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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.

PIERCE COUNTY'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION

This case relates to whether privately owned call detail logs for Pierce County Prosecutor Mark Lindquist's ("Prosecutor") personal cell phone and copies of text messages from that phone held by a private service provider are subject to the Public Records Act, RCW 42.56 ("PRA").

The Prosecutor, or any other public employee in his/her individual capacity, is not an agency under the PRA. The records of a public employee's private communications device are not public records under the PRA. Even if they were public records, they are exempt from disclosure. Pierce County and the Pierce County Prosecutor's Office ("County") should not be subject to PRA penalties for the non-disclosure of records it cannot compel its employees to produce.

The County asks this Court to affirm the trial court's well-reasoned order dismissing this case.

B. ISSUES PRESENTED FOR REVIEW

(1) Is the record of a public employee's private communications device a "public record" within the meaning of RCW 42.56.010(3) and subject to production against that employee's wishes under the PRA?

(2) Is the record of a public employee's private communications device, even if a public record, exempted from disclosure under RCW 42.56.050/42.56.230 and applicable constitutional protections, thereby barring its disclosure?

C. STATEMENT OF THE CASE¹

The trial court granted the County's CR 12(b)(6) motion to dismiss Nissen's complaint in which she alleged that the County violated the PRA when it did not produce the Prosecutor's private cell phone records. The trial court, the Honorable Christine Pomeroy, an experienced judge of the Thurston County Superior Court, reasoned that private cell phone records of a public employee are not public records within the meaning of RCW 42.56.010(3) and are exempt from disclosure by virtue of individual constitutional privacy rights. Op. at 5 n.9.

The Court of Appeals reversed the trial court's decision and remanded the case to the trial court for "the further development of the record," on whether the devices were used to conduct government-related business. Op. at 12 n.16. The Court of Appeals specifically declined to reach the constitutional claims raised by the parties, leaving them instead to be addressed on remand.

Significantly, the Court of Appeals' opinion avoided key practical and legal issues, merely reversing the trial court without careful analysis as to the trial court's decision.

¹ The County relies on its extensive discussion of the facts herein in its Court of Appeals briefing and its petition for review. There is, however, a glaring factual point not mentioned in the Court of Appeals opinion. Verizon told the County that the text messages from the Prosecutor's private cell phone did not exist. CP 56, 81, 598, 616.

D. ARGUMENT

This case squarely presents the question of whether the records of a public employee's private communications devices are subject to the PRA and whether requestors can use the PRA to conduct fishing expeditions into the private records of public employees,² as Nissen seeks to do here.

(1) The Records at Issue Are Not Public Records under the PRA

RCW 42.56.010(3)³ defines a public record as a writing “relating to the conduct of government” that is “prepared, owned, used, or retained” by a governmental agency. Only public records must be disclosed under the PRA.⁴ *Smith v. Okanogan County*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000). Purely *personal* records of public employees are not subject to the

² While this case involves call logs and text messages of an elected official, the principles this Court establishes will affect *every private communications device*, whether a personal computer, tablet, lap top, or other communication tool, of *every public employee in Washington*, whether elected or not.

³ RCW 42.56.010 is set forth in the Appendix.

⁴ The burden to identify with some precision the public record being sought rests with the requester. RCW 42.56.080 (requiring requester to reference “identifiable public records”). While an overly broad request does not justify a rejection of the request, RCW 42.56.080, *Hangartner v. City of Seattle*, 151 Wn.2d 439, 449, 90 P.3d 26 (2004), it is indicative of the fact that Nissen's requests for the Prosecutor's cell records were a fishing expedition. In recognition of protections for personal information, the Court of Appeals was compelled to reinterpret Nissen's broad requests for *all* of Lindquist's private cell phone records, CP 15, 17, 29, as being confined to those records that are “work-related.” Op. at 2-4. This only reinforces the point that many PRA requests concerning elected officials and other public figures are overbroad or otherwise abusive.

PRA. *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 712, 780 P.2d 272, review denied, 114 Wn.2d 1002 (1989) (personal notes, phone messages, and personal appointment calendars exempt); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 868-69, 288 P.3d 384 (2012), review denied, 177 Wn.2d 1002 (2013) (purely personal emails exempt despite review by city agent). The Court of Appeals recognized this distinction, op. at 7, but failed to address the key provisions of RCW 42.56.010, which define the scope of public records subject to the PRA.

