No. 90875-3

IN THE WASHINGTON STATE SUPREME COURT

(No. 44852-1-II COURT OF APPEALS, DIVISION TWO)

GLENDA NISSEN, an individual,

Respondent,

v.

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

Petitioners

v.

PROSECUTOR MARK LINDQUIST,

Petitioner

NISSEN'S ANSWER TO AMICUS BRIEFS OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS AND PUBLIC EMPLOYEE ORGANIZATIONS RE: PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Detective Glenda Nissen incorporates herein her Answer to the Petition for Review and authorities cited herein. She responds to both amicus briefs in this combined Answer.

II. ARGUMENT

A. Constitutional Claims Raised by Amici Do Not Support Review.

The Amici raise several Constitutional challenges, many of which are raised solely by them and not raised by the parties below or on appeal. Arguments raised solely by Amici should not be considered and should not support review, but the arguments further lack merit and cannot support review of this case at this time even if considered.

For example, WASAMA argues that disclosure, or even in camera review, of records of public officials or employees to determine if they meet the definition of a public record violates the official's or employee's right of association. Amici argue that examination by the agency or in camera review by the court is a warrantless search in violation of the Fourth Amendment and state equivalent. They claim it is a "taking" of personal property without just compensation. And for support they cite to criminal cases or civil discovery cases with no similarity or application to the case at issue here and ignore clearly relevant and binding cases.

For example, many of the same arguments Amici make were made by former President Richard Nixon and addressed by the United States Supreme Court in **Nixon v. Administrator of General Services**, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed.2d 867 (1977), when Nixon challenged the Presidential Recordings and Materials Preservation Act that required government archivists to review 42 million pages of his documents and 880 audio tape recordings of his conversations to decide what material was truly personal and could be returned to him and what should be kept by the government after his resignation. Nixon argued his right of association was threatened by review as well as disclosure. He compared the Act to a warrantless search that violated his Fourth Amendment rights. He said it violated his right to privacy, presidential privilege and separation of powers. And the United States Supreme Court rejected each of his claims.

The Act about which Nixon sued required government archivists to seize all of his records and recordings, to review them, and to make determinations as to whether they were truly private or related to his role as President. The private records could be returned to him through a process. The ones deemed governmental would be retained and might be disclosable to the public. Archivists were authorized and required to review all of his records and recordings, including communications with

doctors, clergy, family and friends, and to listen to every recording of every conversation he had recorded over his entire term in office. And the United States Supreme Court rejected all of the Constitutional claims Nixon raised.

The **Nissen** decision is first and foremost a remand to allow records to be provided to a court to review in camera. The records are text messages sent or received by the elected prosecutor over a brief period of specified days and logs of his phone records for a similarly brief period. The review is to determine if the records meet the definition of public record, if they do whether they are exempt, and then to determine what should be disclosed. The elected prosecutor has conceded many of the texts at issue and phone calls on his phone records were related to the conduct of government and not purely private. But, ignoring **Nixon**, these Amici argue the official's employer cannot examine the records and that even an elected judge cannot be permitted to see them. The **Nixon** decision illustrates why the claims of Amici must fail and why those claims do not support review. A remand for the lodging of the records for in camera review is not a warrantless search, is not an invasion of privacy, is not an infringement on one's associational rights, or any of the other allegations raised by these Amici.

Amici focus on cases involving the warrantless search or seizure of property by law enforcement of non-governmental criminal defendants for the sole purpose of criminal investigation and prosecution. They focus on civil discovery cases involving non-governmental entities where the analysis is based on whether discovery sought is relevant to the civil claims and defenses asserted. These two types of cases are far afield from this case, which is about examination of records of a government official which he concedes are government-related to determine if the records should be produced under the state's Public Records Act. The **Nixon** case above, which the Amici did not cite to you, is far more instructive, and relevant, and on point to the case here. The **Nixon** case illustrates why the Division Two decision here is not wrong and why review at this stage of this case is unnecessary. Lindquist's constitutional rights are not violated by the review process that will follow.

