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**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,

PROSECUTOR MARK LINDQUIST,

Intervenor/Respondent.

# BRIEF OF INTERVENOR/RESPONDENT PROSECUTOR MARK LINDQUIST

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ORIGINAL

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## I. INTRODUCTION

Glenda Nissen's ("Plaintiff") lawyer submitted a request under the Public Records Act ("PRA"), Ch. 42.56 RCW, for Pierce County Prosecutor Mark Lindquist's ("Intervenor") private phone records and text messages from a personal cellular phone owned by and paid for by Prosecutor Lindquist and his wife.

Plaintiff initially claimed entitlement to all data relating to any cellular phone that was "[used] to conduct his business," and later expanded the request to include *all* records and messages on Prosecutor's Lindquist's personal phone.

Plaintiff's theory is that if a public employee ever uses his or her personal phone for a work-related call or message, or makes a personal call during "public time," then all of his or her private records and messages become available to the public through the PRA.

Prosecutor Lindquist obtained billing records for the relevant dates from his personal service provider and brought them to his civil division lawyers to review with him. In the interest of openness and the desire to avoid the expense of litigation, Prosecutor Lindquist authorized the release of private phone records that documented calls that were related to the conduct of government. A county public records officer was advised by Verizon that text messages were not recoverable. As it was

difficult to determine which calls were work related, Prosecutor Lindquist later authorized the release of call records that "may be work related," despite the fact that all of this was unnecessary under the PRA because these are not "public records," but rather private records protected by the Washington and federal constitutions and federal statutes.

Unsatisfied, Plaintiff brought suit to compel the disclosure of *all* of Prosecutor Lindquist's private telephone records and text messages. Plaintiff claims the unwarranted right to scrutinize the daily activities - both private and personal - of public employees that occur during "public time," and to access their private communication devices to see whether there are any work related communications during *any* time.

While it is well established law that police and prosecutors cannot seize the personal phone records and text messages of criminal suspects without a warrant, accepting Plaintiff's theory would result in public employees having fewer rights than criminal suspects and mean that anyone – including criminals – could seize and examine the personal phone records and text messages of police, prosecutors, firefighters, teachers, and other public employees under the PRA.

The trial court entertained argument on Respondent Pierce County's motion to dismiss and Intervenor's motions for a temporary restraining order ("TRO") and for preliminary injunction on December 23,

2011. The court did not reach Intervenor's motions, basing its decision instead on Pierce County's motion to dismiss, which it granted. Plaintiff appealed.

## II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

Intervenor accepts the issues as set forth in Pierce County's Response Brief. *See* Cy Res. Br., at 2.

## III. STATEMENT OF THE CASE

Intervenor accepts the Statement of the Case as set forth in Pierce County's Response Brief, with the addition of the following information, primarily to correct representations made in the Appellant's Brief.

Plaintiff Glenda Nissen, a detective for the Pierce County Sheriff's Department, was identified by detectives in her own office as the suspect who sent a death threat to the home of Pierce County Chief Criminal Deputy Mary Robnett. CP 82. Deputy Prosecuting Attorney ("DPA") Robnett, in a sworn declaration, stated that she was told repeatedly by the lead detective in the case, Detective Sergeant Denny Wood, that the detective believed Plaintiff sent the death threat. CP 81-82. To protect herself and others, DPA Robnett requested that Prosecutor Lindquist restrict Nissen from the non-public areas of the Prosecutor's Office while the investigation was pending. *Id. See also CP 361-62.*

Plaintiff actually claims that Prosecutor Lindquist framed her by sending the death threat to his own Chief Criminal Deputy, presumably complicit with DPA Robnett. CP 70-71; AB 2-3. Plaintiff states that she did not support Prosecutor Lindquist in his election and this is the reason for the conspiracy.[1] CP 16, *Complaint* at ¶ 9. Plaintiff claims that "the investigation had never verified a suspect," when in fact, Plaintiff was identified by the Sheriff's Department as the suspect, she was investigated, referred for charging, and nothing in the record supports her implication she was cleared as a suspect. *Compare* AB 3 *with* CP 81-82.

On June 7, 2010, the same day as the postmark on the death threat, Plaintiff sent a 12:25 a.m. email to The News Tribune on her Sheriff Department BlackBerry. In this late night email, she expressed an extreme animus toward the Pierce County Prosecutor's Office, including Chief Criminal Deputy Mary Robnett. "I can no longer stomach the evil produced by the prosecutors office [sic]." CP 82.

The Kitsap County Prosecutor's Office, where the case was sent for review, declined to file charges because the case could not be proved beyond a reasonable doubt. CP 81-82. The Kitsap Deputy Prosecutor wrote to Chief Criminal Deputy Robnett, "Under the law, our office

[1] Prosecutor Lindquist was elected in 2010 with over 61% of the vote, 150,529 votes to 95,266. He was endorsed by the Pierce County Deputy Sheriff's Guild, of which Plaintiff is a member.

cannot file criminal charges just because we believe a person committed a crime. Rather, we must be able to prove the case to a jury beyond a reasonable doubt. This is an extremely difficult standard to meet. After reviewing this case, I have concluded our office could not meet that burden of proof. This office's decision does not, however, prevent you from contacting an attorney to seek a civil remedy." CP 82.

Plaintiff challenged the Prosecutor's Office decision to restrict her from its non-public areas. The restriction issue was resolved for mediation and attorney fees, and contrary to the implication in Plaintiff's brief, no damages were paid to Plaintiff. CP 82; CP 474-75. After the restriction issue was resolved, Plaintiff filed more complaints and grievances: this PRA lawsuit, which was dismissed by the trial court, a "whistleblower" complaint, and three supplemental bar complaints against staff in the Prosecutor's Office, including the victim of the death threat. CP 82. Contrary to the implications of Appellant's Brief, nothing in the record supports that Plaintiff has been successful in any of these actions. Finally, contrary to the implications of Plaintiff's brief, there is no evidence in the record of any improper acts by anyone in the Prosecutor's Office.

