COA #44852-1-II

No. 87187-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GLENDA 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 APPELLANT

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Appellants incorporates the errors discussed in her Statement of Grounds for Direct Review. The issues are follows:

- Whether a new Fourth Amendment and Article I, section 7-based "exemption" from production exists,
- Whether a new "exemption" from production exists based on the PRA's definition of "privacy" in RCW 42.56.050,
- Whether a trial court can determine the factual issues surrounding whether particular records are "public records" (in this case, their use as work-related communications) without ever conducting an *in camera* review,
- Whether a public official's cell phone record—that are admittedly used for agency business—can never be a "public record" because the official pays the cell phone bills,
- Whether *in camera* review violates the Fourth Amendment and Article I, section 7 as argued by the agency in this case,
- Whether information voluntarily provided by an elected official to election officials and placed on a government internet site for a few years can be sealed in court records,
- Whether a trial court hearing a CR 12(b)(6) motion to dismiss can consider facts outside the complaint, stay discovery so the other side cannot respond to the facts outside the complaint, and find facts to be the opposite of those pleaded in the complaint, and
- Whether a trial court can allow discovery of text messages and text call histories under the Stored Communications Act, 18 U.S.C. §§ 2701-2712.

II. STATEMENT OF THE CASE

Appellant Glenda Nissen ("Nissen") is a Detective with the Pierce County Sheriff's Department ("Sheriff's Department") and a member of the Pierce County Deputy Sheriffs Independent Guild ("Guild"). CP 4-5, 14. She has been employed by the Sheriff's Department since 1997, and

was promoted to Detective since 2000. CP 14. Nissen has received excellent performance reviews during her tenure at the Sheriff's Department. CP 14. When the current prosecutor Mark Lindquist ran for election, Nissen did not support him as a candidate. CP 14. Lindquist was and is aware of Nissen's lack of support for him as a candidate and her opposition to his conduct as the Prosecutor. CP 14. When Lindquist was running for election as Prosecutor, he was not endorsed by the Guild. CP 5. Lindquist called Guild attorney Leann Paluck inquiring about Nissen's participation in the Guild's position not to endorse him. **Id.** He called Paluck from what he now describes as his personal cell phone number and is the number at which he had previously left for Paluck to return his calls. **Id.**

After being elected, Lindquist accused Nissen of sending a threatening letter to a deputy prosecutor on June 7, 2010. CP 67-72. The saliva on the envelope was determined to be male and did not match Nissen who is female (CP 70), Nissen passed a polygraph consistent with her affirmation she not send the threat and does not know who did (CP 70), she produced all of her personal cell phone records and cooperated fully with the investigation, and yet Lindquist tried to have her charged criminally as the sender of the letter and did not pursue any other suspect. CP 67-70. A number of witnesses have suspected Lindquist himself sent

the letter, as the DNA on the envelope was male, Lindquist is a published crime novelist who used the word "naughty" just as the threatening letter here uses, and who had a criminal character in his book send a letter to a prosecutor using misspellings as the author of the letter here used. CP 70-71. The Tacoma News Tribune ran an online news story on August 2, 2011, revealing that the investigation had never verified a suspect, but later someone believed to be Lindquist had that sentence removed from the printed version in the newspaper the following day. CP 68. Nissen contends Lindquist falsely targeted her as retaliation for her lack of support of him as a candidate and prosecutor. Nissen filed a whistleblower claim and a mediation was held to resolve the claim on July 26, 2011. CP 5-8, 22.

Lindquist has a County-provided cell phone that he chooses to use only rarely, preferring to use his "personal" cell phone for work business. CP 5-8, 24. Records of his County-provided cell phone were produced in a whistleblower complaint mediation on July 26, 2011, and showed less than 10 minutes of use a month of the County-provided cell phone. CP 6-8, 24. Lindquist was told by the County and mediator that the fact that he used his personal phone for agency business meant he would be required to produce his personal cell phone records. CP 8, 25. Ladenburg, acting as mediator in the mediation, informed Nissen and her counsel that this

was a "hard lesson for Lindquist to learn." CP 8, 23, 25. The County committed to produce the records of the personal cell phone that was used during that mediation (CP 6) and heavily redacted copies were eventually produced. CP 25, 32-36. The redacted bills shows nine work-related calls of 41 total minutes on August 3, 2011, thirteen calls of 72 total minutes on August 2, 2011, and ten calls of 46 total minutes on June 7, 2010. CP 25-26, 32-36. The production acknowledged the existence of at least 16 work related texts on August 2nd and 3rd, 2011, the dates when someone succeeded in having the Tacoma News Tribune omit from its news story the fact that no suspect had ever been verified regarding the June 2010 threat letter, but only the date time and partial phone numbers were produced, not the actual text message or sender or recipient. CP 26, 40, 63-64. The personal cell phone will be described as 253-861-XXX or the 861 phone. CP 15, 23. Lindquist has referred to this phone as the "Bat Phone." CP 15, 23.

Nissen settled her whistleblower case against Lindquist for payment by the County of nearly $40,000. CP 22-23, 37-38. Following the settlement, Lindquist and his office engaged in further conduct Nissen reported to Pierce County Human Resources as retaliatory misconduct. CP 23. Lindquist has called Nissen's attorney Joan Mell from his personal cell phone to discuss Nissen's case against him and his office. CP 23.

Mell produced copies of her own phone records showing the calls placed to her were from the 253-861-XXX number. CP 23, 28.

Nissen through her attorney Mell made a PRA request on August 3, 2011, asking for the following:

> any and all of Mark Lindquist's cellular telephone records for number 253-861-[redacted herein but stated in the records' request] or any other cellular telephone he uses to conduct his business including text messages from August 2, 2011.

CP 15. Nissen is seeking complete disclosure of records related to the phone Lindquist does use to support her retaliation claims. CP 8.

The County responded by letter on August 10, 2011, estimating it would be able to provide information regarding the request within one week. CP 15. Via letter dated August 17, 2011, the County wrote stating it would take an additional two weeks to "complete the process." CP 15. On August 31, 2011, the County wrote stating:

> We are waiting to receive records from telephone providers and do not know when they will arrive. We are hopeful that the information will be received within two (2) weeks, but will let you know if the information becomes available sooner.

CP 15. The first installment of records was produced on September 16, 2011. CP 16. On September 28, 2011, the County wrote stating:

> At this time, I am prepared to release the second and final installment of Mr. Lindquist's personal cell phone records of phone calls and text messages that may be work-related, Pages 5-8.

CP 16. The letter was accompanied by an exemption log which sought to exempt several items based solely on RCW 42.56.50, the definition of "invasion of Privacy", but not itself an exemption. CP 16. The County also stated as exemptions, but without any statutory references, "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. Redacted records were produced for this second installment.

