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**SUPREME COURT OF THE
STATE OF WASHINGTON**

GLEND A NISSEN, an individual, Respondent

v.

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

v.

PROSECUTOR MARK LINDQUIST, Petitioner

SUPPLEMENTAL BRIEF OF PETITIONER LINDQUIST

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I. INTRODUCTION

Nissen v. Pierce County erroneously reinterprets the Public Records Act (hereinafter "PRA") to define public employees as "agencies" subject to the PRA, but fails to address the critical statutory language and dispositive constitutional issues that preclude such a holding.

If *Nissen* were the law, it would presume to transform unconstitutionally all private writings by a public employee that somehow relate to work – e.g., letters, diaries, books, emails, text messages, social media posts, and more – into public records subject to retention, seizure, and disclosure upon demand. *Nissen's* application of the PRA to individuals not only is contrary to the statute's language and precedent, but renders it unconstitutional since, *inter alia*, it requires unlawful search and seizure of personal property and chills free speech and association.

In short, *Nissen's* analysis of the PRA either is mistaken or the PRA is unconstitutional. *Nissen* should be reversed and the trial court affirmed.

II. ASSIGNMENT OF ERROR

The Court of Appeals erred by reversing the trial court's order of dismissal and by remanding to determine if a public employee's personal text messages and telephone call logs are "public records" under the PRA.

Issues Pertaining to Assignment of Error

1. Does the PRA authorize the seizure, review, and disclosure of text

message records in the sole possession of a public employee's private service provider?

2. Where a requester demands text messages from a public employee's personal telephone and the County and employee are told the records do not exist, is the PRA violated where the County does not produce records it does not and could not possess at the time of the request?

3. Does the seizure, review, and production under the PRA of personal telephone call logs created by a public employee's service provider violate constitutional and federal statutory protections?

4. Where a requester demands call logs for a public employee's personal telephone and obtains all such records in the employee's possession that "may be work related," does the PRA authorize the seizure, review, and disclosure of redacted personal material?

III. STATEMENT OF THE CASE

The pleadings and records submitted by Respondent Glenda Nissen establish that after her PRA request seeking records from the personal telephone of Prosecutor Mark Lindquist (hereinafter "Petitioner"), the records were requested from the exclusive possession of his private service provider in the interest of openness. *See* CP 15-16, 597-98. Though his tele-

phone company advised that text records no longer existed,¹ CP 58, 81, 444-46, 490, 598, 616, Petitioner's call logs were obtained and reviewed with his legal counsel in the Prosecutor's Civil Division. CP 81, 445. In an abundance of openness, Petitioner provided Respondent all his personal call logs "that may be work-related." CP 16, 18, 32-36, 40, 86, 334-38, 340-349, 445-46. Petitioner's unrefuted declaration confirms that the only redactions to those logs were of calls he knew were unrelated to work and purely private. CP 81.

Thus, the only document types at issue were: 1) text message content that was not in the County's nor Petitioner's possession at the time of the request, and 2) call logs for purely non-work related conversations that were redacted to protect Petitioner's and others' rights. CP 16, 18, 86, 88, 445-46. All other responsive records the County could obtain were provided. Nevertheless, Respondent sued Pierce County to provide the records Petitioner either did not have or that were purely private. CP 21. To

¹ After suit was filed, the County learned that Nissen had clandestinely requested and obtained a temporary hold of Petitioner's texts through a misleading request to Verizon's "Law Enforcement Resource Team Court Order Compliance Group" – she claimed she was conducting an "investigation." CP 200-02, 598, 615-17. Pursuant to federal law regarding law enforcement requests, Verizon did not disclose this request to Petitioner or the County. *Id.* In December 2011, when Nissen finally revealed she had made a clandestine request to the law enforcement resource team, Petitioner requested that Verizon preserve any records it still had. CP 251, 617-18. Nissen has since claimed this shows Petitioner "admitted" text messages still exist and have been maintained. *See* Nissen's Ans. to Pet. 2. The record instead only shows Verizon agreed four years ago "to preserve whatever text content it had in its custody for at least up to a year" after the 2011 request. CP 617-18. In any case, as the trial court recognized, there is no constitutional means for the court to obtain the records from Verizon without a warrant. 183 Wn.App. at 588 n. 9.

