would authorize employers and courts to "scrutinize" all personal telephone records of public employees to determine "which ..., if any, pertained to the conduct of government business" and then "disclose[]" them under the PRA." *Id.* at 12 (*quoting Nissen*, 183 Wn.App. at 593, 596).

Such "scrutiny" would trigger the "enormous implications" under our constitutions – and run afoul of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.*, which the AG brief ignores. The AG cannot explain how search and seizure problems, or the taking of property and chilling of speech and of associational rights, could be avoided by submitting "affidavits from Mr. Lindquist and Pierce County" that state his personal phone records are not public records. AG Br 12-13. Indeed,

such affidavits already exist in the record and show that far more than just public records were already provided. These declarations were cited in support of the injunction action, yet this case still was remanded for "development of record." CP 80-81, 444-46.⁶

Amicus ACLU also agrees with the AG, Mr. Lindquist, the County and their amici, that our constitutions and federal statute prevent the County and courts from compelling production of the logs or texts. ACLU Br 8-10. The ACLU further agrees with Mr. Lindquist, the County, and their amici that: 1) the SCA bars production also; 2) even "work related" call logs on public employees' private telephones are not subject to the PRA; 3) "examination of the logs is neither necessary nor helpful" here; and 4) the "likely result" of discovery, even just to determine if "the County 'used' the call logs by responding to [Ms.] Nissen's records requests," would be "that future employees would never voluntarily provide logs from personal phones to their agencies ... for fear they would become 'public records,' subject to full disclosure." *Id.* at 6-8, 11.

In conflict with the AG, the ACLU argues that no remand is necessary for this Court to find the County liable for not obtaining texts before the

⁶ Arguably, if *Nissen* were affirmed as the AG requests, Mr. Lindquist and the County's mere examining the records to make such affidavits as suggested by the AG would itself convert the records into "public records." See 183 Wn.App. at 595. *But see Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012), *rev. den.*, 177 Wn.2d 1002 (2013) (city's review of personal records did not convert them into public records).

requests were made. *Id.* at 11-17. The ACLU does not explain how this Court can find liability when even *Nissen* recognizes liability could not be found because it is unclear "if any" text "pertained to the conduct of government business." 183 Wn. App. at 596 (emphasis added). The ACLU also fails to mention there is no PRA cause of action for failing to preserve a record unless a request was made beforehand.⁷

Amicus LWV, in contrast, disagrees with both the AG and ACLU and every other amici by arguing there is no constitutional issue because the documents have not yet been compelled. *See* LWV Br 10-16. The LWV ignores the independent prohibitions of the SCA and the taking, speech, and due process provisions of our constitutions raised in support of the superior court order.⁸ LWV also disagrees with the ACLU and claims personal call logs are public records. *Id.* at 2, 6-10. On that issue, LWV ignores precedent holding the PRA has no application to records of entities that are not listed in the statutory definition of "agency," *see Nast v. Michels*, 107 Wn. 2d 300, 306, 730 P.2d 54 (1986); *West v. Thurston Cy*,

⁷ *See Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522-23, 326 P.3d 688 (2014) (request for log sheets which had been destroyed was properly denied); *Bldg Ind. Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 740-41, 218 P.3d 196 (2009) (no PRA liability for destroying emails before they were requested). *See also* Cy Ans. to Amici Br. at 18-21.

⁸ *See e.g.* Intervenor's Br 14-16, 26-27; Cy Ans. to COA Amicus A.G. 14; Cy Ans. to COA Amici Br 10-11, 13; Intervenor's Ans. to COA Amici Br 8; Cy Pet. for Rev. 14-15, 17; Lindquist Pet. for Rev. 14; Lindquist Resp. to Amici in Supp. of Pet. 6-7, 9; Lindquist Supp. Br 5-13.

168 Wn.App. 162, 183-84, 275 P.3d 1200 (2012),⁹ or the fact public employees are not among those so listed. *See* RCW 42.56.010(1).¹⁰ *See also* discussion *infra* at 9-16.

In contrast to the AG and ACLU, amici WACOG ignore the record and precedent by summarily dismissing those issues and claiming: 1) there was "consent" of some kind; 2) a court is required to review personal records under the PRA; and 3) there is no expectation of privacy in the public employee's private telephone. *See* WACOG Br 2, 18-19. However: 1) the record shows no consent occurred as to the personal records at issue;¹¹ 2) a court is not required to review personal records under the PRA,¹² and 3) there is an expectation of privacy in a public employee's private telephone as a matter of law.¹³

Finally, WACOG raises concerns that public employees might "skirt Public Disclosure Laws," *id.* at 5-6, but ignores that the PRA does not re-

⁹ Only WACOG mentions *West*, but does so in a footnote that addresses solely its holding regarding the element of "use" and not *West's* determinative holding regarding "agency." *See* WACOG Br at 12 n. 9.

¹⁰ LWV argues this Court should hold the County violated the PRA by "erroneously asserting that the requested records were not public records." LWV Br 3-4, 17-18. Like the ACLU, LWV ignores *Nissen* recognized the record on review did not show "if any" of the redacted material "pertained to the conduct of government business." *See* 183 Wn.App. at 596. It also ignores the declarations of record confirm the redactions were purely personal. CP 81.

¹¹ *See* CP 492, 494-518; *see also* Lindquist Supp. Br 13; Intervenor Br 37; Intervenor's Ans. to Amici 4.

¹² *See e.g. Forbes*, 171 Wn.App. at 867-68.

