

FILED
COURT OF APPEALS
DIVISION II

7:14 JAN 24 AM 11/52

STATE OF WASHINGTON

BY  DEPUTY

NO. 44852-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

GLEENDA NISSEN, an individual,

Appellant,

v.

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

Respondent,

v.

PROSECUTOR MARK LINDQUIST,

Intervenor/Respondent.

BRIEF OF AMICUS CURIAE

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

PAMELA B. LOGINSKY
Staff Attorney
Washington Association of Prosecuting Attorneys
206 10th Ave. S.E.
Olympia, WA 98501
(360) 753-2175
E-mail: pamloginsky@waprosecutors.org

TABLE OF CONTENTS

I. INTRODUCTION 1

II. INTEREST OF AMICUS CURIAE 2

III. ISSUE PRESENTED 2

IV. AMICUS CURIAE'S STATEMENT OF THE CASE 3

V. ARGUMENT 5

AN AGENCY'S DUTIES UNDER THE PUBLIC RECORDS
ACT MAY BE CURTAILED BY CONSTITUTIONAL
PROVISIONS 5

1. Constitutional Limitations on the Search for Relevant
Documents 7

2. Limitations on Disclosure 11

VI. CONCLUSION 17

TABLE OF AUTHORITIES

TABLE OF CASES

<i>AFSCME Council 79 v. Scott</i> , 717 F.3d 851(11th Cir. 2013)	10
<i>Binkley v. City of Tacoma</i> , 114 Wn.2d 373, 787 P.2d 1366 (1990)	1
<i>City of Ontario v. Quon</i> , 560 U.S. 746, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010)	9, 10
<i>Delia v. City of Rialto</i> , 2010 U.S. App. LEXIS 26968 (9th Cir. Nov. 8, 2010), <i>rev'd on other grounds by, Filarsky v. Delia</i> , ___ U.S. ___, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012)	9
<i>DeLong v. Parmelee</i> , 157 Wn. App. 119, 236 P.3d 936 (2010), <i>review granted and remanded</i> , 171 Wn.2d 1004 (2011)	8
<i>Denver Post Corp. v. Ritter</i> , 255 P.3d 1083 (Colo. 2011)	15
<i>Engquist v. Or. Dep't of Agric.</i> , 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008)	1
<i>Florida v. Jimeno</i> , 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991)	13
<i>Forbes v. City of Goldbar</i> , 171 Wn. App. 857, 288 P.3d 384 (2012), <i>review denied</i> , 177 Wn.2d 1002 (2013)	16
<i>Freedom Foundation v. Gregoire</i> , 178 Wn.2d 686, 310 P.3d 1252 (2013)	6
<i>Illinois v. Rodriguez</i> , 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990)	12
<i>K-Mart Corp. Store No. 7441 v. Trotti</i> , 677 S.W.2d 632 (Tex. App. 1984)	11

<i>Klayman v. Obama</i> , 2013 U.S. Dist. LEXIS 176925 (D.C. Dec. 16, 2013)	14, 15
<i>Nat'l Treasury Employees Union v. Von Raab</i> , 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989)	10
<i>Neighborhood Alliance v. Spokane County</i> , 172 Wn.2d 702, 261 P.3d 119 (2011)	6, 7
<i>O'Neill v. City of Shoreline</i> , 170 Wn.2d 138, 240 P.3d 1149 (2010)	5, 7, 16
<i>O'Connor v. Ortega</i> , 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1986)	1, 8-10
<i>O'Hartigan v. State Department of Personnel</i> , 118 Wn.2d 111, 821 P.2d 44 (1991)	10
<i>State v. Byrd</i> , 178 Wn.2d 611, 310 P.3d 793 (2013)	13
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008)	11
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998)	13
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	14
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003)	14
<i>State v. Mueller</i> , 63 Wn. App. 720, 821 P.2d 1267, <i>review denied</i> , 119 Wn.2d 1012 (1992)	16
<i>State v. Ruem</i> , ___ Wn.2d ___, ___ P.3d ___, 2013 Wash. LEXIS 943 ¶ 29 (Nov. 27, 2013)	13
<i>Tiberino v. Spokane County</i> , 103 Wn. App. 680, 13 P.3d 1104 (2010)	10
<i>Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation</i> , 392 U.S. 280, 88 S. Ct. 1917, 20 L. Ed. 2d 1089 (1968)	1

<i>United States v. Barrows</i> , 481 F.3d 1246 (10th Cir. 2007)	10
<i>United States v. Dyer</i> , 784 F.2d 812 (7th Cir. 1986)	13
<i>United States v. Jachimko</i> , 19 F.3d 296 (7th Cir. 1994)	13
<i>United States v. Jones</i> , ___ U.S. ___, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)	14
<i>United States v. Sihler</i> , 562 F.2d 349 (5th Cir. 1977)	10
<i>Wal-Mart Stores v. Lee</i> , 348 Ark. 707, 74 S.W. 3d 634 (2002)	8
<i>Wal-Mart Stores v. Lee</i> , 348 Ark. 707, 74 S.W. 3d 634 (2002)	11
<i>Wash. Ass'n for Substance Abuse & Violence Prevention v. State</i> , 174 Wn.2d 642, 278 P.3d 632 (2012)	6

CONSTITUTIONS

Fifth Amendment	1
First Amendment	1
Fourth Amendment	1, 2, 5-12, 14, 16, 17
Washington Const. article I, section 10	6
Washington Const. article I, section 2	6
Washington Const. article I, section 29	6
Washington Const. article I, section 7	1, 2, 5-8, 13-17

STATUTES

Public Records Act, chapter 42.56 RCW 5

RCW 36.27.020 2

RCW 42.17A.555 3

RCW 42.24.090 14

RCW 42.56.050 4

RCW 42.56.070(1) 6

RULES AND REGULATIONS

GR 14.1(b) 9

GR 31(a) 6

OTHER AUTHORITIES

State Auditor's Office Performance Audit Report No. 1006772,
Opportunities to Reduce State Cell Phone Costs (Nov. 18, 2011) .. 12, 15

State Auditor's Office, Performance Audit Report:
Washington Department of General Administration
State Motor Pool (Feb. 28, 2007) 12

Washington State Auditor's Office, Local Government
Performance Center (July 2012) 12

I. INTRODUCTION

Public employees are entitled, like all other persons, to the benefit of the Constitution. By accepting public employment, a person does not relinquish his First Amendment rights,¹ his Fifth Amendment rights,² or his Fourth Amendment rights.³ A government employee's rights must, however, be balanced against the realities of the employment context. In striking the appropriate balance, a court must consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.⁴

The fundamental issue presented by this case is whether an employee's Fourth Amendment right to be free from unreasonable search and seizure and an employee's article I, section 7 right to undisturbed private affairs must give way in response to a Public Records Act request. The

¹See, e.g., *Binkley v. City of Tacoma*, 114 Wn.2d 373, 381, 787 P.2d 1366 (1990) ("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").

²See, e.g., *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 285, 88 S. Ct. 1917, 20 L. Ed. 2d 1089 (1968) ("Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination.").

³See, e.g., *O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1986) ("Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.").

⁴*Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).

answer to this question depends upon the nature of the employee's relationship to the requested record.

II. INTEREST OF AMICUS CURIAE

Amicus Curiae Washington Association of Prosecuting Attorneys (WAPA) is a statewide association of the thirty-nine elected prosecuting attorneys. WAPA assists the prosecuting attorneys in carrying out the statutory duties found at RCW 36.27.020. WAPA accomplishes its purpose by appearing as *amicus curiae* or intervenor in pending lawsuits, proposing legislation, or testifying regarding legislation proposed by others.

Prosecutors statewide are keenly interested in protecting for themselves, their deputies, their staff, their clients, and their clients' staff, their right to privacy. Prosecutors are also concerned with their ability and the ability of their clients to recruit and retain qualified employees.

III. ISSUE PRESENTED

1. Whether an agency fulfills its duty under the Public Records Act to perform an adequate search by seeking an employee's consent to examine an employee's constitutionally protected papers, homes, and vehicles for public records?

2. Whether a public employee's Fourth Amendment and article I, section 7 rights protect the employee against compelled production or inspection of the public employee's home, personal vehicle, personal papers

or metadata in response to a Public Records Act request?

IV. AMICUS CURIAE'S STATEMENT OF THE CASE

On August 3, 2011,⁵ Glenda Nissen, acting through Joan Mell, made a Public Records Act (PRA) request for an government employee's private, non-county provided, cell phone⁶ and any other cellular telephones that the employee used to conduct his business. CP 15 ¶ 19; CP 267 ¶ 1.39; CP 321-22. The County promptly acknowledged receipt of the request and notified that it was seeking records from the telephone providers. CP 15-16 ¶ 22; CP 268 ¶¶ 1.45-1.46; CP 328-32.