A public record subject to the PRA is present if (1) it is a writing; (2) it contains information relating to the conduct of government or performance of governmental or proprietary functions; and (3) it is prepared, owned, used, or retained by a government agency. RCW 42.56.010(3). A “writing” and “agency” are defined respectively in RCW 42.56.010(4) and (1). “Conduct of government” and “preparation, ownership, use, or retention” have been addressed in case law. The records at issue here are not subject to the PRA.

(a) Public Employees Are Not Public Agencies

The Prosecutor and other public employees are not an “agency” within the meaning of RCW 42.56.010(1).⁵ The plain language of RCW

⁵ The Court of Appeals seemed to determine that public employees were an “agency” under RCW 42.56.010(1) only in a cursory footnote. Op. at 11 n.15.

42.56.010(1) is explicit. Nowhere in its definition of an agency does it address private records maintained by *individuals*.⁶

In *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), this Court concluded that the King County Department of Judicial Administration, while generally falling within the definition of an agency under the PRA's predecessor, *id.* at 305, was not an agency for PRA purposes because the courts were not *specifically* included within the definition that is now RCW 42.56.010(1). *Id.* at 304-07. See also, *Koenig v. City of Federal Way*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009); *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 792, 246 P.3d 768 (2011).

The Court of Appeals decision in *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012) also carefully construed the requirement of agency involvement. The court specifically noted that the Legislature, not the courts, defines what constitutes a public record and the courts are not free to expand that definition, as Nissen hopes the Court will do here. *Id.* at 183. In *West*, a county's private attorneys were not subject to the PRA in preparing their private billing invoices because they did not fall within the definition of an agency in the PRA; the court rejected the notion that a county's agents were automatically subject to the PRA. *Id.* at 183-84.

⁶ Whether an entity is an agency under the PRA is determined on a practical basis. *Worthington v. West NET*, ___ Wn.2d ___, 341 P.3d 995, 999 (2015).

The language of RCW 42.56.010(1) is *explicit* in its definition of an agency. *See* Appendix. *Nowhere* does it define an individual public employee as an agency. This Court should not rewrite the language of the statute in the guise of construing it. *Courtright v. Sahlberg Equip. Co.*, 88 Wn.2d 541, 545, 563 P.2d 1267 (1977).

This issue of whether a public employee is synonymous with the agency employing him/her is a vital one. To assert that an employee is an agency under the PRA *vastly expands* the PRA's reach into the private communications of public employees, including diaries, Facebook pages and messages, Twitter accounts, or any other form of communication that may refer to the public employee's work. As evidenced by the language of RCW 42.56.010(1), the PRA was intended to reach *agency* public records, not the personal records of public employees.

Prosecutors and other public employees are not an RCW 42.56.010(1) agency.

(b) The County Never Prepared, Owned, Retained or Used the Records in Question

The County never prepared, owned, retained, or used anything in the Prosecutor's private communications device. The Prosecutor's private cell phone logs and text messages were not *County* public records within the meaning of RCW 42.56.010(3).

As a threshold matter, the County never used or retained the Prosecutor's cell phone text records because the *Prosecutor himself never possessed such records at the time of the requests*, a fact the Court of Appeals ignored. Only his service provider, Verizon, possessed the records *and the County was advised initially by Verizon that the texts did not exist*. Neither the County nor the Prosecutor could review or disclose records Verizon advised did not exist. CP 15-16, 58, 81, 251, 444-46, 597-98, 616-18.⁷ The Court of Appeals opinion did not address *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Col. 2011), where the Colorado Supreme Court held that the governor did not even create a public record by participating in phone calls that resulted in third-party billing statements, *id.* at 1091, and the cell phone service provider actually possessed whatever records were at issue. *See also, West*, 168 Wn. App. at 183 (county never owned, possessed, used, or retained billing records of its retained counsel).

Further, the County never “used” the telephone call records merely because the Prosecutor chose to provide personal records to County legal staff for review in the interest of openness. For a court to hold that records which are otherwise private are nevertheless “used” by an agency simply

⁷ State and federal law forbid the disclosure of personal telephone records without customer consent. RCW 9.26A.140(1)(d); 18 U.S.C. § 2703.

by reviewing them in an effort to be abundantly open, would pervert the PRA, allowing requesters to make baseless PRA requests for private records and, when an agency examines the personal records, to claim the PRA is now applicable.⁸ This is a “Gotcha” argument. It is contrary to the Court of Appeals’ decision in *Forbes, supra*, and would create a real disincentive to a public employee from erring on the side of openness, as the Prosecutor did here. The employee would be compelled to refuse *any* request by his/her public employer to produce private and personal records to avoid the contention that federal statutory or constitutional exemptions she/he could legitimately claim for such records were inapplicable.