protect his constitutional rights and privileges, Petitioner personally intervened through private counsel and sought an injunction. CP 494, 518. The trial court then dismissed the suit because Petitioner's personal phone records: 1) were not "public records"; 2) would be exempt under the PRA in any case; and 3) are protected by state and federal constitutions against compelled production. *See Nissen v. Pierce County*, 183 Wn.App. 581, 588 n. 9, 333 P.3d 577 (2014).

Division Two, however, reversed and ruled the PRA might apply, stating in a footnote that public employees like the Petitioner are an "agency" under the PRA – with no explanation, analysis, consideration of constitutional or practical ramifications, citation to authority or acknowledgment of contrary precedent.² *See id.* at 594 n. 15.

The Court of Appeals did "not reach the question of whether the County violated the PRA," but nevertheless held that public employees who discuss work on their personal phones³ potentially subject their personal

² It did so despite that issue being well briefed in the Court of Appeals. *See e.g.* Corrected Resp. Br. 18-22; Intervenor Br. 10-11; Public Employee Assoc. Amici Br. 4-9; Cy Ans. to Amicus A.G. 5-9; Cy Ans. to Amici Br. 4-7; WSAMA Amicus Br. in Supp. of Pet. 6-9.

³ 67 percent of public employees at every level of federal, state and local government use their personal telephones for work purposes. *See* GovLoop, "Exploring 'Bring Your Own Device' in the Public Sector," p. 9 (2002). Every major public employee group in Washington State filed amici briefs supporting the County, including the Washington Education Association, Washington Association of Prosecuting Attorneys, International Association of Firefighters, Washington State Association of Municipal Attorneys, Washington Education Association, Washington Council of Police and Sheriffs, Washington State Patrol Troopers Association, and Pierce County Prosecuting Attorneys' Association.

cellular phone call detail log and text message records to the PRA. *Id.* at 593, 598 (emphasis added).⁴

The opinion declined to address "constitutional privacy arguments" because it "leave[s] these arguments for the superior court" after it developed the record. 183 Wn.App. at 596. In so doing, it also did not acknowledge that the Superior Court already considered the constitutional issues and found the constitutional issues precluded discovery and required dismissal. *Id.* at 588 n. 9.

IV. ARGUMENT

A. COMPELLING DISCLOSURE OF PERSONAL RECORDS UNDER PRA VIOLATES FEDERAL STATUTE AND CONSTITUTION

Respondent has failed to address several important federal,⁵ and ad-

⁴ Many "factual" statements in the opinion are contrary to the unrefuted record. For example, the opinion erroneously states Petitioner "apparently prefer[red] instead to use his personal cellular phone to conduct government business." 183 Wn.App. at 586. The only records on this issue are Petitioner's disclosed emails, the County's directory, and sworn declarations of two witnesses which all show "two County land line telephones assigned for his use" were used to "conduct[] ... most of his government related communications," CP 234, 258, 681-83. Similarly, the opinion mistakenly asserts Petitioner "and the County concede that some of his personal cellular call logs contained records of his government-related communications and that some of his personal cellular text messages discussed government business." 183 Wn.App. at 591. In fact, Petitioner, the County, and the record instead consistently state only that the telephone records that were produced contained all the calls on his personal telephone that "may be work related." Intervenor Br. 2; Corrected Resp. Br. 4; Intervenor Ans. to Amici 1, 4; Cy Ans. to Amicus A.G. 3, 15; CP 16, 81, 86, 217, 334-38, 340-349, 441, 445-46 (emphasis added).

⁵ Respondent has yet to address federal prohibitions against: 1) chilling free speech under the First Amendment; 2) uncompensated taking under the Fifth; and 3) denial of due process under the Fourteenth. *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.

dressed no state,⁶ constitutional issues. Petitioner therefore addresses only those federal constitutional issues Respondent appears willing to acknowledge.