¹³ *See Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014); *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 900-03 (9th Cir.2008), *rev'd on other grounds* 560 U.S. 746 (2010).

quire the creation of public records every time public employees' communications relate to the conduct of government. Public employees will continue to conduct government business by land line telephones that do not create detailed records, talk in hallways, in elevators, over lunch, at social events, and so forth. The PRA does not, and cannot, prevent this. *See e.g. Belenski v. Jefferson Cnty*, _ Wn. App. __, 2015 WL 2394974 * 7 (2015) ("the PRA neither intends nor requires" a County "to create and produce records that do not currently exist"). Since the enactment of the PRA over 40 years ago and the widespread use of cell phones in the last two decades, democracy in our state has continued to thrive.

In summary, the contradictory and often illogical arguments of the amici supporting the *Nissen* decision are:

- 1) the PRA requires personal records must be produced so that governmental employers and Courts can determine if the PRA requires production of personal records – in other words, seize the personal records first and decide later if the PRA applies to those records;
- 2) using the PRA to compel production of personal records held by public employees poses: a) no constitutional issue by employers' and courts' invading public employees' privacy, property, or freedoms of speech and association to see if personal records really are private; or b) "enormous implications" for constitutional rights; and
- 3) even if there are "enormous implications" for constitutional rights this Court should not address them because: a) the issues might go away somehow; or b) public employers should be liable despite their inability to lawfully obtain their employees' personal records.

These arguments disregard the PRA's actual language, constitutional law and the harmful and unworkable real world impact of *Nissen's* holding.

III. ANALYSIS

A. BY RESPECTING THE PRA'S PLAIN LANGUAGE, PRECEDENT, AND RULES OF CONSTRUCTION, AN UNWORKABLE AND UNCONSTITUTIONAL APPLICATION IS AVOIDED

The plain language of the PRA authorizes suits only against an "agency" – not against officials, employees, or agents in any capacity. *See* RCW 42.56.550; RCW 42.56.520; RCW 42.17A.020 (*see* Appendix at 2-4). *Nissen's* fundamental misinterpretation of "agency" as synonymous with an "official" or "public employee" is nowhere found in the plain text definition of "agency" which lists only governmental entities and no natural person in RCW 42.56.010(1).¹⁴ "Where the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone; we may not look beyond the language nor consider the legislative history." *C.J.C. v. Corporation of the Catholic Bishop*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 452-

¹⁴ This "agency" argument, upon which the holding in *Nissen* improperly turns, was not briefed or raised to the superior court until after the case was dismissed and Ms. Nissen had moved for reconsideration and thus was improperly considered on appeal. *See* CP 419-425, 694. *See also Sterling Savings Ass'n v. Ryan*, 751 F.Supp 871, 882 (E.D. Wa. 1990) (reconsideration motions "are not the proper vehicle for offering evidence or theories of law that were available to the party at the time of the initial ruling"); *Fay Corp v. BAT Holdings I, Inc.*, 651 F.Supp. 307, 309 (W.D.Wa. 1987) ("'after thoughts' or 'shifting ground' are not an appropriate basis for reconsideration").

453, 90 P.3d 26 (2004) (same interpreting the PRA). Even if it could be said "the Legislature possibly may have intended that, it certainly did not say it." *State v. Johnson*, 104 Wn.2d 179, 181, 703 P.2d 1052 (1985).

Examination of this plain text in context confirms that the PRA elsewhere consistently treats "agencies" as distinct from their "officials" and "public employees." See e.g. RCW 42.56.060 (listing "public agency" along with "public official, public employee, or custodian"); RCW 42.56.230(3) (listing "employees, appointees, or elected officials" separately from agency); RCW 42.56.540 (describing "agency or its representative or a person") (emphasis added). In contrast, when the legislature intends the term "agency" to include officials or employees, it knows how to do so. See e.g. RCW 43.17.380 ("agency' means a state agency, ... officer").

The *Nissen* decision and those now supporting it refuse to acknowledge even the existence – much less holding – of precedent that reject their misinterpretation of "agency." Of those who support the *Nissen* decision, none cite *Nast v. Michels*, 107 Wn.2d 300, 306, 730 P.2d 54 (1986), where this Court held the PRA did not apply to courts because its statutory "definitions do not specifically include" them. None who oppose *Nissen's* reversal acknowledge that in *West* the plaintiff argued attorneys "were agents of the County, and that therefore, the County (acting through

its agents) 'prepared'" documents. *See* 168 Wn.App. 183. The Court rejected that argument and held the PRA did not apply because:

[W]e assume that the legislature "means exactly what it says"; and, in this instance, our state's legislature has not yet chosen to extend the PRA this far, expressly designating "agencies" as the only entities that can prepare "public records" subject to disclosure under the PRA. Applying the maxim *expressio unius est exclusio alterius*, "to express one thing in a statute implies the exclusion of the other," we assume that the legislature intended to exclude from this designation an agency's insurer-appointed lawyers who prepare documents that the agency never physically possesses.

Id. at 183-84 (emphasis added). Similarly, in *Yakima Newspapers v. Yakima*, 77 Wn. App. 319, 329, 890 P.2d 544 (1995), yet another decision ignored by the *Nissen* decision and its supporting amici, the court refused to award fees under the PRA because provisions for awards against opposing "agencies" did not apply to opposing public employees.