## IV. ARGUMENT

Plaintiff claims the PRA entitles her to review the entirety of the private phone records of any public employee if the public employee ever

had a work related communication on his or her personal phone. Equally disturbing, Plaintiff also claims any writing, no matter how private, is subject to disclosure under the PRA if done during "public time." CP 18.

If this court were to accept Plaintiff's theory, a nearly endless array of highly private information of public employees and their families would be subject to disclosure under the PRA:

- Bank statements showing account access made during work hours, whether at an ATM or online.

- Entire bank or credit card statements if any purchase on the statement relates to the conduct of government.

- Health information if an employee speaks to his or her doctor during work hours or sends text messages during work hours.

- Health information if an employee sends or receives text messages about his or her health and it relates to the conduct of government, such as an illness that caused the employee to miss work.

- Calendar entries on personal calendars, made during work hours, including medical appointments.

- Cellular bills and text messages of those who called, or were called, by the target of the request.

- Private text messages or emails sent or received on a personal phone during a break in a trial or court hearing.

- Private text messages or emails sent on a personal phone to or from one's spouse or child if the note or text mentions work.

- All of the employee's private phone records if the employee calls in sick to a government employer.

Further, the public employee need not be the one to initiate the phone call or text message for a public record to be created under Plaintiff's theory. Each of the following acts would create public records under Plaintiff's theory:

- Someone calls Prosecutor Lindquist or any other public employee about a campaign-related issue on his or her personal phone. (Such communications cannot be made on agency-provided equipment.[2]) At some point during the campaign call, the caller asks about government work.[3]

- Prosecutor Lindquist's wife or child calls him or texts him on his personal phone about why he is not home from work yet and he responds that he is working late on a homicide case.

- Two public employees are married and one of them brings up work issues while they are talking or texting on private phones,

- A citizen or reporter calls a county employed public defender on his or her personal phone to ask the public defender about a case.

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[2] The use of public office or agency facilities in campaigns is prohibited:

> No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency.

RCW 42.17A.555(1). *See also,* RCW 42.52.180(1) ("No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition.").

[3] Note that Plaintiff directly admits that the calls at issue were campaign related: *Brief of Appellant,* at 2.

- A parent calls a public school teacher on the teacher's personal cell phone about a class schedule or other school-related matter.

- A judge on his or her personal phone calls Prosecutor Lindquist or any other public employee on his or her personal phone about a community fundraiser, and courthouse business comes up.

Under these scenarios, and many others the court can envision, citizens can turn public employees private records into public records by infecting them with a work related question or statement, *and thereby also subject personal records to lengthy retention schedules with criminal penalties for failing to retain the records. See* RCW 40.14.010 *et seq.*

The number of Americans who own and use cellular phones or "smart phones" is staggering. Research has shown that "82% of American adults own a cell phone, BlackBerry, iPhone or other device that is also a cell phone."[4] Over one third of Americans own a smart phone, and "87% of smartphone owners access the internet or email on their handheld, including two-thirds (68%) who do so on a typical day." [5]

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[4] Amanda Lenhart, *Cell Phones and American Adults* (Pew Research Center 2010).
*http://pewinternet.org/~/media//Files/Reports/2010/PIP_Adults_Cellphones_Report_2010.pdf* (last visited Nov. 21, 2011).
[5] Aaron Smith, *35% of American Adults Own A Smartphone* (Pew Research Center 2011) at 3.
http://www.pewinternet.org/~/media//Files/Reports/2011/PIP_Smartphones.pdf (last visited Nov. 21, 2011).

> The varied methods of their use is wide, including email, SMS ("text") messages, audio and video recordings, photographs, calendaring, and internet access. A US District Court has reasoned that modern cell phones "have the capacity for storing immense amounts of private information" and thus likened the devices to laptop computers, in which arrestees have significant privacy interests, rather than to address books or pagers found on their persons, in which they have lesser privacy interests.

*United States v. Park*, No. 2007 WL 1521573, *8 (N.D.Cal. 2007).

The vast majority of public employees at every level of government at some time use their personal telephones for work purposes. *See* GovLoop, "Exploring 'Bring Your Own Device' In the Public Sector," p. 9 (2012).[6]

Plaintiff attempts to rewrite the entire field of records retention to require that all public employees, if they ever use their private phone for work purposes or during work hours, retain their *private* records for several years *or face criminal penalties. See* RCW 40.14.010 *et seq.* Specifically, Plaintiff states:

> 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.***

*Brief of Appellant*, at 26 (emphasis added). Consistent with this, she argues:

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[6] Plaintiff falsely states that Prosecutor Lindquist "*solely* uses his '861' phone for County business, and does not use his County-paid device at all." AB 36 n. 8. Plaintiff's citation to the record not only fails to support this claim, but affirmatively refutes it. *See* CP 378-401. *See also* CP 453; Supp. CP 681-82

> Lindquist and the County have an affirmative duty to ensure that the texts related to government conduct are not destroyed.

*Id.* at 35.

Plaintiff's draconian interpretation of the PRA ignores the plain language of the PRA, the real world implications of her theory, state and federal constitutions, and federal statutes.

### *A.* Intervenor Adopts and Incorporates by Reference Arguments Made in County's Response Brief.

Under RAP 10.1(g) in cases where there are multiple parties on a side, "a party may ...file a separate brief and adopt by reference any part of the brief of another." Pursuant to this rule, Prosecutor Lindquist adopts by reference and joins with Respondent Pierce County in its response to Appellant's Brief. The Prosecutor adds the following to the County's discussion of these issues.

One of the required elements of a public record is that it must be "prepared, owned, used, or retained" by the agency. RCW 42.56.070(2).