1. SCA Bars Compelled Production of Petitioner's Text Messages

Under the SCA, "text messaging ... constitute[s] an 'electronic communication service' and not a 'remote computing service,'" and "an 'electronic communication service' ... may not disclose the content of text messages." *See Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F. Supp.2d 987, 991, 993 (C.D.Cal. 2012) (emphasis added). Petitioner's provider, Verizon Wireless, specifically has been found to be an "electronic communication service" and "prohibit[ed] ... from disclosing the content of any text messages" under civil subpoenas. *See Doe v. City of San Diego*, 2013 WL 2338713 at *2-4 (S.D.Cal., May 28, 2013) (citing *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) ("wireless communications providers such as [Verizon] are properly classified as an 'electronic communication service'" which "must comply with the rules applicable to electronic communication services and 'shall not knowingly divulge to any person or

⁶ At the time of filing, Respondent has ignored the Washington State Constitution's prohibitions against: 1) disturbing "private affairs" under Art. I § 7; 2) taking private property under Art. I, § 16; 3) chilling free speech under Art. I § 5, and 4) denial of due process of law under Art. I § 3. *See e.g.* Corrected Resp. Br. 35, 40-44, 46, 48, 50; Intervenor Br. 16-22; Intervenor Ans. to COA Amici 7-8, 10-13; Cy Pet. in Supp. of Rev. 17-20; Lindquist Pet. for Rev. 14; Lindquist Resp. to Amici in Supp. of Pet. 6.

entity the contents of a communication while in electronic storage by that service,' 18 U.S.C. § 2702(a)(1), unless one of the specifically enumerated exceptions in 18 U.S.C. § 2702(b) apply").

After Division Two's decision, Respondent instead erroneously asserted that under the Stored Communications Act (hereinafter "SCA") "a warrant is not necessary to obtain the texts" because text services supposedly are a lesser protected "remote computing service" under the SCA. *See* Nissen Ans. to Pet. 14-16 (citing 18 U.S.C. § 2703(b)(1)(B)(i)). As shown above, settled law is to the contrary.

Respondent misrepresented the holding of *In re Facebook, Inc.*, 923 F.Supp. 2d 1204 (N.D. Cal. 2012), claiming, "[t]ext messages are discoverable and may be also produced by consent from the sender or recipient without violating the SCA." *See* Nissen Ans. to Pet. 16. To the contrary, the court in that case quashed plaintiff's subpoena because "case law confirms that civil subpoenas may not compel production of records from providers" since to do otherwise "would run afoul of the 'specific [privacy] interests that the [SCA] seeks to protect.'" 923 F.Supp.2d at 1206 (emphasis added). Thus, "while consent may **permit** production by a provider, it may not **require** such a production." *Id.* (emphasis in original). *See also* *Thayer v. Chiczewski*, 2009 WL 2957317 *5 (N.D. Ill., 2009) ("most courts have concluded that third parties cannot be compelled to disclose

electronic communications pursuant to a civil – as opposed to criminal – discovery subpoena"); *J.T. Shannon Lumber Co., Inc. v. Gilco Lumber Inc.*, 2008 WL 4755370 (N.D.Miss. 2008) ("By requiring the defendant and its employees to consent to the disclosure of such information by subpoena of the internet service provider, the court would undermine the statute's intent to create a zone of privacy around that medium. There is no exception in the statute for civil discovery, and the court declines to create one by allowing an end run around the statute").

2. *Nixon* Neither Addressed the Federal Warrant Requirement nor Abolished Federal Privacy and Associational Rights of Public Employees

In her response to the Amici briefing in support of the Petition for review to this Court, Respondent for the first time asserted that *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977), shows an "in camera review is not a warrantless search, is not an invasion of privacy, is not an infringement on one's associational rights, or any of the other allegations raised by these Amici." Nissen's Ans. to Amici in Supp. of Pet. 1-3. An examination of *Nixon* confirms it holds nothing of the kind.