Nissen's unexplained revision of the RCW 42.56.010(1) definition of "agency" also is contrary to principles of statutory construction. It conflicts with the presumption that by listing only artificial entities as agencies the legislature intended to exclude individuals. *See Roberts v. Dudley*, 140 Wn.2d 58, 82, 993 P.2d 901 (2000) ("the legislature did not engage in vain and useless acts and that some significant purpose or object is implicit in every legislative enactment"). The *Nissen* decision ignores that it is a legislative role to rewrite a statute rather than a judicial one. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, 109 P.3d 405 (2005). Finally, it ig-

nones that courts should avoid statutory interpretations that will produce illegal or unconstitutional results. *See Clark v. Martinez*, 543 U.S. 371, 381, 125 S.Ct. 716 (2005); *Cawsey v. Brickey*, 82 Wash. 653, 663-64, 144 P. 938 (1914). An interpretation of a statute should be rejected in favor of others if that construction creates constitutional problems. *State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 494 P.2d 1362 (1972); *State v. Dixon*, 78 Wn.2d 796, 804, 479 P.2d 931 (1971).

Amici supporting *Nissen* attempt to supply rationales for that court's unexplained, but fundamental, conclusion – in a footnote – that a public employee is a "state or local agency" and thus "subject to the PRA" under RCW 42.56.010(3). *See* 183 Wn.App. at 594 n. 15. To justify this erroneous holding that transforms public employees into PRA "agencies," these amici now make three arguments: 1) "courts have implicitly found that public employees must comply with the act;" 2) "agencies can only function through their employees" and therefore employees are "the agency;" and 3) without such a rule, no document created by an employee would be a public record. *See* AG Br 5-6; ACLU Br 6; LWV Br 8; WACOG Br 8-10, 17 n. 13. These attempted rationales do not withstand examination.

First, prior decisions cited by these amici do not "implicitly" hold that public employees are PRA "agencies" and contain no discussion of the PRA's "agency" requirement and no holding that employees have any duty

under it. For example, in *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010), plaintiff named the public employee individually as a party, yet this Court made clear: "We address only whether the City may inspect Fimia's home computer if she gives consent to the inspection" and "do not address whether the City may inspect Fimia's home computer absent her consent." See 170 Wn.2d at 150 n. 4 (emphasis added). In *Forbes v. City of Gold Bar*, 171 Wn.App. 857, 288 P.3d 384 (2012), *rev. den.*, 177 Wn.2d 1002 (2013), public employees did not intervene to assert their rights to personal records but provided even their "purely personal" records to the city, and "the city ... was prepared to hand over the material to the trial court." 171 Wn. App. at 867 (emphasis added). Lastly *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2010), involved no personal records of public employees, no assertion of their private rights, and no dispute over the definition of "public records:" it concerned only whether "personal e-mail addresses" within the agency's records were "exempt from disclosure and properly redacted under the personal information exemption of the PDA, former RCW 42.17.310(1)(u)." See 152 Wn.App. 835, 843 (emphasis added).

In contrast, like Ms. Nissen and the *Nissen* decision itself, these opposing amici refuse to acknowledge *West v. Thurston County*, 168 Wn. App. at 183, repeatedly cited by Mr. Lindquist, the County, and their supporting

amici, which unambiguously rejects the same argument they now make. In *West* the Court found "no Washington authority extending this principal-agency relationship to the PRA context or establishing that records prepared by agents of a public agency automatically become 'public records' subject to disclosure under the PRA." (Emphasis added.) Indeed, principal-agency law does not provide a basis for seizure by government of public employees' personal records. *C.f. Diaz v. Washington State Migrant Council*, 165 Wn.App. 59, 79, 265 P.3d 956 (2011) (finding "no statutory or common law authority ... imposing a duty on a corporate director to make personal records available to the corporation that he or she serves"). The AG's admission that this case has "enormous implications" constitutionally, AG Br 12, and the ACLU's concession that the subject "records are legally inaccessible to the County," ACLU Br 11-12, demonstrate why principle-agency law cannot apply to the PRA: *i.e.*, if it did in the way claimed by opposing amici here, the PRA would be unconstitutional.

Second, that "agencies can only function through their employees" does not mean an employee of an agency "is the agency." Under basic agency law the same person cannot be both agent and principal because "an agency relationship results from the manifestation of consent by one person that another shall act on his behalf" *See Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 106, 285 P.3d 34 (2012) (*quoting Moss v.*

Vadman, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970)) (emphasis added). See also Restatement (Third) of Agency § 1.01 (2006). Like the PRA, numerous legal actions apply to entities that act only through their employees and do not apply to employees working for those entities.¹⁵ It is irrelevant that agencies function through agents when the issue is whether employees' property, privacy, due process, speech, and associational rights are subject to a law affecting only "agencies."

Third, the bald assertion that no document created by an employee would be a public record unless government can access personal communications on public employees' personal devices is an invalid syllogism. For example, documents created on County devices clearly are "public records" even though created by public employees for undeniably private purposes. See e.g. *Tiberino v. Spokane*, 103 Wn.App. 680, 688, 13 P.3d 1104 (2000) (public employee's private emails made on County computer during her work hours were "public records" under PRA because the County "printed the e-mails in preparation for litigation over her termina-

¹⁵ See e.g. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010) (inverse condemnation claims can only be brought against a "governmental entity"); *Haley v. King County*, 21 Wn.2d 53, 58, 149 P.2d 823 (1944) (Public officials cannot be held personally liable for contracts made on behalf of the public agency unless the contracts were fraudulent); 4 *McQuillin Municipal Corporations* § 12:275 (3d ed. 2005) (same); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) ("The liability schemes under Title VII and the ADEA [Age Discrimination in Employment Act] are essentially the same in aspects relevant to this issue; they both limit civil liability to the employer"); *Walsh v. Nevada Dep't of Human Res.*, 471 F.3d 1033, 1034 (9th Cir. 2006) (Americans with Disabilities Act limits liability only to the State, it does not extend to individual employees).

tion, a proprietary function").