The County did not prepare, own, retain, or use the records in question here.

(c) The Records Did Not Relate to the Conduct of Government

A vital part of the definition of a record under RCW 42.56.010(3) requires that the record pertain to the “conduct of government.” The Court of Appeals never defined this term. It merely stated that the Prosecutor “is an elected official in charge of a local government agency --

⁸ This is what Nissen unabashedly advocates. She contends that where public employees like the Prosecutor are open and review personal records, the act of review transforms private records into public records. Nissen PFR Answer at 12-13. Such a position, if correct, will force public employees *not* to seek guidance or be open with private records, for fear that their private records will become subject to the PRA. This will make government less open.

the Pierce County Prosecutor's Office," op. at 10, *presuming*, without analysis, that the conduct of government was therefore somehow implicated by the Prosecutor's private cell phone records. The Court's answer to the possibility of work being discussed on public employee's personal phones -- which is not the same as conducting business -- was for the trial court to examine the records, itself an impermissible, constitutionally-invasive procedure. Op. at 12-15.⁹

The Court of Appeals did not address the requirement set forth in this Court's decision 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) that to meet the "government conduct" aspect of the definition of a public record, the record must have a nexus to agency decisionmaking. Nissen made a fishing expedition PRA request; she has never indicated how any of the Prosecutor's private cell phone records pertain in any way to County decisionmaking.¹⁰

⁹ Apart from the unconstitutional intrusion on the rights of public employees that such hearings would entail, there is a plain practical dimension to such an intrusion into the privacy of public employees. Permitting access to public employees' private communications devices records will embolden PRA requesters to demand to see them to use the court's review of such private records to conduct a fishing expedition. Trial courts in such PRA cases will be embroiled in the parsing of purely private records from theoretically public ones, a laborious task for our already busy trial courts.

¹⁰ Nissen essentially ignores the statutory language and case law, arguing that if a record is in any conceivable way "work-related" (and she nowhere defines such a concept), it is subject to the PRA. Nissen PFR Answer at 3-13. Such a standard,

This issue is of particular concern for elected officials. The “conduct of government,” if too broadly defined, could mean their activities associated with their election and political activities apart from their election are subject to the PRA.¹¹ Such activities cannot be undertaken by the elected official on governmentally-issued communications devices *without violating ethical standards*,¹² a point unaddressed in the Court of Appeals opinion and ignored by Nissen.

In sum, the records at issue here did not qualify as public records under the definition in RCW 42.56.010(3).

undefined by Nissen, vastly expands the reach of the PRA into private records of public employees.

¹¹ Political opponents could use the PRA and the legal system to obtain information on elected officials’ campaign activities by seeking the records of their private communications devices, and perhaps those of their campaigns, in the hope of finding records discussing work, which would be unavoidable during a campaign, opening yet another venue for political combat.

¹² Elected officials like the Prosecutor, as a matter of law, may not use public facilities, which includes any County-issued cell phone, for activities that are political or campaign-driven. RCW 42.52.150(1) (state employees); RCW 42.17A.555 (all elected officials and their employees). See *Herbert v. Wash. State Public Disclosure Comm’n*, 136 Wn. App. 249, 148 P.3d 1102 (2006) (teachers violated statute through use of school’s internal mailing and email systems to gather ballot measure signatures); *Knudsen v. Wash. State Executive Ethics Bd.*, 156 Wn. App. 852, 235 P.3d 835 (2010) (community college instructor violated ethics law by using college email system to urge support for two bills on tenure protection for part-time faculty). Elected officials *must* use private communication devices to communicate about a myriad of matters, such as contacts about endorsements for legislative, executive, or judicial races, fundraising matters for themselves and others, as well as the political ramifications of certain work-related decisions.

(2) Even if the Prosecutor's Private Communications Device Records Are Public Records, and They Are Not, the Records Are Exempt from Disclosure

The Court of Appeals opinion neglected to address the specific statutory and constitutional grounds that exempt the Prosecutor's records at issue here from disclosure under the PRA.¹³ The only ways a court could conclude that the Prosecutor's private communications device records, if public records under the PRA, were *not exempt* would be to conclude that privacy provisions in RCW 42.56.050/.230 do not apply, that public employees have no constitutional protections with regard to their private communications devices under the Fourth Amendment or article I, § 7 of the Washington Constitution, that such employees somehow waive their constitutional rights as a condition of public employment, and that the Prosecutor here knowingly and specifically waived his rights contrary to all evidence and applicable authority. Each will be addressed in turn.