On September 13, 2011, attorney Mell made a second PRA request on behalf of Nissen, asking for "Mark Lindquist's cellular telephone records for number 253-861-[redacted but listed in request] for June 7, [2010]. CP 17. (The original request had a typo stating the year as 2011, but the error was addressed through other communications with the records officer. Mell had requested these records previously but a series of communications had confused the request so Mell began with a fresh request on September 13, 2011. CP 17).

The County responded on September 19, 2011, with a two page exemption log again citing as the sole exemption the privacy definition RCW 42.56.050 and explanations such as non-public information,

personal phone calls, personal account invoice #, personal account payment due date, page # of personal account, detail of account holder and number, bars code, personal account control #, personal account copy # and personal account order #. CP 18. The County produced redacted records to Nissen.

Nissen filed suit on October 26, 2011, taking issue with the redaction of records in response to the August and September PRA requests and the lack of an appropriate exemption cited for the withholding. CP 13-21.

The County moved to strike all references in the court filings to the last four digits of Lindquist's personal cell phone number. Nissen objected citing the fact that Lindquist listed this cell phone number on his candidacy filing published on the Washington Secretary of State's website (CP 26, 41-42), and that the County identified it on a public record request log produced in response to a PRA request. CP 26, 39. On November 4, 2011, the Honorable Christine Pomeroy entered an order striking and sealing all references to Lindquist's cell phone number in any filings. CP 10-11.

Defendants filed a Motion to Dismiss relying on facts outside the Complaint. On November 23, 2011, the trial court ordered that all discovery was stayed pending Defendants' Motion to Dismiss. CP 44.

On December 16, 2011, Nissen filed a Motion to Exclude or in the Alternative to Continue the dismissal motion pursuant to CR 12(b) and CR 56(f) arguing Defendants dismissal motion cited material outside of the Complaint and not subject to judicial notice and discovery had been stayed preventing Nissen from responding. CP 114-124. On December 23, 2011, the trial court granted Pierce County's Motion to Dismiss with no findings. CP 258-259.

On January 26, 2012, Nissen field an Amended Motion for Reconsideration. CP 408- 442. On February 28, 2012, the Court denied the Motion for reconsideration with no findings. CP 447. This appeal followed.

III. LEGAL AUTHORITY AND ARGUMENT

A. This Case was Improperly Dismissed on a CR 12(b)(6) Motion.

The trial court here dismissed this PRA lawsuit on a CR 12(b)(6) Motion. This required the court to accept as true all facts pled in the Complaint. The trial court looked outside the Complaint and accepted declarations of the Defendants, while simultaneously staying discovery and denying Nissen the right to take discovery to probe the details of Defendants' offered evidence or to grant Nissen's CR 56(f) Motion for a continuance or to exclude Defendants' improper submissions. Because this was dismissed on a motion to dismiss, this Court must evaluate

whether the trial court was wrong to find the allegations in Nissen's Complaint failed to state a claim upon which relief could be granted. Although the trial court's order provides no findings whatsoever to support its decision, the Reports of Proceeding show the trial court wrongly presumed an official's work-related texts sent from a cell phone for which he personally pays or the phone records related to that phone can never be ordered disclosed or deemed public records solely because the official pays the bill for the phone. This holding is in direct contradiction of numerous holdings of the appellate courts under the PRA and not supported by any published PRA decision.

B. Consideration of Matters Outside the Complaint Convert the Motion to Dismiss into a Motion for Summary Judgment, Necessitating Continuance.

CR 12(b) provides that consideration of matters outside the complaint convert a motion to dismiss into a motion for summary judgment:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

Discovery was stayed in this matter to permit Defendant to bring the Motion to Dismiss. Defendant then asserted during oral argument that it

did not possess any of the requested records at the time of the request—and therefore that the Complaint should be dismissed. Det. Nissen should have been permitted to test these assertions before the court could take these facts into account, thereby converting the Motion to Dismiss into a motion for summary judgment. Because the trial court considered these facts, the Motion to Dismiss should have been continued pursuant to CR 12(b) and CR 56(f).

C. RCW 42.56.050 is Not a Stand-Alone Exemption to the PRA

Defendant claimed RCW 42.56.050, the definition of "privacy" in the PRA, as an exemption from disclosure. See CP 17 (Complaint ¶29) ("RCW 42.56.050 was the only exemption from disclosure claimed by the County for this request."). There simply is no generalized "privacy" exemption pursuant to RCW 42.56.050 or any other part of the PRA. While RCW 42.56.050 contains the test for establishing whether a right of privacy was violated, the test is to be applied when citing an exemption from disclosure, which RCW 42.56.050 is not. RCW 42.56.050 states:

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

> specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

This is not a statutory exemption from disclosure. Every exemption provided for in the PRA details certain records as being "exempt" from disclosure.[1] The term "exempt" is notably absent from RCW 42.56.050 because RCW 42.56.050 is not an exemption from disclosure. It is just a definition.

The Legislature has even gone so far as to specifically overturn a case holding that there is a generalized privacy exemption to the PRA. In 1986, the Supreme Court held there was a generalized "privacy" exemption from disclosure in **In re Rosier**, 105 Wn.2d 606, 609, 717 P.2d 1353 (1986) ("the public disclosure law provides a general personal privacy exemption when disclosure of the pertinent records would involve an unreasonable invasion of privacy" and "RCW [42.56] clearly provides such an exemption").

Following **Rosier**, the Legislature specifically overruled the Supreme Court and stated:

> The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court decision in "In Re Rosier," 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that ... agencies having public

[1] **See, e.g.**, RCW 42.56.230, .240, .250, .260, .270, .280, .290, .300, .310, .320, .330, .340, .350, .360, .370, .380, 390, .400, .410, .420, .430, .440, .450, .460, .470, .480 (listing records "exempt" from disclosure under PRA).

> records should rely only upon statutory exemptions or prohibitions for refusal to provide public records.

Laws of 1987, ch. 403, § 1, at 1546. The **PAWS** court recognized this requirement to cite a specific statutory exemption from disclosure and stated:

> Indeed, the Legislature's response to our decision in **In re Rosier**, supra, establishes that the Public Records Act contains no general "vital governmental functions" exemption. In Rosier, this court interpreted general language in a procedural section of the Act concerning personal privacy to create a general personal privacy exemption.

Progressive Animal Welfare Soc. v. University of Washington ("**PAWS**"), 125 Wn.2d 243, 258, 884 P.2d 592 (1994).[2]

There simply is no stand-alone privacy exemption based on the definition contained in 42.56.050. As the Attorney General's non-binding Model Rules on Public Records state:

> **There is no general "privacy" exemption**. Op. Att'y Gen. 12 (1988). However, a few specific exemptions incorporate privacy as one of the elements of the exemption. For example, personal information in agency employee files is exempt to the extent that disclosure would violate the employee's right to "privacy." RCW 42.56.210(1)(b). "Privacy" is then one of the elements, in addition to the others in RCW 42.56.210 (1)(b), that an agency or a third party resisting disclosure must prove.

