NO. ~~90857-3~~ 90875-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GLENDA NISSEN,

Appellant

v.

PIERCE COUNTY ET AL.,

Respondent

[PROPOSED] BRIEF OF AMICUS SUBMITTED ON BEHALF OF THE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF **PETITION FOR REVIEW**

Ramsey Ramerman WSBA # 30423
Ramerman Law Office PLLC
218 Main Street No. 319
Kirkland, WA 98033
(425) 257-7000

Attorneys for Amicus, Washington State Association of Municipal Attorneys

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I. INTRODUCTION

The Court of Appeal's decision in *Nissen v. Pierce County,* --Wn. App. --, 333 P.3d 577 (2014) serves to misdirect the sunlight cast by the Public Records Act from the records of an agency onto the personal records of individual employees and officials. Sunshine directed at an agency disinfects by exposing and thus discouraging corruption and waste. But when that sunlight is focus on communications on personal electronic devise, it can have an unconstitutional chilling effect on the exercise of First Amendment rights. This Court should accept review of in this case to protect the First Amendment rights of the approximately half-million residents of this state that work for local and state agencies.

II. SUMMARY OF INTERESTS AND IDENTITY OF AMICI[1]

The members of the Washington State Association of municipal Attorneys (WSAMA) are the attorneys who represent most of the cities and towns in this state and help their clients with PRA compliance.

III. SPECIFIC ISSUE ADDRESSED

The case involves many of the same issues that are also raised in the appellants' Statements of Grounds for Direct Review in West v. Vermillion, Supreme Court No. 90912-1, which were filed with the Court on December 1, 2014. This amicus brief will not reiterate the arguments in those filings, but it should be noted that those arguments also support direct review in this

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[1] Additional details about Amicus, its interest in this case, why the Court should hear from Amicus and the familiarly of the applicant with the issues in this case are described in the Motion to File Brief of Amicus.

case. Instead, this amicus brief focuses on two issues that are uniquely raised in the *Nissen* case.

Issue 1: Does a personal cell-phone bill with call detail "relat[e] to the conduct of government" when one or more of the calls in the detail were made for agency business? (County's Issue 1)

Issue 2: Is remand appropriate to resolve issues related to associational privacy guaranteed by the First Amendment and Article 1, Section 5 of the Washington State Constitution when there is no showing of need made for any records sought? (County's Issue 2).

IV. STATEMENT OF THE CASE

This case involves a PRA request for the personal cell phone records of an elected official, including text messages and phone bills with call detail.

The Court of Appeals ruled that both categories of records "relat[ed] to the conduct of government" when the elected official used his personal cell phone to make calls and send text messages for county business in addition to his personal and political business. It refused to address constitutional claims and directed the trial court to address those issues on remand, which would likely include the in camera review of the records at issue.

V. ARGUMENT

The application of the PRA to the personal records of the elected Prosecuting Attorney would represent a massive invasion of the Prosecutor's personal privacy (protected by Article 1, Section 7) and

associational privacy (protected by Article 1, Section 5). This Court should accept review for all of the reasons set forth by the County and Prosecuting attorney. This amicus brief focuses of two sub-issues that collectively have particularly broad implications for the associational privacy of all elected officials and politically active public employees. The Court of Appeals opinion assumes that the Prosecutor made phone calls and sent text messages from his personal phone for both county business and his own personal, political activities. The latter activities are protected by First Amendment associational privacy and there the rests at issue have the potential of interfering with First Amendment rights.

First, to reach the conclusion that the prosecutor's personal cell bills could qualify as a public record, the court of appeals interpreted the phrase "relating to the conduct of government" in such a board manner that a public official or employee reviewing private records in requested in a PRA request we be left to guess whether any of these private records are really public records because the record mention the agency. This ruling conflicts with the Court's ruling in *Concerned Ratepayers v. Clark County PUD*, 138 Wn.2d. 950, 983 P.2d 635 (1999), where the Court found that "relat[es] to the conduct of government" was base not on the content of the document but instead how the document was used by the agency.

Second, by remanding the constitutional issues to the trial court, the Court of Appeals is effectively mandating in camera review. This conflicts with the Court's ruling in *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990), where the Court ruled that in camera review was improper

when the records sought related to associational privacy until the person seeking the record has made a strong showing of need.

The PRA only applies to requests for identifiable "public records" made pursuant to the PRA. The definition of "public record" has three elements: "Public record" "includes any [1] writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3(a)] prepared, [3(b)] owned, [3(c)] used, or [3(d)] retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3).

When this definition of applied to personal records belonging to public officials and employees, as opposed to agency records, the definition must be carefully construed and applied to avoid violation privacy rights. The Court of Appeals has instead adopted a vague and broad application, which if allowed to stand, will violate privacy rights and have an unconstitutional chilling effect on the exercise of First Amendment rights.

