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SUPREME COURT  
OF THE STATE OF WASHINGTON

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GLEENDA NISSEN, an individual,

Respondent,

v.

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

Petitioners,

v.

PROSECUTOR MARK LINDQUIST,

Petitioner.

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PIERCE COUNTY'S RESPONSE TO AMICI BRIEFS

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii-v
A. INTRODUCTION .....	1
B. STATEMENT OF THE CASE.....	2
C. ARGUMENT WHY REVIEW SHOULD BE GRANTED .....	5
(1) <u>The Records at Issue Here Are Not Public         Records under the PRA.....</u>	5
(a) <u>An Employee Is Not an Agency under             the PRA.....</u>	5
(b) <u>A Public Agency Does Not Own the Records             of a Public Employee’s Private Communications             Device as a Condition of Public Employment.....</u>	7
(c) <u>The County Did Not Use the Records             at Issue .....</u>	8
(d) <u>The Amici Offer No Realistic Definition of             the Conduct of Government under             RCW 42.56.010(3).....</u>	9
(2) <u>Even if the Prosecutor’s Cell Phone Records Are         Public Records, the Records Are Barred from         Disclosure under Federal Law and Constitutional         Principles.....</u>	11
(a) <u>Statutory Restrictions Bar             Disclosure .....</u>	12
(b) <u>Constitutional Limitations Bar             Disclosure Here.....</u>	12

(i)	<u>The County Is Not Arguing That the PRA Is Unconstitutional</u> .....	13
(ii)	<u>Public Employees Do Not Waive Their Statutory or Constitutional Rights as a Condition of Public Employment</u> .....	14
(iii)	<u>At a Minimum, the Fourth Amendment/Article I, § 7 Apply Here</u> .....	14
(iv)	<u>Proceedings in the Trial court to “Create a Record” Are Themselves Violative of Public Employee Rights</u> .....	16
(v)	<u>The Constitutional Issue Is Ripe for Consideration</u> .....	17
(3)	<u>PRA Penalties Should Not Extend to Public Agencies When Such Agencies Cannot Compel Their Employees to Turn Over Their Private Records</u> .....	18
D.	CONCLUSION .....	22

Appendix

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

*Ameriquist Mortgage Co. v. Office of Attorney General*,  
170 Wn.2d 418, 241 P.3d 1245 (2010).....12

*Cerrillo v. Esparza*, 158 Wn.2d 194, 142 P.3d 155 (2006).....5

*Concerned Ratepayers Ass'n v. Public Util. Dist. No. 1 of Clark County*,  
138 Wn.2d 950, 983 P.2d 635 (1999).....9

*Daines v. Spokane County*, 111 Wn. App. 342,  
44 P.3d 909 (2002).....21

*Fisher Broadcasting-Seattle TV LLC v. City of Seattle*,  
180 Wn.2d 515, 326 P.3d 688 (2014).....20

*Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012),  
review denied, 177 Wn.2d 1002 (2013).....10

*Freedom Foundation v. Gregoire*, 178 Wn.2d 686,  
310 P.3d 1252 (2013).....13, 16

*Gendler v. Batiste*, 174 Wn.2d 244, 274 P.3d 346 (2012).....20

*Herbert v. Wash. State Public Disclosure Comm'n*,  
136 Wn. App. 249, 148 P.3d 1102 (2006).....3

*Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998).....6, 20

*McCarthy v. Building Industry Assoc. of Wash.*, 152 Wn. App. 720,  
218 P.3d 196 (2009)..... 21-22

*Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).....7

*Neighborhood Alliance of Spokane County v. County of Spokane*,  
172 Wn.2d 702, 261 P.3d 119 (2011).....19, 21

*O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010).....15

*Planned Parenthood of the Great Northwest v. Bloedow*,  
\_\_\_\_ Wn. App. \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_,  
2015 WL 2393434 (2015).....12

*Snedigar v. Hodderson*, 114 Wn.2d 153, 786 P.2d 781 (1990).....16

*State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014).....15

*State v. Hirschfelder*, 170 Wn.2d 536, 242 P.3d 876 (2010).....20

*Washington State Communications Access Project v. Regal  
Cinemas, Inc.*, 173 Wn. App. 174, 293 P.3d 413,  
review denied, 178 Wn.2d 1010 (2013).....18

<i>Wash. Educ. Ass'n v. Wash. State Public Disclosure Comm'n</i> , 150 Wn.2d 612, 80 P.3d 608 (2003).....	22
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	7

