Supreme Court No.
Court of Appeals No. 48601-6-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Plaintiff/Respondent

v.

STEVE VERMILLION & CITY OF PUYALLUP,

Defendants/Petitioners

PETITION FOR REVIEW OF THE PUBLISHED OPINION OF DIVISION II OF THE COURT OF APPEALS

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I. IDENTITY OF PETITIONERS

Defendant/Petitioners City of Puyallup and its former Councilmember Steve Vermillion ask this Court to review Division II's published decision in *West v. Vermillion*, COA No. 48601-6 (11/8/16).

II. INTRODUCTION

First Amendment rights are different. The Supreme Court should accept review of *West v. Vermillion* because the Court of Appeals (COA) failed to take these differences into account when it refused to address the merits of Vermillion's First Amendment claims. If the *West v. Vermillion* decision is allowed to stand, it will have a chilling effect on the First Amendment rights of every elected official in the state – along with their constituents and political supporters. Review is therefore appropriate under RAP 13.4(b)(1)-(4).

This Court did not address First Amendment rights in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). Petitioners argued to Division II that neither the text of the Public Records Act (PRA) itself, nor the "scope of employment" test adopted in *Nissen* gives elected officials the guidance they need to sort out public records that commingled with their constitutionally protected private political papers.

The COA refused to consider the merits of this First Amendment claim, ruling Vermillion must first produce his private political emails to the City so the City can determine which emails are protected by the First Amendment. This would amount to the warrantless search and seizure of Vermillion's private political correspondence.

There cannot be any greater affront to the values embodied in the First and Fourth Amendments (and Article 1, Section 7) than a statute that allows government officials to seize the private political correspondence of dissident politicians.[1] "[I]nvolvement in partisan politics is closely protected by the First Amendment."[2] In fact, "First Amendment protection is at its zenith" when protecting political rights.[3] The "compelled disclosure [of political correspondence], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"[4] because "[a]wareness that the Government may be watching chills associational and expressive freedoms."[5] The people must be free to privately voice concerns to their elected representatives because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[6]

By refusing to address the merits of Vermillion's First Amendment claim until he sacrificed those rights, the COA ruling gives Vermillion and other elected officials in Washington State less privacy protection in their political papers than the Supreme Court gave President Nixon after Watergate. In fact, this Court has recently given more privacy protections

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[1] *See Stanford v. Texas*, 379 U.S. 476 (1965) (citing "Case of the Seized Papers"); *see also State v. McCollum*, 17 Wn.2d 85, 101, 136 P.2d 165 (1943) (opinion of Millard, J.) The "Case of the Seized Papers" is analyzed in Vermillion's opening brief at pages 13-15.

[2] *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 467 (1977) (quotations omitted).

[3] *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (quotation omitted).

[4] *Nixon*, 433 U.S at 467 (quotations omitted).

[5] *State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014).

[6] *E. R. R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 81 S.Ct. 523 (1961). This does not mean a law could never require the disclosure of such communications, but such a law must be subjected to First Amendment scrutiny.

to the communications of a heroin addict with his dealer,[7] and to the private papers of a child pornographer[8] than the COA ruled elected officials deserve to have in their private political communications with their constituents and supporters.

By placing the privacy rights of elected officials below that of a crook, drug addicts and pornographers, the COA has ignored decades' worth of First Amendment case law. If this Court does not accept review, that holding will have a significant chilling effect on the First Amendment rights of every elected official in the state. See RAP 13.4(b)(1)-(4).

III. STATEMENT OF THE CASE

This case concerns what obligation the City of Puyallup and a former City Councilmember Steve Vermillion have to respond to a PRA request from Arthur West for emails sent to Vermillion's private email account [9] that were "concerning the City of Puyallup, City business, or any matters related to City governance the City Council and mayor, or his membership on the City Council." CP 40-41.

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[7] *Hinton*, 179 Wn.2d at 877.

[8] *State v. Besola*, 184 Wn.2d 605, 611, 359 P.3d 799 (2015).

[9] The original request sought "All records of communications received by or communications or posting by Steve Vermillion concerning the City of Puyallup, City business, or any matters related to City governance the City Council and mayor, or his membership on the City Council," but West later narrowed the request to "the communications received or posted by Mr. Vermillion at or on his website." The request also included two other categories of records that were fulfilled and not at issue. CP 40-41. Although West purported to exclude campaign-related emails from his request, he has continued to demand the disclosure of emails with political contributors so the scope of his exclusion is unclear and meaningless for the purposes of Vermillion's First Amendment challenge. See, e.g., Respondent West's Amended Opening Brief at 41.

Because Vermillion used this email account and associated website for his political activity including his communications with constituents and political supporters, and because the vague definition of "public record" gave him no ability to distinguish between public records and private political records, Vermillion refused to provide the records. CP 69-71. The City supported this decision.

West sued, seeking a forensic search of Vermillion's computer. CP 97. After cross-motions for summary judgment, the trial court ruled in favor of West in part, but stayed that ruling and certified the case for immediate review. CP 182-86. After this Court issued its decision in *Nissen*, it denied Vermillion and the City's motion for direct review and transferred the case to Division II. Division II has now issued its decision but refused to address the merits of Vermillion's First Amendment claim. Petitioners now seek discretionary review.

IV. ISSUES PRESENTED FOR REVIEW

Does the definition of "public record" provide sufficient guidance under a First Amendment standard to allow an elected official to distinguish between "public records" and private political records, or is that definition overbroad or vague?

Does the PRA violate Article 1, Section 7 by implicitly allowing agencies to search and seize private political papers of elected officials without a warrant?

Is an elected official required to turn his private political papers over to the government before he can assert that it would violate his First

Amendment privacy rights if he had to turn his private political papers over to the government?

V. ARGUMENT

A. The COA Decision Conflicts with *Nissen* & *Nixon* by Mandating the Warrantless Search and Seizure of the Private Political Writings of Elected Officials

The COA claimed it was only applying *Nissen* to Vermillion's claims but failed to grasp the constitutional significance of this Court's reliance on *Nixon* and other rulings in that case.

1. The COA Decision Failed to Recognize the Careful Constitutional Balance this Court Struck in *Nissen*

In *Nissen*, this Court reaffirmed that personal records on a private electronic device warrant constitutional protection because they contain "a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *Nissen*, 183 Wn.2d at 883 (quoting *Hinton*, 179 Wn.2d at 869). At the same time, this Court held that employees do not have any expectation of privacy in "public records." *Nissen*, 183 Wn.2d at 883 & n.10.

