

NO. 44852-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

GLEND A NISSEN, Appellant

v.

PIERCE COUNTY, et al., Respondents

**RESPONDENT PIERCE COUNTY'S ANSWER TO AMICUS
BRIEF OF ATTORNEY GENERAL OF WASHINGTON**

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I. INTRODUCTION

The brief of Amicus Curiae Attorney General of Washington (hereinafter “A.G.”) addresses solely the preliminary threshold issue of how the statutory requirements for a “public record” should apply. *See gen.* A.G. Br. In so doing, it correctly notes: “This case concerns the intersection” between the Public Records Act (hereinafter “PRA”) and “the right of individuals – including government employees – to be free from unreasonable searches and intrusions into private affairs.” *Id.* at 1.

The A.G.’s brief approaches that crossroad in step with the law and Respondent Pierce County by recognizing that “cell phone billing records of a personally owned cell phone are not public records, even if the cell phone was used for work-related calls.” *Id.* at 9-12. It remains on course when it next analyzes why it also “agrees with the County that ... review by staff for purposes of determining whether a record is a public record does not automatically change the record into one relating to the conduct of government.” *Id.* at 11. On the remaining “public record” question concerning the content of text messages from private electronic devices owned and paid by public servants, however, the amicus’ brief loses its way. *Id.* at 4-7, 12-13. The A.G.’s brief goes astray when it proposes the court employ a heretofore non-existent “work purposes rule” that is unexplained and inconsistent with the plain language of the PRA. Moreover, it

stops short of analyzing the constitutional intersection it admits this “case concerns,” by suggesting the Court indulge the fiction that on a remand “it is quite possible that Mr. Lindquist will consent to their review, eliminating the need to address the difficult questions the County raises.” *Id.* at 2, 13-15.

This speculation overlooks that Mr. Lindquist intervened to protect the constitutional rights of public employees in their private records, and prevailed on those constitutional issues in the trial court. Failing to respond to the County’s federal statutory and federal and state constitutional analysis, the A.G. appears to concede that in the absence of consent the right of privacy bars access to personal employee records. Further, as explained below, even indulging the A.G. in this hypothetical would not avoid the need to resolve the legal issues still pending before this Court.

II. ANALYSIS

Before addressing the aforementioned divergence between the County and the A.G.’s brief concerning text messages, the facts of record regarding those texts should be recalled.

First, the complaint establishes¹ by quoting the County’s PRA response without comment or challenge, that at the time of the request nei-

¹ See e.g. *Berge v. Gorton*, 88 Wn.2d 756, 764, 567 P.2d 187 (1977) (accepting on CR 12(b)(6) motion the truth of attorney general’s letter because it was “quoted in the complaint without comment or challenge”).

ther Intervenor Lindquist nor the County possessed either the Verizon billing records or the contents of any text message from his private cell phone for the dates demanded, but had “to receive records from telephone providers” in order to respond. CP 15-16. This fact is confirmed by plaintiff’s later evidentiary submissions, *see* CP 171, 173, 205, 207, and conceded by her trial court briefing. *See* CP 570 (plaintiff admits the County had only “possessed the 861 records [at issue] because [Intervenor] Lindquist authorized their release” in redacted form). The complaint and plaintiff’s filings also establish that as a result of this request to the provider, only billing records were obtained by Intervenor Lindquist and those telephone call and text messages billings “that may be work-related” were provided by him to the County and then produced to plaintiff. CP 16, 18, 32-36, 40, 86, 334-38, 340-350, 445-46.