The billing records of a private company – which were generated for the first time by Verizon at the request of its customer Prosecutor Lindquist – are not "prepared, owned, used, or retained" by the agency. *See West v. Thurston County*, 168 Wn.App. 162, 183, 275 P.3d 1200 (2012) (billing records of County's retained counsel is not a "public

record"); *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Col. 2011)(governor's personal telephone record is not a "public record."). As the Attorney General opined in a formal opinion, the records of a private company do not meet this definition:

> Based on these provisions of the resolution, and on our general knowledge of the function of stock and bond registrars, it seems to us, at least with respect to this bond issue, that Skagit County did not "prepare" or "retain" the transfer and registration records. "Ownership" is somewhat more difficult to determine, but in this case, where the bond registrar is an independent bank or trust company, **where the registrar prepares, maintains, and retains the records, and where the county has only a right of inspection**, we cannot say that the county "owns" the records in any meaningful sense.

AGO 1989 No. 11, at 4 (emphasis added). There, Skagit County had even greater access to the records than does Pierce County here, as the County has no "right to inspect" the private phone records of its employees – nor should it. As shown below, this would violate the constitutional and statutory rights of its employees.

### *B.* The Origins of the Right of Privacy: Rooted in the Constitution, Defined by Common Law.

Prosecutor Lindquist's private phone records and text messages are exempt from disclosure due to his right of privacy, as found in numerous state and federal sources. Plaintiff's assertion that the PRA trumps Federal and Washington Constitutional privacy protections (because the

constitution is not a listed exemption) exhibits a fundamental misunderstanding of constitutional law.[7] AB 43.

The United States Supreme Court "has exhibited increasing awareness and appreciation of these important adjuncts to freedom." *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 239, 654 P.2d 673 (1982), *affirmed, Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199 (1984). The Court's discussion of the right of privacy (not coincidentally in the context of telephonic communications) dates back to the Prohibition era. Federal agents wiretapped the telephone of a Seattle Police lieutenant gone bad – rum runner Roy Olmstead. While the Court upheld the agents' actions, Justice Brandeis dissented:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect.... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. ***They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.***

*Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) (emphasis added).

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[7] The PRA specifically preserves the protections of "other laws," which of course would include the constitutions. *See* RCW 42.56.070(1). "Nothing in RCW 42.56.250 and 42.56.330 shall affect a positive duty of an agency to disclose or a positive duty to withhold information which duty to disclose or withhold is ***contained in any other law***." RCW 42.56.510 (emphasis added).

The *Olmstead* dissent and a related law review article[8] are generally recognized as the fountainhead of the right of privacy, whether its locus is the common law, statute, or the constitution. See, Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Cal. Law Rev. 5, at 958 (1989).

While defined by the common law, the right of privacy clearly has its roots in the constitution. The right emanates "from the totality of the constitutional scheme under which we live." *Griswold v. Connecticut*, 381 U.S. 479, 494, 85 S.Ct. 1678, 1687, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring). *See also, Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[the] right of privacy, [is] founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action...").

Based on these bedrock principles, the Prosecutor, like any other public servant and citizen of the United States and Washington, has a right of privacy in personal telephone records.

### *C.* The Washington and U.S. Constitutions Protect Private Records.

A public employee does not surrender his constitutional rights when he accepts public employment. *Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968) ("Petitioners as public employees are

[8] Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

entitled, like all other persons, to the benefit of the Constitution"). At the outset, it should be noted that Plaintiff confuses the privacy definition under the PRA with privacy under the state and federal constitutions. *See* AB 44-46. Plaintiff's attempts to substitute the privacy definition contained in RCW 42.56.050 for the privacy protections found in Article I § 7, should be rejected by this Court. As discussed below, personal telephone records are per se "private affairs" under Article I § 7 and matters to which citizens have a reasonable expectation of privacy under the Fourth Amendment.

First, Plaintiff asserts that whatever privacy protections a public employee possesses at work, he or she loses them when he or she conducts a non-work telephone call during work hours. Second, Plaintiff asserts that whatever constitutional and statutory protections a public employee possesses in his or her private life, he or she loses them if he or she mentions work during a private call, note, or text message. Both assertions are contrary to established law and state and federal constitutions.

Courts should construe a statute in a manner that renders it constitutional. *See O'Day v. King County*, 109 Wn.2d 796, 806, 749 P.2d 142 (1988) (wherein court held that limiting construction cured possible overbreadth infirmities). If, among alternative constructions, one or more

would involve serious constitutional difficulties, the court should reject those interpretations in favor of a construction that will sustain the constitutionality of the statute. *In re Parentage of J.M.K.*, 155 Wn.2d 374, 387, 119 P.3d 840 (2005) (citing *Grant v. Spellman*, 99 Wash.2d 815, 819, 664 P.2d 1227 (1983) and *2A Norman J. Singer, Statutes and Statutory Construction* § 45.11, at 75 (6th ed.2000)). Courts presume legislatures to act with integrity and with a purpose to keep within constitutional limits. *Grant*, 99 Wn.2d at 818–19 (holding under 1 § section 10 that it is unconstitutional to require a public employee to choose between leaving his or her job and renouncing his religious beliefs). Further, strained, unlikely or absurd consequences are to be avoided when interpreting a statute. *State v. Nhere*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

Plaintiff's constitutionally unsupportable theory is that because Prosecutor Lindquist "owns" the telephone and the telephone services he and his wife exclusively purchase, the government must be deemed to "own" any information generated as a part of the phone service simply by virtue of the Prosecutor's public employment. AB at 35-36. Indeed, Plaintiff never questions her claim that the PRA creates government ownership of all that is privately purchased by its employees. Instead, having concluded the PRA permits a taking of private property in a

manner worthy of Lenin,[9] Plaintiff questions only "whether [Prosecutor Lindquist] has a separate individual ownership interest from that of his office . . . simply because he pays the bill." AB at 36. Plaintiff contends the court should not find he has "a protected privacy interest" in phone services paid for by him and his wife because "a source of funds criteria creates a notable disparate impact favoring highly compensated officials who can pay for their service." AB at 36.