The constitutional challenge this Court faced was how to extract the public records that are commingled with constitutionally protected records and stored in a constitutionally protected location.[10] If the Court interpreted the PRA in a way that would compel the production of the private records

[10] *Nissen*, 183 Wn.2d at 883 ("Because an individual has no constitutional privacy interest in a public record, Lindquist's challenge is necessarily grounded in the constitutional rights he has in personal information comingled with those public records.") (footnotes omitted).

along with public records, it would violate Lindquist's constitutional privacy rights. But if he could use the PRA's definition of "public record" to sort his emails, this would protect Lindquist's privacy rights by only requiring him to produce public records.

This Court, however, also recognized that the PRA's definition of "public records," as records "containing information relating to the conduct of government," did not provide sufficient guidance because private records could still "refer to, comment on, or mention the employee's public duties," and thus contain information relating to the conduct of government. *Nissen*, 183 Wn.2d at 880-81 & n.8, 887. To resolve the dilemma, the Court added the "scope of employment" element to the definition of "public record," which allowed employees to easily distinguish between "public records" and private records. *Id.* at 877.

The Court's "self-search" solution works for employees only because the "scope of employment" test provides sufficient guidance in most situations; the employee will inherently "know" whether they are wearing their "employee" hat or their "personal" hat when they create and receive records. The Court presumed that this test would allow Lindquist "to review [a transcript of the content of all the text messages at issue] and produce to the County any that are public records consistent with [the *Nissen*] opinion." *Nissen*, 183 Wn.2d at 888 (emphasis added). Thus, the Court's decision and remand order ensured that Lindquist could apply this new definition to sort out any public records, which meant no one else would get access to his private constitutionally protected communications.

The Petitioners have claimed that even after *Nissen*, the definition of "public record" needs additional refinement to allow Vermillion, as an elected legislative official, to distinguish between public records and private constitutionally protected political records; otherwise the definition was constitutionally overbroad or vague. But rather than apply the reasoning in *Nissen* and supply such guidance, the COA ordered Vermillion to produce all of his responsive emails before it would consider which emails were constitutionally protected by the First Amendment. This compelled production not only would violate the First Amendment, it would also amount to an illegal search and seizure under Article 1, Section 7.[11]

2. The COA Failed to Apply the First Amendment Balancing Test Mandated by the Supreme Court in *Nixon*

The COA also misconstrued this Court's citation to the *Nixon* decision in *Nissen* to hold that Vermillion could not have a First Amendment privacy interest in public records. But *Nixon* only supports the constitutionality of a dichotomy between "public records" and "private

[11] It is not clear whether the Court's search procedure imposed a binding duty on employees to search their own records and produce any "public records," or if the Court simply made agencies liable for producing such records. The body of the opinion suggests the latter, as demonstrated by the Court's emphasis on the importance of agency policies. But the Court's specific order seems to require Lindquist to produce any text messages that fit into the Court's new definition of "public record." A government order requiring someone to turn over records to the government for inspection is a Fourth Amendment "search" that requires a warrant and authority in law. *See, e.g., City of Los Angles v. Patel*, -- U.S. --, 135 S.Ct. 2443 (2015) (statute that required hotel owners to turn over certain business records for inspection by police was facially unconstitutional under the Fourth Amendment); *Seymour v. State*, 152 Wn. App. 156, 216 P.3d 1039 (2009) (warrantless order to turn over business records was unconstitutional search); *Delia v. City of Rialto*, 621 F.3d 1069, 1077 (9th Cir. 2010) (order to government employee to retrieve items from home to make available for inspection by city attorney was unconstitutional search), rev'd in part on other grounds sub nom., *Filarsky v. Delia*, -- U.S. --, 132 S.Ct. 1657 (2012).

records" if "public records" are properly defined. This is why this Court had to adopt the scope of employment test.

Moreover, while this Court did not consider a First Amendment challenge in *Nissen*, in *Nixon*, the U.S. Supreme Court held that political correspondence was entitled to the same privacy protections as private personal correspondence. *Nixon*, 433 U.S. at 466-67. The Supreme Court therefore had to conduct a First Amendment balancing test to assess Nixon's challenge. It was only because of two unique factual circumstances that the Supreme Court concluded that "the First Amendment claim is clearly outweighed by the important governmental interests promoted by the Act." *Nixon*, 433 U.S. at 467-68.

Those two unique factual circumstances that tipped the scale in favor of disclosure in *Nixon* are not present in the case at bar. First, in *Nixon*, the public's interest in seizing the private records was extraordinary because the private personal and political records were commingled with all of Nixon's official presidential papers, "to which great public interest attached." *Nixon*, 433 U.S. at 456. In other words, the only way the public could preserve the historical record of Nixon's presidency was to also seize his private records.

Here, no such great public interest exists because access to Vermillion's emails through the PRA would provide little, if any, insight into the conduct of government beyond what is already provided for using other disclosure tools. First, all of Vermillion's emails sent to or from anyone using a City of Puyallup email address is already subject to

disclosure under the PRA. Second, absent a violation of the Open Public Meetings Act (OPMA), Vermillion cannot take any action on behalf of the City in emails. Third, if there were any evidence of an OPMA violation or any illegal conduct, Vermillion's emails could be accessed through criminal or civil discovery. Thus, in a First Amendment balancing analysis the public "need" weighing in favor of disclosure would be the "need" for access to emails where no government action is taken, no city employee is involved, and where there is no evidence to suggest illegal conduct occurred.

Second, the Presidential Record Act had significant protections that served to minimize the burden on Nixon's privacy. These protections included strict limitations on who could review the records to determine what records were private and would be returned to Nixon, along with internal review procedures Nixon could use before he had to resort to the courts if he disagreed with an archivist's determination of what should be disclosed.[12]

In contrast, if Vermillion were required to turn over his private political correspondence to the City, the PRA would provide few, if any, safeguards to protect Vermillion's privacy. First, nothing in the PRA limits who at the City would be allowed to review the records. Second, short of

[12] *Nixon*, 433 U.S. at 468 ("But a compelling public need that cannot be met in a less restrictive way will override those interests, particularly when the free functioning of our national institutions is involved. . . . The extent of any such burden, however, is speculative in light of the Act's terms protecting appellant from improper public disclosures and guaranteeing him full judicial review before any public access is permitted."); s*ee also Nixon v. Freeman*, 670 F.2d 346, 351-54 (D.C. Cir. 1982) (describing the protections provided by the screening and review process).

suing the City, there is nothing that would give Vermillion any recourse if he and the City disagreed about what should be withheld. Third, such a disagreement would be highly likely given the complete lack of guidance in the PRA regarding political records, and the absence of any general privacy exemption.

