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STATE OF WASHINGTON

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No. 45039-9-II

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

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GLEND A NISSEN,

Appellants,

v.

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

Respondents.

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BRIEF OF AMICI CURIAE WASHINGTON FEDERATION OF STATE EMPLOYEES, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, WASHINGTON EDUCATION ASSOCIATION, WASHINGTON COUNSEL OF POLICE AND SHERIFFS, WASHINGTON STATE PATROL TROOPERS ASSOCIATION, PIERCE COUNTY PROSECUTING ATTORNEYS' ASSOCIATION

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## A. INTRODUCTION

Amici Washington Federation of State Employees, International Association of Fire Fighters, Washington Education Association, Washington Counsel of Police and Sheriffs, Washington State Patrol Troopers Association, and Pierce County Prosecuting Attorneys' Association, organizations representing public employees,<sup>1</sup> believe the trial court was correct to hold text messages and phone records of Pierce County Prosecutor Mark Lindquist from his personal cell phone were not public records within the meaning of the Public Records Act ("PRA") as well as fell within its exceptions to disclosure. The conclusion that records of private communication devices<sup>2</sup> are categorically exempt from PRA disclosure is compelled by its definition of public records, its exemptions, and the constitution.

For this Court to agree with appellant Nissen that records that are derived from private communication devices used during work hours or that might touch upon public business<sup>3</sup> are public and subject to the PRA

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<sup>1</sup> Privacy rights of approximately one million public employees (and their families) are at risk from Nissen's arguments. 2012 U.S. Bureau of Labor Statistics data indicate Washington State has 536,000 government jobs making up 18.83% of its workforce. See [www.bizjournal.com/bizjournals/on-numbers/scott-thomas/2012/05/government-employ-20-percent-of-html](http://www.bizjournal.com/bizjournals/on-numbers/scott-thomas/2012/05/government-employ-20-percent-of-html).

<sup>2</sup> Personal communication devices as used herein, such as cell phones, Blackberrys, laptops, home computers, and tablets, and other communication devices involving oral communications, emails, texts, and the like, are those paid for by the public employee, as distinct from devices provided and paid for by the employee's public agency.

<sup>3</sup> RCW 42.56.010's definition of a public record concerns writings about "the conduct of government or the performance of any governmental or proprietary function." Nissen's briefing reflects a view that any activity touching upon public business meets this test.

would impose an intrusive and unworkable burden on public employees.

While the case has primarily centered on an elected official and public figure, this Court should not lose sight that its decision will apply to the men and women the amici organizations represent, the men and women who respond to emergencies, enforce the law, teach in our classrooms, both in the K-12 and higher education systems, and provide many other public services on a day-to-day basis.

#### B. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici curiae in this, required by RAP 10.3(e), are set forth in detail in their motion for leave to submit this brief.

#### C. STATEMENT OF THE CASE

Amici have reviewed the statement of the case sections of the briefs of appellant Nissen, respondent Pierce County, and intervenor Pierce County Prosecutor Mark Lindquist. They believe the statements of the case in the latter two briefs more accurately conform to the requirements of RAP 10.3(a)(5) that a statement of the case must be a "fair statement of the facts and procedure relevant to the issues present for review, without argument." Amici adopt those statements of the case for this brief.

#### D. SUMMARY OF ARGUMENT

This Court should establish a bright line rule that information derived from a public employee's personal communication devices are not public

records. This bright line is derived from the definition of a public record in RCW 42.56.010(3), the exemptions from disclosure for private documents set forth in RCW 42.56.050, RCW 42.56.070, and RCW 42.56.510, and the provisions guaranteeing protection from takings, privacy, and freedom of expression in the Washington and United States Constitutions.

#### E. ARGUMENT<sup>4</sup>

The amici confine their argument to the categorical rule prohibiting the disclosure of records from public employees' personal communication devices<sup>5</sup> derived from the definition of a public record in RCW 42.56.010(3), the statutory exemptions from PRA disclosure, and constitutional provisions, state and federal, protecting property, privacy, and free speech.