The only interpretation of "agency" consistent with the PRA's plain text and precedent, and the principles of statutory construction – including the principle that unconstitutional interpretations should be avoided – requires rejection of *Nissen's* central conclusion that a public employee is an "agency" under the PRA. If public employees are held to be the agency, then any writing by a public employee that relates to work would be a public record – Facebook posts, diaries, tweets, notes on a smart phone, letters to relatives, and more, all subject to retention, seizure, and disclosure.

The only proper reading of this statute precludes personal records from a private cell phone from being "public records" subject to the PRA and requires reversal of the *Nissen* decision and affirmation of the superior court's order of dismissal.

B. ADOPTING OPPOSING AMICI'S PRA MISINTERPRETATIONS WOULD HAVE HARMFUL AND UNCONSTITUTIONAL REAL WORLD CONSEQUENCES

Those amici opposing reversal, like the *Nissen* decision itself, do not address the harmful effects that would naturally follow if all records from public employees' private devices were subject to "scrutiny before release" by their employer or a court once their devices had been arguably used "to conduct government related conversations." *Nissen*, 183 Wn.App. at 583

(emphasis added). The vague requirement of RCW 42.56.010(3) that a "public record" must "relat[e] to conduct of government" is unworkable, abusive, and unconstitutional if misinterpreted to apply to personal records of employees.

1. Amici Misinterpretations Chill Speech and Associational Rights

As shown by the differing meanings given RCW 42.56.010(3) by these amici, if their proposed tests were applied to public employees' personal records it would be near impossible to know when a communication would be subject to "scrutiny before release" under the PRA. *Compare* LWV Br 6 ("any record" on private cell phones "that relates to the conduct of government is a 'public record'") (emphasis added); ACLU Br 5 (though "one would think" that "work related" would be enough to be a "public record," in a footnote the ACLU states without explanation that "for purposes of this brief" the definition would not be met by work related discussions with family); WACOG Br 8-9, 11 (denying applicability of "nexus" standard stated by this Court in *Concerned Ratepayers Ass 'n v. Pub. Util. Dist. No. 1 of Clark County*, 138 Wn.2d 950, 960-61, 983 P.2d 635 (1999), and arguing "if the communication relates to the conduct of government it must be disclosed no matter where it resides") (emphasis added); AG Br 8-10, 13 (new "legal test proposed by the Attorney General" requires communications be "for the purpose of performing the em-

ployee's duties").

Thus, under the *Nissen* decision and according to opposing amici, the PRA would transform public employees' personal telephone records into a "public record" for every communication that was merely "work related" (e.g., calls to co-workers complaining about work conditions, electronic communications seeking to unionize public workers, city employees making political contacts to support or oppose candidates for mayor, etc.), as well as those that are "for the purpose of performing the employee's duties" (e.g., calls to family for advice how to handle a work conflict, a teacher calling in sick, a school principal calling a substitute to cover for the sick teacher, etc.).

If applied to individuals, the current definition of "public record" as "related to the conduct of government" would chill speech and associational rights since public employees would not know when records of their conversations on their private devices would become "public records." *See State v. Monschke*, 133 Wn. App. 313, 130-31, 135 P.3d 966 (2006) (a "statute is overbroad if it chills ... constitutionally protected free speech activities"); *Rickert v. State, Pub. Disclosure Comm'n*, 129 Wn. App. 450, 452, 119 P.3d 379 (2005) (striking down provision of Washington's PDC because it "is unconstitutionally overbroad"); *see also* WASAMA Br 5-20.

2. Amici Misinterpretations Violate Rights Against Unlawful Search

and Seizure

As "it is inevitable" that public employees will "conduct some business using their personal cell phones," *see* ACLU Br 3, under amici's misinterpretation public employees would be helpless to prevent their employer or a court from seizing and searching all their purely private communications to see if one of them might meet amici's amorphous definition of "public record." This also cannot be the intended effect of the PRA because such search and seizure would violate the Fourth Amendment and Article I § 7. *See Riley, supra.*; *O'Connor v. Ortega*, 480 U.S. 709, 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987); *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014).

Though the ACLU argues this could be avoided by public employers prohibiting such conversations on private devices, ACLU Br 15, it does not address public employees' First Amendment and Article I § 5 rights to discuss work on their own devices on their own time. The AG offers its non-binding regulation¹⁶ as a solution which requires transmission of "agency-related documents" on personal devices to employers, AG Br 7, 11, but that regulation admits "the act does not authorize unbridled searches of agency property" and therefore "the home computer of an agency

¹⁶ *See also BIAW v. McCarthy*, 152 Wn.App. at 736-37 (because AG guidelines "do not bind any agency" they created no duty for county in PRA action); WAC 44-14-00003 ("model rules, and the comments accompanying them, are advisory only").

employee" is not "subject to unbridled searches" See WAC 44-14-03001. Further, that regulation fails to address work-related conversations altogether. Neither of these proposed solutions would solve the problem because it is "inevitable" that public employees will talk about their work on their own devices on their own time.