Thus, had the COA complied with the mandate of *Nixon* and balanced the public's need for disclosure against harm such disclosure would cause, the factual differences likely would have led to a different result. But instead of conducting the mandated analysis, the COA just relied on the result in the *Nixon* case as if this Court had held in *Nixon* that the mandated disclosure of political records will never "inhibit the freedom of political activity and did not reduce the quantity and diversity of political speech and association." *West v. Vermillion*, supra, at ¶31 (citing *Nixon*, 433 U.S. at 468).

Instead of considering whether the factual differences in the case affected the First Amendment balancing analysis, the COA accused the Petitioners of ignoring the "dissimilarities", implying the factual differences made the case inapplicable. Finally, the COA suggested that this Court implicitly rejected any First Amendment claim because it cited to *Nixon* in the *Nissen* decision.

Thus by relying on the results in *Nissen* and *Nixon*, while ignoring the holdings in those cases, the COA failed to address the merits of Vermillion's First Amendment claim that the current definition of public record does not allow Vermillion or any elected official to distinguish

between private political correspondence and public records.[13] This failure conflicts with *Nissen* and *Nixon* and justifies review by this Court.

B. The COA Ignored Decades of Supreme Court Precedent When It Failed to Address the Merits of Petitioners' First Amendment Arguments

The COA decision not to review the merits of the Petitioners' First amendment challenge not only conflicts with *Nissen* and *Nixon*, it is also in direct conflict with 40 years of First Amendment precedent and will have a chilling effect on every elected official in this state that wants to engage in private political correspondence.

1. First Amendment Rights Are Different

Laws that implicate First Amendment rights are not given the standard presumption of constitutionality.[14] Instead, statutes that implicate First Amendment rights must be "sharply drawn"[15] to give persons "wide latitude"[16] so persons have "breathing space"[17] to exercise their rights.

Vague and overbroad laws "raise special First Amendment concerns" because they can violate First Amendment rights merely by having a chilling effect, making persons sacrifice their rights to avoid violating the law.[18] Accordingly, in First Amendment challenges, there "is an exception to the general rule that a litigant cannot rely on hypothetical

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[13] It is noteworthy that for most, if not all, other employees, the *Nissen* test will allow those employees to distinguish between public records and political activity because employees cannot engage in political activity while acting as employees.
[14] *State v. Homan*, 181 Wn.2d 102, 111 n.7, 330 P.3d 182 (2014).
[15] *Voter's Educ. Committee v. PDC*, 161 Wn.2d 470, 846, 166 P.3d 1174 (2007).
[16] *WSRP v. PDC*, 141 Wn.2d 245, 265-66, 4 P.3d 808 (2000).
[17] *Citizens United v. FEC*, 558 U.S. 310, 329 (2010).
[18] *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

conduct to argue the unconstitutionality of a statute."[19] This is because "[i]n the First Amendment context, a 'chilling effect' on First Amendment rights is a recognized present harm, not a future speculative harm, which allows third party standing when the law in question burdens constitutionally protected conduct."[20]

"In a democratic society, privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored . . . can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas."[21]

A statute that mandates the disclosure of private political correspondence implicating First Amendment rights should be reviewed under these standards. But the COA refused to review that claim, asserting it could not make an "advisory" ruling and had to review the actual emails at issue.

2. Courts Will Give Advisory Rulings on Hypothetical Facts in First Amendment Challenges to Protect Against Any "Chilling Effect"

Since at least 1974, this Court has held that litigants can raise First Amendment challenges based on hypothetical facts because restrictions on First Amendment rights have an unconstitutional "chilling effect" on the exercise of those rights. *Fritz v. Gorton*, 83 Wn.2d 275, 311 n.5, 517 P.2d 911 (1974) (citing *NAACP v. Button*, 371 U.S. 415 (1963)). This Court

[19] *State v. Glas*, 147 Wn.2d 410, 419, 54 P.3d 147 (2002).
[20] *Walker v. Munro*, 124 Wn.2d 402, 416, 879 P.2d 920 (1994); *Fritz v. Gorton*, 83 Wn.2d 275, 311 n.5, 517 P.2d 911 (1974).
[21] *Bartinicki v. Vopper*, 532 U.S. 514, 532-33 & n.20 (2001).

reasoned that the "alleged infringement [from the chilling effect] upon the free exercise of [F]irst [A]mendment rights clearly places the issue squarely before the Court." *Fritz*, 83 Wn.2d at 311 n.5 (addressing chilling effect on right to petition). This Court repeated this holding one year later, noting the accepted role of hypotheticals in First Amendment overbreadth challenges:

> The State correctly points out the general rule that one cannot resort to hypothetical behavior in urging the unconstitutionality of a statute. One must be adversely affected by the statute challenged. The rule is different, however, when First Amendment rights are allegedly involved and a statute's overbreadth is asserted. In such cases one can resort to hypotheticals to demonstrate the alleged overbreadth.[22]

Despite this well-established case law favoring advisory rulings in First Amendment cases, the COA rested its decision not to consider the merits of Vermillion's First Amendment claim because he did not put those emails into the record and was instead seeking an advisory opinion based on a hypothetical email. The COA claimed *Walker v. Munro* prohibited it from making advisory rulings:

> A fictitious e-mail that is similar in an unexplained way to an e-mail in an unrelated case cannot be the basis for us to issue an opinion as to the character of a real e-mail in this case. Were we to issue such an opinion, it would be, at best, advisory. *See Walker v. Munro*, 124 Wn.2d 402, 418, 879

[22] *Blondheim v. State*, 84 Wn.2d 874, 876, 549 P.2d 1096 (1975) (citing *NAACP v. Button*, 371 U.S. 415 (1963) (other citations omitted)). The Court has repeated this holding numerous times over the years. *See, e.g.*, *State v. Hegge*, 89 Wn.2d 584, 589-91, 574 P.2d 386 (1978); *Walker v. Munro*, 124 Wn.2d 402, 416, 879 P.2d 920 (1994); *State v. Glas*, 147 Wn.2d 410, 418-19, 54 P.3d 147 (2002); *State v. Stevenson*, 128 Wn. App. 179, 191, 114 P.3d 699 (Div. II, 2005).

> P.2d 920 (1994). ("We choose instead to adhere to the longstanding rule that this court is not authorized under the declaratory judgments act to render advisory opinions or pronouncements upon abstract or speculative questions.").

West v. Vermillion, supra at ¶ 25.