The constitutional rights to privacy and property cannot, as Plaintiff proposes, be tethered to or conditioned upon the particular level of public employee compensation. Privacy and individual ownership rights are not "perks" of employment that the government can shrink based upon a salary scale. In 1918 Justice Brandeis observed that "[a]n essential element of individual property is the legal right to exclude others from enjoying it." *International News Service v. Associated Press*, 248 U.S. 215, 250, (1918) (Brandeis, J. dissenting). Whether a public employee is a first year public school teacher, or a Rule 9[10] legal intern, or the elected Prosecutor, they enjoy privacy in their own personally paid for cell phones and phone service records to the same degree as a highly

[9] "Private property is robbery and a state based on private property is a state of robbers who fight to share in the spoils." V.I. Lenin
[10] APR 9.

compensated county Medical Examiner. Compensation is constitutionally irrelevant to privacy rights afforded under Art 1 § 7 or Art 1 § 3.[11]

The PRA is not an eminent domain law for seizing private property. There is no evidence the legislature intended for the definition of "public record" to extinguish property rights – such a definition would be unconstitutional. Indeed, the term "own" as used in 42.56.010 nowhere indicates that it refers to ownership of records privately paid for by any public employee and his or her spouse. While those married to public employees enjoy a community property right in the phones and phone service records owned by their public employee spouses, that community property right can not extend to the government by virtue of employment. The legislature presumably recognized that such an interpretation of "own" would create an obvious constitutional infirmity in the statute. Further, as a procedural statute, the PRA has no provision for seizing privately owned records.

As the court in *Grant* held it to be unconstitutional to force a public employee to choose between public employment and the free exercise of religion, this court should reject Plaintiff's contention that the PRA should be construed in a manner that forces a public employee, whether Prosecutor, police officer, teacher or firefighter, to choose

[11] Article 1 Section 3: No person shall be deprived of life, liberty, or property, without due process of law.

between employment and the constitutional rights of privacy and the right to exclusively own property paid for by the employee and his or her spouse. Such a construction would be blatantly unconstitutional.

### 1. The Washington Constitution Protects Private Information, Including the Numbers Dialed on a Telephone.

The Washington Constitution provides perhaps the broadest protections of any state. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const., Art. 1, § 7. A disturbance of a person's "private affairs" usually occurs when the government intrudes upon "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass absent a warrant." *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)(*quoting State v. Myrick*, 102 Wn. 2d 506, 510-11, 688 P.2d 151 (1984).

Our Supreme Court has held that this strongly protects telephone records. In *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), police had used a "pen register" to collect the numbers dialed, which is one of the items Plaintiff seeks here. The Court held obtaining dialed telephone numbers to be unlawful without proper authority:

> [W]e conclude that when the police obtained the defendant's long distance, telephone toll records, and when they placed a pen register on her telephone line or

> connections, all without benefit of the issuance of any valid legal process, they unreasonably intruded into her private affairs without authority of law and in violation of Washington Const. art. 1, § 7.

*Gunwall, supra* at 68. The Court agreed with the reasoning of the Colorado Supreme Court, which had held that the numbers dialed on a personal phone are constitutionally protected:

> ***A telephone subscriber ... has an actual expectation that the dialing of telephone numbers from a home telephone will be free from governmental intrusion.*** A telephone is a necessary component of modern life. It is a personal and business necessity indispensable to one's ability to effectively communicate in today's complex society. When a telephone call is made, it is as if two people are having a conversation in the privacy of the home or office, locations entitled to protection under ... the Colorado Constitution.

*Gunwall, supra* at 67 (quoting *People v. Sporleder*, 666 P.2d 135, 141 (Colo.1983) (emphasis added)).

The "authority of law" required by Article I § 7 to obtain phone records includes only authority granted by a valid (i.e. constitutional) statute, the common law, or court rule. *Id.* at 68-69. Hence our Courts make clear that telephone records cannot be accessed without a warrant or other valid judicial subpoena. *See State v. Butterworth*, 48 Wn. App. 152, 737 P.2d 1297 (1987), *rev. denied*, 109 Wn.2d 1004 (1987) (privacy of unlisted telephone is protected by Article I section 7). *See also York v. Wahkiakum Sch. Dist No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995

(2008)(once a matter is deemed private by Article I § 7 a court must consider "whether a search has 'authority of law'—in other words, a warrant."); *McCready*, 123 Wn.2d at 273-74 (there is no general common law right to issue search warrants and "Washington's longstanding tradition of limiting search warrants to carefully circumscribed statutory categories provides powerful support for the proposition that Const. art. 1 section 7 prohibits courts from issuing warrants without an authorizing statute or court rule").

Indeed, even "a subpoena is not authority of law simply because it is authorized by statute." *State v. Miles*, 160 Wn.2d 236, 248, 156 P.3d 864 (2007)(administrative regulation for telephone company authorizing police to access unlisted numbers was deficient "authority of law" under Art. 1 § 7)(*citing Butterworth*, 48 Wn.App. at 158). This is so because "[t]he Legislature may not confer upon [an agency] the judicial power to determine the constitutional rights of citizens," since "[i]f it could, then nothing would prevent [the agency] from effectively overruling the Supreme Court's decision in *Gunwall* by simply adopting a rule allowing for warrantless disclosure of telephone toll records." *Miles, supra.* at 248. *See also In re Maxfield*, 133 Wn.2d 332, 337, 945 P.2d 196 (1997)(Article I § 7 violation where PUD treasurer/comptroller searched utility records and gave power usage information to law enforcement); *Thurston County*

*Rental Owners Ass'n v. Thurston County*, 85 Wn.App. 171, 183, 931 P.2d 208 (1997)(Ordinance authorizing entry on land for inspection was constitutional under Art. I Sec. 7 since it required a warrant).

