

Editorials AUGUST 31, 2015

Court rules officials' texts are public



The Olympian

The Washington state Supreme Court handed down a partial victory for open government last week. The nine justices ruled unanimously that text messages pertaining to government business were public records – even when a message is sent or received via a privately owned cell phone.

Justice Mary Yu, the newest justice on the court, authored the opinion. She cited a court finding five years ago that the state Public Records Act covers records created for a government purpose that are stored on a personal computer. It was an easy step of logic to extend that to text messages.

But the win was not clear cut for transparency. Yu stopped short of ordering a protocol for government retention of such records, and the court said individual employees can decide which emails or texts on their own equipment are public records.

The case dealt with claims asserted by the embattled Pierce County prosecutor, Mark Lindquist. He faces a legal challenge from a former county deputy, Glenda Nissen, who sought his texts as part of her claim that he retaliated against her professionally.

In Lindquist's view he won because the court did not let records requesters "fish through the private phones of public employees and (it said) that billing logs are not public records."

But Lindquist completely lost his most dangerous argument that none of his government-related texts could be considered public records.

The four-year-old case now could return to Superior Court; Nissen has asked a judge to review the texts privately for relevance. So far, Lindquist has run up a \$304,000 public tab for the outside lawyers that Pierce County hired to defend against the disclosures.

It's plainly troubling that the public employee who owns the personal cell phone on which texts were received or sent is the one who determines whether a text message is a public record.

Rowland Thompson, leader of the Allied Daily Newspapers of Washington, was among those who commended the court's larger finding that texts can be public records. But he said the ruling failed to provide needed clarity.

"It comes to a conclusion but it has no means by which an agency or a requester can enforce the law," Thompson said. "It relies on the honesty of the employees. They can lie."

How governments and employees decide to comply with the law may differ jurisdiction to jurisdiction, just as it does now. One remedy is to have an agency issue a phone for official use that it retains full rights to access – including the content of texts. Another is to bar an employee's use of a private cell to send texts for any public business.

Neither is perfect.

The court said some local governments like Thurston County have policies forbidding their employees from texting on privately owned devices. Some like the city of Prosser allow it only for devices synched into city owned networks that can retain a record or log of the communications.

In the end, the Legislature may need to enter the fray to provide uniformity that cuts down court challenges.

Our hopes are not high given lawmakers' record on transparency, but clarity is needed.



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