In *Walker v. Munro*, however, this Court noted that the "no advisory" rule did not apply in First Amendment challenges because "[i]n the First Amendment context, a 'chilling effect' on First Amendment rights is a recognized present harm, not a future speculative harm, which allows third party standing when the law in question burdens constitutionally protected conduct." *Walker*, 124 Wn.2d at 416. The COA ruling ignores the First Amendment exception regarding advisory opinions.

3. The COA's Refusal to Consider Hypothetical Evidence Creates a Catch-22

In the case at bar, Vermillion submitted a declaration showing that the responsive emails included correspondence with constituents and political supporters. CP 69-71. This should have been sufficient to invoke a First Amendment analysis because the compelled production of political papers infringes on First Amendment rights.[23]

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[23] *Nixon*, 433 U.S. at 467 (quotations omitted); *Hinton*, 179 Wn.2d at 877; see also *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) (quashing subpoena for correspondence with elected officials based on First Amendment associational privacy). A party resisting discovery only needs to show that there is "some probability" that disclosure of the records sought will infringe on First Amendment rights to assert a First Amendment privilege. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990). Such records will not even be subjected to in camera review unless the party seeking the records makes a strong showing of need. *Snedigar*, 114 Wn.2d at 166; see also *Right-Price Recreation v. Connells Prairie Community Council*, 105 Wn. App. 813, 21 P.3d 1157 (2001) *aff'd*, 146 Wn.2d 370, 46 P.3d 789 (2002) (under *Snedigar*, trial court erred in ordering in camera review because it was not "clearly necessary" to allow the Court to conduct a First Amendment balancing analysis).

Vermillion did not need to use a hypothetical to make his First Amendment claim, but the fictitious email provided a concrete example showing how difficult it can be to use the "scope of employment" test to determine if constituent correspondence qualifies as public records, particularly as such communications can easily run afoul of the prohibition against the use of public resources for campaign-related communications.[24] The fact that the COA found it "impossible" to provide any guidance for distinguishing between public records and private political communications without an actual email shows why a hypothetical email was provided.

Instead of using that tool to address the merits of Vermillion's claim, the COA ruled that before a court would consider the merits of Vermillion's claim that it would violate his First Amendment rights if he has to turn over his private political emails to the City, Vermillion must first turn over his private political emails to the City. This puts Vermillion in a classic catch-22 situation, which is why courts allow litigants to prove a chilling effect in First Amendment cases using hypothetical evidence.

4. If Allowed to Stand, the COA Decision Will have a Chilling Effect on Every Elected Official in the State

Vermillion has already paid the ultimate political price because of the ambiguities in the law – he was voted out of office in part because of

[24] The fictitious email can be found in two locations in the briefing. First in Vermillion's reply brief at 18-20, the email is analyzed along with an explanation of why the standard in RCW 42.17A.555 cannot be used to define the scope for First Amendment associational privacy rights. Second, the email is analyzed in the Joint Supplemental Brief at 16-17, where the petitioners use it to illustrate how the "scope of employment" test fails to provide sufficient guidance.

the public's perception that he was violating the PRA. But the harm from ambiguities in the definition of a public record is not limited to Vermillion – if the COA decision is allowed to stand, every elected official[25] will be forced to either forgo having confidential political discussions with constituents and supporters or risk exposing their agencies to PRA penalties.

Another hypothetical (again based on an actual case[26]) demonstrates the ambiguities in the definition of "public record" that remain for elected officials after the *Nissen* decision.[27] Assume that after a critical news story about a prosecutor is posted on the newspaper's website, the prosecutor uses his personal cell phone in the middle of the day to text his chief deputy to say, "[t]ell allies to comment on Newspaper story." Was the prosecutor acting within the scope of employment? What if the chief deputy also played an important role in the prosecutor's re-election campaign? The answer becomes even less clear if the text message is viewed through the lens of RCW 42.17A.555, which prohibits the use of public resources to support political campaigns.[28] Can an elected official use public resources

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[25] While the ruling affects every elected official, legislative officials have a stronger First Amendment claim because unlike executive officials, legislative officials are subject to the OPMA and can only take action in open public meetings. Thus, the public's interest in disclosure is significantly less than in the case executive officials.

[26] This hypothetical is based on the *Nissen* case after remand. See Sean Robinson, "Judge Goes Against Lindquist," The News Tribune February 9, 2016 (available at http://www.thenewstribune.com/news/local/article59342783.html) (last visited December 3, 2016).

[27] The use of a hypothetical modeled on the *Nissen* case should not be interpreted as disagreement with this Court's *Nissen* decision. This Court treated Lindquist as an employee in *Nissen* and did not consider the First Amendment. As noted above, the scope of employment test provides meaningful privacy protections for employees.

[28] See supra note 24 regarding the relevance of RCW 42.17A.555.

to orchestrate a covert effort to minimize the political fallout from a negative news story by having political supporters use pseudonyms to post comments favorable to the prosecutor on the newspaper's website? Would such activities qualify as actions "within the scope of employment"?

As long as the defining line between public records and private political records remains unclear, elected officials in this state cannot be assured that their political conversations will remain private. Thus, the ambiguity in the scope of the definition of a public record that was ignored by the COA in *West v. Vermillion* will chill the association speech and privacy rights of every elected official in the state if this Court does not accept review.

C. The Legislature, Not the Courts, Needs to Update the PRA to Bring It into the Digital Age

Vermillion is not arguing he has a constitutional right to conduct City business using a private email account. He is only arguing that the current definition of "public record" is overbroad or vague when applied to the private email account of an elected legislative official because it does not adequately distinguish between public records and private political records. A ruling in favor of petitioners therefore will not undermine the PRA because it will allow the Legislature to adopt a more refined definition that adequately protects privacy. At the same time, the Legislature will almost certainly amend the PRA to provide better access to digital communications.

A ruling in favor of the petitioners would likely have to be a ruling that, as applied to records exclusively in an elected legislative official's possession, the definition of "public record" is unconstitutionally overbroad or vague.[29] Petitioners originally argued that the Court should invoke the doctrine of constitutional avoidance and "interpret" the definition of "public record" similar to this Court's ruling regarding court records in *Nast v. Michaels*,[30] but the *Nissen* decision may foreclose this option. Finally, while a *Nissen*-style ruling that "interprets" the definition of "public record" to provide more guidance could in theory work, the COA found this task impossible without reviewing the actual emails.