First, in *Nixon* no seizure was required. The documents from the moment of their creation always had been in the government's possession; hence, "the Fourth Amendment's warrant requirement is not involved." 433 U.S. at 430-31, 458 n. 21.

Second, as to "invasion of privacy," in *Nixon* there was no compelled *in camera* review of personal records by a court. Here, in contrast, a compelled review by a court would transform, by operation of our state law, all the reviewed documents into presumptive "public records" by the mere act of judicial review itself. Compare *id.* with Wash. Const. Art. I § 10; *Bennett v. Smith Bunday Berma-Britton, P.S.*, 176 Wn.2d 303, 308-12, 291 P.3d 886 (2013). Requiring an *in camera* review, as proposed by Respondent, would be constitutionally invasive, particularly for elected officials whose political opponents would use the PRA to go on fishing expeditions and distract elected officials from their duties.

Third, as to First Amendment associational rights, the Supreme Court recognized "associational privacy" was triggered by the archival review. See 433 U.S. at 466-67. The United States Supreme Court later held "compelled disclosure" of an individual's political views under our Washington PRA likewise "is subject to review under the First Amendment" because it "implicates a First Amendment right." See *John Doe No. 1 v. Reed*, 561 U.S. 186, 194-95 (2010). Division Two ignored this right even though this Court holds associational records are protected under the First Amendment from an *in camera* review without first conducting a stringent constitutional analysis. See *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158,

786 P.2d 781 (1990).⁷

Further, the Supreme Court held "associational rights" were overcome because "the 'free functioning of our national institutions is involved,'" and "review by professional and discreet archivists" would "protect[] ... from improper public disclosures" 433 U.S. at 466-67 (*quoting Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). The "free functioning of our national institutions" clearly is not involved here, and in our state a court's *in camera* review does not protect against public disclosure but presumptively requires it under Article I § 10.

3. No Waiver of Constitutional Rights by Public Employment

In opposing review by this Court, Respondent for the first time claimed Petitioner has no Fourth Amendment "expectation of privacy" in records of his personal telephone conversations, apparently alleging he was on notice at the time he accepted government employment that the PRA requires government employees to waive constitutional privacy

⁷ Respondent vaguely later claimed *T.S. v. Boy Scouts*, 157 Wn.2d 416, 138 P.3d 1053 (2006), "narrowed the doctrine set out in *Snedigar*" but offered no explanation how it did so. Nissen's Ans. to Amici in Supp. of Pet. 6. Instead, an examination of *T.S.* confirms that case did not concern a First Amendment associational privilege but involved an attempt to extend the *Snedigar* analysis to an "article I, section 7 'private affairs' protection [which] is not a 'privilege' within the meaning of *Snedigar* ... but rather is a privacy interest that the trial court necessarily evaluates when considering a motion for a protective order under CR 26(c)." 157 Wn.2d at 431. Here, of course, there was neither a *Snedigar* analysis nor a CR 26(c) evaluation of the First Amendment association privilege at issue – or of any other constitutional protection expressly raised by Petitioner and the County.

rights.⁸ Nissen Ans. to Pet. 16-18. This contention is wholly without merit.

First, the Fourth Amendment clearly recognizes a reasonable expectation of privacy exists in a citizen's cellular telephone records. *See e.g. Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2495, 189 L.Ed.2d 430 (2014) ("Our answer to the question of what police must do before searching a cell phone ... is accordingly simple – get a warrant").

Second, public employees cannot be compelled to waive their federal constitutional privacy protections by becoming public servants. *See Gardner v. Broderick*, 392 U.S. 273, 277 (1968) (quoting *Garrity v. State of New Jersey*, 385 U.S. 493, 500 (1967) (constitution protects "policemen or other members of our body politic"); *Edwards v. Dept. of Transp.*, 66 Wn.App. 552, 832 P.2d 1332 (1992) ("government cannot compel persons to relinquish their First Amendment right ... as a condition of public employment").