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[2] Similarly, though it has not been claimed as an exemption in this case, RCW 42.56.070 is also not an exemption from disclosure. Defendants incorrectly argued below that it authorizes the deletion of information from a document without also citing an exemption from disclosure.

> "Privacy" is defined in RCW 42.56.050 as the disclosure of information that "(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." This is a two-part test requiring the party seeking to prevent disclosure to prove both elements.
>
> **Because "privacy" is not a stand-alone exemption, an agency cannot claim RCW 42.56.050 as an exemption.**

WAC 44-14-06002(2) (emphasis added) (internal footnotes and citations to previous codifications of statutes omitted).[3] **See also** PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE ACT AND OPEN PUBLIC MEETINGS ACT (Wash. State Bar Assoc. 2006) ("DESKBOOK") at 13-2[4] ("Instead of a stand-alone 'privacy' exemption, the PRA incorporates 'privacy' as one of the elements of other specific exemptions."); Op. Att'y Gen. 12 (1988) at 3 (after **Rosier**, "The Legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy. Agencies now

[3] While technically "non-binding," several recent court decisions have adopted other provisions of the Model Rules. **See, e.g., Beal v. City of Seattle,** 150 Wn. App. 865, 876 (2009) ("While the model rules are not binding on the [agency] we agree that they contain persuasive reasoning.") (footnote omitted); **O'Neill v. City of Shoreline,** 170 Wn.2d 138, 240 P.3d 1149; **Burt v. Dept. of Corrections,** 168 Wn.2d 828, 835, n.4 (2010); **Mechling v. City of Monroe**, 152 Wn. App. 830, 849 (2009); **Rental Housing Ass'n of Puget Sound v. City of Des Moines**, 165 Wn.2d 525, 539 & 541 (2009); **Soter v. Cowles Pub. Co.**, 162 Wn.2d 716, 753-4 (2007).

[4] This chapter was written by Michele Earl-Hubbard, an attorney at Allied Law Group. However, the WSBA DESKBOOK does not contain the mere personal opinions of the authors: "This Deskbook is balanced and objective by design. Chapter authors include a Court of Appeals judge, agency attorneys, and requestor attorneys .... Each chapter was edited by a person from the 'other side.' For example, a chapter written by a requestor attorney was edited by an agency attorney. Finally, the Washington State Bar Association provided the final edits, applying their neutrality and accuracy standards." DESKBOOK at 1-3.

must first identify a statutory provision wherein the Legislature evidenced its intent to exempt the record from inspection by the public.").

Tiberino v. Spokane County, the case primarily relied upon by Defendants below to establish that the privacy test under RCW 42.56.050 was a stand-alone exemption, does not even involve a claim of exemption pursuant to 42.56.050, but rather RCW 42.56.230(1).[5] **Tiberino v. Spokane County**, 103 Wn. App. 680, 688, 13 P.3d 1104 (2000). In **Tiberino**, the Spokane County withheld the content of emails based on RCW 42.56.230(1), a statutory exemption which exempts from disclosure "Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." By referring to the "right to privacy," RCW 42.56.230(1) is one of the statutory exemptions that employ the privacy test found in 42.56.050. Therefore, in analyzing whether the disclosure would "violate the right to privacy" as stated in RCW 42.56.230(1), the court employed the test now found in 42.56.050 that "A person's right to privacy is violated 'only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.'" **Tiberino**, 103 Wn. App. at 688. The **Tiberino** court employed the privacy test found in RCW 42.56.050 to

[5] This section was recodified and was formerly RCW 42.17.310(1)(b) at the time of the **Tiberino** decision.

determine whether a specific exemption, RCW 42.56.230(1), applied to the emails in question. This is the proper application of RCW 42.56.050—using the definition of "privacy" to determine if the privacy element of an exemption applies to the records at issue.

Defendants remarkably relied below on the dissenting opinion in **O'Neill** which mentions that disclosure "*should* be precluded pursuant to RCW 42.56.050, which prohibits a records requester from obtaining such a record if it 'would be highly offensive to a reasonable person.'" **O'Neill**, 170 Wn.2d at 155 (emphasis added). A decision by the State Supreme Court is binding on all lower courts in the state. **1000 Virginia Ltd. Partnership v. Vertecs Corp.**, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). However, dissenting opinions are not statements of the law, and this statement is nearly identical to what the Legislature reversed in the wake of **Rosier**.

Cases where the definition of "privacy" was not the basis for withholding a record and dissenting opinions of the Supreme Court do not establish RCW 42.56.050 as an exemption. There are several specific exemptions that incorporate the privacy test in RCW 42.56.050, but none were invoked by Defendants as a basis for withholding the 861 number records.

Further, Defendants ignore the extent of the redactions in their "privacy" argument, analogizing the permitted exemption of the sender and recipient of emails to phone numbers here. Defendants' redactions include the time and duration of calls (among other items). Defendants then argued that knowing the amount of time spent on personal emails was important in **Tiberino** and not important here because in **Tiberino** there was no dispute that the records were subject to the PRA. However, as **Tiberino** held, a public official's time spent on private matters during work is clearly "of legitimate concern to the public" and therefore not within the definition of "privacy." **Tiberino**, 103 Wn. App. at 691. Defendants' attempt to conflate the privacy test with whether the records at issue are a "public record" is simply misleading. Whether a record is a "public record" and therefore subject to potential disclosure under the PRA is a wholly separate question from whether an exemption applies. Therefore, Defendants' argument that the amount of time Lindquist spends on personal matters is not of legitimate concern to the public because there is a dispute as to whether these records are "public records" was baseless and could not support the trial court's ruling.

D. Failure to Claim an Exemption is a Violation of the PRA.

Defendants are correct that an initial claim of exemption does not preclude the claim of a differing, valid, exemption following its initial response. However, failure to claim **any** exemption from disclosure is a violation of the PRA on its face. RCW 42.56.070 only allows withholding based on specific statutory exemptions:

> Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, **unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure** of specific information or records.

(emphasis added). **See e.g. PAWS**, 125 Wn.2d at 260-61 (records or portions of records withheld must fall within a specific exemption from disclosure); **Citizens for Fair Share v. State Dept. of Corrections**, 117 Wn. App. 411, 431, 72 P.3d 206 (2003) (finding agency violated the PRA by failing to cite an exemption in its initial response and stating: "[a]lthough the Department now cites a legal exemption for personal addresses, it did not recite this exemption in response to Citizens' request for offender addresses."). **See also Rental Housing Ass'n of Puget Sound v. City of Des Moines** ("**RHA**"), 165 Wn.2d 525, 538, 199 P.3d 393 (2009) ("Indeed, RCW 42.56.210(3) requires identification of a specific exemption and an explanation of how it applies to the individual agency record."); **see also Newman v. King County**, 133 Wn.2d 565,

571, 947 P.2d 712 (1997) ("Once documents are determined to be within the scope of the [PRA], disclosure is required unless a specific statutory exemption is applicable."). If an agency withholds information and does not cite an exemption from disclosure, it is in violation of the PRA.