Second, it is uncontested that when the Intervenor’s designee attempted to obtain text message content from Verizon, his private service provider, she was advised that customers “could not obtain text messages unless requested within three to five days after the messages are sent” and that therefore no record of the content of any text message could be obtained from it or provided to plaintiff. *See* CP 58, 81, 444-46, 490, 598. 616. Hence, neither the County nor Intervenor possessed any responsive

text message content at the time of the requests or responses.²

A. TEXT MESSAGES SOLELY ON PRIVATE DEVICES AND IN THE EXCLUSIVE POSSESSION OF PUBLIC EMPLOYEES OR THEIR PERSONAL SERVICE PROVIDERS ARE NOT “PUBLIC RECORDS”

The A.G.’s brief asserts that writings from personally owned devices of public officials and employees “can be public records,” and argues this could theoretically occur when “an agency official or employee prepares, owns, uses, or retains records for work purposes” A.G. Br. at 4-6 (emphasis added). This newly minted, unexplained, undefined, and unconstitutional “work purposes rule,” *id.* at 3, fails to confront the statute’s plain language, case law, and Respondent’s Brief. *See* Resp. Br. at 18-22.

² Unbeknownst to the County or Intervenor Lindquist, CP 615-16, plaintiff earlier contacted Verizon and represented there was “an ongoing investigation at this office” requesting preservation of the subject records “pending the issuance of a subpoena or other legal process.” CP 90, 324. Verizon’s “Court Order Compliance” unit responded to confirm it had been preserved but that “TEXT CONTENT is only released pursuant to a SEARCH WARRANT or a signed and notarized CONSENT FORM.” CP 92, 326 (emphasis in original). However, the Stored Communications Act only permits law enforcement agencies issuing search warrants to communications providers to obtain customer data without notification to the customer for 90 days. 18 U.S.C. § 2703. Thus, her surreptitious preservation letter allowed plaintiff to preserve personal records and pursue a fishing expedition while Verizon advised Respondent that the records were not preserved because such disclosure would be inconsistent with the confidentiality rights of law enforcement. CP 616. When the County expressed its good faith understanding that text content did not exist at the time of the request, plaintiff withheld the existence of her preservation request and allowed both the County and Court to operate under a misunderstanding concerning the continued existence of text message content in Verizon’s possession. Plaintiff failed to disclose her Verizon request until six weeks after filing her lawsuit, which was long after both her PRA request and the County’s PRA response. CP 324, 616. When it finally came, plaintiff’s delayed disclosure was in the form of a false claim that it was the County that instead had misled the court. *See* CP 45-46.

First, under the PRA's plain text, a "public record" instead is "any writing prepared, owned, used, or retained by any state or local agency" RCW 42.56.010(2) (emphasis added). The statute not only omits agency officials, officers, or employees from its definition of "public record," it omits them also from its exhaustive definition of "agency." *See* RCW 42.56.010(1) ("Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.")

When the legislature intends to regulate an agency's officers and officials, it knows how to do so. *See e.g.* RCW 43.17.380 ("agency' means a state agency, ... officer, ... and all offices of executive branch state government-elected officials, except agricultural commissions under Title 15 RCW"). As a matter of law, "only the legislature can amend or expand its definition of a 'public record'" since it "is not for the courts to do so because '[w]e cannot make laws. We can only apply the laws which the legislature makes to the facts in a particular case.'" *West v. Thurston County*, 168 Wn.App. 162, 184 n.25, 275 P.3d 1200 (2012), *rev. denied* 176

Wn.2d 1012 (2013). *See also Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 758, 174 P.3d 60 (2007) (Madsen, J., concurring) (in a PRA suit “it is the legislature’s province to amend a statute, not this court’s”).

Second, in *West v. Thurston County*, *supra* at 183-84 – precedent earlier cited by the County but now overlooked by the A.G.’s brief, *see* Resp. Br. at 19-20 – this Court notes there is no Washington authority extending:

... principal-agency relationship to the PRA context or establishing that records prepared by agents of a public agency automatically become “public records” subject to disclosure under the PRA. On the contrary, we assume that the legislature “means exactly what it says”; and, in this instance, our state’s legislature has not yet chosen to extend the PRA this far, expressly designating “agencies” as the only entities that can prepare “public records” subject to disclosure under the PRA. Applying the maxim *expressio unius est exclusio alterius*, “to express one thing in a statute implies the exclusion of the other,” we assume that the legislature intended to exclude from this designation an agency’s [agents] who prepare documents that the agency never physically possesses. Accordingly, we hold that a “writing” prepared by an agency’s [agent] is not automatically a public record under RCW 42.56.010(2) if the agency never physically possessed the documents.