(a) RCW 42.56.050/.230 Exempt the Disclosure of a Public Employee's Private Communications Device Records

It is clear that public employees do not – and cannot be made to – forfeit their civil liberties as a condition of public employment. *See, e.g.,*

¹³ Instead, the court left this critical *legal* issue to the trial court, after the development of a *factual* record, *op. at 13*, a record unnecessary for the appropriate *legal* analysis here.

In re Disciplinary Proceedings Against Sanders, 135 Wn.2d 175, 188, 955 P.2d 369 (1998) (judge's First Amendment rights); *In re Complaint of Judicial Misconduct*, 632 F.3d 1289 (9th Cir. Jud. Council 2011) ("A judge does not check his First Amendment rights at the courthouse door, to be reclaimed at the expiration of his tenure."); *Binkley v. City of Tacoma*, 114 Wn.2d 373, 381, 787 P.2d 1366 (1990) ("It is well settled that the government may not compel persons to relinquish their First Amendment right to comment on matters of public interest as a condition of public employment."); *DeLong v. Parmelee*, 157 Wn. App. 119, 156 n.19, 236 P.3d 936 (2010), *review granted and remanded*, 171 Wn.2d 1004 (2011), *dismissed as moot*, 164 Wn. App. 781, 267 P.3d 410 (2011), *review denied*, 173 Wn.2d 1027 (2012) (DOC employee's article I, § 7 rights).

RCW 42.56.230(2) exempts from production under the PRA records that violate personal privacy rights of public employees.¹⁴ This Court has specifically upheld such a privacy interest as an exemption to the PRA where the disclosure of the information at issue would be highly offensive to a reasonable person and the information is not of legitimate

¹⁴ RCW 42.56.050 defines privacy interests under the PRA. *See generally, Predisik v. Spokane School Dist. No. 81*, __ Wn.2d __, __ P.3d __, 2015 WL 1510443 (2015) (recognizing and applying personal information exemption implicating public employee's privacy rights as to public records).

concern to the public. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 212, 189 P.3d 139 (2008). This principle has even extended to communications sent from a public employee's public computer station when such communications were of a highly personal nature. *Tiberino v. Spokane County*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000). It would be highly offensive to *any* public employee in Washington if, merely because they are a public employee, a judge would have free rein to indiscriminantly review, no matter how private, the contents of their home computer's hard drive, or their cell phone's/tablet's texts and records, to determine if the PRA was, in some fashion, implicated.¹⁵ The Court of Appeals never addressed this statutory exemption.

RCW 42.56.050/.230 exempted the records at issue here from disclosure.

(b) Constitutional Protections Apply to the Records at Issue Here

In addition to statutory exemptions,¹⁶ public employees have a property and a liberty interest in the records of their private

¹⁵ It is even more potentially offensive if such a search is done in open court, rather than in an *in camera* proceeding. The Court of Appeals does not address the potential article I, § 10 issue here.

¹⁶ In addition to the exemption under RCW 42.56.050/.230, records may be exempt under other statutory regimes. RCW 42.56.070(1). The Prosecutor will likely

telecommunications companies violated Fourth Amendment rights of subscribers).

Moreover, this Court has recognized that article I, § 7 of the Washington Constitution broadly protects the “private affairs” of Washington citizens. *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984). *See also, State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990) (reasonable expectation of privacy in one’s trash); *State v. Jardinez*, 184 Wn. App. 518, 338 P.3d 292 (2014) (warrantless search of parolee’s iPod is subject to constitutional limitations).¹⁹ Protecting the privacy of personal communications is essential for freedom of association and expression. *State v. Hinton*, 179 Wn.2d 862, 876, 319 P.3d 9 (2014) (citing *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 955, 956, 181 L.Ed.2d 911 (2012) (Sotomayor, J., concurring) (“Awareness that the Government may be watching chills associational and expressive freedoms.”)).