Procedures provided by the PRA cannot be used by a requestor as an "on demand" mechanism to eviscerate privacy rights granted by the Constitution. There is no administrative subpoena provision in the PRA, nor one that authorizes a search on less than probable cause. Plaintiff is trying to compel the County to violate the Prosecutor's privacy rights by forcing him to provide personal records without a warrant based upon probable cause when such records have long been held to be constitutionally protected "private affairs." *See also Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 602, 694 P.2d 1078 (1985)(school officials and parents were state actors under Fourth Amendment and Article I, § 7 when searching students' luggage).

In *State v. Boland*, 115 Wn.2d at 578, the Court held that though children, scavengers, snoops, and sanitation workers might sift through one's unsecured garbage, citizens reasonably expected to be free from such warrantless intrusion by the government. The Court noted there is a reasonable expectation of privacy even in trash because it typically contained items that "can reveal much about a person's activities, associations and beliefs." *Id.* If there is a reasonable expectation of

privacy in trash, Prosecutor Lindquist -- like any citizen – certainly has a reasonable expectation of privacy in his private telephone records, text message content, and other personal information that can be accessed by use of a cellular phone. *See State v. Miles*, 160 Wn.2d at 246-47 (bank records are part of one's "private affairs" because they "reveal sensitive personal information" such as "what a citizen buys, how often, and from whom," and "disclose what political, recreational, and religious organizations a citizen supports" as well as "where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more.") Under Article I section 7, no court can compel seizure or in camera inspection of the personal records without a warrant based on probable cause.

### 2. The Fourth Amendment Protects All Information Stored on an Electronic Device, Including Telephones.

The Fourth Amendment recognizes, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A reasonable expectation of privacy exists in the content of data that is sent or received by mobile devices. *Katz v. United States,* 389 U.S. 347, 355 (1967) (recognizing privacy interest in content of communication by telephone).

The examination of a private individual's cellular device and its data is a "search" under the Fourth Amendment. A person using a wireless communication device has a reasonable expectation of privacy against a search of the content communicated through the device. "An individual has the same expectation of privacy in a pager, computer or other electronic data storage and retrieval device as in a closed container ...." *United States v. Chan,* 830 F.Supp. 531, 534-35 (N.D.Cal.1993) (quoting *United States v. Nelson Blas,* 1990 WL 265179, 1990 U.S.Dist. Lexis 19961, at 21 (E.D.Wis.1990). *See also, United States v. Morales-Ortiz,* 376 F.Supp.2d 1131, 1139 (D.N.M. 2004) ("An individual has an expectation of privacy in an electronic repository for personal data, including cell telephones and pager data memories."); *United States v. Ortiz,* 84 F.3d 977 (7th Cir. 1996) (pager); *and, United States v. Brookes,* CRIM 2004-0154, 2005 WL 1940124 (D.V.I. June 16, 2005)(same).

Here, the Prosecutor is protected by the Fourth Amendment from having the County or a court, for purposes of an *in camera* inspection, obtain his private phone records, review them or disclose them.

**a. *Private* Property Brought Into a Government Workplace Retains its Constitutionally Protected Status.**

A Fourth Amendment expectation of privacy can exist for the private property of government employees, even when their property is

taken into the work place. Cf. *O'Connor v. Ortega*, 480 U.S. 709 (1987) (state hospital officials searched employee's office and seized personal items from his desk and file cabinets; remanded for development of record as to expectations). "Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.* at 717. Prosecutor Lindquist, like any other citizen, retains his expectation of privacy in his phone even while he uses it in the workplace.

**b. An Expectation of Privacy Can Exist Even for Government Owned Devices.**

Electronic communications are so sensitive and private that public employees may have a Fourth Amendment privacy interest in a *government-issued device used for work and private purposes. See, City of Ontario v. Quon,* 560 U.S. ___, 130 S.Ct. 2619 (2010) (Court assumed arguendo that the police officers had a reasonable expectation of privacy in department-issued pagers). The court cautioned, "Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy [even with government-employer issued devices]." 130 S. Ct. at 2630.

### c. Not Even a Search Warrant Allows *In Toto* Examination of an Electronic Device.

An individual's privacy interest is so strong that even when a warrant is issued to search an electronic device, only the files specified by the magistrate can be examined. This issue is particularly apt here given the wealth of information that is stored on a "smart phone" -- email, phone numbers called and received, third party residential addresses, telephone numbers and email addresses, birthdays, personal calendar/schedule (to include medical information), photographs, video and audio recordings, messages, internet usage and other hidden data. Under plaintiff's theory it would all be disclosable if *any personal action* were taken during work hours or if any work related action were taken *at any hour*.

Plaintiff's theory is unworkable and unlawful in practice because it requires the violation of constitutional and statutory protections to examine private records to determine, somehow, whether the records are work related or were composed during work hours. In other words, *Plaintiff proposes violating the constitutional and statutory privacy rights of public employees to examine their private records to determine if they might relate to government work or were composed during work hours.*

While Plaintiff may not now be seeking all the aforementioned

records[12], if her argument is accepted, it would certainly allow her to come back next week and request all data on the Prosecutor's personal phone – or any other public employee's personal phone – to examine if he or she used it in any manner during work hours or if he or she used it for work at any time. The essence of Plaintiff's claim is that actions taken by a public employee on a personal phone that are in any manner work related or occur during work hours will render *all* records of that phone disclosable under PRA. CP 18. This once again demonstrates that Plaintiff proposes wholesesale disclosure of all private phone records with an alarming disregard and lack of respect for the basic constitutional and statutory protections we all enjoy in the United States of America and Washington State – including public employees.