(Emphasis added, footnotes omitted). *See also Nast v. Michels*, 107 Wn. 2d 300, 306, 730 P.2d 54 (1986) (Courts are exempt from the PRA because, among other things, plain text of its definitions do not “specifically include” them).

The three Washington cases cited by the A.G.’s brief as supposed-

ly “implicitly” holding otherwise, do not. See A.G. Br. 4-6. Thus, in *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240 P3d 1149 (2010), the email at issue was a “public record” because it had been used for a government purpose since its contents had been discussed and promised to be produced at a city council meeting, and thereafter manipulated on an official’s private home computer. See 170 Wn.2d at 142. See also *O’Neill v. City of Shoreline*, 145 Wn.App. 913, 187 P.3d 822 (2008) (“City does not dispute that the e-mail is a public record” because it was “‘used’ during the public meeting”).³ In *Forbes v. City of Gold Bar*, 171 Wn.App. 857, 288 P.3d 384, 388 (2012), the PRA suit actually was dismissed where a city came into possession of its official’s non-responsive personal emails from their private accounts only as part of responding to the record request and the Court held those that were claimed as personal were not public

³ *O’Neill* and *West* are consistent with the out-of-state decision that the A.G. states is the “one court opinion specifically addressing whether a text message sent from a personal cell phone of a government official or employee can be a public record” – *i.e.* *City of Champaign v. Madigan*, 992 N.E.2d 629 (Ill. App. Ct. 2013). In that case the Court examined the Illinois statute’s requirements that a “public record” must be “prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body,” and rejected its state A.G.’s similar attempt to expand “the language of the statute by inserting the qualifier ‘members’ of a public body into the statute” even though it “refers just to the ‘public body,’ not to ‘members’ of the public body.” *Id.* at 636-37 (quoting 5 ILCS 140/2(c) (2010)) (emphasis added). The texts were determined to be public records instead because, as in *O’Neill*, the record arose “during the time a city council meeting was in session, *i.e.*, during the time the individual city council members were functioning collectively as the ‘public body’” *Id.* at 640. The Court concluded its analysis by noting, similar to this Court in *West*: “If the General Assembly intends for communications pertaining to city business to and from an individual city council member’s personal electronic device to be subject to FOIA in every case, it should expressly so state” since it “is not this court’s function to legislate.” *Id.*

records and hence subject neither to *in camera* review nor an exemption log. Finally, *Mechling v. City of Monroe*, 152 Wn.App. 830, 844, 222 P.3d 808 (2009), did not address the authority of a Court to compel disclosure of personal communications existing exclusively on private devices but concerned disclosure of personal email addresses in government related electronic communications between officials -- without reference to where they had been created or where they could be exclusively found.⁴

Here, unlike the cases cited by the A.G., the potentially work-related document is exclusively in the possession of Verizon and is not “prepared, owned, used, or retained by any state or local agency” as required by RCW 42.56.010(2). Indeed, the A.G.’s brief contradicts its own undefined single factor analysis by elsewhere admitting that “not ... every document created, used, or owned by a government employee is a public record simply because it references or relates to the work of the employee” because:

While a court might presume that an agency employee is acting for work purposes when using agency-owned computers or devices, the same cannot be said for an agency employee using personal devices. Instead, most if not nearly all documents and other materials created by an employee on a personal device will be personal records rather than

⁴ Indeed, *Mechling*’s one sentence conclusion that the underlying emails were “public records” cites only *Tiberino v. Spokane County*, 103 Wn.App. 680, 13 P.3d 1104 (2000) - which concerned an employee’s personal communications created and existing on a government computer so that her misuse of government equipment was of public interest even though the content was exempt from disclosure as personal. 152 Wn.App. at 844.

public records, even if those records in a broad sense relate to the conduct of government. For example, ... an agency employee may send a text message or leave a note to his or her spouse stating that the employee will be working late that evening. In either instance, it would be absurd to suggest that the text message, or personal note were public records, even though the records might contain information “relating” to government.