This Court has previously recognized that a court’s PRA decision to require a public employee to reveal the records of his or her private

¹⁹ This Court has held that telecommunications records are specifically protected under article I, § 7 in *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986) when it held that police could not use pen registers to collect telephone numbers dialed by a defendant without a warrant; the Court also indicated that obtaining phone toll and long distance records constituted an intrusion into a person’s private affairs. *See also, State v. Butterworth*, 48 Wn. App. 152, 737 P.2d 1297, review denied, 109 Wn.2d 1004 (1987) (privacy of unlisted telephone number protected under article I, § 7).

communications device implicates article I, § 7. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 156, 240 P.3d 1149 (2010) (Alexander, J. dissenting).²⁰ See also, *Hinton, supra* (text message is a private affair protected by article I, § 7 from warrantless intrusion).

The Fourth Amendment and article I, § 7 prevent disclosure of the records at issue here.

(c) A Public Employee Does Not Waive Constitutional Protection for Personal Records Merely by Entering into Public Employment

A central tenet of Nissen's argument to this Court is that a public employee, whether the Prosecutor or any other public employee, impliedly waives his/her constitutional rights as to personal telecommunications device records. Nissen PFR Answer at 16-19. This position is untenable and offensive to our concept of constitutional liberties and privacy.

As previously noted, public employees are not second-class citizens who lose their constitutional rights upon public employment.

More critically, this Court has been steadfast in holding that any waiver of constitutional rights must be express and unequivocal.²¹ Nissen

²⁰ The *O'Neill* court did not reach the article I, § 7 issue because it required the city there to inspect the public employee's home computer "if she gives consent to the inspection," *id.* at 150 n.4, obviating the constitutional issue, but simultaneously recognizing its potential importance. *Id.* ("We do not address whether the City may inspect Fimia's home computer absent her consent.").

²¹ There is a presumption against the waiver of constitutional rights. For a waiver to be effective, it must be clearly established that there was an intentional

would set this Court on a path toward allowing “implied” waiver of rights that is potentially adverse to the constitutional rights of all Washington citizens, a path this Court should reject.

Simply stated, a public employee does not waive his or her constitutional rights to the privacy of their records of their private communications device by their public employment. Under both the Fourth Amendment and article I, § 7, a public employee cannot be *compelled* by his or her public agency employer to turn over records from their private communications devices, records that are PRA-exempt under *Forbes*, without a warrant.²² In apparent recognition of its constitutional limitation, the PRA nowhere provides “authority of law” to either agencies

abandonment of a known right or privilege. *Brookhart v. Janis*, 384 U.S. 1, 86 S. Ct. 1245, 16 L.Ed.2d 314 (1966); *Johnson v. Zerbst*, 304 U.S. 454, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (citing *Glasser v. U.S.*, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680 (1942); *Ohio Bell Tel. Co. v. Public Utility Comm'n of Ohio*, 301 U.S. 292, 307, 57 S. Ct. 724, 81 L.Ed. 1093 (1937) (court would not presume acquiescence or implied waiver of fundamental property rights held by utility). *Hinton*, 179 Wn.2d at 876 (voluntary exposure of text messages to a third party held to not “have extinguished his privacy interest in the conversation.”).

²² A mere subpoena would not suffice to constitute “authorization by law” under article I § 7. *State v. Miles*, 160 Wn.2d 236, 248, 156 P.3d 864 (2007) (“a subpoena is not authority of law simply because it is authorized by statute.”) (administrative regulation for phone company authorizing police access to unlisted phone numbers was not authority of law under article I, § 7); 18 U.S.C. § 2703 additionally requires a warrant supported by probable cause to obtain content records of an electronic communication service.

or courts to compel a public employee to turn over his/her records from a private communications device.

This Court should hold that a public employee does not waive her/his constitutional privacy-related rights upon public employment.

(d) The Prosecutor Did Not Waive His Constitutional Rights

The Prosecutor has expressly declined to consent to any further intrusion into his personal cell phone records, and he has not actually or impliedly waived his constitutional right to privacy in the records of his private communications devices or his general right to privacy. Erring on the side of openness and disclosing some personal records that may somehow relate to work is not a waiver of privacy rights in all personal records. *See Answer of Intervenor to Amicus Briefs at 6-13.*²³

²³ The Court of Appeals opinion incorrectly states that the County “conceded” that some of Pierce County Prosecutor Mark Lindquist’s (“Prosecutor”) “personal cellular call logs contained records of his government-related communications and that some of his personal cellular text messages discussed government business.” Op. at 8. *See also*, op. at 2, 10, 12. That statement is inaccurate. The County did not “concede” the Prosecutor’s calls pertained to the business of government. Rather, in a surplus of openness, in response to Nissen’s multiple PRA requests, the Prosecutor authorized the release of records of calls that “*may* be work related.” CP 16, 82, 86, 217, 334-38, 340-350, 441, 445-46. Indeed, the Prosecutor and the County consistently asserted this fact, at both the trial and on appeal, and nowhere “conceded” that any of the private records *actually* “contained records of his government-related communications” or “discussed government business.”

