

NO. 45039-9-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GLEND A NISSEN,

Appellant,

v.

PIERCE COUNTY, A PUBLIC AGENCY; PIERCE COUNTY
PROSECUTOR'S OFFICE, A PUBLIC ENTITY,

Respondents.

APPELLANT GLEND A NISSEN'S OPENING BRIEF

JOAN K. MELL, WSBA #21319
Attorneys for Appellant Glenda Nissen
III BRANCHES LAW, PLLC
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

Table of Contents

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR AND ISSUES.....	2
III. STATEMENT OF THE CASE.....	3
<u>Det. Nissen’s Request</u>	3
<u>Prosecutor’s Office Response</u>	4
<u>The “861” Number:</u>	5
<u>Possession of the Texts:</u>	6
<u>Mark Lindquist: the “Agency”</u>	6
<u>Retention of Elected Official’s Communications</u>	7
<u>Texts Public Records</u>	11
<u>Exemptions</u>	12
IV. ARGUMENT	15
A. De Novo Review.....	15
B. Public Policy Favors Public Disclosure	17
C. Issue Preclusion Improper Where Distinct Records Requested....	18
1. Unjust Effect	18
2. No Final Judgment on the Merits.....	19
3. No Identity Of Issues	29
D. Texts Requested Are Public Records That Pierce County Erroneously Withheld From Disclosure	30

1. Mark Lindquist the “Office”	31
2. Texts Are Public Records	33
3. No Applicable Exemptions Cited	37
E. Det. Nissen Entitled to Penalty, Fees, and Costs On Appeal And At Trial Level.....	43
V. CONCLUSION	45

Table of Authorities

Cases

<i>Amren v. City of Kalama</i> , 131 Wn.2d 25, 929 P.2d 389 (1997).....	17
<i>Angel v. Bullington</i> , 330 U.S. 183, 67 S. Ct. 657 (1947).....	20
<i>Bainbridge Island Police Guild v. City of Puyallup</i> , 172 Wn.2d 398, 259 P.3d 190 (2011).....	36
<i>Bauman v. Turpen</i> , 139 Wn. App. 78, 160 P.3d 1050 (2007)	21
<i>Bellevue John Does 1-11v. Bellevue Sch. Dist.</i> , 164 Wn.2d 199, 212-12, 189 P.3d 139 (2008).....	41
<i>Bordeaux v. Ingersoll Rand Co.</i> , 71 Wn.2d 392, 396, 429 P.2d 207 (1967)	18
<i>Bradburn v. N. Central Regional Library</i> , 168 Wn.2d 789, 802, 231 P.3d 166 (2010).....	18, 26
<i>Bravo v. Dolsen Companies</i> , 125 Wn.2d 745, 750, 888 P.2d 147 (1995)	16
<i>Brouillet v. Cowles Publ’g Co.</i> , 114 Wn.2d 788, 791 P.2d 526 (1990)...	24, 38, 42
<i>Broyles v. Thurston County</i> , 147 Wn. App. 409, 195 P.3d 985 (2008)....	32
<i>City of Moses Lake v. Grant County</i> , 39 Wn. App. 256, 258, 693 P.2d 140 (1984).....	35

<i>City of Ontario, Cal. v. Quon</i> , 560 U.S. 746, 130 S. Ct. 2619 (2010)	22, 41
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 60 Wn.2d 66, 44 P.U.R. 3d 409 (1962)	38
<i>Clarke v. State Attorney General's Office</i> , 133 Wn. App. 767, 138 P.3d 144 (2006)	24
<i>Concerned Ratepayers Ass'n. v. PUD No. 1 of Clark County</i> , 138 Wn.2d 950, 983 P.2d 635 (1999)	8, 23, 36
<i>Cowles Publ'g Co. v. State Patrol</i> , 109 Wn.2d 712, 721, 748 P.2d 597 9 (1988)	41
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993)	24, 33
<i>Diaz v. WA State Migrant Council</i> , 165 Wn. App. 59, 265 P.3d 956 (2011)	10, 23, 43
<i>Dragonslayer, Inc. v. WSGC</i> , 139 Wn. App. 433, 161 P.3d 428 (2007)	35
<i>Federated Dept. Stores, Inc. v. Moitie</i> , 452 U.S. 394, 101 S. Ct. 2424 (1981)	20
<i>Francis v. DOC</i> , 2013 WL 6086919, __ Wn.2d __, __ P.3d __ (Nov. 19th, 2013 Div. II)	43
<i>Freedom Foundation v. Gregoire</i> , __ Wn.2d __, 310 P.3d 1252 (2013)	17
<i>Freedom Foundation v. WADOT</i> , 168 Wn. App. 278, 276 P.3d 341 (2012)	38
<i>Fritz v. Gordon</i> , 83 Wn.2d 275, 517 P.2d 911 (1974)	26
<i>Gronquist v. State</i> , WL 5800320, __ Wn.2d __, __ P.3d __ (2013)	16
<i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 561, 852 P.2d 295 (1993)	20
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978)	27, 41

<i>Henderson v. Bardahl Intern. Corp.</i> , 72 Wn.2d 109, 431 P.2d 961 (1967)	19
<i>Hoppe v. King County</i> , 162 Wn. App. 40, 255 P.3d 819 (2011).....	15, 27
<i>In re Facebook, Inc.</i> , 923 F. Supp. 2d 1204 (N.D. Cal. 2012).....	40
<i>In re Marriage of Mudgett</i> , 41 Wn. App. 337, 342, 704 P. 2d 169 (1985)...	20
<i>In re Recall of Pearsall-Stipek</i> , 141 Wn.2d 756, 10 P.3d 1034 (2000)....	32
<i>King County v. Sheehan</i> , 114 Wn. App. 325, 57 P.3d 307 (2002)	42, 44
<i>King v. Olympic Pipeline Co.</i> , 104 Wn. App. 338, 362, 16 P.3d 45 (2000)	21, 42
<i>Lemond v. State, Dept. of Licensing</i> , 143 Wn. App. 797, 180 P.3d 829 (2008).....	29
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998).....	7, 31, 42
<i>Low v. LinkedIn Corp.</i> , 900 F.Supp. 2d 1010 (2012)	39
<i>Lowy v. PeaceHealth</i> , 174 Wn.2d 769, 280 P.3d 1078 (2012).....	10, 24
<i>Lyster v. Metzger</i> , 68 Wn.2d 216, 412 P.2d 340 (1966).....	15
<i>Neighborhood Alliance of Spokane County v. County of Spokane</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).....	10, 21
<i>Neighborhood Alliance</i> , 172 Wn.2d at 718	22
<i>O'Connor v. DSHS</i> , 143 Wn.2d 895, 912, 25 P.3d 426 (2001).....	23
<i>O'Neill v. City of Shoreline</i> , 170 Wn.2d 138, 240 P.3d 1149 (2010). 23,	35
<i>Progressive Animal Welfare Soc v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	38