In **Citizens for Fair Share**, the requestor made a public records request seeking "offenders' addresses, addresses of current reporting facilities, Department policies for managing political opposition to siting of correctional facilities, and the effect of a [CJC] on crime rates and property values." 117 Wn. App. at 418. The agency responded to most of the request, but did not provide any of the addresses of offenders, nor did it provide any claim of exemption. **Id**. at 430-31. The requestors brought a claim alleging multiple causes of action, including one under the PRA. **Id**. at 418-19. The trial court granted summary judgment in favor of the agency. **Id**. at 419.

On appeal, the requestors asserted that the failure to cite *any* exemption in withholding the public records was a violation of the PRA. **Id**. at 430. The agency attempted to argue that the home addresses sought by Citizens were exempt under RCW 42.56.230 (then RCW 42.17.310(1)(a)). **Id**. at 431.

The Court of Appeals rejected the agency's argument, and reversed the trial court on this issue, finding conclusive the fact that "[a]lthough the

Department now cites a legal exemption for personal addresses, it did not recite this exemption in response to [the requestors'] request for offender addresses." **Id**. Specifically, the appellate court in **Citizens for Fair Share** refused to consider whether or not the new exemption (presumably cited only after the cause of action was filed) was actually applicable. **Id**. The Court of Appeals concluded that the fact that the agency did not cite any exemption at all in its response to the request was by itself a violation of the PRA: "[T]he Department nevertheless violated the [PRA] by failing to name and recite to [the requestors] its justification for withholding the addresses." **Id**. Because failing to cite any exemption at all is a per se violation of the PRA, the appellate court found that the trial court had erred in granting the defendant's motion for summary judgment on that claim. **Id**.

Defendants' argument here that they can later cite an applicable exemption does not alter the fact that they did not below cite any exemption from disclosure in response to the request. An agency must cite at least one (valid) exemption when it withholds a record. RCW 42.56.210(3). An agency cannot refuse to cite an exemption and then, after a suit is filed, or on appeal, cite one for the first time and escape PRA liability. The violation of the PRA occurs when the agency fails to cite an exemption in response to the request, not whether it eventually cites one

after the litigation had been filed. As shown above, RCW 42.56.050, Defendants' only alleged "exemption" is not an exemption at all—because of that fact, citation to it is directly analogous to citing nothing at all, as in **Citizens for Fair Share**. A valid exemption must be cited in response to a request. Defendant did not do so and thus violated the PRA just like in **Citizens for Fair Share**.

Further, in **RHA** the Supreme Court rejected the City of Des Moines' attempt to argue that the requirement to provide a withholding index describing the justification for withholding records "is at odds with prior case law establishing that an agency may argue new grounds for exemption at a PRA show cause hearing even if previously-stated reasons for refusing disclosure are invalid." **RHA**., 165 Wn.2d at 536-37. In rejecting this argument, the Supreme Court "emphasized the need for particularity in the identification of records withheld and exemptions claimed." **Id**. at 537 (citing **Progressive Animal Welfare Soc. v. University of Washington** ("**PAWS II**"), 125 Wn.2d 243, 884 P.2d 592 (1994)). A failure to cite an exemption in the first instance is a violation of the PRA. As described above, Defendant did not claim an exemption to the PRA.

Defendants argued that Section .050 was an exemption in its CR 12(b)(6) Motion. As a threshold matter, a 12(b)(6) motion is not the

appropriate vehicle to argue whether an exemption applies to a record.[6] Again, Defendant was required to show that the Complaint did not bring a cognizable claim; whether an exemption applies to a record plays no part in this analysis. Defendant argued that its ability to claim different exemptions through a show cause hearing means it need not cite an exemption until the show cause hearing. While it is true that an agency can cite *additional* or different exemptions at a show cause hearing, an agency still must cite at least one valid exemption in response to the request.

Additional support for this proposition comes from **Mechling v. Monroe**, 152 Wn. App. 830, 222 P.3d 808 (2009). In that case, the City of Monroe failed to claim a specific exemption for its redactions of portions of certain records, claiming that the information contained in redacted portions of emails "does not meet definition of public record." 152 Wn. App. at 839. The Court of Appeals reversed the trial court's grant of summary judgment in favor of the City because "does not meet the definition of public record" is not an exemption from disclosure, and remanded for a determination of whether an applicable exemption applied

[6] Though, as discussed below, Defendant has not claimed an exemption from disclosure. The trial court could determine *whether* RCW 42.56.050 is an exemption at all in the context of a Motion to Dismiss, but it should not determine the merits of the applicability to an exemption to a record in question—because the records in question were not before the Court. The court had no way of evaluating whether the records at issue were subject to an exemption without the court seeing the records.

to the records in question. **Id.** at 855. **Mechling** does not stand for the proposition that a requestor may not sue based on a claimed exemption, or lack thereof, simply because a differing exemption, or an exemption at all, may apply. If this were true, a requestor could never sue for access to a withheld or reacted record until the agency had claimed all exemptions. The **RHA** court has rejected this argument.

Not only is failure to cite an exemption a violation of the PRA, but failure to adequately explain how that exemption would apply to the records in question is a violation as well. **See Sanders v. State**, 169 Wn.2d 827, 846, 240 P.3d 120 (2010) ("Claimed exemptions cannot be vetted for validity if they are unexplained. Thus, [the agency's] failure to explain its claimed exemptions violated the PRA."). Because Defendant failed to claim an exemption from the PRA, Defendant necessarily failed to explain how an exemption applied to the records in question and thereby violated the PRA. Thus granting of the motion to dismiss by the trial court was error.

E. Personally-Paid For Communication Devices Are Not Per Se Shielded from the PRA

The heart of Defendant's CR 12(b)(6) motion is that "personal" devices are never subject to disclosure—this has been squarely rejected by the Supreme Court. Once a public employee begins using personal

methods of communication for public purposes, those may become subject to public disclosure. Again, "If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined." **O'Neill**, 170 Wn.2d at 150.

In **O'Neill**, the Court ruled that an email as well as its associated metadata, located on a personal computer of a City councilmember and received at a personal email address, was subject to disclosure (unless an exemption applied) pursuant to the PRA because the councilmember had used her personal computer to conduct city business. Lindquist similarly uses his 861 number to "make work-related phone calls pertaining to his employment with the County." CP 15 (Complaint ¶16). This on its own was a sufficient basis for the court to deny Defendant's dismissal motion.