Between September 16th and September 28th, 2011, Pierce County produced responsive documents to Mell. *See* CP 16, ¶¶ 23-25; CP 268 ¶ 1.47 CP 333-349. The letter accompanying the final installment indicated that the responsive documents related to Mr. Lindquist's personal cell phone records and that the disclosed records would be limited to calls and texts that were

⁵Ms. Nissen's complaint only alleges PRA violations related to her August 3, 2011 and September 13, 2011, requests. *See* CP 15-17. Although the record contains information about pre-August 3, 2011, PRA requests and post-September 13, 2011, PRA requests, *see, e.g.*, CP 260 ¶¶ 1.6-1.15, 275-76, 282-95, these requests are irrelevant to the instant lawsuit.

⁶In some pleadings, Ms. Nissen appears to question whether cellular phone number 861- is a "personal" cell phone, rather than a work phone. *See, e.g., Brief of Appellant*, at 3; CP 265 ¶ 1.31. In the superior court, Ms. Nissen produced evidence that Mark Lindquist, the owner of the phone, listed the 861- number on his declaration of candidacy and that Mr. Lindquist called the attorney for the Pierce County Deputy Sheriff's Independent Guild regarding an endorsement. *See, e.g.*, CP 4-5, CP 261 ¶ 1.4 and ex. 2. Ms. Nissen's evidence supports intervenor Lindquist's sworn statements, CP 80 ¶ 3; 452 ¶ 3, that the 861- cell phone is not a government provided device. *See* RCW 42.17A.555 (prohibiting public employees from using any of the facilities of a public office in a campaign).

work-related. CP 16 ¶ 24; CP 269 ¶ 1.53-1.53; CP 333-349. The exemption log that accompanied the September 28, 2011, letter indicated that the blacked out items were withheld because of “invasion of privacy” and “RCW 42.56.050.” CP 16, ¶ 26; CP 342-43 The log also indicated that the redacted information included “‘Non-Public Information, Personal Phone calls’, ‘Non-Public Information, Last 4 digits of employee’s personal phone number redacted’, ‘Residential or personal wireless phone numbers, last 4 digits redacted’, ‘Non-Public Personal Phone Calls’, or ‘Non-Public Personal Text Messages.’” CP 17, ¶ 28. *See also* CP 342-43.

Even before Ms. Nissen received the County’s final response to her August 3, 2011, request, she filed another request that eliminated the “work-related” qualifier with respect to records from cellular phone number 861-. CP 17, ¶ 31; CP 265 ¶ 1.27; CP 313-14. The County responded to this modified request with redacted documents and an exemption log that repeatedly asserted “privacy” as a basis for the redactions. The exemption log also indicated that the redacted information includes “Personal Records”, “Personal Account” and other similar notations. *See* CP 18, ¶¶ 36-39; CP 265 ¶ 1.28; CP 315-20.

On October 26, 2011, Ms. Nissen filed a “Complaint for Disclosure of Public Records” in the Thurston County Superior Court. CP 13. This action was ultimately dismissed pursuant to Pierce County’s motion. *See* CP

258-259. *Accord* RP (12/23/2011) at 94. Throughout the pendency of Ms. Nissen's PRA action, both Pierce County and intervenor Mark Lindquist, repeatedly asserted the constitutional rights afforded by the Fourth Amendment and article I, section 7 of the Washington Constitution. *See, e.g.*, CP 83 ¶ 8, 480, 499-501, 509-515, 534-542.

Ms. Nissen appeals, contending that the Fourth Amendment and Const. art. I, § 7, are irrelevant when reviewing an agency's response to a PRA request. *See generally* Brief of Appellant, at 40-42. Ms. Nissen further contends that the fact an employee's personal records are "not a public record" does not justify the non-production of the record. *See generally* Corrected Reply Brief of Appellant at 18-19.

WAPA respectfully submits this brief regarding the intersection of the Public Records Act and the Fourth Amendment and article I, section 7 of the Washington Constitution.

V. ARGUMENT

AN AGENCY'S DUTIES UNDER THE PUBLIC RECORDS ACT MAY BE CURTAILED BY CONSTITUTIONAL PROVISIONS

Initially passed as a citizen's initiative in 1972, the Public Records Act ("PRA" or "Act"), chapter 42.56 RCW, serves to ensure governmental transparency in Washington State. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 146, 240 P.3d 1149 (2010). The PRA is a strongly worded mandate for

broad disclosure of public records. *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011). To effectuate this mandate, agencies are required to disclose any public record on request unless it falls within a specific, enumerated exemption. RCW 42.56.070(1).

An agency's duties under the PRA are limited by constitutional mandates. *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013). This is because the constitution supersedes contrary statutory laws, even those enacted by initiative. *Id.*; *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 654, 278 P.3d 632 (2012). *Accord* Wash. Const. art. I, § 2 ("The Constitution of the United States is the supreme law of the land."); Wash. Const. art. I, § 29 (provisions of the Washington Constitution are mandatory).

This case involves the intersection of two constitutional provisions, the Fourth Amendment and article I, section 7 of the Washington Constitution with the PRA. While the court rules recognize that the personal privacy protections afforded by article I, section 7 can limit the constitutional access to court records contained in article I, section 10, of the Washington Constitution,⁷ *see* GR 31(a), our courts have not yet addressed how article I,

⁷*See* GR 31(a) ("Access to court records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article I, Section 7 of the Washington State Constitution. . . .").

section 7 can limit access to public records sought pursuant to the PRA.⁸

These constitutional protections impose limitations on an agency's search for relevant documents and can limit the amount of information that may be disclosed.

1. Constitutional Limitations on the Search for Relevant Documents

A public agency that receives a request for records under the PRA has an obligation to conduct an adequate search for responsive documents. To be adequate, a search must be reasonably calculated to uncover all relevant documents. *Neighborhood Alliance*, 172 Wn.2d at 720. Agencies must make more than a perfunctory search and are required to follow obvious leads as they are uncovered. *Id.* Ultimately, though, what will be considered reasonable will depend on the facts of each case. *Id.* One of the facts that must be considered in determining the reasonableness of the search are the limitations placed upon government actors by the Fourth Amendment and article I, section 7.

⁸In *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 155, 240 P.3d 1149 (2010) (Alexander, J., dissenting), the four dissenting justices indicated that an employee's article I, section 7 privacy right trumps any duty the employer has to search a location for responsive documents. The majority expressly stated that it was not resolving any conflict that may arise between the employee's Fourth Amendment rights and the employer's duty to produce documents under the PRA. *O'Neill*, 170 Wn.2d at 150 n. 4 ("We do not address whether the City may inspect Fimia's home computer absent her consent.").

Individuals do not shed the protections of the Fourth Amendment and of article I, section 7 by accepting government employment. *O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1986) (“Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.”); *DeLong v. Parmelee*, 157 Wn. App. 119, 156 n. 22, 236 P.3d 936 (2010) (“an individual does not wholly surrender his or her constitutional right to privacy by virtue of his or her decision to seek employment with a governmental agency “), *review granted and remanded*, 171 Wn.2d 1004 (2011). Government employment does not alter the privacy interests that the employee possesses in her home, personal computer, cell phone, vehicle, and other possessions that are never brought to the office or government worksite. Government employers⁹ may only search those locations for public records or other government property with the consent of the employee or pursuant to a search warrant. In these cases, a government agency complies with the PRA’s adequate search requirement by asking an employee if he or she has any public records off-site and, if so, whether the employee will voluntarily produce the record or allow the agency to collect the record from its present location. *See, e.g.*,

⁹Even a non-governmental employer, whose conduct is not subject to either the Fourth Amendment or article I, section 7, can not search an employee’s home with impunity. *See, e.g. Wal-Mart Stores v. Lee*, 348 Ark. 707, 74 S.W. 3d 634 (2002) (employer, who searched employee’s home, after informants told the employer that the employee removed equipment from the employer’s store without permission, liable for the tort of intrusion upon the solicitude or seclusion of another in his private affairs).

Delia v. City of Rialto, 2010 U.S. App. LEXIS 26968 (9th Cir. Nov. 8, 2010)

¹⁰(Fourth Amendment violated by an employer ordering an employee to enter his house and produce evidence of interest in an internal affairs investigation), *rev'd on other grounds by, Filarsky v. Delia*, ___ U.S. ___, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012).

With respect to the actual workplace, special needs, beyond the normal need for law enforcement, may make the warrant and probable-cause requirement impracticable for government employers. *City of Ontario v. Quon*, 560 U.S. 746, 130 S. Ct. 2619, 2628, 177 L. Ed. 2d 216 (2010). Operational realities of the workplace and/or the need to retrieve work-related materials or to investigate violations of workplace rules both factor into the reasonableness of a governmental employer's warrantless search of an employee's workspace. *Id.* Ownership of the item or device to be searched factors strongly into the reasonableness equation. *See O'Connor*, 480 U. S. at 715-16 (greatest expectation of privacy in closed personal luggage, handbag or brief case; least in items posted on bulletin boards).

Governments enjoy nearly unfettered authority to search government owned technology devices,¹¹ files, offices and desks for documents

¹⁰GR 14.1(b) permits the citation of this unpublished opinion. The opinion is reproduced in appendix A.