Of course, this is why the Legislature, rather than courts, drafts legislation. While courts may lack access to sufficient factual information to accurately draw the line between public records and private political records, the Legislature is not so constrained. If this Court finds that the definition of "public record" is overbroad or vague, it is certain the Legislature will react and take up the issue.[31]

A legislative fix is what is needed to bring the PRA into the 21st century and to account for how the digital communication revolution has

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[29] This would amount to a hybrid as applied/facial challenge that would impact all similarly situated elected legislative officials, but would not affect records held by employees or elected executive officials. *See Wash. State Republic Party v. PDC*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000); *see also Citizens United*, 558 U.S. at 331 (noting ill-defined distinction between "as applied" and facial" challenged).

[30] 107 Wn.2d 300, 730 P.2d 54 (1986) (records in possession of courts not public records). The Court, not the parties, determine what remedy to apply to resolve constitutional challenges. *See Citizens United*, 558 U.S. at 330-31 ("once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

[31] Vermillion has even included such a proposal attached to his Reply Brief.

affected the way in which elected officials communicate. This would also allow for the Legislature to create some form of subpoena power so the public would not have to blindly rely on the good faith of public employees and officials, as the Court acknowledges in *Nissen* is currently required. This gap in access after *Nissen* leaves open the possibility of an email scandal in Washington State similar to the scandal that plagued the recent Presidential election. This is because should a city elect to use private email accounts and store emails on a private server, the *Nissen* standard would allow city officials to determine in the first instance what records had to be turned over and what records could be deleted because they were "private." A ruling in favor of petitioners will result in a prompt legislative response that strengthens the PRA, while protecting constitutional privacy rights.

VI. CONCLUSION

In the 1974 *Fritz* decision, this Court upheld the balance Initiative 276 struck between constitutional rights and the public's need for disclosure. Recent decisions from this Court and the U.S. Supreme Court have demonstrated that four decades after the *Fritz* decision, technology and the digital communications revolution has reshaped how private information is stored, requiring new constitutional privacy protections.[32] The PRA needs to be updated to strike a new balance so that the public has legislative tools to access records held by employees and elected officials

[32] *See, e.g., Hinton*, 179 Wn.2d 862; *Riley v. California*, -- U.S. --, 134 S.Ct. 2473 (2014). As Justice Yu recently acknowledged, "It has long been the practice of this court to be cautious when asked to rule on constitutional privacy protections in the face of technological advances." *State v. Samalia*, 186 Wn.2d 262, 281, 375 P.3d 1082 (2016) (Yu, J, dissenting, joined by Stephens, J, and Gordon McCloud, J.).

but that also provides meaningful privacy protections. The COA decision ignores all of this Court's First Amendment jurisprudences and reaches an unconstitutional result that does nothing to move us any closer to the reforms needed. This Court should accept review to address the issues petitioners have raised and protect transparency while being mindful of the rights of individuals to privacy, including political privacy.

RESPECTFULLY SUBMITTED this 8th day of December, 2016.

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

November 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST, Respondent, v. STEVE VERMILLION, CITY OF PUYALLUP, Appellants.	No. 48601-6-II PUBLISHED OPINION

LEE, J. — Arthur West submitted a public records request under the Public Records Act[1] (PRA) to the city of Puyallup (City) for the "communications received or posted" through a personal website and associated e-mail account run by city council member Steve Vermillion. Clerk's Papers (CP) at 41. Vermillion refused to provide records that were in his home, on his personal computer, or in the e-mail account associated with his website, citing privacy provisions of the Washington and United States Constitutions. The City supported Vermillion's position. West sued. The superior court granted West's motion for summary judgment requiring Vermillion to search for and produce the requested records. Vermillion and the City appeal, arguing that the superior court erred because article I, section 7 of the Washington Constitution and the First and Fourth Amendments to the United States Constitution protect the requested documents.

[1] Ch. 42.56 RCW.

We hold that it was proper for the superior court to require Vermillion to produce to the City e-mails in his personal e-mail account that met the definition of a public record under RCW 42.56.010(3) and to submit an affidavit in good faith attesting to the adequacy of his search for the requested records. We further hold that the First and Fourth Amendments to the United States Constitution and article I, section 7 of the Washington Constitution do not afford an individual privacy interest in public records contained in Vermillion's personal e-mail account. Therefore, we affirm, but we remand for the superior court to amend its order in light of *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

FACTS

In 2009, Vermillion created a website and an e-mail account associated with the website to aid in his state congressional campaign. Vermillion continued to use the website and e-mail after the campaign ended for various civic groups with which he was involved.

In 2011, Vermillion began using the website and e-mail to campaign for a position on the Puyallup City Council. Vermillion was elected to the Puyallup City Council effective January 1, 2012. After being elected, Vermillion occasionally received e-mails from constituents, as well as people from the City, through his website and personal e-mail account. Vermillion also used his website and e-mail to coordinate with other city council candidates.

When Vermillion received an e-mail that required an official response or action, he would forward the e-mail to the appropriate person at the City and then delete it from his e-mail. Vermillion said he used his City e-mail account when conducting City business, and he considered his website and the associated e-mail account to be "personal papers." CP at 70.

West submitted a public records request to the City for the communications received or posted through city council member Steve Vermillion's website that "concern[ed] the City of Puyallup, City business, or any matters related to City governance the City Council and mayor, or his membership on the City Council." CP at 40. Vermillion refused to provide records that were at his home, on his personal computer, or in his non-City e-mail account. The City informed West that the records he sought were not within the City's possession or control. West filed a public records request action against the City and Vermillion.

West, the City, and Vermillion filed cross-motions for summary judgment. The superior court denied the City's motion, but granted West's motion in part, ruling that (1) the Fourth Amendment's protections against search and seizure were not implicated because Vermillion had no reasonable expectation of privacy in communications "related to the public's business"; (2) the privacy protections under article I, section 7 did not apply because West was not seeking private information; (3) the First Amendment was not implicated because West was not asking for political activity records; (4) Vermillion was not subject to the City's policy prohibiting City employees and volunteers from performing city business on personal or third-party "technology resource[s]," which include electronic or digital communications and commingling of City and non-City data files; and (5) the public has a right to inspect public records located on a personal computer unless the records are "highly offensive to a reasonable person and are not of legitimate public concern." CP at 183-85. The superior court then ordered Vermillion "under penalty of perjury [to] produce records that are within the scope of [p]laintiff's records request." CP at 185. The superior court also granted a CR 54(b) certification.

Vermillion and the City appealed directly to the Washington Supreme Court. The Supreme Court transferred the appeal to this court for review.

ANALYSIS

Our Supreme Court's decision in *Nissen*, 183 Wn.2d 863, controls. Accordingly, we conclude that the arguments raised by Vermillion and the City fail, but we remand for the superior court to amend its order to conform to the language and procedure set forth in *Nissen*.