<i>Progressive Animal Welfare Soc. v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	17, 24, 42
<i>Resident Action Council v. Seattle Housing Authority</i> , 177 Wn.2d 417, 300 P.3d 376 (2013).....	25, 38
<i>Riblet v. Ideal Cement Co.</i> , 57 Wn.2d 619 (1961).....	20
<i>Seattle Firefighters Union Local No. 27 v. Hollister</i> , 48 Wn. App. 129, 135, 737 P.2d 1302, review denied, 108 Wn.2d 1033 (1987)	41
<i>Seattle Times Co. v. Eberharter</i> , 105 Wn.2d 144, 713 P.2d 710 (1986) ..	17
<i>Seattle Times Co. v. Serko</i> , 170 Wn.2d 581, 243 P. 3d 919 (2010).....	35
<i>Servais v. Port of Bellingham</i> , 127 Wn.2d 820, 827, 904 P.2d 1124 (1995)	17
<i>Shoemaker v. City of Bremerton</i> , 109 Wn.2d 504, 507 (1987).....	20
<i>Snedigar v. Hoddersen</i> , 114 Wn.2d 153, 786 P.2d 781 (1990).....	42
<i>Southcenter Joint Venture v Nat. Democratic Policy Committee</i> , 113 Wn.2d 413, 780 P.2d 1282 (1989).....	26
<i>Spokane Police Guild v. State Liquor Control Bd.</i> , 112 Wn.2d 30, 40, 769 P.2d 283 (1989).....	38
<i>Spokane Research & Defense Fund v. City of Spokane</i> , 96 Wn. App. 568, 983 P.2d 676 (1999).....	38
<i>State v. Goucher</i> , 124 Wn.2d 778, 881 P. 2d 210 (1994).....	40
<i>State v. Hinton</i> , 169 Wn. App. 28, 280 P.3d 476 (2012).....	14, 22
<i>State v. Roden</i> , 169 Wn. App. 59, 279 P.3d 461 (2012).....	14, 22
<i>State v. Whitney</i> , 9 Wash. 377, 379, 37 P. 473 (1984).....	32
<i>Steve Jackson Games, Inc. v. U.S. Secret Serv.</i> , 36 F.3d 457, 461-463 (5th Cir. 1994)	40

<i>Theofel v. Farey-Jones</i> , 359 F.3d 1066 (2003), <i>Crispin v. Christian Audigier, Inc.</i> , 717 F.Supp. 2d 965 (C.D. Cal. 2010)	39
<i>Thurston County v. Washington Growth Management Hearings Bd.</i> , 158 Wn. App. 263, 240 P.3d 1203 (2010)	29
<i>Van Buren v. Miller</i> , 22 Wn. App. 836, 592 P.2d 671	41
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012)	37
<i>West v. Wash. State Ass'n of County Officials</i> , 162 Wn. App. 120,128, 252 P.3d 406 (2011).....	16
<i>Windust v. Dept. of L&I</i> , 52 Wn.2d 33, 323 P.2d 241 (1958)	21
<i>Wright v. State</i> , 176 Wn. App. 585, 309 P.3d 662 (2013).....	15
<i>Yousoufian v. Office of Ron Sims</i> , 168 Wn.2d 444, 467, 229 P.3d 735 (2010).....	22

Statutes

18 U.S.C. § 2702(a)(2).....	39
18 U.S.C. § 2703(a)	40
18 U.S.C. § 2703(b)(1)(B)(i)	40
18 U.S.C. § 2703(b)	39
18 U.S.C. § 2711(2)	39
18 U.S.C. § 2701 et. seq.....	4, 14
PCC 2.06.030	32
RCW 36.16.040	32
RCW 36.16.120	33

RCW 36.27.020	32
RCW 4.56.550(4).....	43
RCW 40.14.010	34, 35
RCW 40.14.020	7, 33
RCW 40.14.060	7, 33
RCW 40.14.070	8, 33
RCW 40.16.010	34
RCW 40.16.020	8, 34
RCW 42.17.020(42).....	4
RCW 42.56.010 (3).....	11
RCW 42.56.010(1).....	7, 31
RCW 42.56.010(3).....	34, 35
RCW 42.56.030	18
RCW 42.56.050	4, 13, 38, 41
RCW 42.56.070(1).....	27
RCW 42.56.250(3).....	4, 13
RCW 42.56.550	passim
RCW 42.56.550(6).....	5
RCW 70.41.200(3).....	24
RCW 9.73.260	4, 13, 40
WAC 434-630-040.....	8, 33

WAC 44.14.03001(3).....	8
WAC 44.14.03005	8
WAC 44-14.03001(3).....	34
WAC 44-14-03001.....	14, 37
WAC 44-14-03005.....	33
WAC 44-14-06002(2).....	39

Other Authorities

<i>Random House Dictionary of the English Language the unabridged version.</i> (1966).....	32
--	----

Rules

CR 12(b)(6).....	5, 16, 19, 20
CR 26 (b)(1).....	10
CR 26(b)(6).....	42

Treatises

<i>A User’s Guide to the Stored Communications Act, and A Legislator’s Guide to Amending It”</i> Orin S. Kerr, 72 Geo. Wash. L. Rev. 1208, 2003-2004	39
AGO 1983 No. 9.....	40
Op. Att’y Gen. 12 (1988), at 3	39

Regulations

GS50-01-12 Rev. 3, Local Government Common Records Retention

Schedule (CORE) Version 3.0 Nov. 2012 33

Constitutional Provisions

U.S.C.A. CONST. AMEND. X 43

WASH. CONST. ART. I § 10 15, 47

WASH. CONST. ART. XI § 5 12, 37

I. INTRODUCTION

The elected Pierce County Prosecutor Mark Lindquist refuses public examination of text communications for a seven day period (July 29th, 2011 to August 4th, 2011). In his official capacity, he has instructed his cellular service provider Verizon to retain them. But, he will not let the court examine the records in camera to decide which texts are public records that must be disclosed.

Detective Glenda Nissen asked to examine texts that relate to the conduct of government or the performance of any governmental or proprietary function through a public records request. Even though Lindquist admits there are texts that relate to work, he now claims a privacy interest in them because he pays for the Verizon service. The Prosecutor also claims a constitutional search and seizure violation from in camera review.

Lindquist was not using his county issued cell phone when Nissen made her request. He was using a phone he claims is his own with a number he used for work. While the trial court was “very interested in the legal issue(s) related to the PRA as presented in this case,” CP 1009, the trial court decided collateral estoppel necessitated summary dismissal precluding a substantive decision on the merits. The trial court deferred to

the earlier Pomeroy ruling from *Nissen I*. *Nissen I* is a related but distinct public records request case. Thurston County Superior Court dismissed the *Nissen I* case on the pleadings. The decision is now on appeal and may be argued in Division II in February. *Nissen I* concerns Det. Nissen's public records request for phone records, including text messages, for one day, August 2nd, 2011.

Det. Nissen asks this court to reverse the dismissal of *Nissen II*. She has requested similar relief in *Nissen I*. She wants the texts that are public records from July 29th to August 4th, 2011. She asks to recover her attorney's fees and costs and the statutory penalty because she has been denied access in violation of the Public Records Act ("PRA").

II. ASSIGNMENTS OF ERROR AND ISSUES

Assignments of Error

1. The trial court erred when it dismissed Det. Nissen's public records request for texts to and from the elected Prosecutor.
2. The trial court erred when it failed to compel preservation of the texts.
3. The trial court erred when it dismissed the case prior to any discovery.
4. The trial court erred when it failed to grant a penalty, fees, and costs to Det. Nissen.

Issue Statements

- a. Does collateral estoppel apply to bar a subsequent public records request for text messages not previously requested?
- b. Are text messages public records when retained by a public official at Verizon?
- c. May the court compel Pierce County to preserve and produce the texts for in camera review through discovery?
- e. Has the Prosecutor met his burden of proving the texts properly withheld under an explicit exemption to the PRA?
- f. Is Det. Nissen entitled to a penalty and fees and costs at the trial level and on appeal?