¹¹While the Supreme Court has cautioned that care must be taken when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer, the Court did note that the existence of state open records

responsive to a PRA request. An employee may, however, still have a privacy interest in the contents of those documents that can limit release. *See, e.g., Tiberino v. Spokane County*, 103 Wn. App. 680, 13 P.3d 1104 (2010) (although e-mails created on a county provided computer, the contents of e-mails that were unrelated to governmental operations were exempt from disclosure).

Not everything that passes through the confines of the business address can be considered part of the workplace context. *O'Connor*, at 716. A government employee retains significant privacy interests in the private objects that he brings to the workplace. An employee's expectation of privacy in the contents of a handbag, briefcase, personal cell phone, tablet or laptop is generally¹² not affected by its being brought each day to the

laws will bear on the legitimacy of an employee's privacy expectation. *See Quon*, 130 S. Ct. at 2629-30.

¹²There are rare situations in which an employee's privacy interest in personal items that are brought into the workplace can be diminished. Certain government employment situations, such as prisons, state mental health units, and military bases, have extraordinary security concerns that can overcome an employee's privacy interests. *Cf. Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (certain forms of public employment, such as working at the United States Mint, may subject an employee to routine personal searches); *AFSCME Council 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013) (while suspicionless drug testing of all government employees would violate the Fourth Amendment, the Fourth Amendment allows drug testing of certain safety-sensitive categories of employees); *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977) (routine searches can be a condition of employment for prison guards); *O'Hartigan v. State Department of Personnel*, 118 Wn.2d 111, 821 P.2d 44 (1991) (although nonconsensual polygraph testing of employees and prospective employees implicates constitutional privacy interests, the testing is allowed in certain sensitive position).

An employee also may lose his Fourth Amendment privacy interest in a personal computer through his actions. *See, e.g., United States v. Barrows*, 481 F.3d 1246 (10th Cir.

workplace.¹³ *O'Connor*, at 716, 725. As with an employee's home, a government agency complies with the PRA's adequate search requirement by asking an employee if he has any public records in the personal item that is in the workplace and, if so, whether the employee will voluntarily produce the record or allow the agency to collect the record from its present location. No adverse employment consequences may be imposed for an employee's withholding of consent. *See, e.g., True v. Nebraska*, 612 F.3d 676, 679 (8th Cir. 2010) (a government employer cannot require that its employees consent to an unreasonable search as a condition of employment).

2. Limitations on Disclosure

Modern devices and the modern work environment inevitably lead to an employee using personal items for work purposes. Sometimes the use of personal devices by an employee is encouraged by the employer as a means

2007) (employee has Fourth Amendment expectation of privacy in a personal computer that he connected to the city network, that he did not password protect, and that he used where the screen was visible to coworkers and others who entered the public space). However, it is doubtful that the same conclusion would be drawn under an article I, section 7 analysis.

See State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008) (the privacy interest protected by article I, section 7 survives the exposure that occurs when it is intruded upon by a private actor; an individual's privacy interest is not extinguished simply because a private actor has actually intruded upon or is likely to intrude upon the interest).

¹³Even a non-governmental employer, whose conduct is not subject to either the Fourth Amendment or article I, section 7, can not search an employee's personal possessions that are brought into the workplace with impunity. *See, e.g., K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632 (Tex. App. 1984) (employer, who searched the contents of the employee's work locker, including the contents of the employee's purse, liable for the tort of intrusion upon the solicitude or seclusion of another in his private affairs).

of reducing the costs of business.¹⁴ Sometimes the employee uses a personal phone or automobile for official calls as a matter of personal convenience. Using a personal device for work-related items does not destroy an employee's privacy right and does not create an employer's common authority over the device. Thus, an employer's ability to release relevant data contained within an employee's personal records or device, in response to a PRA request is dependent, in a large part, on the employee's willingness to waive his or her constitutional rights.

An employee's Fourth Amendment protection against "unreasonable searches and seizures" largely places the employee's personal vehicle, personal cell phone, and other personal records and devices off limits to a government employer absent a search warrant. An employee may, however, dispense with the warrant requirement by consenting to a government employer's search. *Illinois v. Rodriguez*, 497 U.S. 177, 183-84, 110 S. Ct.

¹⁴ See, e.g. State Auditor's Office Performance Audit Report No. 1006772, *Opportunities to Reduce State Cell Phone Costs* at 16 (Nov. 18, 2011) (stating that governments agencies in Washington and elsewhere experience significant cost savings by encouraging employees to use their personal cell phones at work) (report available at <http://www.sao.wa.gov/auditreports/auditreportfiles/ar1006772.pdf> (Last visited Jan. 8, 2014)); State Auditor's Office, Performance Audit Report: Washington Department of General Administration State Motor Pool (Feb. 28, 2007) (encouraging replacing motor pool vehicles with employee use of own vehicle) (report available at <http://www.sao.wa.gov/auditreports/auditreportfiles/ar1000001.pdf> (last visited Jan. 17, 2014)); Washington State Auditor's Office, Local Government Performance Center (July 2012) (encouraging local governments to pay employees a stipend to use their personal cell phone instead of offering a government-provided phone) (document available at http://www.sao.wa.gov/EN/Audits/PerformanceAudit/Documents/Cell_Phones_Savings.pdf (last visited Jan. 8, 2014)).

2793, 111 L. Ed. 2d 148 (1990). However, not every consent is equally broad and no consent is irrevocable. *See Florida v. Jimeno*, 500 U.S. 248, 252, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991) (a person may “delimit as he chooses the scope of the search to which he consents.”); *United States v. Jachimko*, 19 F.3d 296, 299 (7th Cir. 1994) (consent may be withdrawn). Government actors must honor a person’s withdrawal of consent or the limitations placed upon a person’s consent to search. *United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986).

Article I, section 7 is more protective of an individual’s privacy than the Fourth Amendment, guaranteeing that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. *See, e.g., State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). A person may waive the protections of article I, section 7 by consenting to a warrantless search. Such consent is not an all-or-nothing proposition, as a person granting consent has the right to restrict or revoke the consent at any time. *State v. Ruem*, ___ Wn.2d ___, ___ P.3d ___, 2013 Wash. LEXIS 943 ¶ 29 (Nov. 27, 2013); *State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998) (a person granting consent to a warrantless search has the right to revoke the consent at any time and to limit the scope of the consent).

A government employee necessarily consents to certain limited employer searches or demands for personal records by requesting reimbursement for travel expenses, including lodging and the use of his or her personal automobile.¹⁵ The employee, however, may limit that consent. Paying a reimbursed hotel bill with a personal credit card does not eliminate the employee's privacy interest in the monthly statement of the credit card. The employee may, therefore, refuse to provide a copy of the bill to an agency faced with a PRA request. The employee who turns over parking receipts, toll receipts, and mileage numbers, is not prevented from refusing access to her vehicle's GPS¹⁶ or her vehicle's interior. These employee-imposed limitations on a warrantless search of the employee's personal records and possessions will necessarily limit the records an agency may release in response to a PRA request.

A government employee who receives a stipend for using her personal cell phone for official business still possesses a privacy interest¹⁷ in her

¹⁵Reimbursement for travel expenses is specifically authorized by statute. See RCW 42.24.090.

¹⁶A warrant is required by article I, section 7 before the state may affix a global positioning tracking device to a vehicle. See *State v. Jackson*, 150 Wn.2d 251, 263-67, 76 P.3d 217 (2003). Under the Fourth Amendment, the Government's installation of a global-positioning-system (GPS) device on defendant's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search." *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).

¹⁷See e.g., *Klayman v. Obama*, 2013 U.S. Dist. LEXIS 176925 (D.C. Dec. 16, 2013) (finding that a Fourth Amendment search occurs when government obtains cell phone metadata from a phone company); *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808

phone's metadata.¹⁸ Agencies respect that privacy by limiting the employee's waiver to those portions of the billing record that relate to official calls. *See* State Auditor's Office Performance Audit Report No. 1006772, *Opportunities to Reduce State Cell Phone Costs* at 16 (Nov. 18, 2011) (describing practices). An agency faced with a PRA request for a record of all phone calls made or received on the employee's private phone is powerless to consent to a release of those portions of the employee's phone bill that the employee chose to withhold from the employer.

A government employee who uses his or her personally purchased automobile, cell phone, or computer while conducting official business, and who does not seek reimbursement for charges associated with this use, has the absolute constitutional right to withhold and thus prevent an agency from releasing the contents of the employee's device or any bills associated with the device in response to a PRA request. *See Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1085-86 (Colo. 2011) (records of a government official's personally paid phone bill for a personally purchased cell phone are private records). A government employee may voluntarily grant an agency access to the employee's private device or records when the agency receives a PRA

(1986) (article I, section 7 prevents the government for accessing personal telephone records without a warrant).

¹⁸Cell phone metadata includes information far beyond that captured by a pen register. *Klayman*, at *77-100. Cell phone metadata includes phone number dialed, date and time of call, length of call, whether call was completed, and the user's location *Klayman*, at * 93-95.

request. The employee may, pursuant to the employee's Fourth Amendment and article I, section 7 rights, place limitations upon the agency's access to and use of the records. The employer must comply with both limitations. *See State v. Mueller*, 63 Wn. App. 720, 821 P.2d 1267, *review denied*, 119 Wn.2d 1012 (1992) (when police are relying upon consent to search, the search should not exceed any limits on duration, scope, or purpose that are imposed by the consenting person).