Federal Cases

<i>American Civil Libraries Union v. Clapper</i> , ___ F.3d ___, 2015 WL 2097814 (2nd Cir. 2015).....	15
<i>Riley v. California</i> , ___ U.S. ___, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014).....	14
<i>United States v. Jones</i> , 565 U.S. ___, 132 S. Ct. 945, 181 L.Ed.2d 911 (2012).....	15

Other Cases

<i>Denver Post Corp. v. Ritter</i> , 255 P.3d 1083 (Colo. 2011).....	8
--	---

Statutes

RCW 34.05 .....	21
RCW 40.14 .....	6
RCW 40.14.010 .....	21
RCW 40.14.070 .....	21
RCW 42.17A.555.....	3
RCW 42.52.180 .....	3
RCW 42.52.900 .....	4
RCW 42.56.010 .....	7
RCW 42.56.010(1).....	5, 6, 7
RCW 42.56.010(2).....	21
RCW 42.56.010(3).....	9, 10, 11
RCW 42.56.050 .....	11
RCW 42.56.070(1).....	12
RCW 42.56.100 .....	20
RCW 42.56.230 .....	11
RCW 42.56.535 .....	2
RCW 42.56.555 .....	7, 18, 19

Constitutions

Wash. Const. art. I, § 5.....18  
Wash. Const. art. I, § 7.....15, 16, 18  
Wash. Const. art. I, §16.....18

Codes, Rules and Regulations

GR 31.1 .....7  
GR 31.1(k)(4) .....7  
44 U.S.C. § 2911.....22

Other Authorities

Philip Paine, *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. 545 (2015).....15  
Wash. State Bar Ass'n, *Public Records Act Deskbook*, § 16.2  
(2d ed. 2014).....20

## A. INTRODUCTION

In accordance with this Court's May 13, 2015 ruling, petitioner Pierce County ("County") provides this response to the various amici briefs. This is not a case about compliance with the PRA or its policy of transparency. Prosecutor Mark Lindquist ("Prosecutor") and the County made every effort to provide records that were truly public. Rather, this is a case about whether the PRA can be used to conduct fishing expeditions into the records of private communications devices of public employees and to expand liability for public agencies already taxed by PRA compliance, bounds set by the Legislature.

The Court of Appeals' opinion is an unvarnished assault on the privacy rights of public employees. It would transform public employees into repositories of public records by treating them as public agencies, thereby potentially converting private records of public employees which mention work into public records under the Public Records Act, RCW 42.56 ("PRA"). That opinion condones fishing expedition PRA requests that culminate in intrusive superior court proceedings, ignoring public employees' statutory and constitutional privacy rights as to the records of their private communications devices, their Facebook pages, their email accounts, diaries, and any other writings that may pertain to work.

For public agencies like the County, the Court of Appeals' PRA analysis offers the prospect that such public agencies will face exposure to per diem penalties and attorney fees under RCW 42.56.535 in litigation to produce the records of public employees' private communications devices when those agencies do not have the authority to require their employees to relinquish their statutory and constitutional rights as a condition of public employment nor to otherwise compel them to produce such records.

The sheer number of issues, and divergence of opinion on the PRA's interpretation manifested in the various amici briefs, only confirms the point articulated by the County throughout this litigation: this Court should interpret the PRA as it is written and leave to the Legislature any re-working of the PRA to reflect evolving communications technology and concerns about the implementation of the PRA's goal of transparency.

#### B. STATEMENT OF THE CASE

The County does not repeat the factual arguments in its supplemental brief or that of the Prosecutor. It does observe that the amici briefs contain certain misstatements of fact.

First, perhaps the most glaring error repeated on numerous occasions in the amici briefs is that the Prosecutor "chose" to use his private cell phone for "government business." *E.g.*, Media br. at 3, 19.

This is a misrepresentation of the record, as both the County and the Prosecutor have *repeatedly* noted in prior briefing.

Second, amici mischaracterize this case as a refusal to provide “public” records. Media br. at 5, 13, 16; LWV br. at 3-4, 9; ACLU br. at 2. That is untrue. When Nissen made a PRA request for “work related” records for the Prosecutor’s personal telephone, he obtained relevant call logs from his private service provider, reviewed them with legal counsel, and provided to the County all personal call logs “that may be work-related” for release. *See* CP 16, 18, 32-36, 40, 81, 86, 334-38, 340-49, 445-46. The Prosecutor also attempted to obtain texts from his service provider but was advised they no longer existed. *See* CP 58, 81, 444-46, 490, 598, 616. Nissen then made a second PRA request omitting the “work related” qualifier, and sought all of the Prosecutor’s personal telephone records. *See id.*, CP 17, 190.