III. STATEMENT OF THE CASE

Det. Nissen's Request

This is a public records case. CP 26. Det. Nissen made the following request for public records on December 9th, 2011 from the Prosecuting Attorney's Office:

“Please produce for public inspection the text content on Verizon Wireless 253-861-XXXX from July 29th, 2011 to August 4th, 2011 that relate to the conduct of government or the performance of any governmental or proprietary function. This request relates to the cell phone used by Mark Lindquist.” CP 28, 53.

On December 16th, 2011, the Prosecuting Attorney's Public Records Officer Joyce Glass acknowledged the request and assigned it a distinct

reference number, PA Reference No. 161/11-1428.¹ CP 28, 53. To date the Prosecuting Attorney's office has refused to make the requested text messages available for public examination as requested. CP 57.

Prosecutor's Office Response

The Prosecutor's Office denied Det. Nissen's request on February 17th, 2012. CP 29, 54. The Prosecutor's Office enumerated its reasons in a letter as follows:

“1. The subject cell phone number is Mr. Lindquist's personal cell phone.

2. The text messages you are requesting for this cell phone are not in the possession of the Pierce County Prosecuting Attorney.

3. The record that you are asking us to obtain and review for production is not a public record in that it does not relate to the conduct of government or the performance of any governmental or proprietary function. RCW 42.17.020(42).

4. If these records were public records, they would be exemption [sic] from production by RCW 42.56.050, RCW 42.56.250(3), RCW 9.73.260 and 18 U.S.C. § 2701 et. seq.” Id.^{2 3}

When the prosecutor's office closed the request over the objections of Det. Nissen, she filed her claim within one year as required under the

¹ The court summarily dismissed *Nissen I* on December 23rd, 2011, after Det. Nissen requested the texts in this matter. CP 115, 120 (*Nissen I* Complaint filed October 26th, 2011), and 161-162.

² The Prosecutor's Office only asserted the texts were not “public records” based upon the texts not meeting the secondary element of the definition. RCW 42.56.010(3). The Prosecutor did not claim the texts were not “prepared”, “owned”, “used”, or “retained” by him or any other public officer or employee.

³ There is an apparent conflict between (2) and (3). The answer raises an issue regarding the adequacy of the agency's search. If the public records officer has never possessed the texts, how can she affirmatively claim the texts do not relate to the conduct of government or the performance of any governmental or proprietary function?

statute on November 30th, 2012. CP 75, RCW 42.56.550(6). The trial court dismissed her complaint on Pierce County's CR 12(b)(6) Motion to Dismiss on May 22nd, 2013 based upon collateral estoppel. CP 1006, 1009-1013. The Court denied reconsideration on May 16th, 2013. CP 1032. Det. Nissen filed her Notice of Appeal on May 30th, 2013 within thirty days from entry of the final order denying her relief. CP 1014.

The "861" Number:

Det. Nissen used the "861" number in her records request because Mark Lindquist used this number in his official capacity. CP 28. Lindquist contacted Nissen's attorney using this number. CP 274. Lindquist communicated with union counsel for the Pierce County Deputy Sheriff's Independent Guild using this number. CP 277. Lindquist used this number on his Declaration for Candidacy for prosecuting attorney for the November 2010 election. CP 280. Lindquist used this number to communicate with Sheriff's Department personnel, including Ed Troyer its communications officer. CP 848.⁴ The records from his county issued cell phone show he did not use his county issued cell phone. CP 277-278.

⁴ Pierce County produced the personal and county cell phone records of Ed Troyer without redacting Lindquist's "861" number. The date of documented communication between Troyer and Lindquist corresponds with the date Det. Nissen contends Lindquist was retaliating against her. CP 217, 227, 294, 848. Det. Nissen expects the texts will document retaliatory misconduct. CP 121.

The “861” records he did produce reveal multiple calls and texts throughout the work day. CP 370-372. Pierce County represented Lindquist used the “861” number for work and not his county issued phone. CP 54-55, 278.

Mark Lindquist declared under oath in *Nissen I* that he authorized release of cell phone records showing text communications to and from the “861” number “that were related to the conduct of government or the performance of any governmental or proprietary function.” CP 29-30. The phone record produced showed sixteen entries revealing work related texts on August 2nd and August 3rd. CP 30. Lindquist did not produce the text content. His office only produced the to and from telephone numbers and the date and time. *Id.* His office did not produce any records for entries from July 29th, 30th, 31st, or August 1st, or 4th because these records were not requested in *Nissen I*.

Possession of the Texts:

Mark Lindquist: the “Agency”

Det. Nissen requested public records from the Prosecutor’s Office. CP 28. When the Office denied her request, she named Pierce County as the proper party defendant. RCW 42.56.550, CP 27, 52-53. Mark Lindquist is not named separately in an individual capacity. CP 26-27. Lindquist did not intervene in this case like he did in *Nissen I*, which

Det. Nissen claims raises standing issues in this case. CP 493, 518. Pierce County appeared and asserted as defenses the personal privacy and search and seizure claims of Lindquist the individual, rather than limiting its defenses to statutory exemptions identified in the Public Records Act (PRA). CP 303-326, 493-494, 497-499.

The County argues Lindquist was not subject to the PRA, even though historically it has considered the elected prosecutor subject to the PRA. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998). CP 314. Pierce County now argues an “agency” excludes the elected official. *Id.* and CP 494-497.

“Agency” is defined in the PRA as “any office” of the County. RCW 42.56.010(1). Det. Nissen disagreed with Pierce County pointing out the plain meaning of the statutory term “office” encompasses the official and is consistent with references to the office in the constitution state statute, and local code. WASH. CONST. ART. XI § 5. CP 494. The trial court did not decide the prosecutor was distinct from his elected office in its decision. CP 1006, 1009-1013.

Retention of Elected Official’s Communications

Washington requires elected officials retain public records as the property of the State. RCW 40.14.020, and .060. Washington decides what records must be kept, managed, and disposed of lawfully in

accordance with approved records retention schedules. RCW 40.14.070, WAC 434-630-040. Internal and external communications to, from, and/or on behalf of an elected official that is made or received in connection with the transaction of public business including all communication types regardless of format must be retained for two years. WAC 44.14.03005, CP 420 (GS50-01-12 Rev. 3). Public records may not be concealed with a third party. WAC 44.14.03001(3), see Ftnt. 5 “If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.” An agency has to get public records in the possession of a third party. *Concerned Ratepayers Ass’n. v. PUD No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999). It is a class B felony for a public officer to conceal any record or paper “appertaining to the officer’s office.” RCW 40.16.020.

In *Nissen I*, Det. Nissen asked the court to order the text content at Verizon preserved. CP 348-357. Pierce County promised to instruct Verizon to retain the texts. In his official capacity, Mark Lindquist sent through the County’s attorney, not his personal attorney, a letter to

Verizon instructing Verizon to retain and preserve the texts requested.⁵
CP. 133. The motion was considered moot at that point. CP 292.