An employee, who agrees to a limited waiver of his private affairs to enhance an agency's ability to produce relevant documents in response to a PRA request, does not turn a limited consent into authorization for a general search by asking the agency's assistance in locating the documents or records that are both responsive to the PRA request and consistent with the employee's limited consent. In *O'Neill*, the Court recognized that Shoreline Deputy Mayor Fimia would lack the expertise necessary to personally search her home computer's hard drive for the metadata that was responsive to the PRA request. The suggestion that Fimia consent to a City inspection so that the metadata could be located is not accompanied by *any* inference that the City's "use" of the hard drive during the search would render the entire hard drive a public record that is subject to a new PRA request. *See O'Neill*, 170 Wn.2d at 150-51. *See also Forbes v. City of Goldbar*, 171 Wn. App. 857, 288 P.3d 384 (2012) (city paid consultant's review of city officials' personal

emails in order to identify work-related e-mails did not convert the non-work-related e-mails into public records), *review denied*, 177 Wn.2d 1002 (2013).

In the instant case, the parties dispute whether the agency ever had unredacted copies of Mark Lindquist's personal phone bills. *Compare* Brief of Appellant at 27 *with* Corrected Brief of Respondent Pierce County at 23-24. This dispute need not be resolved as the record indicates that Mr. Lindquist, consistent with both his Fourth Amendment and his article I, section 7 rights, granted only a limited waiver of his privacy interests in the billing statements. Specifically, Mr. Lindquist only authorized Pierce County to access and distribute those portions of the bills that memorialized work-related calls. *See* CP 81 ¶ 4, 444-45 ¶¶ 2-3. Mr. Lindquist denied his government employer access to any of his text messages. Pierce County was bound by these limitations.

VI. CONCLUSION

Pierce County and the Pierce County Prosecutor's Office fully discharged their duties under the Public Records Act. Their response to Ms. Nissen's PRA request was as complete as possible in light of Mr. Lindquist's Fourth Amendment and article I, section 7 privacy rights.

//

//

//

Respectfully submitted this 24th day of January, 2014.

A handwritten signature in cursive script, appearing to read "Pamela B. Loginsky", written over a horizontal line.

PAMELA B. LOGINSKY
WSBA No. 18096
Staff Attorney

APPENDIX A



1 of 2 DOCUMENTS

NICHOLAS B. DELIA, Plaintiff-Appellant, v. CITY OF RIALTO, a Public Entity; CITY OF RIALTO FIRE DEPARTMENT, a Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the City of Rialto, Defendants-Appellees.

No. 09-55514

**UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT**

2010 U.S. App. LEXIS 26968

**June 11, 2010, Argued and Submitted, Pasadena, California
November 8, 2010, Amended**

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Central District of California. D.C. No. 2:08-cv-03359-R-PLA. Manuel L. Real, District Judge, Presiding.

Delia v. City of Rialto, 621 F.3d 1069, 2010 U.S. App. LEXIS 18836 (9th Cir. Cal., 2010)

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

COUNSEL: For Nicholas B. Delia, appellant: Michael A. McGill and Carolina V. Diaz of Lackie, Dammeier & McGill, Upland, California.

For City of Rialto, City of Rialto Fire Department, Stephen C. Wells, Mike Peel and Frank Bekker, appellees: Howard B. Golds and Cynthia M. Germano of Best Best & Kreiger,

L.L.P., Riverside, California.

For Steve A. Filarsky, appellee: Jon H. Tisdale and Jennifer Calderon of Gilbert, Kelly, Crowley & Jennett, Los Angeles, California.

JUDGES: Before: Alfred T. Goodwin, Johnnie B. Rawlinson, Circuit Judges, and Mark W. Bennett, District Judge.

* The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa, sitting by designation.

OPINION BY: Mark W. Bennett

OPINION

AMENDED OPINION

BENNETT, District Judge:

Appellant Nicholas B. Delia ("Delia"), a firefighter, brought this 42 U.S.C. § 1983 action against the City of Rialto, the Rialto Fire Department, Rialto Fire Chief Stephen C. Wells, two Rialto Fire Department Battalion Chiefs, Mike Peel and Frank Bekker, and a [*2] private attorney, Steve Filarsky. Delia alleges violations of his constitutional rights arising during a departmental internal affairs investigation. While being represented by counsel and interrogated at headquarters, he was ordered to go directly to his home while being followed by Battalion Chiefs Peel and Bekker in a City vehicle. He was ordered that when he arrived at his home he was to enter his home while in full view of the Battalion Chiefs, retrieve several rolls of recently purchased insulation, and bring them out of the house and place them in his front yard for inspection by the Battalion Chiefs. Delia was told earlier in the interview that if he failed to do this he could be found to be "insubordinate" and subject to disciplinary action including termination. This order was given a few minutes after Delia and his counsel refused to consent to a warrantless search of his home by Battalion Chief Peel. ¹

1 Delia asserts in his complaint that defendants' actions violated his right to be free from unreasonable search and seizures under the *Fourth* and *Fourteenth Amendments*. He also asserts that defendants violated his right to be free from invasions of privacy under the *First*, [*3] *Fifth* and *Fourteenth Amendments*. In this appeal, however, he claims only violations of his *Fourth* and *Fourteenth Amendment* rights.

The district court granted summary judgment in favor of all defendants. In a written order, the district court held that all of the individual defendants were entitled to qualified immunity. The district court also found that the City of Rialto ("the City") could not be held liable under *Monell v. Department*

of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). This was because Delia failed to show that a municipal policy caused his injury. This timely appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

For the reasons discussed below, we conclude that Delia's constitutional right under the *Fourth Amendment of the United States Constitution* to be protected from a warrantless unreasonable compelled search of his home was violated. However, because we also conclude that this right, under these or similar facts, was not clearly established at the time of this constitutional violation, we affirm the district court's order granting qualified immunity to Stephen Wells ("Chief Wells"), Mike Peel ("Peel"), and Frank Bekker ("Bekker"). We also affirm the district [*4] court's grant of summary judgment to the City on Delia's *Monell* claim, but reverse the district court's grant of qualified immunity to Steve Filarsky ("Filarsky") and remand for further proceedings.

I. BACKGROUND

A. Work Incident And Its Aftermath

In July 2000, Delia was hired by the City's Fire Department as a firefighter. He was later promoted to the rank of engineer. As a result of a disciplinary decision against him, he was demoted back to firefighter in June 2006. On August 10, 2006, Delia began to feel ill while working to control a toxic spill. He was then transported to a hospital emergency room for evaluation. There, a doctor gave him an off-duty work order for three work shifts. The doctor, however, did not place any activity restrictions on Delia.

On August 15, 2006, Delia returned to the hospital. The doctor again issued him an off-duty work order. This time it was for eight shifts. The doctor also scheduled a medical test for him. Again, the doctor did not place any activity restrictions on Delia. On August 22,

2006, Delia returned to the hospital and the doctor gave him an off-duty work order for eight shifts. Once again, no activity restrictions were placed on Delia. Shortly [*5] after this examination, Delia underwent a colonoscopy and endoscopy. He was diagnosed with esophagitis, an ulceration of the esophagus. On August 29, 2006, Delia's doctor issued an off-duty work order for the period of August 29, 2006, through September 3, 2006. The doctor cleared him to return to work after September 3, 2006.

The City was suspicious of Delia's off-work status due to his disciplinary history. The record reveals that Delia was previously disciplined for sending improper e-mails. Why this would make the City suspicious of Delia's off-work activities is not readily apparent. In any event, the City hired a private investigation firm to conduct surveillance on Delia. During this surveillance, Delia was filmed buying building supplies, including several rolls of fiberglass building insulation, at a home improvement store. Based on these observations, the City began a formal internal affairs investigation of Delia to determine whether he was off-work on false pretenses. The City began its internal affairs investigation of Delia despite the fact that Delia had no activity restrictions placed on him by his treating physician and the City possessed no contrary evidence.

As part [*6] of the internal affairs investigation, Delia was ordered to appear, on September 18, 2006, for an administrative investigation interview. The interview was conducted by Filarsky, a private attorney retained by the City. Filarsky had previously represented the City in conducting interviews during internal affairs investigations.

B. The Internal Affairs Interview

Filarsky's interview of Delia was conducted on September 18, 2006. In addition to Filarsky and Delia, Delia's attorney, Stuart Adams, Peel and Bekker were also present at the interview.

At the onset of the interview, Filarsky warned Delia that he was obligated to fully cooperate. Delia was further cautioned that "[i]f at any time it is deemed you are not cooperating then you can be held to be insubordinate and subject to disciplinary action, up to and including termination."