F. The PRA Must be Construed Broadly in Favor of Disclosure

The Supreme Court of Washington interprets the PRA as "'a strongly worded mandate for broad disclosure of public records.'" **Amren v. City of Kalama**, 131 Wn.2d 25, 31, 929 P.2d 389 (1997) (quoting **PAWS II**, 125 Wn.2d at 251). Additionally, the reviewing court is to liberally construe the PRA's disclosure provisions, and interpret exemptions narrowly. The PRA's instructions to a court on the interpretation of the Act are unusually strong:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exceptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

RCW 42.56.030; **see also Hartman v. Washington State Game Comm'n**, 85 Wn.2d 176, 179, 532 P.2d 614 (1975) ("Where the legislature prefaces an enactment with a statement of purpose... that declaration... serves as an important guide in understanding the intended effect of operative sections.") (citation omitted); **PAWS II**, 125 Wn.2d at 260 ("[the Legislature took] the trouble to repeat three times that exemptions under the Public Records Act should be construed narrowly."); WAC 44-14-01003 ("The [PRA] emphasizes three separate times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records."). Strict compliance with the disclosure provisions of the PRA is required—substantial compliance is insufficient. **See Zink v. City of Mesa**, 140 Wn. App. 328, 340, 166 P.3d 738, 747 (2007) (holding trial court erred when it concluded substantial compliance with PDA was sufficient).

G. The 861 Phone Records Are a "Writing" and a "Public Record"

Defendant argued that the 861 phone records and text messages were not a "writing" and that they were not "public records." However, "writing" is defined extremely broadly under the Washington PRA:

> "Writing" means handwriting, typewriting, printing, photostating, photographing, and **every other means of recording any form of communication** or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including **existing data compilations from which information may be obtained or translated.**

RCW 42.56.030(3) (emphasis added). Phone records and text messages are "writings." This term must be liberally construed in favor of finding the records are a "public record." **See Yakima Newspapers, Inc. v. City of Yakima**, 77 Wn. App. 319, 323, 890 P.2d 544 (1995) ("public record" defined "broadly"); **O'Neill**, 170 Wn.2d. at 147, ("a very broad statute defining public records as nearly any conceivable government record related to the conduct of government is liberally construed in Washington.").

Public records are any record containing information relating to the conduct of government, owned, used, retained or prepared by any state or local agency regardless of physical form or characteristics. RCW 42.56.030(2).

This case deals with a request for phone records, details of phone calls, and text messages. The phone from which the messages were sent or received and the calls placed was regularly used by the Prosecutor for work-related calls. He intentionally used this personal cell phone for these work-related calls and texts instead of his County-provided phone. He and the County have admitted that several work-related calls and texts occurred on the private cell phone during the dates at issue.

Lindquist obviously "owned" all of the responsive records. He used all of them. He prepared the text messages he sent or forwarded to others. And he "retained" many of the records, or should have, consistent with retention laws. Further, any record Lindquist no longer retained he could clearly obtain from his service provider as those records were at all times within his custody or control. His provider has secured the text messages L:indwuistb claims to have deleted and stands ready with his permission to release them to Nissen or others. Lindquist is an agent of the County and as the records at issue related to his intentional use of his personal cell phone for work-related business and work-related texts he sent or received, these records contain information related to the conduct of government. Here, both the specifics of the text messages sent or received, but also showing how much of his paid on-the-clock time the

Prosecutor was spending on personal calls, as well as work-related calls, via this cell phone.

The County also has now used and retained most of the responsive records. It obtained copies of the phone bills and performed redactions and still retains those records. It analyzed the data and determined what constituted a public record and what allegedly did not. It appears to have access to the text messages, if not outright access now.

The Washington Supreme Court warned against allowing public officials to conduct government business on personally-paid devices without being subject to the PRA: "If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined." **O'Neill v. City of Shoreline**, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010).

Here, the court should have accepted conclusively (at that point) that "Mr. Lindquist uses this cellular phone to make work-related phone calls pertaining to his employment with the County." CP 15 (Complaint ¶16). Therefore, the 861 phone records are "public records" potentially subject to disclosure. The next question is whether those public records can never—under any circumstances—be disclosed. Defendant did not and cannot prove that.

Defendant below pointed to a Colorado case on cell phone records, **Denver Post Corp. v. Ritter**, 255 P.3d 1083 (Col. 2011), to argue that the Washington cell phone records at issue were not "public records." First, Colorado's definition of "public record" differs significantly from Washington's. Unlike Washington's definition, Colorado's definition of public records is limited to only those records "for use in the exercise of functions required or authorized by law or in administrative rule or involving the receipt or expenditure of public funds." Colo. Rev. Stat. §24-72-202(6)(a)(I). Washington's definition of "public record" has no such restriction. **Compare** RCW 42.56.030(2) & (3). The restrictions in Colorado's definition are important here because that state's definition only applies to the records involving the "receipt or expenditure of public funds." **Id**. If Lindquist pays for the 861 phone without public funds, then under Colorado's definition the records would not seem to be "public records"—but the Washington PRA applies, not Colorado's. Washington's PRA does not require a "public record" to involve the receipt or expenditure of public funds. Also, Colorado also does not have the **O'Neill** decision which holds that in Washington, "If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined." **O'Neill**, 170 Wn.2d at 150.

Next Defendant argued that the 861 phone records are not "public records" because, among other things, they were not "used" by the County. However, the trial court was required to accept the facts pled in the Complaint that "Mr. Lindquist uses this cellular phone to make work-related phone calls pertaining to his employment with the County." CP 15 (Complaint ¶16 (emphasis added)). Therefore, because Lindquist—a high-ranking County official—was conducting County business on the 861 phone, the County "used" the 861 phone. Nissen further provided ample evidence proving Lindquist's use of the cell phone for County business, as the County's production of the redacted phone records also established.

1. Under the PRA, Lindquist is the "Office"

Lindquist argued the omission of the term "officer" from the definition of "agency" in the PRA means he is not an "agency" subject to the Act. Lindquist wants to separate himself from his office so that he can destroy and not produce text messages stored with the data service provider he claims to have hired. The PRA and the Public Records Retention Act do not afford him that privilege.

The PRA defines an "agency" to include every county or "any office". The question presented is whether "any office" includes within its meaning the officer elected to the office. Nissen contends the two are one

in the same when the official concedes his communications relate to government conduct.

Lindquist as the elected official is the office of the prosecuting attorney. A municipal corporation by necessity acts through its officers. **Diaz v. Washington State Migrant Council**, 165 Wn. App. 59, 265 P.3d 956 (2011) (The failure of a director to disclose personal information within his control is a failure to disclose by the corporation). The personal knowledge of an officer is imputed to the entity. **Id**. at 967. The alleged fact that Lindquist pays for his phone does not mitigate the public nature of his conduct, particularly where, as here, he swears under oath that at least sixteen text messages relate to the conduct of government, or that phone calls relate to the conduct of government. **See** CP 81. The facts presented by the County below show that an official may act in an official capacity even if the official is using technology that he pays for himself.