### *D.* The Fourteenth Amendment's Due Process Clause Also Protects Private Information.

The Fourteenth Amendment's Substantive Due Process clause has

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[12] See *Complaint* ¶¶ 13-48. See also, "Det. Nissen is not challenging the ultimate redaction of the 1st four digits of the residential phone numbers of agency employees if, for example, Lindquist called his home. Det. Nissen does not seek to learn Lindquist's home phone number. However, the time, duration, and other information aside from the residential phone number of an agency employee are not exempt from disclosure." *Complaint* at ¶ 19, n.1. "The other reasons for withholding the records -- "Personal Account Invoice#", "Personal Account Payment Due Date", "Page# of Personal Account", "Bars Code", "Personal Account Control", "Personal Account Copy#", and "Personal Account Order #" -- are also not valid exemptions from disclosure. However, these portions of the records are not needed by Det. Nissen. Therefore, she chooses not to litigate to obtain them and this Complaint does not seek these categories of records." *Complaint*, ¶ 45, n.3.

at least two recognized branches, the "autonomy branch" that protects an individual's right to make certain personal decisions without government intrusion, and the "confidentiality branch" that protects the "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977).

The Prosecutor's private records are exempt from disclosure based on this provision as well. His interest in maintaining the privacy of personal matters is of constitutional dimension under the Due Process Clause.

***E.*** **The First Amendment Protects One's Right of Association.**

Plaintiff's request also infringes on Prosecutor Lindquist's right of association in his personal life. In the civil discovery context, to assert the associational privilege under the First Amendment, a party resisting disclosure of information need only show some probability that the requested disclosure will infringe upon its First Amendment rights. *Snedigar v. Hoddersen,* 114 Wn.2d 153, 158, 786 P.2d 781 (1990). The burden then shifts to the party seeking discovery to show (1) the relevance and materiality of the information sought and (2) that reasonable efforts to obtain the information by other means have been unsuccessful. *Snedigar*, supra at 164.

To establish relevance, the party seeking discovery must specifically describe the information sought and its importance: "[m]ere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity." *Snedigar*, supra at 165 (quoting *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C.Cir.1981), vacated by 458 U.S. 1118, 102 S.Ct. 3505, 73 L.Ed.2d 1381 (1982)). To meet the second requirement, the party seeking discovery must make a "reasonably explicit" showing that every reasonable alternative source of information has been exhausted before the court will order disclosure. *Id.* at 165. If both parties make the required showings, the court then balances the need for disclosure against the claim of privilege to determine which is more compelling. *Id.* at 166.

In their private lives, Prosecutor Lindquist and other public employees communicate with any number of people who may not wish to speak to them by telephone again if they know that by making a personal call or sending a text message, they will have their identities revealed, the dates or length of their conversations detailed, and the content of their text messages disclosed.

### *F.* The Prosecutor's Review of His Private Records with His Attorneys Does Not Waive His Constitutional Protections.

Plaintiff argues that Prosecutor Lindquist lost his privacy rights by asking his civil department lawyers to review the records with him. Plaintiff argues that if the records were not public records initially, they somehow became public records when the Prosecutor reviewed them with his lawyers.

It is uncontested that only the third party service provider, Verizon, had the records at the time of the requests. CP 16. In the interest of openness, Prosecutor Lindquist voluntarily obtained records so that redacted versions could be provided to the County. Supp CP 445.

For a person to waive his or her constitutional protections there must be a knowing, intentional and voluntary waiver and courts indulge in every reasonable presumption against a waiver of a constitutional right. *See, State v. Coyle*, 95 Wn.2d 1, 7, 621 P.2d 1256 (1980). A person does not knowingly and voluntarily waive a constitutional right by consulting with his or her lawyer. Yet this is the very premise that Plaintiff asks this court to establish. Plaintiff seeks a "gotcha" rule where once a private record is examined by agency lawyers for PRA compliance, it becomes a public record under the PRA. This would be an absurd result, bad public

policy that would discourage openness, and contrary to well established law regarding attorney-client relationships. *See* RCW 5.60.060(2)(a).

### *G.* The Federal *Stored Communications Act* Bars Pierce County (and Plaintiff) from Obtaining Private Telephone Data.

Absent a warrant or court order to assist an ongoing criminal investigation, neither the court nor Pierce County has any legal authority to seize the Prosecutor's personal and private data or the personal and private data of any other public employee.

The growth of electronic communications led Congress to enact statutes that protect users of such communication services from unwarranted intrusion into their privacy while at the same time providing access to information previously unavailable to criminal law enforcement. The *Stored Communications Act* ("SCA"), was enacted in 1986 as Title II of the Electronic Communications Privacy Act of 1986 ("ECPA"), codified as amended at 18 U.S.C. §§ 2701-2711 (2010)), which amended the 1968 "Wiretap Act."

The *Stored Communications Act* (which preempts the PRA) bars entities who provide an "electronic communication service" from divulging the contents of communications in electronic storage to anyone other than the "*addressee* or intended recipient of such communication," §2702(a)(1) & (b)(1), with very limited specified exceptions. Verizon

Wireless fits the definition of "any service which provides to users thereof the ability to send or receive wire or electronic communications," §2510(15).

One section of the SCA provides that in the absence of consent, cell phone carrier (Verizon Wireless) cannot release his information to a third party (Pierce County) without obtaining a search warrant, or court order based on suspected criminal activity. 18 U.S.C. §2703(c)(1).[13] The SCA allows federal officers to use pen registers after "first obtaining a court order under section 3123 of this title or under the Foreign Intelligence Surveillance Act ...." 18 U.S.C. § 3121. Thus, Pierce County has no lawful ability to obtain the records sought here.