In *Nissen II*, Det. Nissen again moved for a protective order to preserve all of the texts held by Verizon and to lodge the records with the court. CP 83-91, 207-209, 291-298. Defense Counsel promised on the record that he would instruct his client to not take any action to destroy the texts. RP 27-28, March 1st, 2013. At the same time, the Prosecutor objected to preservation of the texts at any other location than Verizon. CP 102. The trial court denied Det. Nissen's request for additional protection believing it had no authority to compel the Prosecutor to preserve the records, which Det. Nissen argued against citing to the *Diaz* decision. CP 373-374, 1012. The trial court reserved ruling on lodging of the records. The trial court's deference to the *Nissen I* decision prioritized Lindquist's personal privacy interests over Nissen's constitutional rights to public records and to discovery, a result Det. Nissen argued against. CP 297, 498, 752.

Det. Nissen argued the texts should be produced in discovery and examined in camera. CP 477, 743-735, 887. Public records cases are

⁵ "I represent the subscriber/customer for telephone number (253) 861 - [redacted]. I request that Verizon Wireless continue to preserve all records referenced in Case 953993 until otherwise notified by me...Very truly yours, [Signature] Michael Patterson on behalf of Mark Lindquist Pierce County Prosecuting Attorney." CP 133. (Ltr dated Dec. 20th, 2011).

subject to the rules of civil discovery. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011). Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action. CR 26 (b)(1). Civil discovery is a constitutionally protected interest. WASH. CONST. ART. I § 10; *Lowy v. PeaceHealth*, 174 Wn.2d 769, 280 P.3d 1078 (2012)(“The right of access includes the right of discovery authorized by the civil rules, subject to the restrictions contained therein.”). Corporate officers must comply with civil discovery requests to include the production of documents held in a personal capacity. *Diaz v. WA State Migrant Council*, 165 Wn. App. 59, 265 P.3d 956 (2011).

Lindquist refused to produce the texts for production in discovery. CP 817-828. Pierce County did not respond substantively to Det. Nissen’s discovery requests before moving to dismiss. CP 95, 303, 759- 806. Det. Nissen’s Motion to Compel discovery responses was pending when the trial court dismissed the case on the complaint. CP 743.

The trial court did not compel discovery to consider whether the texts could be located anywhere other than at Verizon. The trial court did not consider examination of Pierce County’s records to ascertain whether any text received were stored on county phones or county phone records. Pierce County claimed it does not have text service on County phones;

however the County does not prohibit text communications for work purposes like Everett does. CP 744, 868.

Texts Public Records

The Prosecutor did not at any time address the texts as public records. CP 511-512. Instead, the Prosecutor argues both requests are for the same phone records. CP 515. The requests are not both for phone records, the requests are distinct.⁶ The Prosecutor argues phone records are created by Verizon, not the County. However, the Prosecutor did not and cannot claim the text messages were not “prepared, owned, used, or retained” by the agency because the texts requested are to and from the Prosecutor. RCW 42.56.010 (3) and CP 516.

The trial court did not accept the Prosecutor’s insistence about the requests being the same. The court explained in its written opinion that the requests were not the same. CP 882. The court decided collateral estoppel applied “even if the claims are distinct.” CP 883. The trial court decided the legal issues in the two actions were the same. The *Nissen II* court authored a written opinion equating the issues in *Nissen I to Nissen II* as follows: *Nissen I* decided the records were not retained by the parties; that the definition of privacy in the PRA is a stand alone

⁶ On August 3rd, 2011, Detective Nissen requested the following: “Please produce any and all of Mark Lindquist’s cellular telephone records for number 253-861-[redacted] or any other cellular telephone he uses to conduct his business including text messages from August 2nd, 2011.” CP 122, 882.

exemption; and that a constitutional right to privacy prohibits disclosure. CP 883.

Det. Nissen moved for reconsideration. CP 886. Reconsideration focused on the distinct legal issues raised by the different requests. CP 886. The *Nissen I* court focused on the phone records with Verizon. CP 117. The oral ruling and written order were silent about text content. CP 116-118, 161-162. Det. Nissen cautioned the *Nissen II* court against duplicating the error in *Nissen I* where the trial court assumed facts in favor of the County on a motion to dismiss, in particular that Verizon was in exclusive possession of the records. CP 887. The *Nissen II* court denied reconsideration without discussion. CP 1004.

Pierce County moved for an award of attorney's fees and costs. CP 1109. The trial court denied its request noting there was no basis for an award of fees and costs, and explaining that the estoppel law cited was distinguishable. Pierce County cross appealed the order denying fees and costs to it. CP 1275-1287.

Exemptions

Nissen II was dismissed without the trial court deciding the application of any exemption to the PRA. Det. Nissen points out the Prosecutor failed to identify any exemption from public disclosure for the texts. Det. Nissen disputes the four reasons the Prosecutor provided for

denying her request because they are not legitimate exemptions that warrant withholding the requested texts from public examination.

1. RCW 42.56.050 - Privacy Definition Not An Exemption

Pierce County asserts the definition of privacy in the PRA is a stand alone exemption that it may rely upon to deny disclosure of the texts, citing as authority the dissent in *O'Neill v. City of Shoreline*. CP 317. Det. Nissen points out the Legislature reminded the courts that the definition of privacy is not a stand alone exemption. CP 317, 497, 523, RCW 42.56.050 Notes. Privacy may be an element of a statutory exemption, but in this case there is no applicable exemption to apply.

2. RCW 42.56.250(3) - Employment and Licensing, residential telephone numbers, personal wireless telephone numbers held by a public agency in personnel records or public employment related records.

The Prosecutor cites the exemption for personal phone numbers held by a public agency in personnel records or public employment related records. CP 497. Det. Nissen argues the exemption inapplicable to text message content never maintained in employee files. CP 497. There is no evidence texts she has requested were ever maintained in employee files.

3. RCW 9.73.260 - Pen registers, trap and trace devices

The Prosecutor cites to a provision in Washington's privacy statutes that mandate a warrant for pen registers. RCW 9.73.260. CP

317, 319. However, the Prosecutor never explains how that statute operates as an exemption under the PRA for text messages. CP 498. Det. Nissen pointed out Lindquist could not have any expectation of privacy in his work text communications. CP 298, 498, 750-751. The Sheriff's Department has considered personal phone records public records when a personal phone is used for work. It disclosed Deputy Troyer's personal phone records. CP 838. Pierce County's Special Prosecutor took into custody Det. Nissen's personal phone records. CP 745, 856. Disclosure of public content on private technology is consistent with the State's Model Rules and the advice of its special deputy. CP 746, WAC 44-14-03001. Det. Nissen also cited to and relied upon two recent criminal cases decided at Division II, concluding there is no reasonable expectation of privacy in sent text messages. CP 499, citing *State v. Hinton*, 169 Wn. App. 28, 280 P.3d 476 (2012), rev. granted Dec. 4th, 2012 and *State v. Roden*, 169 Wn. App. 59, 279 P.3d 461 (2012), rev. granted Dec. 4th, 2012.

4. 18 U.S.C. § 2701 et. seq. - Stored Communications Act

The Prosecutor cited the Stored Communications Act (SCA) as authority requiring a warrant for disclosure of the texts. CP 319. Det. Nissen argues the limitations in the SCA are not applicable here where the Prosecutor created and has likely read the text communications,

which he has officially asked Verizon to retain and store for him for more than a year. CP 484-487. The SCA limitations do not protect this information from discovery like it might with e-mail that was never read or was stored temporarily. Det. Nissen also argues federal law may not pre-empt state public disclosure law. *Id.*

While the trial court did not address each of these exemptions, Det. Nissen maintains there are no applicable exemptions that preclude her examination of the requested texts. She expects to hold Pierce County Prosecuting Attorney Mark Lindquist accountable.