##### 1. Records From Personal Communication Devices Owned by a Public Employee Are Not Public Records

Under the PRA only *public records* are subject to disclosure. *Smith v. Okanogan County*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000) (plaintiff

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<sup>4</sup> While the PRA is a strongly worded mandate for disclosure of public records, *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344-45, 217 P.3d 1172 (2009), the statute makes clear which records are subject to disclosure and affords certain statutory exemptions. Courts interpret the disclosure provisions of the PRA liberally and its exemptions narrowly, *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008), but this does not permit courts to ignore the plain language of the constitution or another statute's specific public disclosure exemption. *Pierce County v. Guillen*, 537 U.S. 129 (2003) (PRA subject to privilege under 42 U.S.C. §409); *Freedom Foundation v. Gregoire*, \_\_\_ Wn.2d \_\_\_, 310 P.3d 1252 (2013) ("the PRA must give way to constitutional mandates").

<sup>5</sup> This case is not limited to telephone calls and text messages. The technology of personal communications has literally exploded in recent years. Handheld communication devices that were science fiction on *Star Trek* only a few years ago have become routine. There is no principled limit on the records that are accessible if this Court concludes that cell phone and text message records may be accessed. Other personal communication devices, privately paid for by a public employee, are equally subject to this analysis.

sought records that did not exist; requests for information, as opposed to records, is outside the PRA); *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012 (1999) (same).<sup>6</sup>

RCW 42.56.010(3) defines a public record under the PRA:

... any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, or retained by any state or local agency regardless of physical form or characteristics.

Thus, the PRA applies only if such a record is in writing and the public agency prepares, owns, uses, or retains it. Not every record touching upon a government activity is then necessarily a "public record" for the Act's purposes. Specifically, records from a public employee's personal communication devices are not prepared, owned, used, or retained by government. Rules of statutory interpretation require application of the Legislature's plain intent as derived from the words of RCW 42.56.010(3). *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

Nissen attempts to circumvent this threshold issue of whether communications from a public employee's personal communication device is a public record under RCW 42.56.010(3) by a sleight of hand. She equates

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<sup>6</sup> Government has no duty to produce records that either do not exist, *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605 n.3, 963 P.2d 869 (1998); *Building Industry Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 734-35, 218 P.3d 196 (2009); *West v. Wash. State Dep't of Nat'l Resources*, 163 Wn. App. 235, 242, 258 P.3d 78 (2011), *rev. denied*, 173 Wn.2d 1020 (2012), or it never possessed. *West v. Thurston County*, 168 Wn.App. 162, 184, 275 P.3d 1200 (2012) (billing records of contractor).

Prosecutor Lindquist with a PRA agency. Nissen br. at 29-34. Critically, she *concedes* Lindquist owned his cell phone records. *Id.* at 35-36; reply br. at 8-9. But Nissen plainly glosses over a rather critical point that will be discussed *infra*. Public employees who pay for their own personal communication devices have a *property interest* that is constitutionally protected and cannot be usurped by governmental fiat. Nissen simply transforms plainly private property into public property merely to facilitate her breathtakingly broad conception of the PRA's scope.

Washington courts have not squarely addressed the question of whether communications from public employees' private communication devices are public records within the statutory definition. It is clear that certain kinds of purely personal records of a public employee simply do not constitute public records at all. *Yacobellis v. City of Bellingham*, 55 Wn.App. 706, 712, 780 P.2d 272, *rev. denied*, 114 Wn.2d 1002 (1989) (personal notes, phone messages, and personal appointment calendars are not public records because they are created solely for the public employees convenience, indicating a private purpose). In *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 868-69, 288 P.3d 384 (2012), *rev. denied*, 177 Wn.2d 1002 (2013), the requestor sought emails sent or received regardless of "whether a governmental or private computer system or electronic device was used." Division I held that public officials' purely personal

emails, not discussing government business, were not public records.<sup>7</sup>

Washington courts have addressed the question of whether a public employee's personal communications are public records. In *Tiberino v. Spokane County*, 103 Wn. App. 680, 13 P.3d 1104 (2000), the Court of Appeals concluded that a Spokane County Prosecutor's Office employee's emails sent *from her work computer* for personal reasons were public records under the PRA where that employee was terminated for improper use of emails on County time. The employee did not dispute that the emails were writings prepared, owned, used, or retained by a public agency. *Id.* at 687. The court rejected the employee's argument that the records had no relation to the conduct of government or a proprietary function of government where such documents plainly related to her discharge. *Id.* at 688. The *Tiberino* court did not hold that records of private activities conducted on private communication devices were public records under the PRA. *Forbes* plainly answered that question.