A.G. Br. at 1, 8-9 (emphasis added).⁵ In short, any proposed non-statutory and indefinite “work purposes” rule contradicts well settled authority that there instead are three statutory requirements -- *i.e.* (1) a “writing;” (2) “containing information relating to the conduct of government or the performance of any governmental or proprietary function;” (3) that is “prepared, owned, used, or retained by any state or local agency” -- that must be satisfied for a record to be “public.” *See Dragonslayer, Inc. v. Wash. State Gambling Comm’n*, 139 Wn.App. 433, 444, 161 P.3d 428 (2007) (emphasis added).

B. PRA DOES NOT AUTHORIZE COMPELLED PRODUCTION OF TEXT MESSAGES EXCLUSIVELY HELD BY PRIVATELY RETAINED SERVICE PROVIDERS

The A.G.’s brief simplistically proposes that “the Court should determine whether the record was created, used, or owned for public agency

⁵ The A.G. in effect suggests that trial courts incur the burden of sifting through all personally paid text message content made and received by public employees to discern which if any are “work-related.” Nowhere does the A.G. explain under what legal principle public employees have any obligation to reveal the contents or other data concerning call or texts made or received on their personally paid private communication devices.

work purposes or for personal purposes.” A.G. Br. 2. The A.G. overlooks two critical points. First, an agency cannot lawfully or practically acquire the personal records of a public employee where the employee asserts his or her constitutional and federal statutory rights. Second, in a PRA action, a court cannot lawfully or practically acquire the personal records of a public employee where the employee asserts his or her constitutional rights. Unless the legislature acts to modify the statute within the parameters of federal statutory and federal and state constitutional protections, there is no authority in the PRA for an agency or a court to compel records from other parties, such as public employees or their third-party service providers such as Verizon.

At the outset, the public record “act only applies when public records have been requested.” *Bonamy v. City of Seattle*, 92 Wn.App. 403, 408-09, 960 P. 2d 447 (1998) (emphasis added). Here, the complaint does not allege text messages that were not released to the County by the private service provider actually were “work related,” reflected “work purposes,” or met any other proposed definition of “public record.” CP 1-9. Such demands for *in camera* review to determine if a document is a “public record” are properly rejected in PRA actions because there is no “clear articulation as to why such a review would be appropriate” and “the request amounted to nothing more than a fishing expedition.” *Forbes*, 171

Wn.App. 388-89. Indeed, according to plaintiff's counsel any *in camera* review would have automatically transformed the material into a public record and dispensed with the need for analysis of the PRA. *See Bennett v. Smith Bundy Berman Britten PS*, 176 Wn.2d 303, 291 P.3d (2013).

Further, neither the A.G.'s brief nor plaintiff cites any statute or precedent authorizing a Court in a PRA action to force public employees, much less employees' personal service providers, to produce records in their exclusive control when the employees assert their constitutional rights. This is so especially where: 1) the plain terms of the PRA regulate only an "agency" and not the personal service providers of its employees; and 2) federal statutory and federal and state constitutional law require instead a warrant based on probable cause of a crime. *See* RCW 42.56.010(1)-(2); *West*, 168 Wn.App. at 183-84; U.S. Const. amend. IV; Article I § 7; 18 U.S.C. §§ 2701, 2703; RCW 9.26A.140. Indeed, plaintiff was informed by Verizon that "a Court Order is not sufficient to release text content." *See* CP 96 (emphasis added) (*see also* appendix).

It also is uncontested in the record that at the time of its response, the County did not possess the requested text message content. Even though they were not public records, it is uncontested the County made reasonable efforts to obtain the requested records for agency review. Specifically, the complaint and plaintiff's other filings establish that: 1) if the

text content had been available at the time of the County's PRA response it could not have been obtained from the service provider "without a search warrant or a signed and notarized consent form" from their private customer, CP 92-93, 96; and 2) at the time of the response, the County and Intervenor attempted to obtain those records but were told by the private provider that the text content was unavailable because it had not been retained. See CP 15-16, 58, 81, 171, 173, 205, 207, 444-46, 490, 570, 579, 598, 616. As shown below, these uncontested facts in the record show a court "determination" of whether text content -- unavailable at the time of the PRA response -- was for "public agency work purposes or for personal purposes," is neither possible nor has any legal significance.