A. STANDARD OF REVIEW

We review PRA requests and summary judgment orders de novo. RCW 42.56.550(3); *Nissen*, 183 Wn.2d at 872; *West v. Thurston County*, 169 Wn. App. 862, 865, 282 P.3d 1150 (2012). We also review "the application of a claimed statutory exemption without regard to any exercise of discretion by the agency." *Newman v. King County*, 133 Wn.2d 565, 571, 947 P.2d 712 (1997).

The PRA "'is a strongly worded mandate for broad disclosure of public records.'" *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (plurality opinion) (quoting *Hearst Corp. v . Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1994)). We are required to construe the PRA's disclosure provisions liberally and its exemptions narrowly. *Progressive Animal Welfare*, 125 Wn.2d at 251 (plurality opinion).

"The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550(1). Unless the requested record falls within a specific exemption of the PRA, or other statute that exempts or prohibits disclosure

of specific information or records, the agency must produce the record. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 730, 174 P.3d 60 (2007); RCW 42.56.070(1).

B. *NISSEN V. PIERCE COUNTY*

Subsequent to West's request, the superior court's decision, and the parties' submission of appellate briefs, our Supreme Court decided *Nissen*, 183 Wn.2d 863. The parties then filed supplemental briefing addressing *Nissen*. The *Nissen* opinion is dispositive of the issues raised on appeal in this case.

In *Nissen*, the court considered whether an elected county prosecutor's text messages on work-related matters sent and received from a private cell phone may be public records. 183 Wn.2d at 873. The records request asked for production of "any and all of [elected county prosecutor's] cellular telephone records for [private telephone number] or any other cellular telephone he uses to conduct his business including text messages from August 2, 2011," and for "[elected county prosecutor's] cellular telephone records for [private telephone number] for June 7, 2010." *Nissen*, 183 Wn.2d at 869-70 (footnotes omitted). *Nissen* first considered whether records of government business conducted on a private phone were "public record[s]" as defined in the PRA; then whether the specific records requested were "public record[s]"; and finally, how "public records" in the exclusive control of public employees could be sought and obtained. 183 Wn.2d at 873.

First, *Nissen* held that "records an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be a public record if they also meet the

other requirements of RCW 42.56.010(3)."[2] 183 Wn.2d at 877. In reaching this conclusion, the court noted that a public record is "'prepared, owned, used, or retained by [a] state or local agency'" but that state and local agencies "lack an innate ability to prepare, own, use, or retain any record" independently, and "instead act exclusively through their employees and other agents." *Nissen*, 183 Wn.2d at 876 (alteration in original) (quoting RCW 42.56.010(3)). Thus, when the

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[2] RCW 42.56.010 states:

> The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.
>
> (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.
>
> (2) "Person in interest" means the person who is the subject of a record or any representative designated by that person, except that if that person is under a legal disability, "person in interest" means and includes the parent or duly appointed legal representative.
>
> (3) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.
>
> (4) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

employee or other agent "acts within the scope of his or her employment, the employee's actions are tantamount to 'the actions of the [body] itself.'" *Nissen*, 183 Wn.2d at 876 (alteration in original) (quoting *Houser v. City of Redmond*, 91 Wn.2d 36, 40, 586 P.2d 482 (1978)). "An employee's communication is 'within the scope of employment' only when the job requires it, the employer directs it, or it furthers the employer's interests." *Nissen*, 183 Wn.2d at 878 (quoting *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 11 (1958)).

Second, the *Nissen* court considered whether the specific records requested were public records. The court noted that the text messages were a writing, and considered whether the requested records "'relat[e] to the conduct of government or the performance of any governmental or proprietary function'" and were "'prepared, owned, used, or retained' by an agency." *Nissen*, 183 Wn.2d at 880-81 (alteration in original) (quoting RCW 42.56.010(3)). The court held that the content of the text messages requested were potentially public records subject to disclosure because the requester sufficiently alleged that the elected prosecutor put "'work related'" outgoing text messages "'into written form'" and "'used'" incoming text messages "while within the scope of employment," thereby satisfying the three elements of a public record in RCW 42.56.010(3). *Nissen*, 183 Wn.2d at 882-83.

Third, the court considered "the mechanics of searching for and obtaining public records stored by or in the control of an employee." *Nissen*, 183 Wn.2d at 883. The court rejected the county's and prosecutor's arguments that various constitutional provisions, including the Fourth Amendment and article I, section 7, protected the records on a private phone from disclosure. *Nissen*, 183 Wn.2d at 883. The court reasoned that "an individual has no constitutional privacy interest in a *public* record." *Nissen*, 183 Wn.2d at 883. Instead, the court held that the agency

employees and agents are required to search their own "files, devices, and accounts for records responsive to a relevant PRA request," and must then "produce any public records (e-mails, text messages, and any other type of data)" to the agency for the agency to then review for disclosure. *Nissen*, 183 Wn.2d at 886. The employee or agent may submit "'reasonably detailed, nonconclusory affidavits' attesting to the nature and extent of their search," to show the agency conducted an adequate search. *Nissen*, 183 Wn.2d at 885 (quoting *Neighborhood All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011)). But the court held:

> Where an employee withholds personal records from the employer, he or she must submit an affidavit with facts sufficient to show the information is not a "public record" under the PRA. So long as the affidavits give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive, the agency has performed an adequate search under the PRA.

Nissen, 183 Wn.2d at 886.

C. PUBLIC RECORDS ON PERSONAL ACCOUNTS

1. Personal E-mail Accounts are Subject to the PRA

Appellants argue that the superior court erred in ordering Vermillion "to produce e[-]mails from his personal e[-]mail account and swear under [penalty of] perjury that he had complied." Br. of Appellant (Vermillion) at 3. Specifically, Vermillion argues that the PRA does not "authorize an agency to require an elected official to search a personal e[-]mail account." Br. of Appellant (Vermillion) at 4. We reject Vermillion's argument.

Nissen squarely addressed this argument and held that an agency's employees or agents must search their own "files, devices, and accounts," and produce any public records, including "e-mails," to the employer agency that are responsive to the PRA request. 183 Wn.2d at 886. The *Nissen* court also held that affidavits by the agency employees, submitted in good faith, are

sufficient to satisfy the agency's burden to show it conducted an adequate search for records. 183 Wn.2d at 885. Thus, we hold that it was proper for the superior court to require Vermillion to produce[3] to the City e-mails in his personal e-mail account that meet the definition of a public record under RCW 42.56.010(3) and to submit an affidavit in good faith attesting to the adequacy of his search for the requested records.