In *Mechling v. City of Monroe*, 152 Wn.App. 830, 222 P.3d 808 (2009), *rev. denied*, 169 Wn.2d 1007 (2010), a case on which Nissen relies, the court focused on private email addresses of City Council members

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<sup>7</sup> Plainly, communications of an entirely private nature on public employees' personal communication devices are not public records. But who decides whether the communications are purely personal? Nissen would have a judge in an *in camera* proceeding pour through records of public employees' personal communication devices. Such an excursion would not only be intrusive but could conceivably render the records open to public scrutiny under the openness principles of article I, § 10 of the Washington Constitution.

that appeared in emails from Council members from their home computers to the City Administrator. *Id.* at 837. The court *assumed* the emails were public records and found the email addresses were not exempt under PRA privacy exemptions. A citizen requested records of emails to and from City Council members' home computers in which Council business was discussed. The City redacted the personal email addresses of Council members in responding to the request. The trial court concluded that such addresses were properly redacted. The Court of Appeals reversed, concluding that emails were writings under the PRA. It asserted that because the writings ostensibly related to the conduct of government, they fell within the definition of a public record. Critically, the *Mechling* court never carefully analyzed whether communications from a public employee's private communication device constituted a public record at all.

In *O'Neill*, a citizen sent an email claiming Council members had engaged in improper conduct to another citizen and copied certain public officials on it. The City's deputy mayor disclosed the email at a public Council meeting. One of the people mentioned in the email, who was in attendance, made a demand for it. The deputy mayor went home and forwarded the email to her personal email account, deleting the sender's identity. She then forwarded it to City staff. The requestor asked for the unredacted email, which she received, but then she also demanded the meta-

data from the entire email chain. The majority *assumed* the original email that prompted the metadata request was a public record although it nowhere specifically analyzed that issue. *Id.* at 147-48 ("There is no doubt here that the relevant email itself is a public record, so its embedded metadata is also a public record and must be disclosed).<sup>8</sup> Again, as in *Mechling*, the issue of whether a communication from a public employee's private communication device could be a public record was not analyzed.<sup>9</sup>

The Supreme Court concluded that metadata was subject to the PRA. It directed that the deputy mayor's home computer hard drive could be inspected by the City for metadata with the deputy mayor's consent. *Id.* at 150 n.4. Here, there was no such consent.

In *West, supra*, the Court of Appeals carefully examined the attorney billings at issue in light of RCW 42.56.010(3) and concluded that attorney invoices for services over the County's deductible limit were not public records because *they were not a record prepared by a government agency*. 168 Wn. App. at 183-84. Merely because an agent of a public agency prepared the record, it was not automatically transformed into a public re-

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<sup>8</sup> It appears that the email in question was, at some point, sent to the public email accounts of Shoreline officials. *O'Neill*, 170 Wn.2d at 142.

<sup>9</sup> A four-justice dissent *did* express doubt about whether the original email was a public record. *Id.* at 155. ("I dissent because I do not believe that what is contained on the hard drive of a public employee's personal home computer, whether it is deemed "metadata" or something else, is a public record"). The dissent expressed concern about the personal information the employee stored on the hard drive. *Id.* at 155.

cord. Similarly, such invoices were not owned by a government agency as they were never possessed by the agency. *Id.* at 184. The records were not used by the agency because it never received them. *Id.* at 185-86. Finally, the agency never retained them. *Id.* at 186.<sup>10</sup>