This is a complex area of law and public policy that requires consideration of statutory and constitutional rights. Amici's efforts to rewrite the PRA's plain statutory language to reach the use of personal devices invokes a legislative, not judicial, function. Though amici appear to argue this was just a legislative omission, this Court recently held: "we do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission" because it "would be a clear judicial usurpation of legislative power for us to correct that legislative oversight." *State v. Reis*, __ Wn.2d __, 2015 WL 2145986 * 8 (2015). See also *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, 109 P.3d 405 (2005) ("We show greater respect for the legislature by preserving the legislature's fundamental role to rewrite the statute rather than undertaking that legislative task ourselves"). It is for the legislature, not the courts, to change the statute and to do so constitutionally.

3. Amici Misinterpretations Take Property Without Just Compensation

Opposing amici admit their interpretation transforms public employees' privately paid-for property into public property. *See* LWV Br 14 (government "actually owns those records"); WACOG Br 10 ("County should own the texts and billing records for work related calls"), 16-17 ("these records belong to the County"). *See also* AG Br 4-5. Thus, every draft for Governor Gregoire's memoirs about her terms as Washington's Governor, every work of fiction by public employees based on their government experiences, and every course outline written by public employees for a private school political science class they teach on their own time, could be obtained by a PRA request. Such disclosure would take the private property of public employees solely because they "related to conduct of government." This also cannot be the PRA's intent because a "Disclosure Act violates the Takings Clause by taking appellees' property without just compensation." *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 46 (1st Cir 2002). *See also* Art. I § 16.

4. Amici Misinterpretations Require Employers to Violate the Rights of Employees

It also cannot be the purpose of the PRA to require public employers to "command" their employees to produce their privately owned personal records on the threat of being sued by government for "conversion, contempt, replevin, or writ of mandamus" as advocated by these amici. LWV

Br 14-15, 18; WACOG Br 14-15. Government agencies would be liable for hostile work environment claims and also damages and attorney fees under federal law, such as 42 U.S.C. § 1983, if the agencies compelled public employees to hire private counsel to protect their constitutional rights against intrusion by their employers. *See City of Ontario v. Quon*, 560 U.S. 746, 756, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010) (federal constitution applies "when the Government acts in its capacity as an employer").

These amici fail to mention that under *Nissen* if employees cooperate with their employers by submitting personal records for a PRA response such can convert public employees' purely private records into "public records." 183 Wn. App. at 595. Further, if public employees do not successfully resist court review then their purely private records become presumptively public under Article I § 10. *See Bennett v. Smith Bunday Berma-Britton, P.S.*, 176 Wn.2d 303, 308-12, 291 P.3d 886 (2013). The goal of the PRA is to facilitate openness in government not facilitate the violation of constitutional rights.

5. Amici Misinterpretations Enables Inmates and Profit-Seekers to Abuse the PRA for Financial Purposes and to Harass Public Employees

Finally, these amici's proposed misapplication of the PRA will open new avenues for abuses of that statute which do nothing to further its pur-

pose of government transparency and are contrary to public policy.

Under their analysis, public employees can be directly harassed by those, such as prisoners, who seek to punish them for – or discourage them from – the performance of their official duties, where in the past they could only attempt to do so indirectly through their employers. *See e.g. DeLong v. Parmelee*, 157 Wn. App. 119, 131, 236 P.3d 936 (2010) (inmate requester admitted intended to misuse information received about DOC staff), *modified on remand*, 164 Wn. App. 781, 267 P.3d 410 (2011), *rev. den.*, 173 Wn.2d 1027 (2012); *King County v. Sheehan*, 114 Wn. App. 325, 340-41, 114 P.3d 307 (2002) (discussing stress and risk of identity theft and harassment experienced by police officers and their families by posting on web sites information gained through PRA requests). Indeed, if *Nissen* is allowed to stand and public employees are deemed "agencies," then those seeking to harm, harass or violate the rights of public employees will have new means to do so. For example, under *Nissen* individuals could now be personally liable for penalties and fees under the PRA if the requestor sues the individual. *See* RCW 42.56.550(4) (listing awards to be granted to "[a]ny person who prevails against an agency") (emphasis added).

Amici's proposed misreading of the PRA would create new and expansive opportunities for professional plaintiffs to use the PRA for the sole

purpose of obtaining penalties and fees. They will seek personal records of public employees in the hope that employees will resist such offensive invasions, and government employers will be unable to lawfully coerce their production. *See discussion*, "Public Records in Private Devices: How Public Employees' Article I, Section 7 Privacy Rights Create a Dilemma for State and Local Government," 90 Wash.L.Rev. 544, 555, 576 (2015).

If the PRA is expanded to public employees' personal records, the availability of penalties and fees under the PRA will have devastating effects on the ability of some governments to function.¹⁷ *See e.g. Moore v. Wayman*, 85 Wn.App. 710, 726, 934 P.2d 707 (1997) (statute "was not meant to unleash unlimited liability upon the government").

The goal of the PRA is to promote open government, not to open up taxpayer pockets.