2. No Individual Constitutional Privacy Interests in Public Records

Appellants argue that the superior court "erred in ruling that a search would not violate Vermillion's privacy rights," and that the PRA does not provide sufficient guidance to distinguish between what e-mails should be produced to the city and what should be protected by Vermillion's constitutional privacy rights. Br. of Appellant (Vermillion) at 3. In support, Vermillion relies on article I, section 7 and the Fourth Amendment to argue that the entirety of his personal e-mail account is protected from a compelled search. Vermillion also relies on the First Amendment to argue that the content of his e-mails is protected by his right to associate privately. We disagree.

a. Fourth Amendment and Article I, Section 7

In *Nissen*, the court held that "an individual has no constitutional privacy interest in a *public* record." 183 Wn.2d at 883. Like the appellants, the elected prosecutor and Pierce County in *Nissen* "primarily cite[d] to the Fourth Amendment to the United States Constitution and article I,

[3] We are mindful of the distinction between the terms "produce" and "disclose," along with the variations of each word, as discussed in *White v. City of Lakewood*, 194 Wn. App. 778, 374 P.3d 286 (2016). Here, "produce" is used because "produce" is the term that the Supreme Court uses in *Nissen* and the term "produce" only contemplates production to the city, which then reviews the entire set of responsive records before deciding what will be disclosed to the requester. 183 Wn.2d at 873 (ordering the prosecutor "to obtain, segregate, and produce those public records to the County").

section 7 of the Washington Constitution" in asserting constitutional rights to privacy in the place potentially containing public records. 183 Wn.2d at 883 n.9. Vermillion's argument differs only in that the place potentially containing public records is his personal e-mail account rather than a personal cell phone. Vermillion does not argue that this factual distinction changes the constitutional analysis, and we hold that it does not. Because our Supreme Court considered and rejected the argument that the Fourth Amendment and article I, section 7 afford an individual privacy interest in public records held on a personal cell phone, we also reject the argument that the Fourth Amendment and article I, section 7 afford an individual privacy interest in public records contained in a personal e-mail account.

b. First Amendment Right To Associate

Vermillion and the City submitted supplemental briefs addressing what they believed the effect *Nissen* has on the case here. Appellants argue that the *Nissen* court did not address the "privacy of associational communications" afforded by the First Amendment. Suppl. Br. of Appellants at 9. We hold that (1) the language of the *Nissen* holding is not limited to the constitutional principles explicitly expressed by the *Nissen* court, (2) the *Nissen* opinion shows the court was mindful of the First Amendment's associational privacy rights, and (3) even if individual constitutional protections could prevent disclosure of public records, the absence of specificity as to the particular records claimed to be protected here would render any opinion as to those records similarly vague and wholly advisory.

As stated above, "an individual has no constitutional privacy interest in a *public* record." *Nissen*, 183 Wn.2d at 883. The language of this holding does not limit it to only certain constitutional privacy interests nor to only those privacy interests enumerated under certain

constitutional provisions. Instead, *Nissen* was clear that an individual does not have a constitutional privacy interest in public records. *Nissen*'s holding was mindful of the associational privacy rights the First Amendment affords elected officials, as evidenced by the court's citation to *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 426, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (considering First Amendment associational privacy rights of President Nixon as they related to the Presidential Recordings and Materials Preservation Act of 1974 (Act)[4]) immediately following its holding. 183 Wn.2d at 883 n.10. We, therefore, reject appellants' argument that the First Amendment's right to association protects public records in Vermillion's personal e-mail account from disclosure because associational privacy rights under the First Amendment are constitutional privacy rights, and "an individual has no constitutional privacy interest in a *public* record." *Nissen*, 183 Wn.2d at 883.

Nissen also concluded that "it [wa]s impossible at th[at] stage to determine if any of the messages are in fact public records," and directed the elected prosecutor to "obtain a transcript of the content of all the text messages at issue, review them, and produce to the County any that are public records consistent with [the *Nissen*] opinion." 183 Wn.2d at 888. This would then allow the County to conduct its review just as it would any other public records request. *Nissen*, 183 Wn.2d at 888.

Similarly here, the record before us does not contain information upon which we can determine whether e-mails contained in Vermillion's personal e-mail account could be subject to First Amendment protections, let alone if they are public records. The closest thing to the actual

[4] Specifically, Title I of Pub. L. No. 93-526, 88 Stat. 1695, note following 44 U.S.C. § 2107 (Supp. V 1970).

e-mails in dispute that is in our record is a "fictitious e[-]mail . . . based on an actual e[-]mail at issue in a case that involves this exact issue currently being litigated in Skamania Superior Court." Reply Br. of Appellant (Vermillion) at 19 n.40; *see also* Suppl. Br. of Appellants at 17 n.35 (reproducing the same "fictitious e-mail"). A fictitious e-mail that is similar in an unexplained way to an e-mail in an unrelated case cannot be the basis for us to issue an opinion as to the character of a real e-mail in this case. Were we to issue such an opinion, it would be, at best, advisory. *See Walker v. Munro*, 124 Wn.2d 402, 418, 879 P.2d 920, (1994) ("We choose instead to adhere to the longstanding rule that this court is not authorized under the declaratory judgments act to render advisory opinions or pronouncements upon abstract or speculative questions."). Therefore, we hold that even if individual constitutional protections under the First Amendment could allow Vermillion to not disclose public records in his personal e-mail account, it is impossible for us to determine if any of the e-mails are subject to First Amendment protections or are even public records.

3. Amicus Briefing

The Washington Coalition for Open Government (WCOG) filed an amicus curiae brief. Appellants responded jointly to the Amicus brief.

a. Elected Officials—Legislative vs. Executive

WCOG argues that the PRA applies to elected officials. As explained above, the *Nissen* court held that the PRA applied to elected officials when it ruled that Pierce County's elected prosecutor was subject to the PRA. 183 Wn.2d at 879.

In reply, appellants argue, for the first time, that the result must be different as applied to them because Vermillion was an elected *legislative* official, rather than an elected *executive*

official. Appellants contend that this distinction is important because "unlike an elected executive official such as a county prosecutor, an elected legislative official has no legal authority to act on behalf of the city through e[-]mail, or to take any unilateral action on behalf of the City at all." Joint Response to Amicus Br. at 2. We disagree.