Plaintiff's only response to this issue is that a mobile device user *can* consent to the disclosure by the service provider of his or her private records. AB at 41 ("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."). While this

[13] "Requirements for court order. - A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are ***relevant and material to an ongoing criminal investigation.*** In the case of a State governmental authority, such a court order ***shall not issue if prohibited by the law of such State."*** 18 S.C. § 2703(d) (emphasis added).

may be true, she cannot *compel* Prosecutor Lindquist's consent under the SCA. A federal court has flatly rejected Plaintiff's proposal:

> By requiring the defendant and its employees to consent to the disclosure of such information by subpoena of the internet service provider, the court would undermine the statute's intent to create a zone of privacy around that medium. There is no exception in the statute for civil discovery, and the court declines to create one by allowing an end run around the statute.

*J.T. Shannon Lumber Co., Inc. v. Gilco Lumber Inc.,* 2008 WL 4755370 (N.D. Miss. 2008).

As will be discussed below, the law provides no mechanism for the court to authorize seizure of private records not involved in criminal activity. Plaintiff's logic would protect the phone records of criminals, but allow seizure of the private records of police, prosecutors, firefighters, teachers and other public employees.

The content of an employee's e-mail on personal accounts remain private despite the fact that they were viewed while at work using the employer's computers, or that personal user names and passwords were found on work computers. *Pure Power Boot Camp v. Warrior Fitness Boot Camp,* 587 F. Supp. 2d 548 (S.D.N.Y. 2008) ("...Brenner's access to Fell's Hotmail account violated the SCA and Fell's privacy. While Fell arguably "authorized" access to any e-mails which he viewed and saved on [his employer's] computers, Brenner was not authorized to access those e-

mails directly from Fell's Hotmail account, and was clearly not authorized to access e-mails from Fell's Gmail and WFBC accounts."); *see also* RCW 9.73.260(2) (the Washington Legislature has prohibited the use of pen traps without court supervision. "No person may install or use a pen register or trap and trace device without a prior court order.")

Thus, Pierce County has no lawful means to obtain even the numbers dialed by the Prosecutor without violating the SCA as well as state and federal constitutions.

### *H.* Alternative Basis to Affirm: Intervenor Lindquist's Request for Temporary Restraining Order and Preliminary Injunction.

This Court "may affirm the trial court on any theory within the pleadings and the evidence, even if the trial court did not consider it." *Olmsted v. Mulder*, 72 Wn. App. 169, 178, 863 P.2d 1355, 1360 (1993), *review denied*, 123 Wn.2d 1025 (1994).

The owner of the requested private records -- Prosecutor Lindquist – intervened in this proceeding and filed a motion for a TRO and a preliminary injunction. The rules governing the resolution of each of these motions plainly allow the use of affidavits and other facts outside the four corners of the complaint. The trial court would properly have granted the Intervenor's motions using a factual record, e.g, CP 80-110, but for the grant of the County's CR12(b)(6) motion.

The Prosecutor had the right to seek injunctive relief under the PRA and the injunction statute. The PRA automatically grants a person who is the subject of a record authority to file a motion to enjoin disclosure. In pertinent part the statute provides:

> The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

RCW 42.56.540. This was the first basis for Intervenor's motions. As has been discussed extensively above, any further intrusion in to his private records would substantially and irreparably damage his and his wife's privacy rights, *see* Supp CP 452-53, as well as irreparably damage the privacy rights of anyone else whose number or text messages would be disclosed.

The Prosecutor also sought a TRO and preliminary injunction under the injunction statute, Ch. 7.40 RCW.[14] To obtain injunctive relief

[14] "When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff ... an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion." RCW 7.40.020

one must establish (1) he has a clear legal or equitable right; (2) he has a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which he complains are either resulting or will result in actual and substantial injury to him. *Tyler Pipe Indus. v. Dep't of Revenue,* 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). A temporary restraining order may issue if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition..." CR 65(a) (2). All of these elements have also been shown above.

Prosecutor Lindquist had a clear legal right to the protection from disclosure of his private records. Plaintiff was not only seeking an order compelling such, but also demanding that the County be penalized with fines if the Prosecutor's private records were not disclosed. Lastly, if such disclosure was ordered, irreparable injury to his privacy interests – and the privacy rights of those with whom he communicated – would have resulted. "It has been recognized by federal courts at all levels that a violation of constitutional rights constitutes irreparable harm as a matter of law." *Cohen v. Cohama County, Miss.,* 805 F.Supp. 398, 406 (N.D. Miss. 1992). *See also Planned Parenthood of Minnesota, Inc. v. Citizens for*

*Community Action,* 558 F.2d 861, 867 (8th Cir. 1977) (a showing that a law interferes with the exercise of constitutional rights supports a finding of irreparable harm).

In the trial court, Plaintiff largely ignored the primary basis of Intervenor's motion – injunctive relief under the *Public Records Act*, Ch. 42.56 RCW, devoting almost all of her argument to the Title 7 RCW injunction request.[15] She had no answer to the PRA injunction request, but again proposed that the court should unlawfully seize the personal records and fish through them.

The trial court would likely have granted Intervenor's motion for a PRA injunction and this provides an alternative ground for affirming the trial court's order.

## *I.* *In Camera* Inspection Is Neither Allowed Nor Legally Necessary.

To engage in an *in camera* review the court would have to have the private records before it, but Plaintiff cannot identify any legal authority for the court to obtain such records in this PRA case. Other than a properly issued warrant or court order, as discussed above, there is no legal authority for compelled production of these records. As there has been no

showing of compliance with the SCA, let alone the higher constitutional standard of probable cause, no *in camera* inspection is lawful.

Plaintiff asks the court to ignore the state and federal constitutions and the SCA. Supp. CP 610-11. Plaintiff's proposes that the court should disregard the constitutional barriers and examine the records *in camera* to determine their contents. *But see*, U.S. Const. Art. 6; *Pierce County v. Guillen*, 537 US 129 (2003). In other words, Plaintiff asks the court to unlawfully seize private records, without a warrant or compliance with the SCA, to see if they contain anything of interest.