After some preliminary questions, Filarsky asked Delia about any home construction projects he was currently undertaking in his home. Delia answered that he had some duct work done in his home and had purchased some rolls of insulation. He told Filarsky that the rolls were currently sitting in his house. Filarsky showed Delia a videotape of him purchasing home [*7] construction materials, including the rolls of insulation, at a store. Filarsky asked Delia whether this insulation had been installed. Delia told Filarsky that it was still bagged at his house. Shortly after this line of questioning, Filarsky requested Delia and Adams step out of the interview room so he could confer with "the Chiefs." During this break, Filarsky consulted with Chief Wells concerning his desire to order Delia to produce the rolls of insulation for inspection. Chief Wells, who was never present during the interview with Delia, agreed to permit Filarsky to order Delia to produce the rolls of insulation.

Following the break, Filarsky asked Delia to allow Peel to follow him to his house and, once there, permit Peel to enter his home to conduct a warrantless search of the insulation there. On the advice of counsel, Delia refused Filarsky's request. Unable to get Delia to consent to a warrantless search of his house by Peel, Filarsky then asked if Delia would volunteer to have Peel follow him to his house, where Delia would bring out the rolls of insulation to show Peel that they had not been installed. Again, on the advice of his counsel, Delia refused Filarsky's request.

Unable [*8] to get Delia to volunteer, Filarsky orally ordered Delia to produce the rolls of insulation from his house. Adams, Delia's attorney, questioned Filarsky's legal

authority for issuing such an order and requested that the order be in writing. Following a lengthy break, Delia was presented with a written order to produce the insulation for inspection signed by Chief Wells. The interview then concluded.

C. The Search And Resulting Lawsuit

Immediately after the interview, Peel and Bekker followed Delia, in a city vehicle, to Delia's house. Once there, Peel and Bekker parked alongside the curb in front of Delia's house, and waited a few minutes for Adams to arrive. Peel and Bekker never left their vehicle. After Adams arrived, he, Delia, and a union representative went into Delia's house and brought out three or four rolls of insulation and placed them on his lawn. After Delia brought out the last roll of insulation, Peel thanked him for showing them the insulation and the two drove off. On May 21, 2008, Delia filed this lawsuit. Defendants subsequently moved for summary judgment. At the hearing on defendants' motions for summary judgment, the district court orally granted defendants' motions. [*9] The court found that Delia had not established municipal liability against the City. The court concluded that Delia had failed to show that he was injured by an express policy, a longstanding custom, or an official with final policymaking authority. The district court also found that the individual defendants, Chief Wells, Peel, and Bekker were entitled to qualified immunity. However, with respect to Filarsky, the court stated:

As to Defendant Filarsky, the evidence establishes that Filarsky's conduct did not result in the deprivation of any constitutional right required -- as a required element for a 1983 claim. Filarsky's conduct consisted of conducting the interview, arguing with Delia's attorney, and consulting with Fire Chief Wells, who then issued the written order.

Filarsky was not present at Delia's house, and at no point was Delia threatened with subordination [sic] or termination if he refused to comply with the order.

The district court's written order granting defendants' motions for summary judgment does not contain this holding.

The district court directed defense counsel to prepare findings of fact and conclusions of law. It appears from the record that the district court [*10] mechanically adopted the findings of fact and conclusions of law as prepared by defense counsel. ² In its written order, the district court concluded that Filarsky, as well as Peel, Bekker and Chief Wells, was entitled to qualified immunity. No explanation for this change in the district court's reasoning appears in its written order. ³ The district court also held that the City was entitled to summary judgment on Delia's *Monell* claim. The district court, again, found that Delia had not established that he was injured by an express policy, a longstanding custom, or an official with final policymaking authority.

2 This court has previously noted its disapproval of this practice. *Federal Trade Comm'n v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1215 (9th Cir. 2004); *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (9th Cir. 1985); *Lumbermen's Underwriting Alliance v. Can-Car, Inc.*, 645 F.2d 17, 18-19 (9th Cir. 1980); *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970). As this court recognized forty years ago in *Interchemical Corp.*: "This practice has been condemned because of the possibility that such findings and conclusions, prepared by the non-objective [*11] advocate, may not fully and accurately reflect the thoughts entertained by the impartial judge at the

time of his initial decision." *Interchemical Corp.*, 437 F.2d at 1339; see also *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4, 84 S. Ct. 1044, 12 L. Ed. 2d 12 (1964) (quoting Judge J. Skelly Wright's admonition, in his Seminars for Newly Appointed United States District Judges 166 (1963), that: "lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case."); *Nissho-Iwai Co. v. Star Bulk Shipping Co.*, 503 F.2d 596, 598 (9th Cir. 1974) ("We are aware that busy judges sometimes request attorneys to prepare the first draft of proposed findings and conclusions. The vice is when the district judge fails to study them and make such changes as are necessary to be sure they reflect his opinion.").

3 The dangers of mechanically adopting counsel prepared summary judgment orders appear to be exemplified in this case. The [*12] district court's oral reasons for granting summary judgment do not match its written order. Yet, no explanation for this change appears in the record. Because the district court's written order postdates its oral statement, we will proceed on the presumption that the district court abandoned its prior oral reasoning for granting summary judgment. We will, instead, rely exclusively on the district court's written order. See *White v. Washington Public Power Supply Sys.*, 692 F.2d 1286, 1289 n.1 (9th Cir. 1982) (noting that "the rule in this circuit is that the formal findings of fact and conclusions of law supersede the oral decision."); see also *O'Neill v.*

AGWI Lines, 74 F.3d 93, 95 (5th Cir. 1996) (noting that "to the extent that the district court's statements from the bench conflict with its formal findings and conclusions of law, we need not consider them."); *Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 727 (3d Cir. 1988) (noting that "a formal order controls over a prior oral statement."); *E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967, 974 (5th Cir. 1984) (observing that "to the extent the [trial] court's statements from the bench conflict with its formal findings and conclusions, [*13] we do not consider them."); *Harbor Tug & Barge v. Belcher Towing*, 733 F.2d 823, 827 n.3 (11th Cir. 1984) ("The trial judge was not bound by his off-hand remarks. In its search for error, the reviewing court looks to the formal findings and conclusions . . .").

II. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 689 (9th Cir. 2010). We must determine whether, viewing the evidence in the light most favorable to Delia, as the nonmoving party, "there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *California Alliance of Child and Family Servs. v. Allenby*, 589 F.3d 1017, 1020 (9th Cir. 2009).

III. DISCUSSION

A. Qualified Immunity--The City's Employees

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815,

172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). In *Pearson*, the United [*14] States Supreme Court offered this explanation of the reasoning behind the concept of qualified immunity: "Qualified immunity balances two important interests--the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* In fact, "[t]he protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 129 S. Ct. at 815 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (Kennedy, J., dissenting)).

In considering a claim for qualified immunity, the court engages in a two-part inquiry: whether the facts shown "make out a violation of a constitutional right," and "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson*, 129 S. Ct. at 815-16. In *Pearson*, the Court overruled its prior holding, in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), that courts had to proceed through the two-step inquiry sequentially. *Pearson*, 129 S. Ct. at 818; see *James v. Rowlands*, 606 F.3d 646, 651 (9th Cir. 2010) [*15] (recognizing that *Pearson* overruled *Saucier* in part). As the Court explained, "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 129 S. Ct. at 818. Thus, following *Pearson*, it is within our discretion to decide which step to address first. *Brooks v. Seattle*, 599 F.3d 1018, 1022

n.7 (9th Cir. 2010); *Bull v. City & County of San Francisco*, 595 F.3d 964, 971 (9th Cir. 2010) (en banc). Thus, the threshold question we will decide is whether Delia being ordered to bring the rolls of insulation out of his home for inspection "make[s] out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 816; see *Saucier*, 533 U.S. at 201.

1. Fourth Amendment violation

Delia contends that Chief Wells, Peel, and Bekker violated his *Fourth Amendment* right to be free from unreasonable searches and seizures when he was ordered to retrieve the rolls of home insulation [*16] and show them to fire department personnel. We agree. The *Fourth Amendment*, made applicable to the states through the *Fourteenth Amendment*, *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 *Ohio Law Abs.* 513 (1961), guarantees, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *U.S. CONST. amend. IV*. The Supreme Court has held that the *Fourth Amendment* applies to "[s]earches and seizures by government employers or supervisors of the private property of their employees." *O'Connor v. Ortega*, 480 U.S. 709, 715, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).

In *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the Supreme Court explained that no zone of privacy is more clearly defined than one's home: "[T]he *Fourth Amendment* has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590; see *Kyllo v. United States*, 533 U.S. 27, 28, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (observing that "search of a home's interior" is "the prototypical [*17] . . . area of protected

activity . . ."); *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961) (observing that "[a]t the very core" of the *Fourth Amendment* "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); see also *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir. 2010) (recognizing the core of the *Fourth Amendment* is protection against unreasonable searches of one's home); *United States v. Brock*, 667 F.2d 1311, 1326 (9th Cir. 1982) (noting that "[o]ne of the foundations of the *fourth amendment* is the right of the people 'to be secure in their . . . houses.'"); cf. *New York v. Harris*, 495 U.S. 14, 17, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) ("[T]he rule in *Payton* was designed to protect the physical integrity of the home[.]"). Therefore, the warrantless search of a home is presumptively unreasonable unless the government can prove consent or that the search falls within one of the carefully defined sets of exceptions. See *Arizona v. Hicks*, 480 U.S. 321, 327, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The circumstances which excuse the failure to obtain a warrant are "few in number and carefully delineated," where one's [*18] home is concerned. * See *Welsh v. Wisconsin*, 466 U.S. 740, 749, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (quoting *United States v. United States District Court*, 407 U.S. 297, 318, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)).