The lesson of *Tiberino*, *Mechling*, *Forbes*, and *O'Neill* is that far from the PRA interpretation offered by Nissen that communication from all personal communication devices of public employees used during work hours or that relate in any way to public business automatically constitute public records, the proper analysis of the PRA requires careful attention to the definition of a public record in RCW 42.56.010(3). When the definition is properly analyzed, records of a public employee's personal communication device, whether a cell phone, laptop, personal computer, or the like, are categorically *private* and are not public records. *By their nature, these records are not prepared, owned, used, or retained by an agency.*<sup>11</sup>

## 2. Records Derived From Private Employees' Use of Private Communication Devices Are Exempt From PRA Disclosure

In addition to the statutory definition of a public record in RCW 42.56.010(3), the various privacy-related PRA exemptions illustrate the

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<sup>10</sup> This identical analysis of RCW 42.56.010(3)'s requirements applies to Prosecutor Lindquist's cell phone records for the reasons set forth in his brief and that of Pierce County. For cell phone records, the argument applies for any public employee. *See Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011) (Governor's personal cell phone records not subject to disclosure under Colorado's version of the PRA because Governor did not keep cell phone records in his official capacity).

<sup>11</sup> These are often held by third parties. County br. at 18-22; Intervenor br. at 30-33.

principle that records of public employee personal communication devices are categorically exempt from disclosure.

As a starting point, merely because a person is a public employee, he or she does not forfeit rights afforded others in our society under the constitution, both state and federal, and our laws. See e.g. *In re Disciplinary Proceedings Against Sanders*, 135 Wn.2d 175, 188, 955 P.2d 369 (1998) ("A judge does not surrender First Amendment rights upon becoming a member of the judiciary"). A similar analysis was articulated in *DeLong v. Parmalee*, 157 Wn.App. 119, 156 n.19, 236 P.3d 936 (2010), review granted and remanded, 171 Wn.2d 1004 (2011), dismissed as moot, 164 Wn.App. 781, 267 P.3d 410 (2011), rev. denied, 173 Wn.2d 1027 (2012):

It is important to note that Wash. Const. art. I, § 7 guarantees the people of Washington the right to privacy above and beyond the privacy exemption provided under the PRA. And an individual does not wholly surrender his or her constitutional right to privacy by virtue of his or her decision to seek employment with a governmental agency such as DOC. We can think of no reason why an individual who serves as a cook at DOC is afforded a lesser privacy right to the use of their photographic image than an individual who chooses to work as a cook at a local diner.

Assuming the records of a public employee's personal communication device were public records (and for the reasons already articulated, amici believe they are not), specific PRA exemptions and other law protect public employees, and create a bright line rule protecting records of public

employees' personal communication devices from PRA disclosure, particularly where our Supreme Court has long recognized that the purpose of PRA exemptions is to protect privacy interests:

The general purpose of the exemptions to the Act's broad mandate of disclosure is to exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government.

*Limstrom v. Ladenburg*, 136 Wn.2d 595, 607, 963 P.2d 869 (1998).

The specific PRA privacy exemptions provide that a public employee's records from a privately-owned communication device are exempt under the PRA. These exemptions confirm there should be a bright line rule exempting records of public employees' private communication devices. The parties in this case have addressed RCW 42.56.050, RCW 42.56.070, RCW 42.56.230, RCW 42.56.250, and RCW 42.56.510.

These statutes exempt public employee personal information maintained in files on such employees generally, RCW 42.56.230(3), and specific information such as Social Security numbers, personal cell phone and other telephone numbers, and personal e-addresses. RCW 42.56.250(3). Washington courts have held such information is not confined simply to information in a formal personnel file. *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357, *remanded*, 136 Wn. 2d 1030, *op. modified on remand*, 972 P.2d 932 (1998). In determining if privacy

rights of public employees are implicated, the privacy test in RCW 42.56.050 applies. The highly offensive prong of the statutory test has been held to exempt mere accusations of serious misconduct that are not substantiated. *John Does v. Bellevue School District No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (allegations of teacher sexual misconduct with students); *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011)(identity of policeman accused of sexual assault).