The PRA does not define the term "office." The rules of statutory construction permit reference to the dictionary definition to ascertain the plain and ordinary meaning of a term. **Peacock v. Public Disclosure Com'n**, 84 Wn. App. 282, 928 P.2d 427 (1996). By dictionary definition, the term "office" encompasses the official: "Employment or position as an official" or "a position of duty, trust, or authority, esp. in the government." The Random House Dictionary of the English Language

the unabridged version. (1966). The term "office" is used in the state constitution in the context of the prosecuting attorney's office. WASH. CONST. Art. 11 §5 authorizes the legislature to provide for the election of a person to carry out the duties of the county prosecutor's office.

In addition to the constitutional reference there are statutory references that equate the term "office" to the elected prosecutor. Upon election the prosecutor must swear under oath to "faithfully and impartially discharge the duties of his or her office." RCW 36.16.040. The prosecuting attorney shall furnish a bond of five thousand dollars before he enters upon the duties of his office. RCW 36.16.050. Once elected and sworn in the official assumes the office. **Wood v. Battle Ground School Dist.**, 107 Wn. App. 550, 561, 27 P.3d 1208 (2001). The elected prosecutor performs the duties of the office, and may employ deputies or other employees where the duties of the office are greater than can be performed by the person elected to fill the office. RCW 36.116.070.

The term "office" contemplates acts committed by a public officer in his official capacity committed during the official's term of office. **In re Recall of Pearsall-Stipek**, 141 Wn. 2d 756, 769, 10 P.3d 1034 (2000).[7]

[7] Additionally, "All county officers shall complete the business of their offices..." (RCW 36.16.120); an official obligates the county to liability for his actions (RCW 4.96.010); and, the County indemnifies the officer (RCW 4.96.041).

The prosecutor appears for and represents the county in all civil proceedings. RCW 36.27.020. The prosecutor has the obligation to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law. RCW 36.27.020. The prosecutor may not engage in retaliatory action which includes hostile actions against an employee that are encouraged by an official. RCW 42.41.020. The manner in which Lindquist is or is not carrying out his official duties is reflected in the content of the text messages requested in this action.

A privacy interest generally does not arise where the communications concern something that is a subject of legitimate news interest. **City of San Diego, Cal. v. Roe**, 543 U.S. 77, 125 S. Ct. 521 (2004). A subject that is of general interest and of value and concern to the public at the time of publication is not private. 543 U.S. at 83-84. Here, the texts purportedly relate to news coverage of the Nissen settlement and are the content of exchanges between Lindquist and other public employees.

The manner in which an elected official charged with managing a vital governmental agency discharges his responsibilities concerns the public. Here, Lindquist swears under oath that at least sixteen text messages from August 2nd relate to the conduct of government. CP 81. ("I authorized the release of records of calls that were related to the

conduct of government or the performance of any governmental or proprietary function").

Lindquist's response to the August 3rd request for his text messages shows various texts back and forth from the "861" number, but there is no way to know why Lindquist identifies these texts as related to the conduct of government. However, the texts between the "861" number and the "330" number are text exchanges between phones of Lindquist and Ed Troyer from Pierce County Sheriff's Department. **See** CP 366-68 (Troyer Phone Records). Troyer is the employee that Adam Lynn from the News Tribune consulted about Lindquist's requested redaction from Lynn's story on Nissen's settlement that was first posted on August 2nd, with the altered print version in the paper on August 3rd. **See** CP 355-62 (Lynn Article "Last Updated August 3rd, 2011 10:35 AM").

Nissen believes the content will evidence Lindquist's retaliatory actions, and likely relates at least in part to Lindquist's use of County employees to publicly tarnish her reputation and credibility as a law enforcement officer. The text content could be direct evidence that Lindquist retaliated in violation of his statutory duties set forth at RCW 42.41.020. Nissen and the public suffer if these texts are hidden from the public. Further, there may be other texts that relate to the conduct of

government, but Nissen was denied discovery and an in camera review. Unless the text content is reviewed in camera the content of the text messages remains unknown.

The PRA establishes the criteria for analyzing the public nature of any record. Whether the record was paid for from the private funds of the elected official is not determinative. Lindquist must produce any data such as a text message that he prepared, owned, or used that relates to the conduct of government or performance of a governmental function.

a) Lindquist "Prepared" the Text Messages

We know from the records Lindquist produced and from his declaration that represents the texts relate to the conduct of government that Lindquist likely prepared the text messages from his "861" number. Lindquist apparently deleted the text from his blackberry, where he can view his content, after it was requested by Nissen, but his service provider stored the content that he prepared and other employees sent to him. Data compilations that "may be obtained" are considered a public record when prepared by the office or official. RCW 42.56.010. We know at present that Lindquist may obtain the text messages that he prepared.

Lindquist may easily obtain the text content from his service provider by signing the consent form and returning it to his provider. In fact, Troyer or any of the other recipients of the texts could obtain the

content from Lindquist's service provider. The SCA authorizes his carrier to disclose text content to the sender and to the recipient or their agents with their consent. 18 U.S.C. §2702(b). Lindquist and the County have an affirmative duty to ensure that the texts related to government conduct are not destroyed. RCW 40.14.070.

The text content prepared by Lindquist or other county employees is public record because employees prepared the data while performing in an official capacity and for government purposes according to Lindquist. The data is a public record that should be produced under the PRA.

b) Lindquist and the Other Employees "Used" the Texts

Data that is "used" is a public record. RCW 42.56.010 (3). Lindquist used his texts to communicate his official directives, which meets the test for a public record under the PRA. The recipient employees presumably used Lindquist's texts to act on his official directives. Lindquist used the recipient's texts to him to ensure his directives were carried out. Thus, the texts deleted from Lindquist's blackberry and stored with his provider are public records subject to disclosure.

c) Lindquist "Owns" The Text Messages

Data owned by an agency is a public record. RCW 42.56.010(3). Lindquist apparently chooses to use a blackberry he purchases and pays for to transact his official business, and generated text messages using a

service he buys. By contract, he owns text content held by his service provider. He is the customer or subscriber authorized to obtained the texts, thus, he "owns" the texts.

The issue then is whether he has a separate individual ownership interest from that of his office to those texts that relate to government functions simply because he pays the bill. Payment for the service should not be the determinative factor. A source of funds criteria creates a notable disparate impact favoring highly compensated elected officials who can pay for their own service. The wealthy elected official who should be subject to greater public scrutiny can buy privacy and hide the nature and content of his office.[8] That is precisely the harm caused here by ruling Lindquist has a protected privacy interest in text messages when he is the elected official who has voluntarily sent and received texts that relate to government activity on a phone he buys. In this case where there is no dispute that the content relates to the conduct of government, Lindquist's ownership may be imputed to the County. **See Diaz**, 165 Wn. App. 59, 265 P.3d at 967.