C. PUBLIC EMPLOYERS CANNOT USE DISCOVERY TO OBTAIN THEIR EMPLOYEES' PERSONAL TELEPHONE RECORDS

All amici seeking reversal of the *Nissen* decision, as well as amicus ACLU, agree there is no mechanism by which employers can statutorily or constitutionally take public employees' personal telephone records under

¹⁷ *See e.g.* Public records lawsuit clouds Mesa's future, Tri-cityHerald.com, (March 14, 2011), see App. 8-9 (city liable under PRA for \$246,000 award – ¼ of annual budget – so that it "is at risk of not being able to meet its financial obligations because of the lawsuit"); Unintended effects of Public Records Act troublesome, Tri-CityHerald.com, (Feb. 21, 2011), see App. 10-12. *See also* 90 Wash. L.Rev. at 554-55; State Paying Record Amount for Records Lawsuits, KING5.COM (Oct. 26, 2013, 4:06 PM), <http://www.king5.com/news/investigators/Public-records-lawsuits-138457009.html>.

the PRA. *See* WFSE Br 7-9; WAPA Br 10-13; WASAMA Br 13-20; ACLU 7-9. The AG ignores the issue hoping the "superior court may be able to resolve this case without any sort of seizure or inspection of Mr. Lindquist's data," but does not describe any way the court could do so under the *Nissen* decision. *Compare* AG Br 12-13 with *discussion supra.* at 4-5. Only LWV and WACOG affirmatively argue discovery is available, but do so by ignoring the insurmountable obstacles to such discovery in responding to a PRA request. *See* LWV Br 10-15; WACOG Br 19,

First, one such obstacle is that discovery is unavailable to a government employer before any suit is filed and while it is attempting to respond a PRA request. *See* 90 Wash.L.Rev. 569-70 ("If the legislature intended to authorize the courts to judicially compel the disclosure of 'private affairs' protected under article I, section 7, it seems reasonable that it would have provided at least some procedural mechanism in the statutory scheme. But there is none.") *See also* *discussion supra.* at 19-20.

Second, even if a suit is eventually brought against a county, civil discovery does not allow a party to subpoena personal records from public employees because "a subpoena to the corporation does not subject a custodian's personal papers to inspection." *See e.g. Diaz*, 165 Wn. App. at 78 (*citing Wilson v. United States*, 221 U.S. 361, 386, 31 S.Ct. 538, 55 L.Ed. 771 (1911)).

Third, neither the LWV nor WACOG address how the Stored Communications Act and our state and federal constitutions will permit discovery where a public employee objects to the invasion of privacy, taking of property, chilling of speech, and violation of associational rights. *See e.g. In re Facebook, Inc.*, 923 F.Supp.2d 1204 (N.D. Cal. 2012) (plaintiff's civil subpoena quashed because it "would run afoul of the 'specific [privacy] interests that the [SCA] seeks to protect'"); 90 Wash.L.Rev. at 567-70 ("the 'authority of law' required to disturb an individual's private affairs [under Art. I § 7] cannot be grounded solely in the PRA"); WAC 44-14-03001(3) (since "agency property is not subject to unbridled searches, then neither is the home [electronic device] of an agency employee").

Because the scope of civil discovery is proscribed by the protections of the SCA and our state and federal constitutions, "further development of the record" as sought by amici would be unlawful.

IV. CONCLUSION

The record indisputably shows all responsive phone records for Mr. Lindquist in the County's possession were disclosed. Additionally, in the interest of openness and transparency, Mr. Lindquist and the County also disclosed all personal records that he could obtain that "may be work-related," even though they were not public records. CP 81, 234, 444-46, 681-83. Nevertheless, Ms. Nissen and her supporting amici want employ-

ers or courts to seize personal records, call logs, and personal text records from public employees and decide, after the seizure, if any are subject to the PRA. This is prohibited by constitutional and statutory protections.

The Superior Court dismissed the instant PRA action because it recognized that: 1) the personal call logs and texts at issue were not "public records;" and 2) the record need not and could not be developed further without violating statutory and constitutional law because these personal materials could not lawfully be obtained. *See* 183 Wn.App. at 588 n. 9. The Court of Appeal's decision avoids the constitutional issues that the superior court properly relied upon.

The PRA's plain text, established precedent, the principles of statutory construction, and our state and federal constitutions do not allow the seizure and "scrutiny" of personal records to determine if any are "work-related." Public employees are not agencies under the plain language of the PRA. Moreover, they possess constitutional and statutory rights that cannot be trumped by the PRA. Teachers, firefighters, prosecutors, and other public employees do not waive their constitutional rights by serving the public.

Limitations on how public employees use private electronic devices can be imposed by the legislature so long as such limits comport with federal law and our constitutions. Ms. Nissen and supporting amici propose

an interpretation of the PRA that would render it unlawful and unconstitutional. Washington has a long history of protecting the civil liberties of its citizens, and this should not change because technology changes.

It is respectfully requested that Division II's decision be reversed and the superior court's dismissal of this case be affirmed.

Respectfully submitted this 27th day of May, 2015.

KEATING, BUCKLIN & McCORMACK, INC., P.S.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was delivered this 27th day of May, 2015, by electronic mail pursuant to the agreement of the parties as follows:

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SUPREME COURT OF THE
STATE OF WASHINGTON

GLEND A NISSEN, an individual, Petitioner

v.

PIERCE COUNTY, a public agency; PIERCE COUNTY
PROSECUTOR'S OFFICE, a public agency, Respondent

v.