Third, it is extraordinary that Nissen and a number of the amici fail to acknowledge the fact that the Prosecutor, like other public employees, cannot *by law* use publicly-issued communications devices for political communications, which, by their nature, frequently relate to the conduct of government. *See* RCW 42.17A.555; RCW 42.52.180. *See generally*, AGO 1973 No. 14; AGO 1975 No. 23; *Herbert v. Wash. State Public Disclosure Comm’n*, 136 Wn. App. 249, 254-57, 148 P.3d 1102 (2006)

(teachers fined for using school email system to collect signatures on ballot measure).<sup>1</sup>

For public employees generally and electeds in particular, and even the members of this Court,<sup>2</sup> certain activities relating to their work as elected officials cannot be addressed on government-issued communication devices such as endorsements of candidates or ballot measures, election-related fundraising activity and the like, even though such activities are "work-related."

Further, as noted by the public employee association amici, many communications such as union-related activities are "work-related," but to allow access by public employers or outsiders like the media to such communications would defeat the fundamentally important public policies at issue.

More critically, the politically-related communications, even if arguably within the work or government responsibilities of public employees, particularly elected officials, implicate core First Amendment speech and associational rights of those public employees. Pub. emp. ass'ns amici br. at 14-19; WSAMA br. at 1-4, 8-9.

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<sup>1</sup> Ethics in government is a public policy in Washington no less significant than the transparency policy embodied in the PRA. *See* RCW 42.52.900.

<sup>2</sup> CJC 4.1(9) bans "use of court staff, facilities, or other court resources in a campaign for judicial office except as permitted by law."

Several key factual points made by the County and Lindquist in their supplemental briefs, however, are clearly confirmed by the various amici briefs.

- This Court's decision affects all private communications devices of public employees, not just cell phones. Media br. at 2 n.2;
- The decision affects all public employees in Washington, whether elected officials or not. Pub. emp. ass'ns br. at 3-4;
- Some of the amici clearly believe that a hearing into the contents of any private records of public employees may not necessarily be in camera, Media br. at 18-19.

#### C. ARGUMENT

This Court's traditional statutory interpretation principles are of vital importance to this Court as it addresses the issues here. This Court has repeatedly noted that it must defer to the Legislature's plain language in interpreting statutes like RCW 42.56.010(1). *E.g., Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). This Court may not read matters or policies into a statute that are not in it, and may not create legislation in the guise of construing a statute. *Id.*

(1) The Records at Issue Here Are Not Public Records

(a) An Employee Is Not an Agency under the PRA

In defining a public agency in RCW 42.56.010(1), the Legislature intended to define the appropriate repositories of public records.<sup>3</sup> As the specific language of that statute reveals, it *never* intended to make individual public employees repositories of public records, thereby subjecting each public employee to standards for government records repositories on the maintenance and treatment of public records.<sup>4</sup>

Nissen cited *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998) as authority for the proposition that the Prosecutor is a PRA public agency. Nissen suppl. br. at 14-16. But that case does not stand for that proposition and merely makes the unremarkable statement that *a prosecutor's office* is a public agency. *Id.* at 604. *Nowhere* does it equate the individual elected official with a public agency. Several of the other amici parrot the Court of Appeals' assertion that a public agency only acts through its employees. *E.g.*, AG br. at 6. But the legislative language is *unambiguous*. Public employees certainly generate public records but that

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<sup>3</sup> The Court of Appeals paid scant attention to the equation of public employees with public agencies, addressing this issue by a conclusion without analysis in a footnote to its opinion. *Op.* at 11 n.15. As the public employee associations correctly observe, the Legislature used the term *public agency* deliberately. Pub. emp. ass'ns br. at 3. Several of the amici try to sidestep this issue by simply equating a public employee's actions with those of the agency. *E.g.*, Media br. at 9-10; AG br. at 5-8; LWV br. at 8-9. If that had been the legislative intent, and it was not, the language of RCW 42.56.010(1) would have so stated.