4 We note that the Supreme Court recently reemphasized that the "special needs" of the workplace" constitute an exception to the general rule that warrantless searches "are per se unreasonable under the *Fourth Amendment*". . . *Ontario v. Quon*, 130 S. Ct. 2619, 2630, 177 L. Ed. 2d 216 (2010) (citation and internal quotations omitted). In *Quon*, the Court reviewed a disagreement in *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d

714 (1987), on the proper analytical framework for *Fourth Amendment* claims against government employers. *Quon*, 130 S. Ct. at 2628. Under one approach, representing the plurality opinion in *O'Connor*, the Court explained the plurality analysis has two steps:

First, because "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable," *id.*, at 718, a court must consider "[t]he operational realities of the workplace" in order to determine whether an employee's *Fourth Amendment* rights are implicated, *id.*, at 717 . . . Next, where an employee has a legitimate privacy expectation, an employer's intrusion [*19] on that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."

Id. (quoting *O'Connor*, 480 U.S. at 717, 718, and 725-726). The competing approach, championed by Justice Scalia in his concurrence in *O'Connor*, "dispensed with an inquiry into 'operational realities' and would conclude 'that the offices of government employees . . . are covered by *Fourth Amendment* protections as a general matter.'" *Id.* (quoting *O'Connor*, 480 U.S. at 731). Thus, under Justice Scalia's approach, the core inquiry is whether the

search would be "regarded as reasonable and normal in the private-employer context." *O'Connor*, 480 U.S. at 732. If so, the search does not violate the *Fourth Amendment*. *Id* The Court did not resolve this schism in *Quon. Quon*, 130 S. Ct. at 2628. The *Quon-O'Connor* workplace warrant exception, however, has no application here. Although the search at issue in this case arose as a result of a workplace investigation, defendants were not seeking to search Delia's workplace environment, but his home. *See Quon*, 130 S. Ct. at 2633 (concerning search of messages [*20] made by police officer on government owned alphanumeric pager); *O'Connor*, 480 U.S. at 712-13 (concerning search of physician's state office and seizure of personal items from his desk and filing cabinet). Moreover, even if the *Quon-O'Connor* workplace warrant exception was applicable to the search here, the search was unreasonable under either the *O'Connor* plurality or Justice Scalia's approach. Under the *O'Connor* plurality approach, the search here was unjustified from the start because there were no reasonable grounds for believing that a search for the insulation was necessary for the investigation. Delia was being investigated for abuse of sick leave. However, no activity restrictions were ever placed on Delia by his treating physician as a result of his work-place exposure to the hazardous substances. Consequently, whether or not he installed insulation in his home was irrelevant to the investigation, since he could install insulation in his home and still be in full compliance with his physician's orders. For these same reasons, we also conclude that the search would fail to satisfy Justice Scalia's approach because it would not be "regarded as reasonable and normal in the private-employer [*21] context." *O'Connor*, 480 U.S. at

732.

In this case, defendants initially attempted to conduct a warrantless search of Delia's house for the insulation by asking for Delia's consent. Presumably, this is because a search conducted with the home owner's voluntary consent is an exception to the *Fourth Amendment's* proscription on warrantless searches. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *United States v. Rubio*, 727 F.2d 786, 796 (9th Cir. 1983). Filarsky asked Delia to consent to allowing Peel to search for the insulation. Delia, however, refused to consent. Unable to obtain Delia's consent to a warrantless search of his house by Peel, Filarsky tried a different tactic. He sought to obtain Delia's consent to Delia bringing the rolls of insulation out of his home to show Peel that they had not yet been installed. No doubt this was done because an individual does not have an expectation of privacy in items exposed to the public, thereby eliminating the need for a search warrant. *See Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ("[T]he *Fourth Amendment* protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject [*22] of *Fourth Amendment* protection."); *see also United States v. Broadhurst*, 805 F.2d 849, 856 (9th Cir. 1986) ("What a person knowingly exposes to public view is not protected by the *Fourth Amendment*"). Delia, however, again rejected Filarsky's request.

Unable to obtain Delia's consent to search his home, and alternatively, failing to persuade Delia to voluntarily retrieve the insulation from his home and place it in public view on his front lawn, Filarsky was stymied. It was only at this juncture that Filarsky's final move was to hatch a plan to compel Delia to do indirectly what Filarsky and the City of Rialto officials declined to do directly. Delia was *ordered* to go into his house and bring out the rolls of insulation for inspection. He was cautioned at

the beginning of his interview that his failure to cooperate with the investigation could result in charges of insubordination and possible termination of his employment. As a result, Chief Wells's order "convey[ed] a message that compliance with [his] request[] [was] required." *Florida v. Bostick*, 501 U.S. 429, 435, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). As this court has recognized in the situation where police demand entrance to a dwelling, "compliance with a [*23] [governmental] demand is not consent." *United States v. Winsor*, 846 F.2d 1569, 1573 n.3 (9th Cir. 1988) (en banc) (internal quotations omitted). In *Winsor*, police officers decided to enter a hotel and go from room to room looking for a robbery suspect. *Id.* at 1571. "When the police knocked on the door [of the defendants' room] and demanded that it be opened," one of the defendants obeyed, at which point, the police officers recognized the suspect as the robber and found evidence of the robbery in plain view. *Id.* This court found that the defendant had opened the door in response to a claim of lawful authority, not voluntarily. *Id.* at 1573. Consequently, this court held that "the police did effect a 'search' when they gained visual entry into the room through the door that was opened at their command." *Id.* Similarly, under the facts in this case, Delia was compelled to enter his own home and retrieve the insulation for public view by order of Chief Wells. Delia's actions were involuntary and coerced by the direct threat of sanctions including loss of his firefighter position. ⁵ Therefore, we hold that the warrantless compelled search of Delia's own home, requiring him to retrieve and [*24] display the insulation in public view on his front yard, violated Delia's right under the *Fourth Amendment* to be free from an unreasonable search of his home by his employer.

5 It is well established that public employers generally cannot condition employment on an employee's waiver of constitutional rights. See *O'Hare Truck*

Serv., Inc. v. City of Northlake, 518 U.S. 712, 717, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996); *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Vance v. Barrett*, 345 F.3d 1083, 1092 (9th Cir. 2003); see also *McDonell v. Hunter*, 809 F.2d 1302, 1310 (8th Cir. 1987) (holding that the state may not require, as a condition of employment, waiver of the *Fourth Amendment* right to be free from unreasonable searches).

2. Clearly established right

Having found that Delia's *Fourth Amendment* rights were violated, we turn to the second prong of the qualified immunity inquiry, whether the right was clearly established at the time of the defendants' misconduct. Accordingly, we must focus on what the defendants' knew, or should have known, concerning Delia's *Fourth Amendment* constitutional rights as of September 18, 2006, the date of Chief Wells's order. Whether a right is clearly established "turns on the 'objective [*25] legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson*, 129 S. Ct. at 822 (quoting *Wilson v. Layne*, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)); see *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1241 (9th Cir. 2010); *Greene v. Camreta*, 588 F.3d 1011, 1031 (9th Cir. 2009). Delia bears the burden of demonstrating that the right allegedly violated was clearly established at the time of the incident. See *Greene*, 588 F.3d at 1031; *Robinson v. York*, 566 F.3d 817, 825 (9th Cir. 2009), cert. denied, 130 S. Ct. 1047, 175 L. Ed. 2d 881 (2010); *Galen v. County of Los Angeles*, 477 F.3d 652, 665 (9th Cir. 2007). The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); see *James*, 606 F.3d at 652.

This case does not fit neatly into any previous category of *Fourth Amendment* law. This is best demonstrated by the fact that no party provided any prior case law analogous to this situation. Moreover, until today, this court had not extended *Winsor* beyond situations where police demand entrance. In attempting to demonstrate [*26] that the right allegedly violated was clearly established at the time of Chief Wells's order, Delia cites several cases. These cases include this court's prior decision in *Los Angeles Police Protective League v. Gates*, 907 F.2d 879 (9th Cir. 1990), as well as the Supreme Court's decisions in *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280, 88 S. Ct. 1917, 20 L. Ed. 2d 1089 (1968) and *Gardner v. Broderick*, 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968). A review of these decisions, however, does not demonstrate that Chief Wells's order violated a clearly established right.

