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STATE OF WASHINGTON
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No. 90875-3

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IN THE WASHINGTON STATE SUPREME COURT

GLEND A NISSEN, an individual,

Respondent,

v.

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

Petitioners

v.

PROSECUTOR MARK LINDQUIST,

Petitioner

**NISSEN'S ANSWER TO AMICUS BRIEFS OF ATTORNEY
GENERAL OF WASHINGTON AND ACLU OF WASHINGTON**

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 ORIGINAL

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I. INTRODUCTION

Respondent Nissen incorporates herein her 11/5/14 Answer to the Petitions for Review and her 1/23/15 Answer to the Amicus Curiae Briefs in support of the Petition for Review, her 4/20/15 Supplemental Brief, and her 5/27/15 Answer to the Government Amici and the authorities cited in all. She answers the following Amici herein: The Attorney General of Washington and the ACLU of Washington.

II. STATEMENT OF RELEVANT FACTS

Nissen has fully described the relevant facts in previous briefing. One relevant fact requires correction. Amici ACLU of Washington incorrectly claimed Detective Nissen used her status as a law enforcement officer to secure the continued preservation of the text messages at Verizon. This is untrue. Nissen's civil attorney secured their preservation for a civil matter. CP 90. Detective Nissen was not involved. The County and Lindquist in turn secured the texts at Verizon as well. See, e.g., CP 618; see also, Lindquist's Pet. for Rev. at 2 n. 1. The text records still existed as of the Division Two decision in this case and must, barring an act of spoliation and unethical conduct, exist today.

III. ARGUMENT

A. Nissen is entitled to access to the records as well as fees, costs and penalties.

Amici ACLU agrees that certain records could be public records but argues that when the records reside on a personal device that the requestor is entitled to fees, costs and penalties for a PRA violation and record denial but that the requestor cannot be assured of access to the records. Access to records is what the PRA is designed to preserve. Monetary fines and reimbursement for fees and costs is a tool to help secure that access and to encourage compliance by agencies. Here, the elected official has expended hundreds of thousands of dollars of his agency's money and years of that agency's employees' time to hide 16 text messages he admits were work-related. Paying agency dollars to secure secrecy would appear to be a painless bargain for these Petitioners.

Money is a necessary tool to secure compliance and enable requestors to fight for their rights to records. But record access must be secured as well or the Act will be gutted and its goals obliterated.

B. The SCA does not bar access here.

ACLU's claims regarding the Stored Communications Act ("SCA") are incorrect. The SCA does not bar access to these records, as explained in previous briefing. See also Nissen's Answer to remaining amici filed herewith.

C. The AGO's definition must include improper exercise of authority and performance of duties.

The Attorney General's Amicus Brief reflects the policy and interpretation of its office as well as that of the Secretary of State and is generally sound. Nissen responds solely to the issue of the definitions proposed by the AGO. While it is not clear the AGO disagrees, Nissen clarifies that the definition of a public record and the concept of governmental purpose and function must encompass situations where an official abuses his power and acts beyond the proper exercise of his duties and not only those where he acts appropriately. A governor shutting down a busy bridge as retaliation against another leader for not supporting his political candidacy would not be a proper exercise of power, but it would meet the definition of governmental conduct and records relating to those events would meet the definition of public record under Washington's law. (See Amicus Brief of Allied Daily Newspapers of Washington, et al., at 5-6 and fns. 5-7 discussing this example.) Similarly, if council members secretly traded texts with union officials during open public council meetings advising the council members how to vote during the meeting on certain measures, this would also be an improper exercise of their power and an improper performance of their duties, but it would nonetheless be governmental conduct and related to a governmental function. (See

Amicus Brief of Allied Daily Newspapers of Washington, et al., at 6 and fn. 8 discussing this example.)

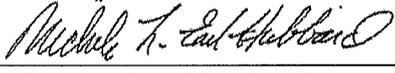
If an elected prosecutor sent text messages to his staff or others to investigate and then retaliate against a Detective who urged her union not to support him in an election, or he used agency resources and the power of his office to silence law enforcement about abusive tactics or unjustified prosecutions or criminal discovery violations and to retaliate against those who challenged him, or he used agency resources and the power of his office to pressure the media to alter news coverage about himself and his detractors – while all such acts would be an improper exercise of his power, and an improper performance of his duties, such acts would fall within the definition of governmental purpose and conduct and records related to such acts would meet the definition of public record.

IV. CONCLUSION

The text messages and call logs here are public records regardless of the device on which they were created, read, or stored, and whether the exercise of power and performance of duties was appropriate or inappropriate. Further, money, while important to help secure compliance with the PRA, is not the sole entitlement here. Nissen is entitled both to access to records as well as fees, costs and a statutory penalty award.

RESPECTFULLY SUBMITTED this 27th day of May, 2015

ALLIED LAW GROUP LLC
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By 

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 27, 2015, I served by email pursuant to agreement the foregoing document and this certificate of service on:

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Dated this 27th day of May, 2015, at Shoreline, Washington.



Michele Earl-Hubbard

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

Dear Clerk:

Attached please find for filing the following:

Nissen's Answer to

- (1) Nissen's Answer to Amicus Briefs of Attorney General of Washington and ACLU of Washington and
- (2) Nissen's Answer to Amicus Briefs of Washington Association of Municipal Attorneys, Washington Association of Prosecuting Attorneys, and "Public Employees Unions:" (Collectively "Government Amici") and attached certificates of service for same.

The attorney filing this document is Michele Earl-Hubbard, WSBA #26454, attorney for Respondent Nissen. My contact information is below.

Thank you.

This email further constitutes email service upon all recipients pursuant to an email service agreement.

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