<sup>4</sup> For example, if an individual public employee is a repository of public records, must that employee adhere to policies on preservation and destruction of public records found in RCW 40.14 or face potential criminal sanctions for failing to do so?

does not mean that they are then a “public agency” as defined in RCW 42.56.010(1).<sup>5</sup> That is why, for example, this Court in promulgating the present version of GR 31.1 makes clear in GR 31.1(k)(4): “A judicial officer is not a court or judicial agency.”

This Court has previously mandated a strict adherence to the specific language of RCW 42.56.010. *Nast v. Michels*, 107 Wn.2d 300, 306, 730 P.2d 54 (1986) (courts are not agencies as defined in PRA). *See also, West v. Thurston County*, 168 Wn. App. 162, 183-84, 275 P.3d 1200 (2012) (PRA agency definition does not extend to agents of public agency). Amici ignore these holdings.

The Prosecutor is not an agency under RCW 42.56.010(1).

(b) A Public Agency Does Not Own the Records of a Public Employee’s Private Communications Device as a Condition of Public Employment

Without so much as a word of analysis on constitutional takings, or the citation of any supporting authority, some of the amici assert that public agencies *own* the records of their employees’ private communications devices. Media br. at 10, 14; LWV br. at 14. The League of Women Voters actually argues that a public employer, because it owns the employee’s records, can bring “an action against the employee

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<sup>5</sup> The Attorney General plainly grasped the implications of this distinction when he pointedly noted that individual public employees are not subject to the penalties of RCW 42.56.555. AG br. at 6 n.4. But why is that so? If a public employee *is* an agency, nothing in RCW 42.56.555 bars the application of its penalties to that “agency.”

[who declines to turn over such records] for conversion, contempt, replevin, or writ of mandamus...” LWV br. at 4.

These arguments illustrate concerns previously posited by the County and others that in order for the PRA to apply to the private communications devices of public employees, the public employer must exact a taking of the employees’ private property. *E.g.*, County suppl. br. at 14 n.17. This Court should reject the notion that a condition of public employment in Washington is the mandatory transfer by public employees to their employers of any property interest in the records of their private communications devices.

(c) The County Did Not Use the Records at Issue

The amici have no real answer to the argument that the County never prepared, owned, retained, or used the records at issue here. County suppl. br. at 6-8. Indeed, none of the amici even address *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011), a key case on this point.

Nissen has contended that where a public employee like the Prosecutor seeks to comply with a PRA request, the very act of seeking to assess whether records are subject to the PRA transforms private records into public records. Such a position, if correct, will force public employees *not* to seek guidance on records and be open with private records, for fear that their private records will become subject to the PRA.

This will necessarily make impossible a true government agency's "reasonable efforts" to obtain from its employees what could be now deemed its "public records."

The County never prepared, owned, retained or used the records at issue here.

(d) The Amici Offer No Realistic Definition of the Conduct of Government under RCW 42.56.010(3)

The Court of Appeals' opinion fails to define "the conduct of government," the core phrase to RCW 42.56.010(3), thereby subjecting Washington public employees to extreme uncertainty as to the reach of the PRA into their private lives, into their communications on private devices, their personal Facebook pages, and other personal writings that might mention work.

A number of the amici similarly offer no working definition of that concept, instead using "work-related," "conduct of government," and "public business" essentially interchangeably, and without any further definition of the proffered terms. But the term "work related" is clearly different than "related to the conduct of government." The Court of Appeals' opinion is contrary to this Court's key decision on RCW 42.56.010(3), *Concerned Ratepayers Ass'n v. Public Util. Dist. No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999). There, this Court

specifically held that a record is subject to the PRA only if the agency and its staff reviewed, evaluated, referred to, or otherwise used the record at issue, and that record had a nexus to the agency's decisionmaking process. *Id.* at 960-61. But that definition creates a serious problem here, where the agency never actually had possession of the records and it could not obtain the records by compulsion.

The media amici, ACLU, and LWV however, propose a breathtaking expansion of the PRA untethered to the statutory language of RCW 42.56.010(3), or the principle that private records of public employees are not subject to the PRA. *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013). Yet again they would have this Court ignore both the Legislature's statutory language and case law, in favor of an open-ended theory of RCW 42.56.010(3) they have freshly crafted, arguing that if a record is in any conceivable way "work-related" (and they nowhere define such a concept), it is subject to the PRA.