H. Discovery Was Necessary to Determine the Factual Issues in The Case Before Consideration of the County's Motion

[8] It is now apparent that Mr. Lindquist *solely* uses his "861" phone for County business, and does not use his County-paid device at all. **See** CP 374-402.

The trial court was reviewing a CR 12(b)(6) motion so an ultimate determination of the facts was not before the court as the facts in the Complaint were to be taken as established. However, Defendant's own arguments underscored how the facts that Defendant needed to prevail were still largely unknown. For example, Defendant correctly noted that a key component of whether a record is a "public record" is whether it contains "information relating to the conduct of government ..." The court did not view the records in camera and could not know if the actual records at issue contain "information relating to the conduct of government." All the court had before it was the Complaint, and the Complaint showed that the phone records and texts were "work-related." The trial court erred in staying discovery of Nissen and yet ruling on the CR 12(b)(6) Motion of Defendants asserting facts outside the Complaint.

I. Defendant Possessed at Least Some Records When Requested.

Defendant argued below it never had the records when they were requested. However, Defendant had the records, and reviewed and redacted them, and then provided some of them to Nissen in redacted form. CP 16 (Complaint ¶¶23-24.) An agency cannot provide redacted records and then claim—after being sued—that it never possessed the records. It possessed and provided the records, and records were clearly in

the possession of Defendant on September 13, 2011, when Nissen made her second request.

Moreover, Defendant is attempting to impose a very narrow definition of "possess." Under the PRA, records are "public records" even if not possessed by the agency. In **Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1**, 138 Wn.2d 950 (1999), the records at issue where in possession of a North Carolina vendor but the Washington agency "used" them. The Supreme Court held, "an agency may have used a document not in its possession ..." and held that the records in North Carolina were "public records." **Id**. at 960.

In the CR 12(b)(6) motion below, which must address solely the sufficiency of the Complaint to state a cause of action, Defendant invited the court to take "judicial notice" of the "fact" that Defendant did not possess some of the records. This the court should not have done as a CR 12(b)(6) motion is limited to the facts in the Complaint.[9]

Using the (improperly) presumed "fact" that Defendant did not possess some of the records, Defendant went on to argue that in **Concerned Ratepayers**, the records at issue were known to have been "used" by the agency and that is not known in this case. However, the use of the records was known for the purposes of the CR 12(b)(6) motion.

[9] See also Plaintiff's Motion for Continuance Pursuant to CR 56(f), CP 114-123..

See CP 16 (Complaint ¶¶23-24 (Defendant had paper records and provided redacted copies)). The ultimate determination of which records Defendant possessed or used, and when, must be determined through discovery, not presumed in favor of Defendant in the context of a CR 12(b)(6) motion.

J. Yacobellis Does Not Render the 861 Records To Be Non-"Public Records"

Defendant argued that **Yacobellis v. City of Bellingham**, 55 Wn. App. 706, 780 P.2d 272 (1989) held that private appointment calendars and telephone messages are not public records. However, this is pure dicta. The issue decided in **Yacobellis** was whether a municipal golf course survey was a public record subject to disclosure. **Id**. at 708 ("Yacobellis sought disclosure of all information concerning the golf survey ..."). The dicta about appointment calendars cited by Defendant described the agency's position in the case. **Id**. at 711. **Yacobellis** held that the municipal golf course survey in question was, indeed, a "public record." **Id**. at 714. Turning to the dicta cited by Defendants, the **Yacobellis** court said, in passing, that federal Freedom of Information Act cases hold personal notes and telephone messages are not public records (presumably under the federal, not Washington, definition of "public records") because, in part, they are "not under agency control ...." **Id**. at

712. However, the 861 phone records are now under Defendant's control—Defendant has them and has provided a redacted version of them. CP 16 (Complaint ¶¶23-24). Turning back to Washington law, Defendant has yet to refute the fact that the Washington definition of "public record" must be broadly construed. **See Yakima Newspapers**, 77 Wn. App. at 323 ("public record" defined "broadly"); **O'Neill**, 170 Wn.2d. at 147; **Ames**, 71 Wn. App. at 291 (same).

K. Defendant's Reliance on Federal Statute, Article 1§7 of the State Constitution and the Fourth Amendment are Misplaced.

Defendant possesses many of the records in question and produced them (in redacted format) in response to public records requests. Putting aside the problems with Defendant's arguments that access to these records is precluded by the Stored Communications Act, Article 1 §7, and the Fourth Amendment ignores the fact that Defendant actually possess the records, and such possession was obtained through the Prosecutor's Office, headed by the individual whose records are in question. Defendant need not forcibly obtain Lindquist's records, because it already has them.[10] No forcible taking of the records is required.

[10] Defendant' position was frankly bizarre considering Pierce County was at the time responding to a public records request from one of its own deputy prosecutors for the "personal" cellular phone records of Nissen.

The Stored Communications Act allows for service providers to provide records pertaining to an account holder directly to a government entity with the consent of the account holder. 18 U.S.C. §2703(c)(1)(C). Also, in **O'Neill**, the deputy mayor of the City of Shoreline allowed the city access to her computer to search for an email that she had accessed from her personal computer relating to government business. **O'Neill**, 170 Wn.2d. at 150. The Supreme Court stated: "There is no doubt here that the relevant e-mail itself is a public record." **Id**. at 147-48. However, the Supreme Court noted that when allowing the city to locate the email on the deputy mayor's computer, that "this inspection is appropriate only because [the deputy mayor] used her personal computer for city business," and did not address whether the city could inspect absent her consent. **Id**. at 150.

Just as in **O'Neill** where the deputy mayor of a city provided her computer to the city to locate an email, Lindquist authorized the release of records of calls and texts that he deemed related to the conduct of government. The County possessed the 861 records because Lindquist authorized their release. Also as in **O'Neill**, the Court here need not reach the issue of what would occur if Lindquist had not given consent to obtaining the records in question because he consented. Though Lindquist obviously objects to the production of certain portions of records to Det.

Nissen, this is a wholly separate issue from whether the County can obtain the records under the Stored Communications Act. The Complaint shows that the County possessed the records, and there are no facts in the Complaint—the only source of facts the trial court was to consider—that the County no longer possess the records.[11]

Finally, obtaining the text content of messages from the phone provider is a last resort which would not have to occur barring Lindquist's deletion of his text messages that, according to the facts in the Complaint, which must be accepted, are "work-related" and are thus "public records." Text messages would not have to be obtained from the phone company if Lindquist had not deleted them. Some of the text messages at issue were created one day prior to the request for the records. (August 3, 2011, request for August 2, 2011 records.) So, unless Lindquist immediately deletes his text messages on a continuous basis, he would have possessed them. The Complaint does not indicate that he instantly deleted the text messages—which would be a topic for discovery. Public officials should not be able to immediately delete their public communications and then attempt to use the protections of the SCA to make it impossible to obtain those records.