Numerous Washington cases have held these privacy exemption statutes afford public employees significant protection of their privacy rights. In *Tiberino*, for example, after concluding that an employee's personal emails sent from her Prosecutor's Office personal computer were public records, the appellate court nevertheless found such records to fall within the privacy protection exception of the former RCW 42.17.310(1)(b) (now RCW 42.56.210). The court ruled that the disclosure of the private emails would be highly offensive and served no legitimate public concern:

The content of Ms. Tiberino's e-mails is personal and is unrelated to governmental operations. Certainly, the public has an interest in seeing that public employees are not spending their time on the public payroll pursuing personal matters, not the content of personal e-mails or phone calls or conversations, that is of public interest. The fact that Ms. Tiberino sent 467 e-mails over a 40 working-day time frame is of significance in her termination action and the public has a legitimate interest in having that information. But what she said in those e-mails is of no public significance. The public has no legitimate concern requiring re-

lease of the e-mails and they should be exempt from disclosure.

103 Wn. App. at 691. *See also Mechling*, 152 Wn. App. at 847 (personal e-addresses in public employment records protected from disclosure).

These exemptions in the PRA prohibit the requested disclosure.

3. Records Derived From Public Employee's Use of Private Communication Devices Are Constitutionally Protected From Disclosure

The government cannot by fiat transform a private record into a public record subject to seizure under the PRA, but that is what Nissen seeks.

a. Takings Under Article I § 16 and Fifth/Fourteenth Amendments

In order to make records of personal communication devices paid for by a public employee into a public record, a court must give the government a property interest in the employee's personal communication device it simply does not possess.

If a government in Washington claimed an ownership interest in the records derived from a public employee's personal communication device, such an action would constitute a taking under article I, § 16 of the Washington Constitution. Property under that constitutional provision is used in a comprehensive and unlimited sense. *State v. Superior Court of King County*, 26 Wash. 278, 286, 66 P. 385 (1901). This section also applies to governmental seizures of personal property. *See, e.g., Manufactured Housing Cmty. of Wash. v. State*, 142 Wn.2d 347, 363-68, 13 P.3d 183

(2000) (right of first refusal to purchase property).

Similarly, the Fifth and Fourteenth Amendments preclude government seizure of private property interests such as communication records without just compensation particularly where personal property is subject to the Fifth Amendment, *e.g.*, *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 123 S. Ct. 1406, 155 L.Ed.2d 376 (2003) (interest on lawyer trust accounts), and the scope of public use is "coterminous with the scope of the sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S. Ct. 2321, 81 L.Ed.2d 186 (1984).

In sum, to the extent that Nissen argues the PRA transforms records of personal communication devices into public records by fiat, a taking has occurred. This would invalidate the PRA. *See* 142 Wn.2d at 374.

b. Privacy Under Article I, § 7 and Fourth Amendment

Both Pierce County and Prosecutor Lindquist have shown that article I, § 7 and the Fourth Amendment provide for a right of privacy for public employees that protects them from disclosing records from private communication devices. Pierce County br. at 60-64; Intervenor br. at 13-26.<sup>12</sup> Amici do not repeat those arguments here. Indeed, this Court in *DeLong*

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<sup>12</sup> Article I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law") is *broader* than the Fourth Amendment in protecting personal privacy. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (article I, § 7 extends broader protection of privacy rights than Fourth Amendment; government may not obtain citizen records from phone company or install a pen register device to obtain phone numbers dialed from a phone without a search warrant).

and the Supreme Court in *O'Neill* recognize article I, § 7 is at issue,<sup>13</sup> while federal courts recognize statutory programs seeking telephone meta-data from third party providers can violate the Fourth Amendment. *See e.g. Klayman v. Obama*, --- F.Supp.2d ----, 2013 WL 6598728 (D.D.C., 2013) (enjoining National Security Agency from obtaining Verizon records of telephone number called, duration of call, length of call).

But in addition, Washington's common law has also protects personal privacy interests. In *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998), our Supreme Court confirmed that Washington law provides a common law right of privacy: "we explicitly hold the common law right of privacy exists in this state and that individuals may bring a cause of action for invasion of that right." *Id.* at 206. Confirming that the tort is based on the *Restatement (Second) of Torts* § 652H,<sup>14</sup> the court found that relatives of descendents whose autopsy photographs were used and displayed by

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<sup>13</sup> The *O'Neill* majority recognized, but avoided, article I, § 7 in the relief it conferred:

We address only whether the City may inspect Fimia's home computer if she gives consent to the inspection. We do not address whether the City may inspect Fimia's home computer absent her consent.