IV. ARGUMENT

A. De Novo Review

The standard of review applicable to a public records case such as this is de novo. *Wright v. State*, 176 Wn. App. 585, 309 P.3d 662 (2013). De novo review also applies to the application of collateral estoppel. *Hoppe v. King County*, 162 Wn. App. 40, 255 P.3d 819 (2011)(PRA summary judgment case where appellate court ruled on the claimed exemptions even though collateral estoppel applied because decision on the merits was in the public interest). A trial court is afforded no discretion when deciding legal issues. *Lyster v. Metzger*, 68 Wn.2d 216, 412 P.2d 340 (1966). The appellate court reviews the record in the same position as the trial court. *Id.*

Dismissals on the pleadings are disfavored and are warranted only if the trial court concludes beyond a reasonable doubt that the plaintiff cannot prove any set of facts justifying recovery. *West v. Wash. State Ass'n of County Officials*, 162 Wn. App. 120,128, 252 P.3d 406 (2011). CR 12(b)(6) motions should be granted only “sparingly and with care.” *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). In a PRA case, an agency that wants to withhold records has the burden of proof. RCW 42.56.550(1). The refusal to permit public inspection and copying must be in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records. *Id.* The agency has the burden of proof to establish that a specific exemption applies. *Gronquist v. State*, WL 5800320, __ Wn.2d __, __ P.3d __ (2013).

In this case, the court did not find and could not find that the texts requested are not public records because the case was erroneously dismissed without discovery and without in camera review of the texts. Det. Nissen properly pled the texts she is requesting are public records related to the conduct of Pierce County Prosecuting Attorney Mark Lindquist. Det Nissen asserts the Prosecutor owned, used, prepared and retained the texts. The trial court improperly dismissed her case because there is no PRA exemption or other statute that clearly exempts

work related texts from public disclosure. Just the opposite, the work related communications of an elected prosecutor must be retained and archived according to state retention schedules. The Prosecutor fails to meet his burden of proving an applicable explicit exemption for the texts.

B. Public Policy Favors Public Disclosure

The PRA serves to ensure governmental transparency in Washington State. *Freedom Foundation v. Gregoire*, __ Wn.2d __, 310 P.3d 1252 (2013). The Legislature authorizes courts to construe the PRA liberally in favor of disclosure. RCW 42.56.030. The authorization is a strongly worded mandate for broad disclosure of public records. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994). The courts have recognized this mandate and have said the PRA shall be liberally construed to promote full access to public records. *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997). Exemptions under the PRA shall be narrowly construed. *Id.* The purpose for liberal construction is grounded in constitutional principles of a free and democratic society.: “full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.” *Servais v. Port of Bellingham*, 127 Wn.2d 820, 827, 904 P.2d 1124 (1995); *Seattle Times Co. v. Eberharter*, 105 Wn.2d 144, 713 P.2d 710 (1986)(For

self-government to flourish, “debate must not only be unfettered; it must also be informed.”); *Bradburn v. N. Central Regional Library*, 168 Wn.2d 789, 802, 231 P.3d 166 (2010)(“First Amendment protects the right to receive information and ideas...”). Public servants have no right to decide what is good for the people to know and what is not good for them to know. RCW 42.56.030. The citizens of Pierce County such as Detective Glenda Nissen insist upon remaining informed so that they may maintain control over the instruments they have created. *Id.* This case is about holding the Pierce County Prosecuting Attorney accountable to the public he serves. His work related texts are public and he should not be permitted to hide them at Verizon. Det. Nissen has the right to transparency in one of the most powerful positions in Pierce County.

C. Issue Preclusion Improper Where Distinct Records Requested

1. Unjust Effect

Estoppel must be mutual. *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 396, 429 P.2d 207 (1967). In this case, the equitable doctrine does not apply mutually as needed to fairly apply the equitable doctrine. The Prosecutor has no intention of providing the text messages requested in *Nissen II* in *Nissen I*. If Det. Nissen had prevailed in *Nissen I* on reconsideration, the Prosecutor would not have provided the texts requested in *Nissen II* because it had already closed the request. CP 9. If

Det. Nissen prevails in *Nissen I* on appeal the Prosecutor still has no intention of producing the requested texts because this case has been dismissed summarily. This case is her only request for the texts from the 29th to the 4th. The only overlap is August 2nd. Estoppel may not be fairly applied in this case where summary dismissal prejudices Det. Nissen's access to public records from the 29th, 30th, 31st, 1st, 3rd, and 4th.

2. No Final Judgment on the Merits

Issue preclusion cannot achieve the desired equitable outcome where the party against whom the doctrine is applied has never had the opportunity to fairly and fully present her case. *Henderson v. Bardahl Intern. Corp.*, 72 Wn.2d 109, 431 P.2d 961 (1967). The preclusive action must have been decided on its merits.

a. Dismissal On the Pleadings Improper

Washington courts have never supported summary dismissal of a case where the first action was appealed and not yet finally decided. A granted 12(b)(6) motion to dismiss has never before been used to prevent a requestor's access to public records. The Prosecutor did not cite any Washington case where the first action, PRA case or other cause, was

dismissed on the pleadings and collateral estoppel applied.⁷ The Supreme Court has said that a CR 12(b)(6) motion that is not appealed may have a preclusive effect where the first action is not appealed. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424 (1981); *Angel v. Bullington*, 330 U.S. 183, 67 S. Ct. 657 (1947). In the *Federated* case plaintiffs who did not appeal the first action that was dismissed on the pleadings were estopped under collateral estoppel. In the *Angel* case, the later federal case was dismissed when the “carbon copy” state case was dismissed and not appealed. Where the first action is truly final and not on appeal, the policy favoring finality of decision can be achieved; however where the first action is not final and is appealed, application of the doctrine to a subsequent proceeding has no effect on finality and instead risks the potential of inconsistent outcomes. If the first action is reversed then the second action has never been decided on the merits of the request and there is no jurisdiction to obtain the texts absent a second appeal.

⁷ Pierce County cited the following cases: *In re Marriage of Mudgett*, 41 Wn. App. 337, 342, 704 P. 2d 169 (1985)(Dissolution Decree and Separation Agreement/Summary Judgment); *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993)(Appealed criminal conviction/Summary judgment); *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507 (1987)(Administrative hearing/Summary judgment) and *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619 (1961)(Jury verdicts affirmed on appeal/Directed verdict).

Collateral estoppel worked an injustice here where Det. Nissen has been forced to pursue two appeals just so she does not compromise her rights to access the text communications that might otherwise be destroyed even if she prevails on *Nissen I*. The trial court should have decided the case on the merits and stayed the disclosure until *Nissen I* was decided.

The trial court could have decided the case on the merits because there is no horizontal stare decisis applicable among superior court judges. A trial court may properly disregard the findings of facts and conclusions of law of a superior court because a superior court decision is not legal authority and has no precedential value. *Bauman v. Turpen*, 139 Wn. App. 78, 160 P.3d 1050 (2007). Also, the doctrine does not apply to a case of statutory interpretation like that required here where the court is asked to apply the PRA. *Windust v. Dept. of L&I*, 52 Wn.2d 33, 323 P.2d 241 (1958). The trial court erred in its application of collateral estoppel.

b. Discovery Rules Violated

Det. Nissen was further prejudiced because her constitutional right to discovery was compromised. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 362, 16 P.3d 45 (2000). The civil rules control discovery in a public record action. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). An agency is obligated to make more than a perfunctory search; an agency is required to

follow obvious leads as they are uncovered to locate responsive materials. *Id.* at 721. An agency may not limit its search to only one record system.