The Attorney General makes an effort to develop a new two-part test for whether records fall within the ambit of RCW 42.56.010(3), acknowledging that "not every record on a public employee's personal device is a public record simply because it references or relates to the work of the employee." AG br. at 9. Acknowledging that the role a

record plays in our system of government is important to whether it is subject to the PRA, *id.*, the Attorney General unfortunately chooses to disregard the *decisionmaking* nexus this Court established in *Concerned Ratepayers*.

If a public employee's private communications merely touching upon "work," without a nexus to government decisionmaking, are to be classified as public records, that is a policy decision for the Legislature. Such an interpretation is not mandated by the existing statutory language of RCW 42.56.010(3). This Court should adhere instead to the express language of that section and find that records in the private communications devices of public employees do not meet the current statutory definition of "conduct of government."

(2) Even if the Prosecutor's Cell Phone Records Are Public Records, the Records Are Barred from Disclosure under Federal Law and Constitutional Principles

The amici briefs also reinforce the point articulated by the County, County suppl. br. at 11-20, that even assuming, *arguendo*, the records at issue here are public records under RCW 42.56.010(3), they are, nevertheless, still not subject to production because RCW 42.56.050/42.56.230, federal law, and constitutional provisions bar their disclosure. The Court of Appeals simply refused to address such exemptions. Op. at 13.

(a) Statutory Restrictions Bar Disclosure

The Stored Communications Act, 18 U.S.C. §§ 2701-03, (“SCA”) bars disclosure of private telecommunications unless relevant to a criminal investigation. Prosecutor’s suppl. br. at 6-8.<sup>6</sup> Indeed, the amici are at odds about whether the SCA applies here. The ACLU says it does. ACLU br. at 8-11.<sup>7</sup> Other amici deny its application by arguing that they County could forcibly compel the Prosecutor to provide it his private records as a condition of his public employment. Media br. at 14-16. The Prosecutor’s telecommunications records could not be produced over his objection without a court order and then only if relevant to a criminal investigation. Further, in this case, the Prosecutor could not have produced the text message records because the County and he were told they did not exist.

(b) Constitutional Limitations Bar Disclosure Here

As WAPA and the public employee associations note, individual employees’ privacy, associational, and free speech rights under applicable federal and state constitutional provisions are implicated by an expansive

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<sup>6</sup> The SCA falls within the “other statute” exemption to the PRA. RCW 42.56.070(1); *Ameriquest Mortgage Co. v. Office of Attorney General*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010); *Planned Parenthood of the Great Northwest v. Bloedow*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 2393434 (2015).

<sup>7</sup> The ACLU states “...without Lindquist’s consent, and unable to meet any of the other requirements of the SCA, the County is simply unable to obtain the requested text messages and cannot disclose them to Nissen.” ACLU br. at 10.

reach of the PRA into the records of public employees private communications devices. This Court should avoid such constitutional issues by a careful reading of the PRA.<sup>8</sup>

(i) The County Is Not Arguing That the PRA Is Unconstitutional

Like Nissen, Nissen suppl. br. at 2-8, the LWV sets up a straw man argument that the County is arguing that the PRA is unconstitutional. LWV br. at 10-15. *Nowhere* in its briefing in this case has the County contended that the PRA is facially unconstitutional. Rather, it is Nissen and her supporting amici who propose a new definition of agency that could render the PRA unconstitutional as applied to particular public employees. The County has consistently argued that public employees, faced by demands from requesters for the records of their private communications devices, will insist on their constitutional rights and will not produce such records, compelling this Court ultimately to discern the constitutional reach of the PRA.<sup>9</sup> The County's is a constitutional avoidance argument. If the Court properly construes the PRA, constitutional issues can be avoided. WSAMA br. at 6, 17-20.

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<sup>8</sup> Indeed, WSAMA notes that First Amendment issues are implicated by the PRA's reach into interactions between elected legislators and their constituents. WSAMA br. at 2-4.

<sup>9</sup> In *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013), this Court recognized that the PRA's reach was limited by constitutional mandates, creating what amounts to a constitutional exemption to the PRA.

(ii) Public Employees Do Not Waive Their Statutory or Constitutional Rights as a Condition of Public Employment

In contending that a public employee waives any privacy protections afforded that employee as a condition of public employment, e.g., Media br. at 14-16, some of the amici defy the numerous decisions that public employees do not forfeit or waive their constitutional rights as a condition of public employment. County suppl. br. at 11-12, 18; Prosecutor's suppl. br. at 10-13. Similarly, those amici do not explain how the traditional waiver standard is met here because it cannot be met.<sup>10</sup> No public employee, including the Prosecutor, has intentionally relinquished of his or her known rights regarding the records of their private communications devices.