PROSECUTOR MARK LINDQUIST, Petitioner

APPENDIX

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ORIGINAL

18 U.S. Code § 2701 – Unlawful access to stored communications

(a) Offense.— Except as provided in subsection (c) of this section whoever—

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

(b) Punishment.— The punishment for an offense under subsection (a) of this section is—

(1) if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain, or in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or any State—

(A) a fine under this title or imprisonment for not more than 5 years, or both, in the case of a first offense under this subparagraph; and

(B) a fine under this title or imprisonment for not more than 10 years, or both, for any subsequent offense under this subparagraph; and

(2) in any other case—

(A) a fine under this title or imprisonment for not more than 1 year or both, in the case of a first offense under this paragraph; and

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under this subparagraph that occurs after a conviction of another offense under this section.

(c) Exceptions.— Subsection (a) of this section does not apply with respect to conduct authorized—

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 2703, 2704 or 2518 of this title.

RCW 42.56.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

(2) "Person in interest" means the person who is the subject of a record or any representative designated by that person, except that if that person is under a legal disability, "person in interest" means and includes the parent or duly appointed legal representative.

(3) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

(4) "Writing" means handwriting, typewriting, printing,

photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.550

Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees,

incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

RCW 42.56.520

Prompt responses required.

Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; (3) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (4) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the

secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

-
- A. **RCW 42.17A.020**
 - B. **Statements and reports public records.**
 - C.

All statements and reports filed under this chapter shall be public records of the agency where they are filed, and shall be available for public inspection and copying during normal business hours at the expense of the person requesting copies, provided that the charge for such copies shall not exceed actual cost to the agency.

RCW 42.56.060
Disclaimer of public liability.

No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter.

RCW 42.56.230
Personal information.

The following personal information is exempt from public inspection and copying under this chapter:

...

(3) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy;

...

RCW 42.56.540

Court protection of public records.

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

RCW 43.17.380

Quality management, accountability, and performance system – Definitions.

As used in RCW 43.17.385 and 43.17.390:

(1) "State agency" or "agency" means a state agency, department, office, officer, board, commission, bureau, division, institution, or institution of higher education, and all offices of executive branch state government-elected officials, except agricultural commissions under Title 15 RCW.

(2) "Quality management, accountability, and performance system" means a nationally recognized integrated, interdisciplinary system of measures, tools, and reports used to improve the performance of a work unit or organization.

WAC 44-14-00003

Model rules and comments are nonbinding.

The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies. The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.

WAC 44-14-03001

"Public record" defined.

Courts use a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.¹

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW 42.17.020(41). "Writing" is defined very broadly as: "...handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW 42.17.020(48). An e-mail is a "writing."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the

¹ *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998). For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020(41).

performance of any governmental or proprietary function." RCW 42.17.020(41). Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be. For example, a record showing the existence of a purely personal e-mail sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the e-mail itself were not.²

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW 42.17.020(41).

A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."³ For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.⁴ The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a record to a third party for the sole purpose of avoiding disclosure.⁵

Sometimes agency employees work on agency business from home computers. These home computer records (including e-mail) were "used" by the agency and relate to the "conduct of government" so they are "public records." RCW 42.17.020(41). However, the act does not authorize unbridled searches of agency property.⁶ If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee. Yet, because the home computer documents relating to

² *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000).

³ *Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999).

⁴ *Id.*

⁵ See Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

⁶ See *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work e-mails back to the employee's agency e-mail account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers.

Public records lawsuit clouds Mesa's future

By Kristi Pihl, Herald staff writer

March 14, 2011

MESA — The small town of Mesa's financial future appears dismal as it faces penalties from an eight-year-old public records lawsuit that's still plodding through the courts.

A recent preliminary state audit of Mesa has confirmed what city officials already knew -- that the city is at risk of not being able to meet its financial obligations because of the lawsuit.

Donna Zink, a former Mesa mayor, sued the city for withholding public documents she requested and won in 2008 when a visiting judge in Franklin County Superior Court found that city officials had improperly withheld documents in 40 record requests.

The original judgment of \$246,000 against the town of 489 now has reached more than \$300,000 with interest, according to the city. That doesn't include attorneys' fees for the city and the Zinks.

The dispute began in 2002 when Zink and her husband Jeff began requesting public records after the city told them a building permit to repair their fire-damaged home had expired.

Both Zink and Mesa have appealed the ruling, and the case is scheduled to be argued before the Court of Appeals in Spokane on March 23 for the third time.

Mesa is asking the court to consider the penalties using mitigating factors such as the city's limited resources, culpability and all the circumstances of the case, said Kennewick attorney Lee Kerr, who is representing Mesa along with Everett attorney Ramsey Ramerman.

Zink, on the other hand, has said the per-day penalty for withholding the records isn't steep enough considering the offense. She also is challenging the exclusion of 842 days of interest for the time she did not have the records requested. That covers the duration between a 2005 decision in Mesa's favor and when the Court of Appeals decision overturning his initial ruling.

In response to the state's preliminary audit findings, Mesa City Council members last week unanimously approved a plan for what the city will do once the court process is complete.

Mesa began this year with about \$319,000 in the bank. The city's annual operating budget is about \$1 million.

The city's plan said its first step would be to use its \$72,000 in reserves to pay the judgment if the total fine is equal to or less than the reserves.

If the city must pay more than that, Mesa would try to obtain a loan from the private market or a public entity like Franklin County or the state, Kerr said.

Kerr said he wasn't aware of any available grants that would help Mesa cover the costs of the court case.

The city also could ask voters to pass a property tax levy lid lift to pay for the court costs, Kerr said.

If all else fails, the bottom line is declaring bankruptcy or disincorporation, according to the city's plan.