Relevant evidence, and any evidence likely to lead to admissible evidence is discoverable. *Id.* at 717. Relevant evidence includes the agency's motivation for failing to disclose or for withholding documents. *Id.* An agency's good faith may be measured by the existence of agency systems to track and retrieve public records. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010). The reasons why documents are withheld, destroyed, or otherwise inaccessible are relevant. *Neighborhood Alliance*, 172 Wn.2d at 718. Dismissal on the pleadings before discovery violates Det. Nissen's constitutional rights to discovery and access to public records and to address the wrongful withholding of them.

The scope of discovery is different in *Nissen I* than *Nissen II*. Phone records raise distinct issues regarding the expectation of privacy from sent and received text messages involving work. *State v. Hinton*, 169 Wn. App. 28, 280 P.3d 476 (2012), rev. granted; *State v. Roden*, 169 Wn. App. 59, 279 P.3d 461 (2012), rev. granted. In the context of public employment privacy is never absolute. *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 130 S. Ct. 2619 (2010). Texts may be found in locations and with persons who would not necessarily have ever had access to the phone

records. Texts once sent have no expectation of privacy because the recipient may do with the text as he or she pleases. This includes saving it, storing it, forwarding it, or copying it. Det. Nissen has yet to discover where all the texts can be found. The one place she knows the texts are is at Verizon, a location accessible through discovery under the discovery doctrine explained in the case of *Diaz v. WA State Migrant Council*, 165 Wn. App. 59, 265 P.3d 956 (2011)(Corporation obligated to produce records in private possession of corporate officer). The duty to discover and produce public records in a PRA case is high. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010)(Because Mayor used personal computer to review a citizen e-mail forwarded to her, it was proper for the City to search the Mayor's hard drive to retrieve the metadata the Mayor deleted and produce it.); and *Concerned Ratepayers Ass'n. v. PUD No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999)(Agency obligated to get records in possession of a North Carolina vendor because agency may have at one time used the records.) Embarrassment regarding the content is not relevant; embarrassing public records must still be made available. RCW 42.56.550(3).

Records available in civil litigation through the pre-trial rules of civil discovery are not exempt from public disclosure. *O'Connor v. DSHS*, 143 Wn.2d 895, 912, 25 P.3d 426 (2001). Evidence such as tax

returns that ordinarily may be considered confidential are not privileged from disclosure in a civil suit. *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 138 P.3d 144 (2006). Statutes that characterize certain documents as confidential may not be used as a shield to obstruct proper discovery of information. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 280 P.3d 1078 (2012), citing RCW 70.41.200(3). A hospital was obligated to conduct an internal review to locate records that were not created specifically for the quality improvement committee, and had to produce them in response to discovery. *Id.* at 720.

Pierce County cannot cite any authority that exempts text messages from civil discovery on privacy grounds. Privacy may not be weighed under a balancing test that makes access to public records secondary to individual privacy interests. When the court decides whether an exemption that has a privacy element applies, the employee's privacy interest may not be balanced against the public interest in public disclosure. *Dawson v. Daly*, 120 Wn.2d 782, 795, 845 P.2d 995 (1993), citing *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990), limited by *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994)(Privacy is not a stand alone exemption from public disclosure, the public interest outweighs individual privacy claims, absent a specific applicable exemption.) Only relevant privacy

rights are protected as articulated in a specific exemption. *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 300 P.3d 376 (2013).

Every request requires a multi step analysis by the Prosecutor: First, determine whether any public records are responsive to the request - if not the PRA does not apply; Second, if certain records are responsive, determine whether any exemptions apply generally to the records or information contained in the records; Third, if an exemption applies generally to a relevant type of information or record, then determine whether the exemption is categorical or conditional. If the exemption is conditional and the condition is not satisfied in the given case, the records must be disclosed; Fourth, if the exemption is categorical, or if the exemption is conditional and the condition is satisfied, then the agency must consider whether the exemption applies to entire records or only to certain information that may be redacted. *Id.* at 437. Here, the agency never conducted the proper analysis. The Prosecutor's Office closed the request before conducting a search for the texts sent to and from Mark Lindquist. CP 773 - 777. Dismissal on the pleadings prevented a proper search for responsive records and analysis of the records for disclosure. The trial court erred in dismissing this case before discovery and before engaging in the analysis described by the Supreme Court.

b. Constitutional Questions Warrant Substantive Decision

Collateral estoppel is not properly applied where constitutional interests are asserted in a personal capacity as a “personal” right rather than a “property” right. *Southcenter Joint Venture v Nat. Democratic Policy Committee*, 113 Wn.2d 413, 780 P.2d 1282 (1989)(Doctrine of collateral estoppel did not apply to prevent relitigation of free speech issues raised in prior action between previous shopping center owner and political organization.) There is a lack of privity where the rights at issue are personal such as “free speech” rights. *Id.* at 419. There is no privity. The Constitutional interests at issue in this case that warrant substantive review include a 1st Amendment right to access public records and Det. Nissen’s Constitutional right to discovery. *Bradburn v. N. Central Regional Library*, 168 Wn.2d 789, 231 P.3d 166 (2010), *Fritz v. Gordon*, 83 Wn.2d 275, 517 P.2d 911 (1974). Lindquist’s personal privacy rights are not properly raised in this case.

Here Det. Nissen contends the County has no standing under the PRA to assert privacy as a stand alone exemption or as an “other” exemption. The County is not asserting its own privacy, it is arguing the individual and personal privacy claims of Mark Lindquist. CP 895. Mark Lindquist was a party to *Nissen I*. He intervened. Mark Lindquist is

not a party to *Nissen II*. He did not intervene. The two cases are unique based upon the standing issues alone.

The PRA contains a provision that permits an agency to prevent an unreasonable invasion of personal privacy interests protected by the chapter through redaction consistent with the PRA. RCW 42.56.070(1). The Prosecutor argues this subsection gives the County standing to assert Mark Lindquist's personal privacy claims in this case. This subsection does not expressly provide standing to any public entity to assert personal privacy claims. The PRA contains a competing provision, advising agencies that inconvenience or embarrassment of a public official or others is not a proper basis to redact or withhold information. RCW 42.56.550; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978). Thus, the subjective impressions of the Prosecutor's Office or Mark Lindquist regarding the content of the texts does not provide any standing nor authority to withhold them.

Collateral estoppel may not preclude a substantive decision on the merits where there is a continuing public interest in the issue. *Hoppe v. King County*, 162 Wn. App. 40, 255 P.3d 819 (2011). Whether an elected official like Mark Lindquist can have his office assert a privacy claim on his behalf raises several important reasons for a court to address the merits of the case. First, there is the question of whether elected officials may

conduct the public's business offline by using technology the public does not purchase. If Mark Lindquist is permitted to hide text messages, other government officials may also choose to conduct the public's business offline by text to avoid public scrutiny. This conduct would undermine transparency in government service. Second, there is the question of whether an elected official may have a local government litigate personal privacy interests on his behalf without paying for it. Det. Nissen is particularly interested in this question because a prosecutor requested her personal cell phone records for a much longer period and the Prosecutor's Special Deputy has demanded she turn them over. The Prosecutor has not similarly expended the public's resources representing her with regard to processing her personal phone records for public disclosure. Instead, the Prosecutor retained and deputized a special attorney to intrude upon the privacy he claims is constitutionally protected. Det. Nissen has a direct interest in knowing whether the Prosecutor has harmed her interests by invading her privacy without providing a defense equal to that provided to Mark Lindquist. Other public employees would similarly be interested in whether the County must also assert and argue their personal privacy interests in PRA cases. The public interest in this case warrants a substantive review.