(iii) At a Minimum, the Fourth Amendment/ Article I, § 7 Apply Here

Some of the amici contend that constitutional rights of public employees regarding private communications devices are not involved here. LWV br. at 10-15; Media br. at 18-19. But they fail to carefully analyze United States Supreme Court precedents applying the Fourth Amendment to private communications devices like *Riley v. California*, \_\_ U.S. \_\_\_, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014),<sup>11</sup> and misrepresent this Court's

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<sup>10</sup> See County suppl. br. at 16 n.21.

decision on article I, § 7 in *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010) where the Court did not reach the application of the Washington Constitution.<sup>12</sup> Those amici are oblivious to the practical problem that an employee may, and likely will, insist on the application of constitutional provisions to resist a PRA request, and the public employer is powerless to force the employee to comply. Indeed, attempts by an agency to coerce compliance by infringing upon a public employee's constitutional rights could lead to the agency incurring other liability.

That public employees enjoy such Fourth Amendment and article I, § 7 rights is amply documented in amicus WAPA's brief, and in a recent law review article. Philip Paine, *Public Records in Private Devices: How Public Employees' Article I, Section 7 Privacy Rights Create a Dilemma*

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<sup>11</sup> The recent decision in *United States v. Jones*, 565 U.S. \_\_\_, 132 S. Ct. 945, 181 L.Ed.2d 911 (2012) applied the Fourth Amendment to the surreptitious, warrantless placement of a GPS tracking device on a vehicle. *See also, American Civil Liberties Union v. Clapper*, \_\_\_ F.3d \_\_\_, 2015 WL 2097814 (2nd Cir. 2015) (barring warrantless seizures of cell phone data by the National Security Agency under the Patriot Act). These cases only reinforce the point that warrantless intrusion by government into the records of public employees' private communications devices runs afoul of the Fourth Amendment.

To the extent that this Court holds that the PRA extends to records from public employees' private communications devices, the constitutional issue adroitly avoided in *O'Neill* must be addressed.

<sup>12</sup> The *O'Neill* court also did not have the benefit of this Court's later, more detailed analysis of the application of article I, § 7 to private communications devices in *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014) where this Court concluded that article I, § 7 applied to text messages on a cell phone and suppressed evidence derived from a warrantless search of the phone's contents.

*for State and Local Government*, 90 Wash. L. Rev. 545, 557-61 (2015). That article further notes that any mandatory inspection of private communications devices of public employees implicates article I, § 7, *id.* at 561-66, that the PRA itself does not constitute the necessary authority of law to inspect private records under article I, § 7, and that no other statute or court rule authorizes issuance of a warrant to allow access to a public employee's private communications device's records. *Id.* at 567-70.

(iv) Proceedings in the Trial Court to "Create a Record" Are Themselves Violative of Public Employee Rights

While Nissen has argued that the Court of Appeals ordered an *in camera* review,<sup>13</sup> some of the amici do not agree that a superior court's review of a public employee's records will be *in camera*. Media br. at 18-19; LWV br. at 18. Moreover, such a procedure would itself violate public employees' privacy rights.<sup>14</sup>

Just as judicial inspection of executive branch materials alone "intrudes upon the separation of powers by breaching the confidentiality of the communications," *Freedom Foundation*, 178 Wn.2d at 704, in

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<sup>13</sup> The Court of Appeals opinion here nowhere refers to *in camera* review.

<sup>14</sup> WSAMA is entirely correct in noting in its brief at 15-16 that this Court has expressed reservations about *in camera* review where key constitutional rights are at issue. *Snedigar v. Hodderson*, 114 Wn.2d 153, 165-67, 786 P.2d 781 (1990).

camera proceedings will themselves intrude upon the privacy rights of public employees.

Moreover, as a superior court hearing will not cure any concern about a public employee's constitutional and statutory privacy rights. Emboldened by the Court of Appeals' decision, requestors will routinely seek private communications records of public employees and such employees will be subjected to the intrusion of a judge poring through the hard drive of such employee's personal computer, his/her tablet, and the records of his/her cell phone hoping to chance upon a reference to their work (under Nissen's "work-related" standard). Such a process is a spectacular breach of the privacy rights of public employees, to say nothing of the unworkable prospect of overworked superior court judges reviewing the personal devices and family communications records of hundreds of thousands of public employees.