A. The Court of Appeals Adopted an Unconstitutionally Broad and Vague Definition of Public Record

The court of appeals had to interpret the meaning of "public record" before it could determine if the personal records at issue were "public records." The court of appeals should have strived to adopt a definition that was constitutional and could be applied with sufficient definiteness to allow public employees to determine what personal records were or were not public records. See *State v. Dan J. Evans Campaign Committee*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976) (adopting narrow interpretation of disclosure

obligations in the Public Disclosure Act to avoid First Amendment issues "which could result from a literal reading" of the act). Instead of aiming to adopt a constitutional definition, however, the Court of appeals deliberately chose to not consider any constitutional issues and as a result adopted a definition of public record that is vague and unconstitutional.

The court of appeals determined the Prosecutor's personal cell phone bills "relat[ed] to the conduct of government" based on the determination that the phone itself had been used for agency business and therefore, because the phone bills reflected the numbers called and time and length of calls, the phone bills also related to the conduct of government. This focus on content is inconsistent with numerous prior cases and results in a definition of public record that is overly broad and unconstitutional vague.

The meaning of the phrase "relating to the conduct of government" was squarely addressed in *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989). The records at issue were survey results prepared by other cities that contained information about operations at those other cities but that were used by the City of Bellingham to help it make a city decision. The contents of the surveys were, by definition, not related to the conduct of the city of Bellingham. Nevertheless, the court held that the surveys related to the conduct of the city and were thus public records. To reach this conclusion, the court held it would look not to the content of the record but instead to "the role the documents played in the system[.]" *Yacobellis*, 55 Wn. App. at 711-12. This required consideration of who

created the record, who controls the record, where the record is stored and haw the agency used the record. *Yacobellis*, 55 Wn. App. at 712.

The issue of content next arose in this Court's decision in *Concerned Ratepayers v. Clark County PUD*, 138 Wn.2d. 950, 983 P.2d 635 (1999). In that case, the record at issue contained technical specifications for turbine that a PUD was considering for purchase. On its face, the content of the record did not relate to the conduct of government. Nevertheless, the Court looked to the *Yacobellis* decision to support the conclusion it was the PUD's public record because the PUD had reviewed the record before deciding not to purchase the turbine and therefore there was a nexus between the record and agency action. *Concerned Ratepayers*, 138 Wn.2d at 961-63.

While the Court was analyzing the term "use" in *Concerned Ratepayers*, its analysis shows how "use" and "relating to the conduct of government" are closely related. Thus, in *Dragonslayer v. State*, 139 Wn. App. 433, 161 P.3d 428 (2007), the court of appeals remanded the lawsuit for "addition fact findings as to how the [agency] uses these [financial] statements [of a private business], [which was] necessary to determine whether they are related to the conduct of government." *Dragonslayer*, 139 Wn. App. 433 (analyzing whether private business records in the possession of the state qualify as public records).

The content of a record was also a central issue in *Tiberino v. Spokane County*, 103 Wn. App. 680, 13 P.3d 1104 (2000), which involved a public employee who was disciplined for sending personal emails from her work computer. The content of those records, were, by definition not

related to the conduct of the county. Nevertheless, the Court held that emails became public records when the county used the emails as a basis for employee discipline. *Tiberino*, 103 Wn. App. at 688, 691.

A final case that raises the issue of content is *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012), where the court of appeals ruled that attorney fee bills for defending a county that were paid by an insurance pool and never shown to the county were not county records. Although the decision focuses on the use element of the definition, the case again illustrates that content alone is not dispositive on what is or is not a public record. Instead, courts have consistently looked to "the role the documents played in the system" or how required that the agency actual put the record to some official use before it will qualify as a public record. The content will often provide evidence about how a record was used by an agency, but content alone cannot control whether a document "relates" to the conduct of government.

The problems caused by focusing on content rather than use can be illustrated by considering two hypothetical emails that cannot be public records: (1) an email from an agency employee to his mother sent from a his personal smart phone during his lunch hour, where he complains about the conduct of his boss during an hour-long conference call that morning; (2) an email from a public employee during her lunch hour using a personal computer and email account urging the recipients to vote for her boss, who is an elected official.

If the employees were tasked to produce emails that have played a role in agency business, the employees would readily conclude these are not public records. But under the Court of Appeal's content-based analysis, there is nothing that would allow the employees to easily determine why there emails are not public records.[2] The Court of Appeal's interpretation thus is unconstitutional and this Court should accept review to adopt a constitutional definition of "public record".

B. In Camera Review of the Requested Records Would Violate the Prosecutor's Associational Privacy.

As Nissen concedes, court of appeals remand would likely result in some form of in camera review to address the constitutional privacy issues the defendants have raised. But in a case like this, where there is at least "some probability" that the records sought will likely include records regarding private political communications[3] that are protected by associational privacy under Article 1, Section 5, in camera review is itself a violation of that privacy. See *Snedigar v*, 114 Wn.2d at 158; *Right-Price Rec. LLC v. Connells Prairie Comm'y Council*, 104 Wn. App. 813, 21 p.3d 1157 (2001), *aff'd other grounds*, 146 Wn.2d 370, 46 P.3d 381 (2002).