To the extent that Plaintiff relies upon *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010), to avoid constitutional protections and analysis, her reliance is misplaced. *See* AB 41-42. All of the justices in *O'Neill* recognized the presence of a constitutional issue in obtaining what was undisputedly a public record sent to a public employee's privately owned home computer. The justices in the majority simply addressed whether the computer could be inspected "if [the employee] gives consent to the inspection" and not "whether the City may inspect ... absent her consent." *O'Neill*, 170 Wn.2d at 150, n. 4. In the instant case, unlike *O'Neill*, no such assumption is possible. There is no consent, CP 16-18, and the records in question here are private records held by a third party rather than the public record at issue in *O'Neill*.

Additionally, no *in camera* inspection is required to determine if the phone call records are public records. *Harris v. Pierce County*, 84 Wn.App. 222, 236, 928 P.2d 1111 (1996). The Prosecutor's declarations clearly state that the phone records are his personal records. CP 80-84; Supp CP 452-53; *see also* CP 444-46. So does the declaration of one of Plaintiff's counsel, *Mell Decl.*, Nov. 4, 2011, and the *Complaint*, ¶ 24. CP 7-9, 13-21.

Further, even an unlawful *in camera* inspection will not provide the information Plaintiff claims she seeks. The listing of constitutionally protected numbers will not necessarily identify the caller, nor will it reveal the content of the call, or the purpose of the call.

Finally, Plaintiff contends a public employee's constitutional right to privacy in his personal records can be overridden by anyone asserting there is a "legitimate concern to the public" in their contents. Supp. CP 610-11. As previously discussed, there is no public interest in *private* phone records, but even if there were, no matter what the motivation, such an interest cannot trump constitutional protections. U.S. Const. Article 6; Wash. Const. Article 1, § 7.

By appealing the denial of *in camera* review, Plaintiff's counsel may be attempting to lay a trap by arguing, as she did in *Bennett v. Smith Bundy Berman Britton PS*, _ Wn.2d _, 291 P.3d 886 (2013), that the very

act of conducting any *in camera* review would result in private documents being made public under the state constitution. The records, however, would still be protected under the Supremacy Clause of the federal constitution. *Compare* Wash. Const. Article I, § 10 *with* U.S. Const. Article 6. *See also Felder v. Casey*, 487 U.S. 131, 138 (1988) ("Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield'")(internal citations omitted). More importantly, an *in camera* review in this case would still be unconstitutional and prohibited by federal statutes for the reasons discussed above.

***J.*** **Plaintiff Offers No Basis For Discovery.**

Defendant Pierce County has demonstrated why Plaintiff's request for discovery is improper and unwarranted. Intervenor incorporates this argument by reference. *Cy Res. Br., at 11-13.*

Intervenor would add that Plaintiff fails to understand the nature of a CR 12(b)(6) motion, which considers only the legal sufficiency of the complaint and facts available through judicial notice. This is a matter of law. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d

831 (2007). This matter was properly resolved by the trial court without unnecessary discovery.

## V. CONCLUSION

In sum, the trial court properly dismissed Plaintiff's complaint holding:

> As a matter of law, I find that no public record exists with the billing statement or the records of the private cell phone of the public employee, that being the Pierce County Prosecutor. . .
>
> I find that 42.56.050, the invasion of privacy is simply that. I go back to number one, it is not a public record. The private cell phone records of a public elected official or a public employee are not public records. Number two. I believe that he has a right to privacy as a valid exemption; and three, I do think that I have absolutely no power to require the third-party provider, without a search warrant application with probable cause, to disclose records. I have no power to do so under this Act. Whether or not this Act violates the elected official or public official's constitutional rights, be either state or federal, I find that they still have those rights; that just because you run for public office does not make you exempt in your maintaining of your right against search and seizure, either under the state constitution or the federal constitution, and that's my ruling.

12/23/11 VRP 94-95.

This Court should affirm that decision. Alternatively, the Court may affirm because the trial court could have properly granted the Prosecutor's TRO and injunction. *See e.g. Olmsted v. Mulder*, 72 Wn. App. at 178.

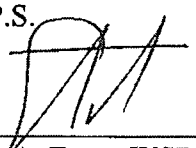
Plaintiff asks the Court to rewrite our laws so personal records and private writings – text messages to and from spouses and children, diaries and other private compositions, *any* writing by a public employee – must be retained and disclosed if the record or the writing relates to work or was made during work hours. This is both unworkable and unlawful.

If the PRA were interpreted as Plaintiff proposes, then it would be unconstitutional under both state and federal constitutions and courts should not interpret statutes in a manner that renders them unconstitutional.

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

DATED this 4th day of March, 2013.

KEATING, BUCKLIN & McCORMACK, INC., P.S.



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## CERTIFICATE OF SERVICE

I, Shelly Ossinger, hereby certify under the laws of the State of Washington that on March 4, 2013, I caused to be electronically filed a true and accurate copy of the *Answering Brief of Respondent/Intervenor Prosecutor Mark Lindquist* with the Washington Supreme Court via email to this address: Supreme@courts.wa.gov. I further certify under the laws of the State of Washington that I caused true and accurate copies of the same document to be served on all parties of record no later than March 4, 2013, via electronic mail pursuant to the agreement of the parties as follows:

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DATED this 4th day of March, 2013, at Seattle, WA.

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1086-001/11432

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**No. 87187-6**
**Glenda Nissen v. Pierce County, et al., v. Prosecutor Mark Lindquist**

Attached for filing in the Supreme Court and agreed electronic service of all parties, please find Brief of Intervenor/Respondent Prosecutor Mark Lindquist.

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