(v) The Constitutional Issue Is Ripe for Consideration

The Attorney General, agreeing with the Court of Appeals, claims that the constitutional issues implicated by this case may go away on remand. AG br. at 12-13. Amicus LWV seemingly agrees, asserting that the constitutional issues here are not yet "ripe" for resolution by this Court. LWV br. at 11-12. But *see*, ACLU br.; WAPA br.; WSAMA br.;

Pub. emp. ass'ns br. The LWV and Attorney General's wishful thinking is belied by the record here.<sup>15</sup> This backdoor "ripeness" argument is contradicted by Washington's ripeness jurisprudence.<sup>16</sup> This Court's guidance on these fundamental issues is vitally needed for all public agencies and employees in Washington.

(3) PRA Penalties Should Not Extend to Public Agencies When Such Agencies Cannot Compel Their Employees to Turn Over Their Private Records

Even if the records at issue here were public and this Court concludes that public employees somehow lose their constitutional privacy rights under the Fourth Amendment and article I, § 7, speech and associational rights under the First Amendment and article I, § 5, and property rights under the Fifth Amendment and article I, § 16, this Court should not allow the imposition of penalties against public agencies like the County under RCW 42.56.555 by engrafting new and unattainable requirements on those agencies in the guise of construing the PRA.

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<sup>15</sup> The Prosecutor filed a motion for a TRO and preliminary injunction action below. He has made it clear that he shares the County's position that public employees have constitutional rights. County suppl. br. at 18.

<sup>16</sup> An issue is ripe for judicial review if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *Washington State Communications Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 208-09, 293 P.3d 413, *review denied*, 178 Wn.2d 1010 (2013) (finding injunctive action against theater chain in case regarding access for hearing disabled patrons ripe for review even though theater chain had not yet addressed compliance with captioning technology).

Both the ACLU and LWV actually argue that penalties should apply even if the public agency cannot compel its staff to relinquish their statutory/constitutional rights as a condition of public employment or otherwise force them to provide documents to the County. ACLU br. at 11-17; LWV br. at 16-19. Such an argument, fraught with potential for a vast expansion of municipal liability,<sup>17</sup> is oblivious to the fact that public moneys are at issue. It should be rejected by this Court, particularly under the facts in this case. As previously noted, the record is undisputed that the Prosecutor did not have the texts. The County was told by the Prosecutor's service provider that they did not exist, and Nissen used duplicity to induce that provider to retain them. The County cannot be liable after it made a diligent effort to produce its employee's texts that it reasonably concluded did not exist. The County conducted a sincere and adequate search in satisfaction of the PRA's mandate. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 719-25, 261 P.3d 119 (2011). It was not obligated to go outside its own

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<sup>17</sup> Under the ACLU's theory, a public agency should be liable for PRA penalties because it failed to preserve alleged public records *before* a PRA request was made. This is a vast expansion of the scope of RCW 42.56.555 making public agencies liable without temporal limits to any requester even if the agency cannot obtain a record. Such an interpretation is contrary to the PRA's statutory language and any case law interpreting it. If such a profound expansion of public agency liability is merited, the Legislature should make such a decision.

records and resources to identify or locate a record. *Limstrom*, 136 Wn.2d at 604 n.3.

Any duty to produce non-exempt texts under the PRA is dependent on whether the County had those texts at the time the requests were made.<sup>18</sup> Here, the record discloses neither the County, nor the Prosecutor, had the records at issue.

In a similar vein, several of the amici argue that this Court should interpret the PRA to require public employees to make copies of documents from their private communications devices and to take added steps to provide their documents to their public employers. *E.g.*, AG br. at 11; ACLU br. at 12-17. Nissen did not make this argument, CP 13-21, 259, and it is raised for the first time by amici.<sup>19</sup> Moreover, such a procedure is *nowhere* compelled by any language in the PRA itself.<sup>20</sup> This Court cannot add language to a statute in the guise of construing it, as

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<sup>18</sup> *See, e.g., Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522-23, 326 P.3d 688 (2014) (request for log sheets that had been destroyed was properly denied); *Gendler v. Batisie*, 174 Wn.2d 244, 252, 274 P.3d 346 (2012) (Agency has no duty to create or produce a record that is nonexistent).

<sup>19</sup> Issues raised only by amici are disregarded by this Court. *State v. Hirschfelder*, 170 Wn.2d 536, 552, 242 P.3d 876 (2010).