An agency's obligation under the PRA is determined as of the time of the request. See e.g. *Building Industry Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 740, 218 P.3d 196 (2009). It only "applies to the situation where the agency has the records but says, 'we are not going to give them to you' ... [rather than where the agency says] 'we do not have these records.'" *Id.* (quoting *Daines v. Spokane County*, 111 Wn.App. 342, 348, 44 P.3d 909 (2002), overruled on other grounds, 172 Wn.2d 702 (2011)) (internal quotations omitted). Even where "public records" are at issue, RCW 42.56.550(1) only states that "the superior court in the county in

which a record is maintained⁶ may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.” (Emphasis added.)

As the A.G.’s own guidelines concede: “An agency is only required to provide access to public records it has or has used,” WAC 44-14-04004(4)(a), and even then it cannot be required to do so if “doing so would be impossible.” WAC 44-14-03001(3). *See also O’Neill*, 170 Wn.2d at 150 (“If it is possible for the City to retrieve this information, the PRA requires that it be found and released to the O’Neills”) (emphasis added). Indeed, even when it is possible to obtain records, the Supreme Court holds: “On its face the Act does not require, and we do not interpret it to require, an agency to go outside its own records and resources to try to identify or locate the record requested.” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604 n. 3, 963 P.2d 869 (1998).

Because our Courts hold that an agency has no duty under the PRA even “to inquire with other Pierce County departments concerning a record request directed only to the prosecutor’s office,” *Koenig v. Pierce County*, 151 Wn.App. 221, 232, 211 P.3d 423 (2009) (emphasis added), it hardly can have a duty to obtain for *in camera* inspection its employees’ personal text content held exclusively by their private service providers.

⁶ Verizon’s records, however, were located in New Jersey. *See e.g.* CP 90, 93-94, 98-99.

This is especially true where, as here, the County and the Intervenor were told the text content was unavailable.

Finally, courts use common sense to avoid absurd results when interpreting statutes, *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007), and especially do so to avoid statutory interpretations that will produce illegal or unconstitutional results. *See Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 816, 123 P.3d 88 (2005); *Cawsey v. Brickey*, 82 Wash. 653, 663-64, 144 P. 938 (1914). Here, the A.G. agrees “records stored by an individual ... implicate an individual’s right to be free from unreasonable search and seizure and from government intrusion into private affairs” under the Fourth Amendment and Article I § 7. *See* A.G. Br. 13-15. *See also* 18 U.S.C. §§2701, 2703; U.S. Const. amend. I & XIV; Resp. Br. at 39-50; Intervener’s Br. at 10-30.

The fact that one construction among other alternatives involves serious constitutional difficulties is reason to reject that interpretation in favor of another. *State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 494 P.2d 1362 (1972); *State v. Dixon*, 78 Wn. 2d 796, 804, 479 P.2d 931 (1971). The assertion that a privately held document can be a “public record” that must be disclosed even though the agency does not have it and “public” has no legal right to obtain it, is nonsensical. The Court should reject the A.G.’s amorphous and unworkable definition of “public record”

and continue to apply that term only to “the situation where the agency has the records” but “has refused to allow inspection or copying.” That is not the case here where the County never had the text message content or ability to legally obtain those records from Verizon. *See* RCW 42.56.050(1); *McCarthy*, 152 Wn.App. at 740 (*quoting Daines*, 111 Wn. App. at 348).