(e) The Practical Implications of Any PRA Exemption Decision

A public agency is placed in an ultimately untenable, Catch-22 position were this Court to allow the Court of Appeals decision to stand, and the trial court's decision is not affirmed. An agency is subject to severe PRA penalties if it fails to turn over "public records." But if an employee legitimately claims a statutory or constitutional privacy right, *the public agency has no lawful means to compel the employee to provide the records.* This Court has not decided whether penalties may nonetheless be imposed against the agency under RCW 42.56.550(4). Were this Court to do so would create an impossible burden for agencies, state and local. The Court should not adopt an analysis that puts public agencies in such a position.

If this Court is concerned that public employees might deliberately seek to use private communications devices to avoid the PRA, the Legislature is best suited to confront such a concern. The Legislature could amend the PRA to subject private communications of public employees in some fashion to its provisions so long as this is done within constitutional limitations.²⁴ It could amend the state and local ethics laws

²⁴ For example, 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. Contrary

to provide penalties for public employees who intentionally use private communications devices to transact government business. But such decisions require balancing of multiple policy interests -- a function best suited for the legislative branch of government.

Under the PRA, as it now exists, the County met its burden to provide Nissen a proper response to her requests.

F. CONCLUSION

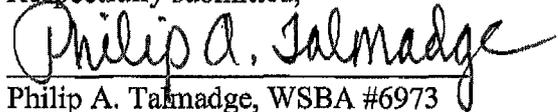
This is an extremely important case to the people of Washington and the hundreds of thousands of men and women in our State in public service in state and local government. Public employees are not public agencies under the PRA. The records of their private and personal communications, whether on phones, Facebook pages, diaries, or some other form, are not public records under RCW 42.56.010(3). Even if the records of those private communications devices were public records, they are exempt from disclosure under RCW 42.56.050/.230. They are also protected by federal statutory and constitutional protections that attach to such records which are not waived merely because such employees entered into public service.

to Nissen's assertion in her answer at 5-6, neither the PRA, nor any appellate decision, requires such a process by a Washington public employee.

This Court should reverse the Court of Appeals, reinstating the trial court's thoughtful decision. Costs on appeal should be awarded to the County.

DATED this 20th day of April, 2015.

Respectfully submitted,



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APPENDIX

RCW 42.56.010:

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 or 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 42.56.050:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

RCW 42.56.230:

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;

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 Pierce County's Supplemental Brief in Supreme Court Cause No. 90875-3 to the following parties:

Mark Lindquist
Daniel Hamilton
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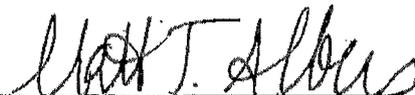
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Original efiled with:
Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504-0929

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: April 20, 2015, at Seattle, Washington.



Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick/Tribe

OFFICE RECEPTIONIST, CLERK

To: Matt Albers
Cc: mark.lindquist@co.pierce.wa.us; dhamilt@co.pierce.wa.us; sestres@kbmlawyers.com; michelle@alliedlawgroup.com; kkelstr@co.pierce.wa.us
Subject: RE: Glenda Nissen v. Pierce County, et al. - Cause #90875-3

Received 4-20-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Matt Albers [mailto:Matt@tal-fitzlaw.com]
Sent: Monday, April 20, 2015 2:49 PM
To: OFFICE RECEPTIONIST, CLERK
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Subject: Glenda Nissen v. Pierce County, et al. - Cause #90875-3

Good afternoon,

Attached please find the following documents for filing with the Court:

Documents to be filed: Motion for Leave to File Over-Length Supplemental Brief and Pierce County's Supplemental Brief

Case Name: Glenda Nissen v. Pierce County, et al.

Case Cause Number: 90875-3

Attorney Name and WSBA#: Philip A. Talmadge, WSBA #6973

Contact information: Matt J. Albers, (206) 574-6661, matt@tal-fitzlaw.com

If you have any questions, please feel free to contact me. Thank you!

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