Part of the reason the cost of the case is so high is because of the difficulty getting scheduled in court, Kerr said. And in the meantime "The interest clock is still ticking," he said.

Kerr said a decision from the Court of Appeals could come 90 days to six months after the court hearing.

Even then, he expects that the appeals court will send the case back to Franklin Superior Court to be heard yet again.

The ruling also could be appealed by either side, Kerr said, which would extend the amount of time.

Zink said she hopes the Court of Appeals will make a final decision on the penalties so the case can end.

* Kristi Pihl: 509-582-1512; kpihl@tricityherald.com

Unintended effects of Public Records Act troublesome
By Kristi Pihl and John Trumbo, Herald staff writers
February 21, 2011

Prosser and Mesa have become poster children for reforming Washington's Public Records Act.

The two small towns are featured prominently in the Association of Washington Cities' current issue of Cityvision magazine, which calls for reform of the 39-year-old act.

Controversies such as those in Prosser and Mesa have become more common in recent years, said Victoria Lincoln, Association of Washington Cities legislative and policy advocate.

All it takes is one disgruntled citizen or a major issue for a city to be buried in records requests, she said. While local governments acknowledge the importance of citizen access to government records, unintended effects of the law have been troublesome for some cities.

Some of the 21 bills being considered in the Legislature would make major changes to the act, such as adding the ability for public agencies to charge requesters for staff time to answer requests, requiring an attempt at addressing issues before a lawsuit can be filed, starting a pilot appeal program and limits on requests made by inmates.

The proposed reforms are disheartening for Donna Zink, former Mesa mayor, who sued her city for mishandling public records requests.

"It is just starting to work," Zink said, noting some bills would essentially gut the act and take away the penalties.

Those penalties are needed to hold agencies accountable when they make serious mistakes, Zink said.

Kennewick City Attorney Lisa Beaton said legislative changes would "strike a balance" by helping public agencies without taking away from the Public Records Act's original intent.

"With current law, the requester doesn't have to give notice (to the public agency) before asking for penalties," said Beaton, who favors a bill that

would give a 15-day grace period to correct mistakes such as those that happened with Mesa.

Kennewick hasn't had anyone challenge it in the past decade over a records request, but Beaton is uneasy about what could happen.

"It's a minefield because of case law that has interpreted the act. It's getting more complicated. And if you get it wrong, the statute of limitations is one year," she said.

One major change the Legislature might consider is allowing public agencies to charge requesters for staff time spent answering a record request.

Lincoln said House Bill 1300 and Senate Bill 5088 could help cities that suffer when one person makes many requests or a large, time-consuming request.

The bills would give each person five free hours of city staff time per month. If requests took longer, the requester would be billed for the additional time or could ask to delay the remainder until the next month.

But Greg Overstreet, a former assistant attorney general who works on open government issues with Seattle's Allied Law Group, said such charges would deter people from making requests. He also said he believes cities are trying to find another revenue source.

"I think charging for search time would gut the Public Records Act," he said.

Another target during this legislative session is requests filed by inmates, which some agencies have pointed to as a burden.

SB 5099, sponsored by Sen. Jerome Delvin, R-Richland, would allow a public agency to ask the court to approve the denial of public records if the inmate is using the act to harass the agency, or if the records could endanger someone's safety.

The most time-consuming request the small town of Mesa received in 2010 was from an inmate, Brandon Burrell, 31, of Seattle. He requested

payroll information, the most recent election results and construction costs for city projects from 2006-09, said clerk-treasurer Terri Standridge.

That request resulted in a stack of more than 400 pages, Standridge said.

The records have been waiting at city hall since last summer because Burrell has not arranged to get them.

Burrell said in a letter that he requested the documents because he had heard allegations the town was misappropriating money and wanted to see how money was spent.

Burrell, who made more than 160 public records requests during 2010 while at the Washington State Reformatory in Monroe, was convicted of first-degree robbery, unlawful possession of a firearm and bribery of a witness. He has been incarcerated since April 14, 2009.

"Allowing an agency to deny a PRA request to inmates would not be American," he said in a letter.

Although Overstreet opposes many of the suggested changes in the Public Records Act, he agrees change is needed. But he wants to put teeth back in the law, not remove its bite.

The act has been eroded almost beyond recognition from the original 1972 citizen initiative that created it, Overstreet said. He would love to have the act go back to its original form, with only 10 exemptions for withholding records. It now has 300, he said.

Many people lack the money to take the government to court, and even if a court awards a penalty the agency's insurance, not the agency itself, often foots the bill, Overstreet said.

"Agencies can ignore the act and nothing ever happens to them," he said.

State Rep. Larry Haler, R-Richland, wants citizens who make public records requests to remember they are spending taxpayer money to obtain information.

But Overstreet said the cost savings that happen when government is open and transparent should be weighed when debating the real costs of the act.

Rowland Thompson, executive director of Allied Daily Newspapers in Washington, said Senate Bill 5685, introduced Feb. 7, would give judges total discretion in setting penalties and might be the best answer.

The bill sponsored by Sen. Dan Swecker, R-Rochester, and Sen. Craig Pridemore, D-Vancouver, would remove the top and bottom on penalties and let judges have full review on each case. It would be simpler than sorting through a patchwork of other proposed reforms, Thompson said.

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Subject: Nissen v. Pierce County Cause No. 90875-3

Dear Clerk:

Attached please find for filing the Answer to Amici of Petitioner Lindquist, Appendix, and Motion for Permission to File Overlength Brief.

Thank you.

STEWESTES

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