*O'Neill*, 170 Wn.2d at 150 n.4. Unanswered questions persist. If Fimia withheld consent, would a court be compelled to issue a warrant? How could a court issue a warrant if no crime was committed? Would the city be liable for PRA per diem penalties while the public employee insisted on his/her rights? How would such strict liability for records outside an agency's control advance the disclosure policies of the PRA?

<sup>14</sup> The *Restatement* asserts:

One who has established a cause of action for invasion of his privacy is entitled to recover damages for (a) the harm to his interest in privacy resulting from the invasion; (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and (c) special damage of which the invasion is a legal cause.

the staff of a Medical Examiner's Office, stated a claim under the tort.

The importance of article I, § 7 and the common law here is that Washington law affords generous protections to citizen privacy from intrusion by government. Any interpretation of the PRA that mandates disclosure of the records of a public employee's private communication device implicates constitutional protections for that employee's privacy and could afford the employee common law privacy claims.

c. Free Speech Under Article I, § 5 and First Amendment

Prosecutor Lindquist in his brief at 27-28 argues that his First Amendment associational interests are at risk from Nissen's action, but free speech questions are also present.<sup>15</sup> *See, e.g., Resident Action Council v. Seattle Housing Authority*, 162 Wn.2d 773, 174 P.3d 84 (2004) (government bears the burden of justifying restrictions on free speech and agency violated tenants' First Amendment free speech rights in restricting the posting of signs on apartment doors).

Indeed, Washington law recognizes that public employees do not forfeit their free speech rights by entering public employment, as our courts have recognized tort claims under 42 U.S.C. § 1983 and the common law and for wrongful discharge in violation of public policy when public employee free speech rights are infringed by actions of government. *White v.*

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<sup>15</sup> Article I, § 5 states: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

*State*, 131 Wn.2d 1, 929 P.2d 396 (1997); *Smith v. Bates Tech. College*, 139 Wn.2d 793, 991 P.2d 1135 (2000).

Subjecting records of public employees' personal communication devices to disclosure under the PRA would have a profound, and unconstitutional, chilling effect on the exercise of free speech, particularly where Nissen has advocated for a judicial *in camera* review of such records. Reply br. at 24. For example, a fire fighter may refrain from using personal e-mail to contact a news reporter regarding a potential workplace safety hazard affecting the ability of a fire department to timely respond to emergencies because this "work related" message could subject all the employee's email records to disclosure. Further, judicial review would inevitably intrusively compel a public employee to subject his/her home computer, cell phone, and other communication devices to examination.<sup>16</sup>

4. Records of Public Employee's Personal Communications on Private Devices Are Categorically Protected From PRA

A categorical rule is required by the definition in RCW 42.56.010(3),

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<sup>16</sup> Nissen is oblivious to the constitutional implications of such *in camera* review, reply br. at 24, and the intrusiveness of having a judge look at every cell phone communication or computer email entry simply because someone made a PRA request. Such individuals might be inmates or excessively curious neighbors. Indeed, Nissen even argues that calls between public employees are presumptively public records. Nissen br. at 33. This, of course, ignores the fact that public employees may be related by blood or marriage. Not every communication on private communication devices of a teacher married to a firefighter or a daughter who is a staffer to the mayor of a city to a father who is a nurse at a public hospital should be subject to the intrusion of the PRA. Additionally, the records could become a matter of public record under article I, § 10 of the Washington Constitution unless a court seals them, a result that is not easily secured. GR 15(c). *See also, Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010).

the PRA privacy exemptions, and constitutional principles. Public employment covers a wide sweep of employment situations from elected officials to classroom teachers, college professors, transportation workers, and park rangers. The records of a public employee's personal communication device do not become public records merely because a public employee is involved or even if the communication relates in some fashion, however, remotely, to government.<sup>17</sup> A teacher might text a spouse that she must go to the library and will be late and will not be home for dinner. This does not transform everything in that fire fighter or teacher's cell phones to a public record subject to a PRA request. Additionally, under the plaintiffs' interpretation of the PRA, an off-duty fire fighter who texts a coworker to arrange an exchange of duty because of personal illness or family emergency may be forced to disclose their phone records because of sending a "work related" text message.