A record subject to disclosure under the PRA is not contingent on its possessor's ability to take unilateral action on behalf of the agency. Instead, a record is subject to disclosure under the PRA if it is "a record that an agency employee prepares, owns, uses, or retains in the scope of employment." *Nissen*, 183 Wn.2d 876. And the record is "'within the scope of employment' only when the job requires it, the employer directs it, or it furthers the employer's interests." *Nissen*, 183 Wn.2d at 878 (quoting *Greene*, at 573). Thus, whether a record is subject to disclosure hinges on if the record was prepared, owned, used, or retained "within the scope of employment," not if the record was prepared, owned, used, or retained within the scope of employment by the executive branch of the government. *Nissen*, 183 Wn.2d at 879. Appellants' attempt to distinguish *Nissen* on the basis that Vermillion was an elected legislative official rather than an elected executive official fails.

b. First Amendment

WCOG argues that the First Amendment does not bar the e-mails that are public records from disclosure. WCOG relies on the holding in *Nissen* that "an individual has no constitutional privacy interest in a *public* record." 183 Wn.2d at 883.

Instead of addressing *Nissen*, appellants rely entirely on *Nixon* to support the proposition that "Vermillion's correspondence with constituents qualifies as political association, which would be 'seriously infringed' if subjected to disclosure under the PRA." Joint Response to Amicus Br.

at 4 (citing *Nixon*, 433 U.S. at 467). Appellants seize on the *Nixon* Court's recognition "that involvement in partisan politics is closely protected by the First Amendment." 433 U.S. at 467. The *Nixon* Court was considering whether a subpart of the Act that provided the "scheme for custody and archival screening of the materials" disclosed under the Act "'necessarily inhibits [the] freedom of political activity [of future Presidents] and thereby reduces the quantity and diversity of the political speech and association that the Nation will be receiving from its leaders.'" 433 U.S. at 468 (alterations in original) (quoting "Brief of Appellant 168"). The *Nixon* Court held that the Act did not inhibit the freedom of political activity and did not reduce the quantity and diversity of political speech and association. 433 U.S. at 468.

Appellants' reliance on *Nixon* rather than *Nissen* is not persuasive. Appellants do not argue that *Nixon* and *Nissen* are in conflict with one another. Nor do appellants analyze the significant factual dissimilarities between *Nixon* and the case at bar. *Nissen* interpreted the same statute at issue here, under similar facts, and citing to *Nixon*, held that under Washington's PRA, "an individual has no constitutional privacy interest in a *public* record." 183 Wn.2d at 883. We follow *Nissen* and hold Vermillion has no constitutional privacy interest in public records that are contained in his personal e-mail account.

CONCLUSION

Under *Nissen*, appellants' arguments fail. However, because the superior court issued its order before our Supreme Court decided *Nissen*, we remand this case for the superior court to amend its order to conform to the language and procedure set forth in *Nissen*. This will include requiring Vermillion to conduct "'an adequate search'" of the undisclosed e-mails. *Nissen*, 183 Wn.2d at 885 (quoting *Neigh. All.*, 172 Wn.2d at 721). In doing so Vermillion must "in good faith

. . . submit 'reasonably detailed, nonconclusory affidavits' attesting to the nature and extent of [his] search." *Nissen*, 183 Wn.2d at 885 (quoting *Neigh. All.*, 172 Wn.2d at 721). Those affidavits must be submitted "with facts sufficient to show the information [he decides not to disclose] is not a 'public record' under the PRA." *Nissen*, 183 Wn.2d at 886.[5]

We affirm, but we remand for the superior court to amend its order in light of *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

Lee, J.

We concur:

Johanson, P.J.

Sutton, J.

[5] *Nissen* recognized that this "adequate" and "good faith" procedure was subject to abuse. 183 Wn.2d at 886. The court made two points regarding this potential for abuse that are applicable here. First, the superior court has the authority to "resolve disputes about the nature of a record 'based solely on affidavits' RCW 42.56.550(3), without an in camera review, without searching for records itself, and without infringing on an individual's constitutional privacy interest in private information he or she keeps at work." *Nissen*, 183 Wn.2d at 885. And, second, where an "employee asserts a potential responsive record is personal, he or she must provide the employer and 'the courts with the opportunity to evaluate the facts and reach their own conclusions,' about whether the record is subject to" disclosure. *Nissen*, 183 Wn.2d at 886 (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 480-81 (2d Cir. 1999) (adopting procedure used by federal courts for the Freedom of Information Act)). Thus, the possibility for in camera review is not foreclosed, but is not immediately required.

United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I, USCA CONST Amend. I
Current through P.L. 114-248.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 7

§ 7. Invasion of Private Affairs or Home Prohibited

Currentness

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Credits

Adopted 1889.

Editors' Notes

<Notes of Decisions for Art. I, § 7, are displayed in two separate documents. Notes of Decisions for subdivision I are contained in this document. Notes of Decisions for subdivision II are contained in the second document for Art. I, § 7.>

Notes of Decisions (1505)

West's RCWA Const. Art. 1, § 7, WA CONST Art. 1, § 7
Current through amendments approved 11-3-2015.

End of Document

West's Revised Code of Washington Annotated
Title 42. Public Officers and Agencies (Refs & Annos)
Chapter 42.17A. Campaign Disclosure and Contribution (Refs & Annos)
Public Officials', Employees', and Agencies' Campaign Restrictions and Prohibitions--Reporting

West's RCWA 42.17A.555

42.17A.555. Use of public office or agency facilities in campaigns--Prohibition--Exceptions

Effective: January 1, 2012

Currentness

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. However, this does not apply to the following activities:

(1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) Activities which are part of the normal and regular conduct of the office or agency.

(4) This section does not apply to any person who is a state officer or state employee as defined in RCW 42.52.010.

Credits

[2010 c 204 § 701, eff. Jan. 1, 2012; 2006 c 215 § 2, eff. June 7, 2006; 1979 ex.s. c 265 § 2; 1975-'76 2nd ex.s. c 112 § 6; 1973 c 1 § 13 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.130.]

Notes of Decisions (19)

West's RCWA 42.17A.555, WA ST 42.17A.555
The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated
Title 42. Public Officers and Agencies (Refs & Annos)
Chapter 42.56. Public Records Act (Refs & Annos)

West's RCWA 42.56.010

42.56.010. Definitions

Effective: January 1, 2012

Currentness

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(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.

(2) "Person in interest" means the person who is the subject of a record or any representative designated by that person, except that if that person is under a legal disability, "person in interest" means and includes the parent or duly appointed legal representative.

(3) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

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

Credits

[2010 c 204 § 1005, eff. Jan. 1, 2012; 2007 c 197 § 1, eff. July 22, 2007; 2005 c 274 § 101, eff. July 1, 2006.]

Notes of Decisions (83)

West's RCWA 42.56.010, WA ST 42.56.010
The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

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