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State Supreme Court rules against Lindquist in phone records case

BY SEAN ROBINSON
Staff writer

In a unanimous decision, the Washington State Supreme Court ruled Thursday that text messages created on Pierce County Prosecutor Mark Lindquist's private phone are public records if they pertain to public business.

The 9-0 ruling from the high court, written by Justice Mary Yu, comes in a case closely watched by open-government advocates, who praised the ruling as a precedent-setting and sensible decision for the digital age.

It orders Lindquist to acquire transcripts of his text messages, determine which are public, and "obtain, segregate and produce those public records to the County."

The decision dismisses arguments from Lindquist and county attorneys that privacy rights trump the public's right of access to public records.

"We therefore reject the County's argument that records related to an employee's private cellphone can never be public records as a matter of law," the ruling states.

The decision is a loss for Lindquist, who has resisted disclosure of the text messages since they were first requested in 2011. The county has paid $304,000 to outside attorneys in defense of the nondisclosure argument.

The court ruled that Lindquist's private phone bills and call logs aren't public records, but that his text messages are, if they pertain to public business.

Lindquist issued a statement and a news release Thursday, claiming legal victory, while omitting mention of the text messages he was ordered to disclose.

He referred to the portion of the court's ruling that said his private phone bill isn't a public record, and another section that said the county's initial response to a records request was based on a good-faith interpretation of the state Public Records Act (the court's ruling adds that the county's interpretation was incorrect).

"We won on the principles we stood for," Lindquist said. "This case has always been about the constitutional privacy and speech rights that all citizens have in our personal phones.

"I'm pleased our State Supreme Court agreed with us that requesters should not be able to fish through the private phones of public employees and that billing logs are not public records.

“Further, the Supreme Court expressly recognized that we have acted in good faith. The Court acknowledged the constitutional rights of Washington citizens in general, and public employees in particular, and we are confident we will again prevail in superior court.”

Another key player disagreed with Lindquist’s claim of a win: sheriff’s deputy Glenda Nissen, the plaintiff in the case.

Through her attorney, Joan Mell, Nissen applauded the court’s ruling.

“I am very pleased with the decision,” she said. “The Supreme Court holds public officials accountable for what we do for the public.”

Mell and attorney Michelle Earl Hubbard, who argued the case before the Supreme Court, offered a separate statement that shrugged off the prosecutor’s claim of victory:

“Fabulous win,” the statement said. “We expect Lindquist to spin the decision as a win for him, because he has a history of doing that, but he and the County did not win this one. The public has paid a high cost in county resources and outside attorneys’ fees to get a common sense ruling.

“The Supreme Court describes a process of good faith disclosure that every official believing in transparency would have accomplished at the time the request was made without court intervention. The decision reaffirms what we all expect from our government officials and is a great endorsement for Det. Nissen and the citizens of Pierce County.”

The underlying case, Nissen v. Pierce County, pits the deputy against county government and the prosecutor.

Four years ago, Nissen filed a records request with Pierce County, seeking phone records and text messages from Lindquist’s private phone — particularly text messages created, sent and received in the course of a single day.

Lindquist initially provided partial records voluntarily, but redacted some elements, claiming privacy. The records included his private phone bill, which listed logs of calls and logs of text messages that Lindquist acknowledged might be work-related.

The content of the text messages was never provided.

Nissen believes the text messages will show that Lindquist retaliated against her in the course of a long-running dispute.

During oral arguments before the Supreme Court in June, Lindquist's attorney stated that the prosecutor deleted the text messages after creating them.

However, the high court's ruling notes that Verizon, the cellphone provider, retained copies of the messages.

The court's ruling dismissed arguments from Lindquist and county attorneys on several points. The ruling orders him to obtain and review the text messages and disclose any that pertain to public business. Those are the records Nissen requested, which the public has never seen.

The court also dismissed arguments from Lindquist and county attorneys that using a private phone to create public records creates a shield of privacy that trumps the public's right of access. During oral arguments, Lindquist's attorney contended that the only way to pierce that shield was for the Legislature to pass a new law.

The high court disagreed.

"We find nothing in the text or purpose of the PRA supporting the County's suggestion that only work product made using agency property can be a public record," the ruling states. "To the contrary, the PRA is explicit that information qualifies as a public record regardless of its physical form or characteristics."

The court waved off another argument from Lindquist's side: that the prosecutor and the office he oversees aren't the same thing.

"Since county employees like Lindquist are not literally a 'county,' the County argues its employees and the records they control are completely removed from the PRA's scope," the ruling states. "While this reasoning may have superficial appeal, it misses the central question here."

Lindquist contended that the high court's ruling agreed with his position that records requesters can't conduct fishing expeditions through a public employee's private phone.

The court's ruling characterized the issue differently. It acknowledged that purely personal messages such as telling a spouse about coming home for dinner aren't public records; but the ruling added that such records weren't the topic of the Nissen case.

"This case does not involve a public employer seizing an employee's private cellphone to search for public records," the ruling states. "It does not involve a records request for every piece of data on a smartphone. And it does not involve a citizen suing a public employee for access to the employee's phone."

In the original case, Nissen and her attorneys asked a judge to conduct a private, in-camera — that is, alone, in chambers — review of Lindquist's phone records to determine whether any of the redacted material qualifies as a public record.

The high court's ruling envisions a different process.

It requires Lindquist to obtain the text messages, review them and supply those that qualify as public records to the county. The county must review the messages, apply any potential public-record exemptions and hand the results to Nissen.

In theory, if Nissen and her attorneys are dissatisfied with the response they can take the argument back into court.

The high court noted that if Lindquist withholds some of those records, he must provide an affidavit to the county "with facts sufficient to show the information is not a 'public record' under the PRA." The county must then provide that affidavit to Nissen. Noting that such an affidavit hinges on the good faith of the employee, the court acknowledged that the procedure could be abused.

The ruling cites that point as an incentive for local governments to adopt policies governing the retention and disclosure of public records created on private devices owned by employees. Pierce County has no such policy, though other local governments have adopted versions.

"Emails can be routed through agency servers, documents can be cached to agency-controlled cloud services, and instant-messaging apps can store conversations," the court's ruling states.

Others familiar with the case commended the high court's ruling as a victory for open-government principles.

Attorney General Bob Ferguson issued a news release Thursday, declaring, “The Court appropriately reiterated the spirit of openness underlying our Public Records Act.”

Toby Nixon, president of the Washington Coalition for Open Government and a Kirkland City Council member, also saw the ruling as a strong endorsement for public disclosure.

“It’s a good day,” he said. “The Supreme Court unanimously affirmed that public records that are held on private devices in whatever form are still public records, subject to disclosure. For me, the key issue was text messages.”

Backers of an active effort to recall Lindquist from office also weighed in with a statement:

“Even now, in the face of a unanimous Supreme Court decision against him, Mr. Lindquist falsely claims the decision to be a victory,” said Cheryl Iseberg, leader of the recall campaign.

The timing of subsequent steps was unclear Thursday.

The court’s order that Lindquist must obtain the text message transcripts and supply any potential public records to the county did not specify a timeline.

County leaders were still wrestling with those details, and Nissen’s attorneys were waiting for more information about the next stage of the disclosure process.

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Sean Robinson: 253-597-8486

sean.robinson@thenewstribune.com

@seanrobinsonTNT

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