Third, in that the PRA has never been held to constitute a waiver of the constitutional rights of public employees, *see O'Neill v. Shoreline*, 170

⁸ As noted above, Respondent ignores Article I section 7's protection of "private affairs." Unlike the Fourth Amendment, this state constitutional right is "not determined according to a person's subjective expectation of privacy because looking at subjective expectations will not identify privacy rights that citizens have held or privacy rights that they are entitled to hold" and therefore a statute cannot provide the "authority of law" required for such a governmental intrusion. *See State v. Miles*, 160 Wn.2d 236, 243-44, 247-49, 156 P.3d 864 (2007). *See also State v. Hinton*, 179 Wn.2d 862, 865, 319 P.3d 9 (2014) ("[T]ext message conversation was a private affair protected by the state constitution from warrantless intrusion"); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008) (once a matter is deemed private by Art. I § 7, a court considers "whether a search has 'authority of law' – in other words, a warrant").

Wn.2d 138, 150 n. 4, 248 P.3d 1149 (2010), no knowing, intentional, and voluntary waiver exists – much less can be presumed. *See e.g. State v. Coyle*, 95 Wn.2d 1, 7, 621 P.2d 1251 (1980) (waiver must be done "knowingly, intentionally and voluntarily" while "[e]very reasonable presumption is indulged against waiver of a constitutional right") (*citing State v. Forza*, 70 Wn.2d 69, 781, 422 P.2d 475 (1970)). As a matter of law, the courts "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). *See also Fuentes v. Shevin*, 407 U.S. 67, 95 n. 31 (1972) (test for waiver of constitutional rights applies equally to criminal and civil cases).

Finally, a "statute may not produce a [waiver of constitutional rights] via the fiction of implied consent." *See* 4 W.R. LaFare, *Search and Seizure*, 8.2(L) (5th ed. 2012). Otherwise, "if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects." *Smith v. Maryland*, 442 U.S. 735, 741 n. 5 (1979). Thus, "[t]o hold that the legislature could nonetheless pass laws stating that a person 'impliedly' consents to searches under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment." *Cooper v. State*, 587 S.E.2d

605, 612 (Ga. 2003) (quoting *Hannoy v. State*, 789 N.E. 2d 977, 987 (Ind.App.2003)). *See also* Intervenor Ans to COA Amici 9-13.

If the legislature is concerned about public employees conducting public business on private devices, it can consider legislation prohibiting the intentional use of private devices to transact government business so long as the statutes do not violate state and federal constitutions. As this Court recognizes: the "PRA must give way to constitutional mandates." *See Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013).

B. FURTHER DEVELOPMENT OF RECORD IS UNNECESSARY

1. Text Messages Neither Subject to Production nor Available

The pleadings and undisputed evidence submitted by both parties establish: 1) at the time of both PRA requests, the subject text messages were not in possession of either Petitioner or Pierce County, *see* CP 15-16, 597-98; and 2) because his service provider advised that the text messages no longer existed, neither the County nor the Petitioner could produce them. *See* CP 58, 81, 444-46, 490, 598-99, 616. Under these undisputed facts in the pleadings and record, no further fact needs to be "developed."

First, there could be no PRA violation as to texts because, even if they somehow were "public records," as a matter of law the PRA only applies to records an agency possesses at the time of the request. *See e.g. Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 740, 218 P.3d 196

(2009) (no violation where records not in possession of agency at time of request); *Kleven v. City of Des Moines*, 111 Wn.App. 284, 294, 44 P.3d 887 (2002) (no PRA violation because the agency had "made available all that it could find"). Because an agency has no duty under the PRA "to go outside its own records and resources to try to identify or locate the record requested," *Limstrom v. Ladenburg*, 136 Wn. 2d 595, 604 n. 3, 963 P.2d 869 (1998), or even "to inquire with other Pierce County departments concerning a record request directed only to the prosecutor's office," *see Koenig v. Pierce County*, 151 Wn.App. 221, 232, 211 P. 3d 423 (2009), there was no duty to obtain text records from an employee's provider – especially when that provider represents that they do not exist.