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[2] Problems still arise when the use-based analysis is applied, but the Court of Appeal's adoption of the content-based analysis has made those problems worse.

[3] The political nature of communications at issue is illustrated by one of the communicatinos Nissen is expressly seeking information about. This case is described on page 2 of Nissen's opening appellate brief: " When Lindquist was running for election as Prosecutor, he was not endorsed by the Guild. CP 5. Lindquist called Guild attorney Leann Paluck inquiring about Nissen's participation in the Guild' s position not to endorse him. Id. He called Paluck from what he now describes as his personal cell phone number and is the number at which he had previously left for Paluck to return his calls." The commuication Nissen describes could easily have been a communication protected by associational privacy under the First Amendment.

In *Snedigar*, the Court adopted a three-step process for analyzing claims of associational privacy, which requires the requestor to make a strong showing of "need" for the records any time the party resisting disclosure makes a showing that there is "some probability" some of the records sought were protected by associational privacy. *Snedigar v*, 114 Wn.2d at 164-65. In the third step, the court must balance the need with the risk that disclosure would have a chilling effect on associational privacy. In *Snedigar*, this Court held that in camera review should not occur before this third stage and was "justifiable only if essential to fairly evaluate the competing interests." *Snedigar*, 114 Wn.2d at 167. This is because in camera review itself is a violation of associational privacy and will have a chilling effect on that right. *See Right-Price*, 105 Wn. App. at 824-25 (holding order for in camera review as improper absent a strong showing of need for the records at issue).

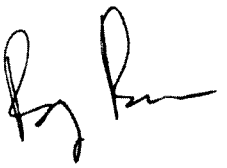
Here, in a PRA case, there is no "need" that would justify disclosure because there is no "need" requirement for PRA requests. Accordingly, the Court should accept review to prevent the remand and potential in camera review that would have an unconstitutional chilling effect. This Court should accept review to prevent that result.

VI. CONCLUSION

The Court of Appeals started its analysis by recognizing that a public official's constitutional privacy rights can trump the application of the PRA but then refused to take the constitutional issues into account when interpreting the PRA. *Nissen*, 333 P.3d at 581-82 ("PRA must give way to

constitutional mandates") (*quoting Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013)). As a result, its interpretation of the PRA and its remedy both suffer constitutional infirmities that only this court can relieve. Absent such relief, the privacy of every city councilmember and city employee will be at risk. The Court should therefore accept review.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.



By:_____
Ramsey Ramerman
Ramerman Law Office PLLC
WSBA # 30423
Attorneys for Amicus Washington State Association of Municipal Attorneys

CERTIFICATE OF SERVICE

I, Ramsey Ramerman, certify under penalty of perjury that true and correct copies of the above attached document were delivered via email, with the parties' agreement to accept email service:

Michele Earl-Hubbard:	michele@alliedlawgroup.com
Stewart A. Estes:	sestes@kbmlawyers.com
Peter B. Gonick:	peterg@atg.wa.gov; wendyo@atg.wa.gov
Judith A. Endejan:	jendejan@gsblaw.com
Anita Hunter:	anitah@wfse.org
Martin S. Garfinkel:	garfinkel@sgb-law.com
Jared E. Ausserer:	jared.ausserer@co.pierce.wa.us
Pamela Loginski:	pamloginsky@waprosecutors.org
Aimee Strand Iverson:	aiverson@washingtonea.org
Jeffrey Julius:	jeffj@vjmlaw.com
Dan Hamilton	dhamilt@co.pierce.wa.us
Philip A. Talmadge:	phil@tal-fitzlaw.com

Executed at Everett, Washington, this 5th day of December, 2014.

Ramsey Ramerman

OFFICE RECEPTIONIST, CLERK

To: Ramsey Ramerman
Cc: Dan Hamilton; Michele Earl-Hubbard; sestes@kbmlawyers.com; peterg@atg.wa.gov; wendyo@atg.wa.gov; Judy Endejan; anitah@wfse.org; garfinkel@sgb-law.com; jared.ausserer@co.pierce.wa.us; pamloginsky@waprosecutors.org; aiverson@washingtonea.org; jeffj@vjmlaw.com; phil@tal-fitzlaw.com
Subject: RE: Nissen v. Pierce County 90857-3: Amicus filing by WSAMA

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Subject: Nissen v. Pierce County 90857-3: Amicus filing by WSAMA

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Attached for filing are the following documents

1. Motion To File Brief Of Amicus Submitted On Behalf Of WSAMA In Support Of Petition For Review
2. Proposed Amicus Brief

Ramsey Ramerman, Attorney for Amicus the Washington State Association of Municipal Attorneys

WSBA 30423

RamseyRamerman@gmail.com

NOTE, because I can only have one "official" email address, my city of Everett email address is listed with the Bar.

206-949-6234