[11] Even if the County does not possess the records now, it "used" them and, like the agency in **Concerned Ratepayers**, must obtain the records.

For the trial court to grant Defendant's Motion to Dismiss, Defendant had to demonstrate that none of the records at issue could ever—under any circumstances—be subject to disclosure. Defendant did not meet that burden. Any doubt should have been resolved in favor of Det. Nissen in light of the PRA's extremely broad mandate of disclosure and it instruction that "[i]n the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." RCW 42.56.030.

L. Many Items Redacted are Clearly Not Exempt From Disclosure

Defendant below redacted, among other items, the time and duration of nearly all phone calls it deemed to be private. Even accepting Defendant's argument that the phone calls at issue are "private," there is no conceivable argument that these could be exempt from disclosure as being "private." For example, records showing an individual was on the phone for a "work-related" call for seven minutes could hardly be considered "highly offensive to a reasonable person," which is one of the elements in the RCW 42.56.050 definition of "privacy." This Response to a CR 12(b)(6) motion is not the place to exhaustively describe all the exemptions that do not apply to the 861 phone records since the issue is merely whether no facts in the Complaint or even a hypothetical set based

on the facts in the Complaint could ever state a claim. Applicability of exemptions was also not at issue yet in the case because Defendant had not claimed any (RCW 42.56.050 not being a valid exemption).

M. Disclosure of Contested Items Will Not Constitute an Invasion of Privacy

Defendant's state and federal constitutional arguments require a finding that Lindquist has a privacy interest in the 861 phone records. Lindquist has no constitutional privacy interest in the 861 phone records.

At the outset, Defendants—the County and Prosecutor's Office—have no standing to assert the privacy interests of Lindquist, who has intervened in this case as a private person. **See generally**, **State v. Walker**, 136 Wn.2d 678, 685, 965 P.2d 1079 (1998) (only person whose privacy interests are at stake may claim privacy right under state and federal constitutions).

Aside from Defendant's lack of standing to make the constitutional arguments, disclosure of the contested items in this case would not constitute an invasion of privacy. First, Lindquist provided some of the 861 phone records (the exact extent of which remains unknown absent discovery) to Defendant. He cannot now claim an unqualified privacy interest in something he voluntary provided.

Specifically, Lindquist cannot prove it is "highly offensive to a reasonable person" to allow the re-disclosure of records that he provided to his employer. The fact that Defendant redacted the 861 phone records does not change this. Defendant is arguing that disclosure of any privately-paid cell phone records is always an unconstitutional invasion of privacy—not just the release of the portions of the records that have been redacted here. Defendant is categorical: *all* privately-paid cell phone records.

Second, the disclosure of portions of the 861 phone records redacted cannot possibly be "highly offensive to a reasonable person," one of the elements of the RCW 42.56.050 definition of "privacy." The fact that Lindquist spoke on the phone for a given period of time cannot conceivably be considered private—no matter who was on the other end of the phone call. Again, this lawsuit does not seek items such as the phone number of Lindquist's family. Therefore, for example, if one of the phone calls happened to be to a family member, but the family member's phone number was removed, there could be no argument that the duration of the call is private. Also, the amount of time Lindquist spends on purely private calls while on-the-clock as a paid government official cannot meet the second prong of the definition of "privacy" in RCW 42.56.050 because disclosure of this information is "of legitimate concern to the public"

because it shows how much of the time a public employee is not performing his public duties. See Tiberino, 103 Wn. App. at 691.

N. Nissen is Entitled to an Award of Fees, Costs and Penalties under the PRA and as a Prevailing Party in this Appeal.

RCW 42.56.550(4) of the PRA provides:

> *Any person* who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action [.]

(Emphasis added). Washington courts recognize that "[s]trict enforcement of this provision discourages improper denial of access to public records." Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005) (citation omitted). Moreover, "permitting a liberal recovery of costs" for a requestor in a PRA enforcement action, "is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access public records." Am. Civil Liberties Union of Washington ("ACLU") v. Blaine Sch. Dist. No. 503, 95 Wn. App. 106, 115, 975 P.2d 536 (1999); see also WAC 44-14-08004(7) ("The purpose of [the PRA's] attorneys' fees, costs and daily penalties provisions is to reimburse the requester for vindicating the public's right to obtain public records, to make it financially feasible for

requestors to do so, and to deter agencies from improperly withholding records.") (citing **ACLU**).

Previous case law is clear that a person that loses at trial in a PRA action, but prevails on the principal issue on appeal is entitled to attorneys' fees, costs, and mandatory penalties. **See O'Connor v. Washington State Dept. of Social and Health Services**, 143 Wn.2d 895, 911, 25 P.3d 426 (2001); **see also Olsen v. King County**, 106 Wn. App. 616, 625, 24 P.3d 467 (2001) (remanding on appeal to calculate fees and costs for requester that had lost at trial, finding that agency had still not provided responsive records—even though requesters already had copies of requested documents); **see also Zink**, 144 Wn. App. 348-49 (finding requester substantially prevailed on appeal, and remanding to determine fees and costs).

The PRA does not allow for court discretion in deciding **whether** to award attorney fees to a prevailing party. **PAWS**, 114 Wn.2d at 687-88; **Amren v. City of Kalama**, 131 Wn.2d 25, 35, 929 P.2d 389 (1997) . The only discretion the court has is in determining the *amount* of reasonable attorney's fees. **Amren**, 131 Wn.2d at 36-37 (discussing how statutory penalties combine with attorney's fees and costs under the PRA to comprise the statute's "punitive provisions") (citation and internal quotation marks omitted).

The Supreme Court in **Limstrom v. Ladenburg**, 136 Wn.2d 595, 616, 963 P.2d 869 (1998) , remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees—"[including] fees on appeal"—to the requester. Should Nissen prevail on appeal in any respect, she should be awarded her fees, costs and statutory penalties.

IV. CONCLUSION

For the reasons set forth above, Nissen respectfully requests that this Court overturn the trial court's grant of the motion to dismiss, award her her attorneys fees, costs and statutory penalty, and remand for further proceedings and in camera review.

RESPECTFULLY SUBMITTED this 1st day of November, 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 1, 2012, I caused the delivery of a copy of the foregoing Brief of Appellant to the following by the method indicated:

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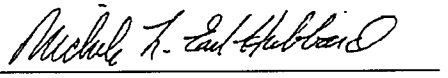

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