3. No Identity Of Issues

Collateral estoppel may not be properly applied when there is an absence of evidence identifying the precise issue decided in the first matter. *Lemond v. State, Dept. of Licensing*, 143 Wn. App. 797, 180 P.3d 829 (2008). The precise issue decided in the first matter must be established by competent evidence in order for the decision-maker in the subsequent proceeding to undertake the necessary analysis of whether the issues in the second proceeding are, in fact, identical. *Id.* The issues must indeed be “identical.” *Thurston County v. Washington Growth Management Hearings Bd.*, 158 Wn. App. 263, 240 P.3d 1203 (2010)(Issues not identical where the appropriateness of urban growth size involve different population projections in different plans even though legal question is the same.) The application of the same legal analysis to a different set of data or information precludes estoppel. *Id.* The court did not allow discovery to locate all of the requested texts and it never examined any texts before deciding the texts were not accessible under the PRA.

The *Nissen I* court assumed facts not in evidence when it dismissed the case. Most notably the *Nissen I* court concluded the phone records were indeed Mark Lindquist’s personal phone records for an account he paid for exclusively. The *Nissen I* court also concluded that the phone

records were only with Mark Lindquist in a personal capacity: “*the Prosecutor’s Office did not have or retain in its possession the alleged record.*” CP 1010. The *Nissen II* court adopted the *Nissen I* court’s errors when it decided *Nissen II*. The *Nissen II* court necessarily assumed facts not in evidence and not in favor of Det. Nissen. The *Nissen II* court erroneously assumed the texts were only with Verizon in phone records from a phone owned by Mark Lindquist. Det. Nissen was denied any opportunity find the texts from any other source. Texts, unlike phone records, have a to and from recipient. Verizon was treated as if it created the texts, when Verizon merely stored the texts at the direction of the Pierce County Prosecuting Attorney. The texts have been retained by Mark Lindquist in an official capacity, which means the records are public records by definition under the PRA. Verizon did not create the text content and it was erroneous and prejudicial to Det. Nissen to treat the texts the same as phone records.

Given the erroneous factual assumptions of the court in *Nissen I*, there has been no final resolution to the disputed facts that are material to answering the legal question before estoppel can be applied. Dismissal on estoppel grounds was erroneous.

D. Texts Requested Are Public Records That Pierce County
Erroneously Withheld From Disclosure

1. Mark Lindquist the “Office”

The Prosecutor points to the definition in the PRA for an “agency” and argues he is not covered by the PRA because he is an officer, not an “agency.” Det. Nissen points out Mark Lindquist the elected prosecuting attorney is indeed an “agency” covered by the PRA.

The PRA defines “agency” as follows:

(1) "Agency" includes all state agencies and all local agencies. ... "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. RCW 42.56.010(1).

The Pierce County Prosecutor has historically been considered without question an “agency” under the PRA. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998). Mark Lindquist is the first to claim a distinction between his “office” and himself as an “officer.” Ironically, he claims this distinction while using his public office and the public’s resources to assert his own individual privacy claims. The PRA defines an “agency” to include any “office.” RCW 42.56.010(1). The PRA does not define the term “office.” The plain meaning of the term “office” encompasses the individual official occupying the office: “Employment or position as an official” or “a position of duty, trust, or authority, esp. in the government.” *Random House Dictionary of the English Language the*

unabridged version. (1966) WASH. CONST. ART. XI § 5 authorizes the legislature to provide for the election of a person to carry out the prescribed duties of the county prosecutor's office. The prosecuting attorney is a county officer. *State v. Whitney*, 9 Wash. 377, 379, 37 P. 473 (1984). The power of the county prosecutor's office can only be exercised by its agents or officers acting under their authority or authority of law. RCW 36.01.030. When a county prosecutor exercises the county's powers, his actions are the actions of the county. *Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008). The term "office" contemplates acts committed by a public officer in his official capacity as well as private acts committed outside of an officer's official duties, committed during the official's term of office. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 10 P.3d 1034 (2000). Pierce County Code identifies the elected prosecutor as an "Office of the County: "This department shall be headed by the elected Pierce County Prosecutor whose duties and responsibilities are regulated by RCW 36.27.020." PCC 2.06.030. As the elected official he has superior power to the county executive over staff and normal daily operations of his office. PC Charter Sec. 3.10. Upon election, the prosecutor must swear under oath to "faithfully and impartially discharge the duties of his or her office." RCW 36.16.040. The duties of the prosecutor's office include compliance with

the PRA. *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). “All county officers shall complete the business of their offices...” RCW 36.16.120. Mark Lindquist is obligated to comply with the PRA. He was and is the “agency.”

2. Texts Are Public Records

Public records are the property of the State of Washington. RCW 40.14.020. Public records do not belong to the individuals who create or receive them. *Id.* All public records must be retained in accordance with the applicable retention schedules. RCW 40.14.060. The duration of retention depends upon the record. Washington’s Local Records Committee controls the periods of retention. RCW 40.14.070. The Local Records Committee review lists or records submitted to it and may veto the destruction of any or all items. WAC 434-630-040. The prosecutor is subject to a specific retention schedule for prosecuting attorneys and the retention schedule for all local government agencies. WAC 44-14-03005. Internal and external communications to, from, and/or on behalf of the agency’s elected officials that are made or received in connection with the transaction of public business must be retained for two years and then transferred to archives for appraisal. GS50-01-12 Rev. 3, Local Government Common Records Retention Schedule (CORE) Version 3.0 Nov. 2012. Texts to and from the elected Pierce County Prosecutor are

records that should have been retained. The concealment of any record deposited with any public officer is a class C felony. RCW 40.16.010. An officer who conceals any record or paper appertaining to the officer's office may be guilty of a class B felony. RCW 40.16.020.

The Pierce County Prosecutor has retained the records. He has retained them at Verizon. In this matter, the Prosecutor should have retrieved them and produced them in discovery. WAC 44-14.03001(3): "An agency cannot send its only copy of a record to a third party for the sole purpose of avoiding disclosure" and Ftnt 5: "If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers." Det. Nissen asks this court to hold the elected prosecutor accountable for retaining his communications as required.

Public records include digital information: "public record" includes any correspondence, machine-readable material, or other document "regardless of physical form or characteristic." RCW 40.14.010, RCW 42.56.010(3). The fact that texts are digital does not mean the texts are not "public records." Digital data, including metadata

and e-mails are considered public records. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010).

If the digital data contains “any 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”, it is a “public record.” RCW 42.56.010(3). Specific factual findings are needed as developed through discovery to decide whether a particular record relates to government. *Dragonslayer, Inc. v. WSGC*, 139 Wn. App. 433, 434, 161 P.3d 428 (2007). Local records “made or received” by a public official in the transaction of public business are public records. RCW 40.14.010. Detective Nissen properly pled in her complaint that the texts she is seeking are indeed those texts from specific dates that relate to the conduct of government or the performance of any governmental or proprietary function. These facts should have been accepted as true. *City of Moses Lake v. Grant County*, 39 Wn. App. 256, 258, 693 P.2d 140 (1984). They are true. Mark Lindquist has sworn under oath that texts on the 2nd and 3rd relate to the conduct of government.