C. STATUTORY AND CONSTITUTIONAL PROHIBITIONS AGAINST COMPELLING PUBLIC EMPLOYEES TO PRODUCE TEXT MESSAGE CONTENT FROM PRIVATE DEVICES CANNOT BE AVOIDED

First, the A.G.’s brief suggests this Court should “decline to address” the “difficult questions the County raises” under federal and state law and “instead wait to see how the facts and issues develop on remand” because for unexplained reasons “it is quite possible that Mr. Lindquist will consent to their review ...” A.G. Br. 15. However, the “difficult questions” of federal and state civil rights are not just those “the County raises” as allowed by RCW 42.56.070(1), but are asserted also by the person who holds those rights. *See* Intervener Lindquist’s Br.; Intervener Lindquist’s Answer to Amicus A.G.

After voluntarily disclosing his personal records that “may be work-related” even though they were not public records, CP 16, Prosecutor Lindquist legally intervened only when plaintiff brought suit seeking, among other things, to monitor private “calls made on public time.” *See*

CP 18, 25-26, 559-60. He did so to make a principled stand against the proposed violation of the constitutional and statutory rights of his staff as well as law enforcement officers, fire fighters, teachers, and others. *See e.g.* CP 489-519, 546-48, 627-32; 12/23/11 VRP 80-93. The Intervenor's answer to the A.G.'s brief has made clear he intends to continue to defend the constitutional and statutory rights of public employees. *See* Intervenor's Answer to Amicus A.G. Hence, any remand by this Court that does not address the federal and state constitutional and statutory issues raised by Intervenor Lindquist and the County will not avoid those issues in the trial court, which already has favorably ruled for Intervenor Lindquist and the County on those issues. *See* CP 258-59, 447, 12/23/11 VRP 94-95.

Second, any remand premised on mythical consent would not change the required legal analysis necessary to decide this PRA suit. This is so because, again, an agency's obligation under the PRA is determined as of the time of the requests. *See e.g. McCarthy*, 152 Wn.App. at 740. It is undisputed that neither the County nor the Intervenor could obtain the text content from Verizon at the time of the requests. *See* CP 15-16, 58, 81, 82, 92, 171, 173, 205, 207, 444-46, 490, 570, 579, 616. Thus, no amount of "wait[ing] to see how the facts and issues develop on remand" will change the legal analysis required since the threshold requirement of the PRA claim is the availability to the County of the text content at the

time of the requests.

“[T]he PRA must give way to constitutional mandates” because they are of greater importance as a matter of law. *See Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013). *See also Pierce County v. Guillen*, 537 U.S. 129 (2003) (reversing state court because PRA subject to federal statutory privilege); *Seattle v. Egan*, ___ Wn.App. ___, 2014 WL 390416 (2014) (“United States Supreme Court revealed that there is not a general constitutional right of access to government information” so “obligation to provide the public records to [plaintiff] arises under state law” only); *King County v. Parmelee*, 163 Wn.App. 337, 354, 254 P.3d 927 (2011) (“PRA ‘merely creates [a] procedure, it does not create a liberty interest’”) (*quoting DeLong v. Parmelee*, 157 Wn.App. 119, 163, 236 P.3d 936 (2010)).

Here, constitutional and federal statutory issues only can be avoided by interpreting the PRA in the manner advocated by the County, Intervenor, and numerous amici associations representing teachers, police, firefighters, prosecutors, and other public employees -- *i.e.* it does not apply to text message content exclusively in the possession of non-consenting individuals or their private service providers.⁷

⁷ The A.G.’s brief at page 15 cites *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000) – which holds that “[w]here an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds.” This reliance

Third, the A.G.'s brief references the majority's concern in *O'Neill*, "if government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined." See A.G. Br. 5, 13 (quoting 170 Wn.2d at 150). *O'Neill*, however, did not confront an agency that tried but was unable to obtain records because of federal statutory law and the constitutional rights of its employees. See 170 Wn.2d at 150. The solution to concerns about circumvention of the PRA's current language lies not in pursuing unconstitutional statutory interpretations that are contrary to the PRA's plain text, but with legislative action consistent with constitutional protections. See *Champaign v. Madigan*, 992 N.E.2d 629, 640 (Ill. App. Ct. 2013) (refusing to judicially rewrite public records act, noting local municipalities could "consider promulgating their own rules prohibiting city council members from using their personal electronic devices during city council meetings").