B. Lindquist as "Agency"

Nissen has briefed several times the issue of why Lindquist, as the Prosecutor, is "the Office" and thus falls within the definition of "agency" under the PRA. See RCW 42.56.010(1) The Pierce County Prosecutor has historically been considered without question an "agency" under the PRA. **Limstrom v. Ladenburg**, 136 Wn.2d 595, 963 P.2d 869 (1998). Lindquist is the first to claim a distinction between his "office" and

himself as an "officer."The PRA does not define the term "office." The plain meaning of the term "office" encompasses the individual official occupying the office: "Employment or position as an official" or "a position of duty, trust, or authority, esp. in the government." *Random House Dictionary of the English Language the unabridged version* (1966). WASH. CONST. ART. XI § 5 authorizes the legislature to provide for the election of a person to carry out the prescribed duties of the county prosecutor's office. The prosecuting attorney is a county officer. **State v. Whitney**, 9 Wash. 377, 379, 37 P. 473 (1984). The power of the county prosecutor's office can only be exercised by its agents or officers acting under their authority or authority of law. RCW 36.01.030. When a county prosecutor exercises the county's powers, his actions are the actions of the county. **Broyles v. Thurston County**, 147 Wn. App. 409, 195 P.3d 985 (2008). The term "office" contemplates acts committed by a public officer in his official capacity as well as private acts committed outside of an officer's official duties, committed during the official's term of office. **In re Recall of Pearsall-Stipek**, 141 Wn.2d 756, 10 P.3d 1034 (2000). Pierce County Code identifies the elected prosecutor as an "Office of the County: "This department shall be headed by the elected Pierce County Prosecutor whose duties and responsibilities are regulated by RCW 36.27.020." PCC 2.06.030. As the elected official he has superior power

to the county executive over staff and normal daily operations of his office. Pierce County Charter Sec. 3.10. 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 duties of the prosecutor's office include compliance with the PRA. **Dawson v. Daly**, 120 Wn.2d 782, 845 P.2d 995 (1993). "All county officers shall complete the business of their offices..." RCW 36.16.120. Lindquist is obligated to comply with the PRA. He was and is the "agency." Such a finding is neither novel nor concerning. It does not require review.

C. No "Need" Based Showing to Get Public Records.

Amici argue that the public must show "need" for employee's communications before they can obtain in camera review of them, citing solely to civil discovery cases about limits on discovery. They fail to cite **TS v. Boy Scouts**, 157 Wn.2d 416, 138 P.3d 1053 (2006), which narrowed the doctrine set out in **Snedigar v. Hodderson**, 114 Wn.2d 152, 786 P.2d 781 (1990). They also fail to explain that the civil discovery cases are about whether or not a litigant can discovery information about an opponent having no bearing on the civil litigation claims when an actual associational harm has been shown.

Requestors do not have to show a "need" for public records because they are lawfully entitled to them because they are by definition "public."

> 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 exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In 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. All of Amici's arguments ignore the fact that the records at issue here are those of a public official many of which have been conceded to relate to the conduct of government and that those records are being sought, not through civil discovery, but as a public record under the PRA. The Court should focus on the records actually at issue, and the case actually before it, when deciding whether to accept review. Review here should be denied.

III. CONCLUSION

For the foregoing reasons, Detective Nissen asks that this Court deny the Petitions for Review.

RESPECTFULLY SUBMITTED this 23rd day of January, 2015

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 23, 2015, I served by email pursuant to agreement the foregoing document and this certificate of service on:

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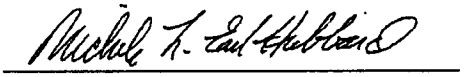
Dated this 23rd day of January, 2015, at Shoreline, Washington.



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Attached please find Glenda Nissen's Answer to the Amici Memoranda and an attached certificate of service for filing in in Supreme Court Cause No. 90875-3.

This is being filed by Michele Earl-Hubbard, WSBA #26454, attorney for Respondent Glenda Nissen. My contact information is below.

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