Both Supreme Court decisions concern municipal employees who were questioned about corruption in their agencies. In *Gardner*, the plaintiff, a police officer, was subpoenaed to appear before a New York County grand jury that was investigating bribery and corruption of police officers in connection with gambling operations. *Gardner*, 392 U.S. at 274. Although he was informed of his privilege against self-incrimination, the police officer was told that he would be fired if he did not sign a waiver of immunity. *Id.* After he refused to sign the waiver, he was fired. *Id.* at 274-75. The Court held that the plaintiff was discharged "not for failure to [*27] answer relevant questions about his official duties, but for refusal to waive a constitutional right. . . . He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege." *Id.* at 278.

The Court reached an identical conclusion in *Uniformed Sanitation Men*, decided the same day as *Gardner*. In *Uniformed Sanitation Men*, fifteen sanitation workers were summoned to

appear at a hearing conducted by a commissioner of investigations. The commissioner was investigating charges that sanitation department employees were not charging certain fees and were keeping other fees for themselves. *Uniformed Sanitation Men Ass'n, Inc.*, 392 U.S. at 281. Each sanitation employee was told that if he refused to testify "his employment and eligibility for other city employment would terminate." *Uniformed Sanitation Men Ass'n, Inc.* 392 U.S. at 282. Twelve workers refused to answer, invoking their privilege against self-incrimination, and were discharged. *Id.* The remaining three workers answered questions at the hearing. They were subsequently suspended as a result of "information received from the Commissioner of Investigation [*28] concerning irregularities arising out of (their) employment in the Department of Sanitation." *Id.* The three workers were later summoned before a grand jury and asked to sign waivers of immunity. *Id.* They refused and were fired solely for refusing to sign waivers of immunity. *Id.* at 282-83. The Supreme Court held all the discharges unconstitutional, noting that, "[the sanitation workers] were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination." *Id.* at 283. Thus, in both *Gardner* and *Uniformed Sanitation Men*, the Court held that public agencies may not impair an individual's privilege against self-incrimination by compelling incriminating answers, or by requiring a waiver of immunity. *See id.*; *Gardner*, 392 U.S. at 278. Neither case involved the legality of a search under the *Fourth Amendment*. Accordingly, neither *Gardner* nor *Uniformed Sanitation Men* would have put defendants on notice that Chief Wells's order to Delia, with no attendant threat to his employment, constituted a violation of the *Fourth Amendment*.

Delia also cites this court's decision [*29] in *Gates*. In *Gates*, a police officer was served

with an administrative warrant to search his garage. *Gates*, 907 F.2d at 883. When the plaintiff refused to permit the search, he was fired for insubordination. *Id.* Relying on the Supreme Court's decisions in *Gardner* and *Uniformed Sanitation Men*, this court held that the plaintiff "could not be disciplined when he refused to allow the appellants to violate his constitutional rights. As the Supreme Court has pointed out, it is not proper to discharge an officer from duty in order to punish that officer for exercising rights guaranteed to him under the constitution." *Id.* at 886. Thus, the *Gates* decision did not concern the legality of an actual search, let alone a "search" under circumstances similar to this case. As a result, the *Gates* decision, like the Supreme Court's decisions in *Gardner* and *Uniformed Sanitation Men*, would hardly have put defendants on notice that their conduct here violated the *Fourth Amendment*. Thus, Delia has not demonstrated that a constitutional right was clearly established as of the date of Chief Wells's order, such that defendants would have known that their actions were unlawful. Accordingly, we affirm the district [*30] court's grant of summary judgment in favor of Chief Wells, Peel, and Bekker on the ground of qualified immunity.

B. Qualified Immunity--Filarsky

We next take up the issue of whether Filarsky, too, is entitled to qualified immunity. Unlike the other individual defendants in this case, Filarsky is not an employee of the City. Instead, he is a private attorney, who was retained by the City to participate in internal affairs investigations. Delia contends that Filarsky, as a private attorney, is not entitled to qualified immunity. Filarsky, on the other hand, argues that this is a distinction without a difference. He urges this court to follow the Sixth Circuit Court of Appeals's decision in *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997), and hold that he is entitled to qualified immunity. In *Cullinan*, the Sixth Circuit held that a law firm that had been hired

by the City of Louisville to serve as outside counsel was entitled to qualified immunity against plaintiffs' § 1983 claims. *Id.* The court succinctly concluded: "We see no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." *Id.* In arriving at this conclusion, the [*31] court of appeals relied exclusively on dictum in *Richardson v. McKnight*, 521 U.S. 399, 407, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997), that "the common law 'did provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" *Cullinan*, 128 F.3d at 310.

The hitch in Delia's argument is that we are not free to follow the *Cullinan* decision. We are "bound by prior panel opinions 'unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.'" *In re Findley*, 593 F.3d 1048, 1050 (9th Cir. 2010) (quoting *Nghiem v. NEC Elec, Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994); *Robbins v. Carey*, 481 F.3d 1143, 1149 n.3 (9th Cir. 2007)) ("Ordinarily, panels cannot overrule a circuit precedent; that power is reserved to the circuit court sitting en banc"). In *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003), another panel of this court held that a private attorney representing a county was not entitled to qualified immunity. *Id.* at 834-35. In *Gonzalez*, the defendant, a private attorney, was retained to defend Los Angeles County in an underlying civil rights suit brought by the plaintiff. *Id.* at 834. The attorney accessed [*32] the plaintiff's juvenile court file without notifying him and without obtaining authorization from the juvenile court. *Id.* The attorney employed information from the file in deposing the plaintiff. *Id.* The plaintiff brought suit against the attorney, her law firm, and the county "for accessing and using his juvenile court file without authorization." *Id.* The plaintiff alleged that this conduct constituted a violation of his *Fourth* and *Fourteenth Amendment* rights. *Id.* In rejecting the attorney's claim of qualified immunity, this

court reasoned, "[the attorney] is not entitled to qualified immunity. She is a private party, not a government employee, and she has pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." *Id.* at 835 (quoting *Richardson*, 521 U.S. at 412); see *Wyatt v. Cole*, 504 U.S. 158, 168-69, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992) (holding that private defendants in § 1983 suit for "invoking a state replevin, garnishment, or attachment statute" later declared unconstitutional were not entitled to qualified immunity from suit); cf. *Pollard v. The GEO Group, Inc.*, 607 F.3d 583, 602 (9th Cir. 2010) (observing that "[u]nlike officers [*33] employed by public prisons," employees of a private corporation operating a federal prison would not be entitled to qualified immunity in *Bivens* cause of action); *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996) (holding that "the common law did not provide immunity to private attorneys conspiring with a judge to deprive someone of their constitutional rights"). Filarsky does not allege any intervening en banc decision, Supreme Court decision, or intervening legislation which would permit us to overrule the holding in *Gonzalez*. Therefore, we are bound by the *Gonzalez* decision. Accordingly, Filarsky is not entitled to qualified immunity as a private attorney and we reverse the district court's grant of summary judgment in his favor and remand for trial, or further proceedings as determined by the district court. ⁶

⁶ We are skeptical of the district court's oral holding that Filarsky has no responsibility for the deprivation of Delia's *Fourth Amendment* rights which occurred in this case. We leave to the district court on remand to determine Filarsky's liability consistent with this opinion. We do note that searches by private parties are subject to the *Fourth Amendment* if private parties [*34] act as agents of the government. *Skinner v. Railway Labor Executives' Assn.*, 489

U.S. 602, 614, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); United States v. Young, 153 F.3d 1079, 1080 (9th Cir. 1998). Under § 1983, private parties acting under color of state law can be held liable for violations of federal constitutional rights. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Franklin v. Fox*, 312 F.3d 423, 444 (9th Cir. 2002).

C. Municipal Liability

Finally, we consider whether the City may be held liable under § 1983 for the individual defendants' actions. The City may be held liable under § 1983 for its employees' actions where one of its customs or policies caused a violation of Delia's constitutional rights. *Monell*, 436 U.S. at 690-91. In *Monell*, the United States Supreme Court held that municipalities are "persons" subject to damages liability under § 1983 where it has caused a constitutional tort through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. The Court further observed that § 1983 also authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received [*35] formal approval through the body's official decisionmaking channels." *Id.* at 690-691. The Court, however, specifically rejected the use of the doctrine of *respondeat superior* to hold a municipality liable for the unconstitutional acts of its employees. The Court instructed that municipalities could be held liable only when an injury was inflicted by a city's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. "[T]he touchstone of 'official policy' is designed 'to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.'" *City of St. Louis v.*

Praprotnik, 485 U.S. 112, 138, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) (Brennan, J., concurring) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)) (emphasis in *Pembaur*).

Even in the absence of an official policy or a custom, the Supreme Court has held that "an unconstitutional government policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Praprotnik*, 485 U.S. at 123. [*36] Under this paradigm, however, "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481.