III. CONCLUSION

For the foregoing reasons, Pierce County respectfully requests that the Court: 1) adopt the trial court, the County and the A.G. analysis confirming that billing records of public employees held by third party service

is misplaced because, as the Supreme Court in *Tunstall* concluded: "Because we do not favorably resolve the ... claims ... on statutory grounds, we next analyze the ... constitutional rights" *Id.* at 216.

providers are not “public records;” 2) reject the A.G.’s new, undefined, unworkable, and unconstitutional “work-purposes” test, which invites trial courts to violate the constitutional rights of public employees; 3) acknowledge that “text content” on private devices of public employees is not accessible to agencies; and 4) affirm the trial court’s order of dismissal holding that Intervenor’s billing and text records created by and held by Verizon are not “public records,” and are protected by federal and state statutes and constitutions.

DATED this 10th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was delivered this 10th day of February, 2014, by electronic mail pursuant to the agreement of the parties as follows:

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APPENDIX

RCW 9.26A.140

Unauthorized sale or procurement of telephone records — Penalties — Definitions.

(1) A person is guilty of the unauthorized sale or procurement of telephone records if the person:

(a) Intentionally sells the telephone record of any resident of this state without the authorization of the customer to whom the record pertains;

(b) By fraudulent, deceptive, or false means obtains the telephone record of any resident of this state to whom the record pertains;

(c) Knowingly purchases the telephone record of any resident of this state without the authorization of the customer to whom the record pertains; or

(d) Knowingly receives the telephone record of any resident of this state without the authorization of the customer to whom the record pertains.

(2) This section does not apply to:

(a) Any action by a government agency, or any officer, employee, or agent of such agency, to obtain telephone records in connection with the performance of the official duties of the agency;

(b) A telecommunications company that obtains, uses, discloses, or permits access to any telephone record, either directly or indirectly through its agents, that is:

(i) With the lawful consent of the customer or subscriber;

(ii) Authorized by law;

(iii) Necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or

(iv) In connection with the sale or transfer of all or part of its business, or the purchase or acquisition of a portion or all of a business, or the migration of a customer from one carrier to another.

(3) A violation of subsection (1)(a), (b), or (c) of this section is a class C felony. A violation of subsection (1)(d) of this section is a gross misdemeanor.

(4) A person who violates this section is subject to legal action for injunctive relief and either actual damages, including mental pain and suffering, or liquidated damages of five thousand dollars per violation, whichever is greater. Reasonable attorneys' fees and other costs of litigation are also recoverable.

(5) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Telecommunications company" has the meaning provided in RCW 9.26A.100 and includes "radio communications service companies" as defined in RCW 80.04.010.

(b) "Telephone record" means information retained by a telecommunications company that relates to

the telephone number dialed by the customer or the incoming number or call directed to a customer, or other data related to such calls typically contained on a customer telephone bill such as the time the call started and ended, the duration of the call, the time of day the call was made, and any charges applied. "Telephone record" does not include any information collected and retained by customers using caller identification or other similar technologies.

(c) "Procure" means to obtain by any means, whether electronically, in writing, or in oral form, with or without consideration.

[2006 c 193 § 1.]

Comments:

Please be advised that a Court Order is not sufficient to release text content.

Content is only released pursuant to either a Search Warrant or the attached Consent form signed and notarized by the USER of the phone which is NOT necessarily the account holder.

Please note, VZW fax numbers have changed to:

Subpoenas: 888-667-0028

Court Orders: 888-667-0026

Please note that the time reflected on any call detail report or bill copy is reflective of the switch that processed the call, which may not be the same as the clock time at the call site where the call was initiated.

The information contained in this message and any attachment may be proprietary, confidential and privileged or subject to the work product doctrine and thus protected from disclosure.

If the reader of this message is not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

If you have received this communication in error, please notify me immediately by replying to this message and deleting it and all copies and backups thereof. Thank you.

PIERCE COUNTY PROSECUTOR

February 10, 2014 - 3:39 PM

Transmittal Letter

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this is the subject of the County's motion to file overlength brief

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