Second, even if Petitioner's personal text messages had been available, they cannot be "public records" because a public employee is not an "agency" under the PRA. The PRA's definition of "agency" does not list public servants or any natural person. *See* RCW 42.56.010(1). Further, the opinion's unsupported and unexplained suggestion that public servants are an "agency" conflicts with the reasoning of both this Court's precedent in *Nast v. Michels*, 107 Wn.2d 300, 306, 730 P.2d 54 (1986) (courts are not "agencies" because the PRA's definition did not "specifically include" them), and that of Division Two itself in *West v. Thurston County*, 168 Wn.App. 162, 183-84, 275 P.3d 1200 (2012) (finding "no Washington au-

thority 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," and holding the legislature "intended to exclude from this designation" those "who prepare documents that the agency never physically possesses").

If public employees like the Petitioner were an "agency" under the PRA, then any writing by a public employee relating to work – letters, diaries, books, emails, text messages, social media posts, and more – would be unconstitutionally transformed into a public record subject to retention, seizure, and disclosure by government agencies that have no lawful means to retain and seize personal writings by public employees on personal equipment.

2. Call Logs Not "Public Records" Under Facts and Law

Further development of the record also is unnecessary as to the redacted portions of Petitioner's personal telephone call logs.

First, in order for a communication to be subject to the PRA, it must have a "nexus with the agency's decision-making process" and thus be "relat[ed] to the conduct of government." *See Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1 of Clark Cnty.*, 138 Wn.2d 950, 958, 960-61, 983 P.2d 635 (1999). Here, Respondent's pleadings and her own evidence established that Petitioner had provided all his personal call logs

"that may be work-related," CP 16, 18, 32-36, 40, 86, 334-38, 340-349, 445-46, while Petitioner's sworn and unrefuted declaration confirms the "redacted private telephone calls" all "were private in nature" CP 81.

Second, no further development of the record is necessary because the uncontested record established the redacted portions of the personal logs were not "public records" because they also were not "prepared, owned, used, or retained by any state or local agency" *See* RCW 42.56.010(3). At the hearing on Petitioner's injunction action, the unrefuted sworn declarations confirmed Petitioner obtained his call logs from his provider, reviewed them with his attorneys and their staff to identify communications that may have been work related, and did not surrender possession of the unredacted records. *See* CP 81, 445. The numerous materials Respondent submitted to oppose Petitioner's injunction action contained nothing to refute this sworn testimony. *See e.g.* CP 260-373. As a matter of law, "[p]urely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit which is accorded a presumption of good faith." *Forbes v. City of Gold Bar*, 171 Wn.App. 857, 868, 288 P.3d 384 (2012), *rev. denied*, 177 Wn.2d 1002 (2013)).

In *Forbes*, a plaintiff's demand for an *in camera* review was properly denied and the PRA suit properly dismissed because personal records that came into the agency's possession while responding to a PRA request were

not "public records," even though officials' communications on their personal devices had been reviewed by the city as part of their attempt to respond to the PRA request. *Id.* at 867-69.

Third, remanding for development of a record of whether Petitioner "(or another public employee) reviewed, referred to, or otherwise 'used' [his personal] call logs to determine when he talked to a particular person about government business," 183 Wn.App. at 594-95, would violate the attorney-client privilege and attorney work product protections. *See e.g.* 15A Karl B. Tegland, Wash. Pract. §40.8 (3rd ed. 2014) (CR 26 protects against asking "questions designed to reveal an attorney's impressions, theories or strategies"); James W. Moore, et al., Federal Practice, ¶ 26.15[1], at 26-293 (2d ed. 1995) ("activities of the attorneys" are "protected regardless of the discovery method employed"). Compelling Petitioner to show why each excised contact was private, by producing the excised material⁹ and/or deposition, would endorse – as shown below – an unlawful seizure and taking of personal property, as well as unconstitutionally chill speech and freedom of association. *See discussion supra* at

⁹ The documents identified in Respondent's complaint and already submitted by her to the trial court confirm an inspection of the unredacted billing documents at issue would not reveal whether the calls redacted as private somehow actually were related "to the conduct of government or the performance of any governmental or proprietary function." Rather, such billing record inspection only would give the telephone number of the unknown person who called or was called rather than its content -- and thereby violate his or her associational privacy as well. *See e.g.* CP 32-36, 40.