Thus, in order to establish an official policy or custom sufficient for *Monell* liability, a plaintiff must show a constitutional right violation resulting from (1) an employee acting pursuant to an expressly adopted official policy; (2) an employee acting pursuant to a longstanding practice or custom; or (3) an employee acting as a "final policymaker." *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003); see *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 984-85 (9th Cir. 2002); *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). Delia has not directed us to any policy, officially adopted and promulgated by the City. Nor has he established a practice, so permanent and well-settled so as to constitute a custom, that existed and through which Chief Wells acted in ordering Delia to produce the rolls of insulation. See *Praprotnik*, 485 U.S. at 121. Indeed, Delia does not suggest that defendants were acting pursuant to an express official policy or a longstanding practice [*37] or custom.

This leaves only the third means of establishing municipal liability available to Delia, that he was injured by an employee of the City with "final policymaking authority."

Id. at 123. Delia asserts that the individual defendants, and Chief Wells in particular, were acting as final policymakers when ordering him to produce the rolls of insulation. In response, the City argues that none of the individual defendants had final policymaking authority. "[W]hether a particular official has 'final policymaking authority' is a question of state law." *Praprotnik*, 485 U.S. at 124; see *Pembaur*, 475 U.S. at 483 (noting that "[a]uthority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority"); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) ("whether a particular official has 'final policymaking authority' is a question of *state law*.")) (quoting *Praprotnik*, 485 U.S. at 123); *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004) ("To determine whether a school district employee is a final policymaker, we look first to state law.").

Review of the City's Code of Ordinances reveals that the Fire Chief [*38] has not been delegated final policymaking authority regarding any practices for the City's Fire Department. Instead, the City Council is vested with exclusive final policymaking authority for the Fire Department. Rialto Ordinance Chapter 2.34 governs the City's Fire Department. Section 2.34.020 provides:

The fire department is a department within the framework of the city's administrative organization and is governed by state and federal laws pertaining thereto and the ordinances, *policies and procedures established by the city council.*

RIALTO, CAL., ORDINANCES § 2.34.020 (emphasis added). Section 2.34.030, which concerns the establishment of a Fire Chief, provides:

There is a chief of the fire

department who is subject to the general supervision of the city administrator and *with the approval of the city council*, solely responsible for the management and conduct of the department.

RIALTO, CAL., ORDINANCES § 2.34.030 (emphasis added). Finally, § 2.34.040 specifies the duties of the City's Fire Chief, providing in pertinent part as follows:

The duties of the fire chief include, but are not limited to, the following:

A. *To formulate and recommend policies and procedures* pertaining to the enforcement [*39] of rules and regulations for the government and operation of the fire department and pertaining to the prevention and control of fires; to administer such policies and procedures *when approved* and to conduct such activities for the city;

....

H. To carry out such other affairs and assignments *as he/she is assigned by the city council by resolution*, or to carry out other functions as described of the fire chief in other provisions of this code;

I. To be responsible for the general supervision and administration of the fire safety division.

RIALTO, CAL., ORDINANCES § 2.34.020 (emphasis added).

Thus, under these ordinances, even though Chief Wells had final authority over the fire department's day-to-day supervision and

administration, he was not authorized to establish city policy. In *Pembaur*, the Supreme Court distinguished final policymaking authority from final decisionmaking authority, observing that:

The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government [*40] policy respecting such activity before the municipality can be held liable.

Pembaur, 475 U.S. at 481-83 (citations and footnote omitted). To drive home this point, the Court offered the following illustration:

Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the

decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and [*41] could give rise to municipal liability.

Pembaur, 475 U.S. at 483 n.12.

The facts here mirror the *Pembaur* illustration. Chief Wells clearly had supervisory and final decisionmaking authority over the City's Fire Department. In that capacity, he signed the order requiring Delia to produce the rolls of insulation. The record, however, is devoid of any evidence that Chief Wells's authority included responsibility for establishing final departmental policy. To the contrary, the City's Code of Ordinances places policymaking authority for the fire department in the exclusive hands of the city council. See RIALTO, CAL., ORDINANCES §§ 2.34.020, 2.34.030. Thus, only the city council's decisions would provide a basis for city liability. No such decisions appear in the record. As the Supreme Court cautioned in *Praprotnik*, "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik*, 485 U.S. at 128.

Delia directs our attention to the fact that Chief Wells did not provide the city administrator with a copy of his order to Delia as evidence that he wielded final policymaking authority. This [*42] argument confuses final decisionmaking authority with final policymaking authority. While Chief Wells wielded the former, only the latter is sufficient to hold the City liable under § 1983 for his actions. See *Pembaur*, 475 U.S. at 483 & n.12. Indeed, if we were to accept the evidence in this case as establishing *Monell* liability, "the

result would be indistinguishable from respondeat superior liability." *Praprotnik*, 485 U.S. at 126 (cautioning that "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability."); see *Clouthier*, 591 F.3d at 1253 (noting that "[t]o hold cities liable under *section 1983* whenever policymakers fail to overrule the unconstitutional discretionary acts of subordinates would simply smuggle *respondeat superior* liability into *section 1983* law [creating an] end run around *Monell*") (quoting *Gillette*, 979 F.2d at 1348). Accordingly, we conclude that the evidence here fails to establish that Chief Wells had final policymaking authority.

Our conclusion is buttressed by cases from this court as well as our sister circuits. In *Gillette*, 979 F.2d 1342, this [*43] court held a fire chief's actions in firing the plaintiff could not constitute the basis for municipal liability because the fire chief was not a final policymaker. *Id.* at 1350. In arriving at this conclusion, this court observed that the fire chief's discretionary authority to hire and fire employees, standing alone, was "not sufficient to establish a basis for municipal liability." *Id.* This court also noted the fact that the "City Charter and ordinances grant authority to make City employment policy *only* to the City Manager and the City Council." *Id.* (emphasis added). In the absence of any evidence that the fire chief actually made policy, this court found that he was not a final policymaker. *Id.*; see *Collins v. City of San Diego*, 841 F.2d 337, 341-42 (9th Cir. 1988) (holding city was not liable for employment actions of police sergeant, even though police sergeant had "discretion to recommend hiring, firing, and discipline of employees", where he was not the city official responsible for establishing final departmental employment policy). The Eighth Circuit Court of Appeals reached the same conclusion in *Davison v. City of Minneapolis*, 490 F.3d 648, 661 (8th Cir. 2007). In *Davison*, [*44] the court held that there was insufficient

evidence to subject the city to *Monell* liability for the actions of its fire chief. *Id.* In reaching this conclusion, the court noted that although the fire chief had final decisionmaking authority regarding employment promotions, there was no evidence that he was also delegated with authority to make final municipal policy regarding employment practices. *Id.*; see *Bechtel v. City of Belton*, 250 F.3d 1157, 1161 (8th Cir. 2001) (holding that city fire chief whose authority over the operations of the fire department was subject to review by the city administrator "had no authority as the 'highest official responsible for setting policy.'").

Likewise, in *Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962 (4th Cir. 1995), the Fourth Circuit Court of Appeals arrived at the identical determination. In that case, a firefighter sued the City of Greensboro under § 1983, alleging retaliation by the fire chief because of the firefighter's union participation. *Id.* at 963-64. The fire chief had failed to promote him despite the fact that he had the highest score on the promotions list. *Id.* Examining relevant state and city [*45] laws, the Fourth Circuit found that "'final policymaking authority' over employer-employee relations in the City of Greensboro rests only with the City Council and the City Manager." *Id.* at 965-66. Accordingly, the court held that even though the fire chief may have had final authority to determine whom to promote, he was not authorized to adopt a "municipal policy embodying anti-union animus." *Id.*; see *Crowley v. Prince George's County*, 890 F.2d 683, 685-86 (4th Cir. 1989) (holding that although a county police chief was responsible for personnel decisions within the police department, he did not have "final policymaking authority" that would impute liability to the county under 42 U.S.C. § 1981). Similarly, in this case, there is a total absence of any policymaking authority delegated to

Chief Wells by the City's Code of Ordinances. Chief Wells's final decisionmaking authority regarding whether to order Delia to produce the rolls of insulation, standing alone, is insufficient to subject the City to liability for his action. Accordingly, we affirm the district court's grant of summary judgment in the City's favor.

IV. CONCLUSION

Upon *de novo* review, we hold that Delia's *Fourth Amendment* [*46] rights were violated when Chief Wells, Peel, and Bekker affected a warrantless "search" of Delia's home by ordering Delia to go into his home and bring out the rolls of insulation for inspection. Because Delia's actions were involuntary and occurred as a result of the direct threat of sanctions, we hold that the warrantless compelled search of Delia's home violated his rights under the *Fourth Amendment*. Nevertheless, we conclude that these defendants are entitled to qualified immunity because Delia has not established that this constitutional right was clearly established at the time of Chief Wells's order to Delia. We therefore affirm the district court's grant of summary judgment on their behalf. We further conclude that Filarsky is not entitled to qualified immunity as a private attorney. Thus, we reverse the district court's grant of summary judgment in his favor and remand for trial or further proceedings consistent with this opinion. Finally, we conclude that neither Chief Wells, nor any of the other individual defendants, had final policymaking authority for the City. Therefore, we affirm the district court's grant of summary judgment in favor of the City.

AFFIRMED IN PART, REVERSED [*47]
IN PART, AND REMANDED

Each party is to bear its own costs on appeal.