Nissen has even argued that RCW 40.14.070 applies if a public em-

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<sup>17</sup> If public employees send communications from private devices to those paid for by a public agency, communications on the public devices become records used or retained by a public agency under RCW 42.56.010(3). See *Mechling, supra*. If there is a fear public employees will transact public business on personal communication devices to circumvent the PRA, the legislature has already provided its remedy. If state employees intentionally circumvent the PRA's provisions by deliberately conducting public business on personal communication devices with the express intent to avoid public disclosure, they may violate RCW 42.52.050(4) and could be subject to disciplinary action, RCW 42.52.520, and the other penalty provisions of RCW 42.52. If plaintiff deems this insufficient, "courts cannot legislate," *Cowles Pub. Co. v. Employment Sec. Dept.*, 15 Wn. App. 590, 550 P.2d 712 (1976), and only an appropriate legislative body may craft a statutory remedy. See e.g. *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 482, 104 P.2d 478 (1940) ("Courts cannot correct supposed errors, omissions, or defects in legislation").

ployee discards or deletes personal texts (and presumably emails as well). Nissen br. at 35. If a public employee willfully destroys public records, they may be guilty of a felony. RCW 40.16.010. Nissen's argument is plainly onerous as to public employees' obligations to preserve records of communications touching upon public business.

Further, because these records are personal and private, the inevitable result of an application of the PRA to such records is an unwarranted intrusion by government and the courts into such private records to attempt to discern precisely what is public and what is private. No public employee will ever be safe from such intrusion or harassment. Anything other than a categorical rule respecting the privacy of the records of public employees' personal communication devices will allow fishing expeditions from inmates, merely curious citizens, and others, trampling on public employee privacy, and requiring such employees to incur the expense of upholding the privacy of their communications.

Were the Court to conclude otherwise, it must squarely address constitutionally-based property and privacy issues that protect public employees from intrusion into records of their private communication devices, a problem glaringly present in *O'Neill* but avoided by facts not present here.

#### F. CONCLUSION

The trial court was correct in concluding the Pierce County Prosecu-

tor's private cell phone records were not public records under the PRA as well as fell within recognized exceptions to the PRA.

The amici represent public employees who serve our state in a variety of public employment settings. The records from their personal communication devices are not subject to the PRA. Merely being public employees does not make the records of their personal communication devices public. A public employee does not forfeit his or her privacy and other constitutional rights by entering into public service. Under RCW 42.56.010(3) and pertinent exemptions to the PRA, records derived from a public employee's personal communication device are categorically exempt from disclosure under the PRA. This Court should affirm the trial court's order.

DATED this 24th day of January, 2014.

Respectfully submitted,

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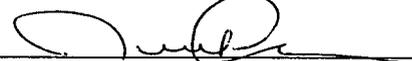
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing document was delivered this 24th day of January, 2014, via electronic mail and to the U.S. Postal Service, postage prepaid, with appropriate instruction to forward the same to the following parties:

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# APPENDIX

RCW 42.56.050:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

RCW 42.56.070:

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of \*subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

RCW 42.56.230:

The following personal information is exempt from public inspection and copying under this chapter:

.....

(3) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy;

RCW 42.56.250:

The following employment and licensing information is exempt from public inspection and copying under this chapter:

.....

(2) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;

(3) The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency that are held by any public agency in personnel records, public employment related records, or volunteer rosters, or are included in any mailing list of employees or volunteers of any public agency. For purposes of this subsection, "employees" includes independent provider home care workers as defined in RCW 74.39A.240.

RCW 42.56.510:

Nothing in RCW 42.56.250 and 42.56.330 shall affect a positive duty of an agency to disclose or a positive duty to withhold information which duty to disclose or withhold is contained in any other law.