6-13.

Fourth, remand for inquiry into whether Petitioner "stor[ed] them in the prosecutor's office or in some other government office" would violate his reasonable expectation of privacy. *See O'Connor v. Ortega*, 480 U.S. 709, 716 (1987) (reasonable expectation of privacy exists for desk and file cabinets in state employee's office since "[n]ot everything that passes through the confines of the business address can be considered part of the workplace context").

Finally, the further development of the record specifically ordered here is contrary to the underlying purpose of the PRA because it ensures less, rather than more, public disclosure. Public employees who err on the side of openness should not be penalized by the involuntary conversion of their private documents into public documents. Even consenting to allow a court to conduct an *in camera* inspection converts those personal records into presumptive public records by operation of law under Article I § 10 of the Washington Constitution. *See Bennett*, 176 Wn.2d at 308-12.

Nissen's intrusion into the constitutionally protected associations of all public servants – and of those who associate with them – will be unavoidable and universal. From the teacher whose school must be contacted if he or she will miss class due to illness, to the public employee, elected or otherwise, who is required by RCW 42.17A.555(1) and RCW

42.52.180(1)¹⁰ to use a private device to make constitutionally protected political campaign communications, government workers have no choice but to use their private devices on occasion to communicate about work. As a matter of law, however, a "statute is overbroad if it chills ... constitutionally protected free speech activities." *See State v. Monschke*, 133 Wn.App. 313, 130-31, 135 P.3d 966 (2006). Thus, if *Nissen's* overbroad interpretation of the PRA somehow stands, the PRA itself cannot. *See e.g. 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").

V. CONCLUSION

The trial court should be affirmed because it properly held that the personal cell phone records of public employees are not public records, are exempt from disclosure, and are protected by the state and federal constitutions and statutes.

Nissen seeks to expand the PRA's reach into the private lives of public employees and their families and friends by defining public employees as

¹⁰ These statutes require public employees (including prosecutors and judges) to use their personal devices if communicating about work-related activity that is political in nature; such as, endorsing candidates or ballot measures, raising money, scheduling attendance at political functions, and the like. *See also* proposed GR 31.1 concerning records of the judiciary. Under the policy expressed by statute and court rule, then, discussion of work-related matters on privately-owned devices can be not only permitted but legally required.

"agencies," so that any writing that relates to work – letters, diaries, books, emails, text messages, social media posts, and more – would be a public record. This would be unworkable and unconstitutional.

Any waiver of a constitutional right must be knowing, voluntary, and intelligent. Public employees do not waive their constitutional rights by serving the public. Reviewing records with legal counsel in the interest of openness is also not a waiver of constitutional rights. Ethics rules require that public employees such as the Petitioner must use their personal phones to discuss government business if the discussion in any way relates to political campaigns. Work as a topic is necessarily going to arise in personal as well as political conversations. Comporting with ethics rules and discussing work is also not a waiver of constitutional privacy rights.

The PRA recognizes constitutional protections and the PRA cannot, as Nissen proposes, trump state and federal constitutions and statutes, and deprive public employees of their right to private property and a private life because they became public servants.

DATED this 20TH day of April, 2015.

By



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DECLARATION OF SERVICE

I declare, under penalty of perjury of the laws of the State of Washington, that on January 23, 2015, a true and correct copy of the foregoing document, Petitioner Lindquist's Answer to Amici Curiae Briefs, was served upon the parties listed below, via U.S. Mail, and a courtesy copy was sent via email:

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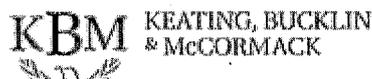
Dear Clerk:

Attached for filing (and service) is the Supplemental Brief of Petitioner Lindquist.

Thank you, Stew

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