<sup>20</sup> The ACLU claims RCW 42.56.100 requires policies that prevent public records from “damage or disorganization” and claims the County should be liable because it “is not aware of any County policy.” ACLU br. at 13. The absence of a policy to obtain records before a request is made is not a basis for PRA liability. *See* Wash. State Bar Ass’n, *Public Records Act Deskbook*, § 16.2 at 16-3 (2d ed. 2014).

noted *supra*. This, like much of what amici propose, is a task for the Legislature.

These amici find support for their misinterpretation of the PRA in the provisions of RCW 40.14.070, relating to local governments' maintenance and destruction of public records as repositories for such records. *Nowhere* in the language of that statute do its provisions apply to individual public employees. By its terms, the statute applies only to *public agencies*. Moreover, nothing in that statute directs a public employee to make copies of documents arguably relating to the conduct of government from his or her private communications devices to a public employer, or creates a private cause of action for failing to do so.<sup>21</sup>

The Attorney General references his model rules as a basis for a policy requiring public employees to transmit public records generated and maintained on public employees' private communications devices to the appropriate public agency record repository. AG br. at 7, 11. But such guidelines, not adopted as rules by the Attorney General under the APA, RCW 34.05, do not have the force of law. *McCarthy v. Building Industry*

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<sup>21</sup> RCW 40.14 concerns only administrative regulation of records and does not create an enforceable duty owed to individuals. See *Daines v. Spokane County*, 111 Wn. App. 342, 349-50, 44 P.3d 909 (2002) (private litigant had no right to declaratory judgment that destruction of emails after 5 days violated RCW 40.14), *overruled in part on other grounds* by *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011). Indeed, the PRA makes no reference to that statute and each defines "public record" differently. Compare, RCW 40.14.010 with RCW 42.56.010(2).

*Assoc. of Wash.*, 152 Wn. App. 720, 736-37, 218 P.3d 196 (2009) (AG PRA Model Rules are not binding). *See generally*, *Wash. Educ. Ass'n v. Wash. State Public Disclosure Comm'n*, 150 Wn.2d 612, 622, 80 P.3d 608 (2003). The adoption of such a substantive policy change in the PRA is best left to the Legislature.<sup>22</sup>

Similarly, if this Court is concerned that public employees might seek to use private communications devices to avoid the PRA, the Legislature sets policy and is in the best position to amend the PRA to address such a concern.

#### D. CONCLUSION

This Court should reverse the Court of Appeals, reinstating the trial court's thoughtful decision, which respected the statutory and constitutional rights of public employees. This Court should not interpret the PRA to condone fishing expeditions into the records of private communications devices of public employees particularly where, as here, the County and the Prosecutor were transparent beyond the requirements of the PRA and disclosed all personal records that were arguably work-related and available at the time of the request. An appropriately strict interpretation of the PRA's express language avoids a myriad of statutory

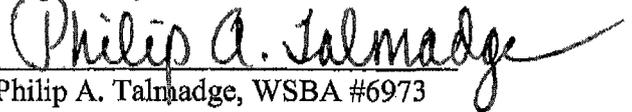
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<sup>22</sup> In a similar situation, in H.R. 1233, Congress recently amended the Presidential Records Act to require employees using "non-official electronic messaging accounts" to make copies of any communications for "official" accounts. 44 U.S.C. § 2911. Critically, this policy was established *by statute*.

and constitutional issues. Any attempt to rewrite the PRA should be left to the Legislature.

DATED this 27th day of May, 2015.

Respectfully submitted,



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# APPENDIX

RCW 42.17A.555

No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency.

RCW 42.56.010:

The definitions in this section apply throughout this chapter unless the context specifically 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.

...

(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.

RCW 42.52.180(1):

No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Motion for Leave to File Over-Length Response Brief and Pierce County's Response to Amici Briefs in Supreme Court Cause No. 90875-3 to the following parties:

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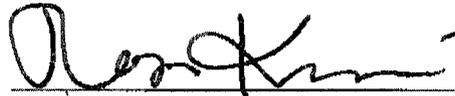
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 27, 2015, at Seattle, Washington.



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Roya Kolahi, Legal Assistant  
Talmadge/Fitzpatrick/Tribe

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Good Afternoon:

Attached please find the Motion for Leave to File Over-length Response Brief and Pierce County's Response to Amici Briefs in Supreme Court Cause No. 90875-3 for today's filing. Thank you.

Sincerely,

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