The courts interpret the test broadly in favor of public disclosure. *Dragonslayer, Inc. v. WSGC*, 139 Wn. App. 433, 161 P.3d 428 (2007). Each requested record must be examined and findings entered as to each factor. *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P. 3d 919 (2010).

In camera review is the proper means for examination of the records at issue. *Id.* The court may examine records that may be private when applying the PRA to determine the appropriate application of any exemption, including the right to privacy. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011)(Disclosure of unsubstantiated and unfounded investigative records on police officers did not violate their privacy rights.) The trial court failed to conduct the requisite in camera review needed to properly apply the PRA.

The unfortunate result of the court's ruling is that it did not address how Det. Nissen can obtain these text messages. The requested texts may never be examined even if the texts are "public records," an unacceptable outcome under the PRA.

The Prosecutor cannot argue without examination that a text sent by the prosecutor was not "prepared" by a local agency. If the prosecutor wrote a text the prosecutor "prepared" it, Verizon did not. The Prosecutor cannot argue that a text received by the prosecutor or that a text acted on or responded to by the prosecutor was not "used" by a local agency without examination. Any information that the agency employees for, applies to, or makes instrumental to a government end or purposes is "used." *Concerned Ratepayers Ass'n. v. PUD No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999); *West v. Thurston County*, 168 Wn. App.

162, 275 P.3d 1200 (2012)(Private law firm's billing records public if reviewed when paid by the County).

The Prosecutor cannot counter the uncontested fact that Mark Lindquist in his capacity as Prosecuting Attorney has "retained" the texts at Verizon. The County's attorney, not Mark Lindquist's private attorney, demanded retention of the texts in an official capacity. The Prosecutor's only argument on whether the records are "public records" is to point out that Verizon has the texts and Verizon is a private company. Public officials have been on notice since adoption of the model rules that the use of private technology for work means the work product is public. WAC 44-14-03001. The Prosecutor attempts to shield the true character of the texts as public by arguing he does not have them. Whether the Prosecutor presently has the texts is a discovery issue. The current whereabouts of the texts is not determinative of whether the texts are indeed "public records." The trial court failed to recognize the requested texts are public records as properly pled by Det. Nissen. The trial court erroneously dismissed the case without a record by record review and examination of the content and character of the texts.

3. No Applicable Exemptions Cited
 - a. Stored Communications Act Not An Explicit "Other" Exemption

Exemptions outside the PRA must be explicit. *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 300 P.3d 376 (2013); *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994)(*PAWS II*). Federal laws may not interfere with this state's right to govern. U.S.C.A. CONST. AMEND. X. The powers of municipal corporations in Washington may be increased or diminished only by Washington legislative enactments. *City of Tacoma v. Taxpayers of Tacoma*, 60 Wn.2d 66, 44 P.U.R. 3d 409 (1962). Where a federal law is inconsistent with the PRA, the PRA controls. *Freedom Foundation v. WADOT*, 168 Wn. App. 278, 276 P.3d 341 (2012); *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 983 P.2d 676 (1999). The Prosecutor's reliance upon the Stored Communications Act (SCA) impermissibly conflicts with the PRA. The SCA does not equate to an explicit privacy exemption recognized in Washington. The SCA does not define privacy and the federal regulatory scheme regarding digital data has no preemptory power of this state's ability to define what is a "public record" or when "privacy" is implicated as "privacy" is defined in the PRA. RCW 42.56.050. An agency may not rely upon federal regulations or any other contract terms to override the PRA. *Spokane Police Guild v. State Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989) and *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 526 (1990).

Privacy is not a stand alone, or “other” explicit exemption from public disclosure. The legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy.” WAC 44-14-06002(2), citing to Op. Att’y Gen. 12 (1988), at 3.

The SCA does not stand for the absolute privacy proposition the prosecutor wants. Text data stored exclusively with a third party provider is not shielded from discovery under the SCA. *Theofel v. Farey-Jones*, 359 F.3d 1066 (2003), *Crispin v. Christian Audigier, Inc.*, 717 F.Supp. 2d 965 (C.D. Cal. 2010), and “*A User’s Guide to the Stored Communications Act, and A Legislator’s Guide to Amending It*” Orin S. Kerr, 72 Geo. Wash. L. Rev. 1208, 2003-2004. “Remote computing service” (“RCS”) data does not have the same privacy protections as data kept by an e-mail service provider. RCS may be accessed via a court order, rather than under the more stringent standards applicable to electronic communication services (“ECS”). 18 U.S.C. §§ 2703(b), 2703(d); *Low v. LinkedIn Corp.*, 900 F.Supp. 2d 1010 (2012). A “remote computing service” is defined in the SCA as “the provision to the public of computer storage or processing services by means of an electronic communications system.” 18 U.S.C. §2711(2). The texts that have been read and now are stored at Verizon separately from any phone bills are governed by the rules for RCS, and not the rules for ECS. 18 U.S.C. §§ 2702(a)(2), 2703(b), see also *Steve*

Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, 461-463 (5th Cir. 1994). Content retained beyond 180 days is treated under distinct provisions from those held 180 days or less. 18 U.S.C. § 2703(a). The Prosecutor has stored the texts with Verizon for more than 180 days. The data has not expired in the normal course, meaning the ECS standard is not applicable and the RCS standard is controlling. A warrant is not necessary to obtain the texts. A trial subpoena is sufficient. 18 U.S.C. § 2703(b)(1)(B)(i). Text messages are discoverable and may be also produced by consent from the sender or recipient without violating the SCA. *In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

In addition to federal law, the Prosecutor cites to state law concerning wire taps, RCW 9.73.260. The wire tapping statute is similarly not an explicit “other” exemption to constitute an exception that would apply to the texts messages requested here. It is unclear how the state statute even applies. Privacy is not implicated in workplace communications.

b. No Privacy In Work Texts

Any constitutional privacy interest depends upon a subjective and reasonable expectation of privacy in private affairs. *State v. Goucher*, 124 Wn.2d 778, 881 P. 2d 210 (1994). Matters of legitimate public interest outweigh offensive public scrutiny of private life. AGO 1983 No. 9,

citing to *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978). The “special needs” of a government workplace justifies a warrantless examination of digital communications under search and seizure laws. *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 130 S. Ct. 2619, 2630 (2010). Det. Nissen specifically asked that any truly private texts be withheld from disclosure. Indeed all she is requesting are text communications that are work related. Setting aside the fact that privacy is not a stand alone exemption and the prosecutor has not identified an applicable exemption, under the definition of privacy in the PRA, the text content would have to be highly offensive information that is truly secret in order to apply the definition of privacy under the PRA. RCW 42.56.050. *Van Buren v. Miller*, 22 Wn. App. 836, 592 P.2d 671, review denied, 92 Wn.2d 1021(1979); *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 721, 748 P.2d 597 9 (1988); *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 135, 737 P.2d 1302, review denied, 108 Wn.2d 1033 (1987); *Bellevue John Does 1-11v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 212-12, 189 P.3d 139 (2008). It is impossible to articulate truly secret information for which the definition of privacy even applies to texts to and from the prosecutor about prosecutor office business. Public officials are held to a high standard because the public has the right to judge an official’s performance and safeguard against corruption. *King County v.*

Sheehan, 114 Wn. App. 325, 57 P.3d 307 (2002). That is precisely the purpose of Det. Nissen's request.

In camera review provides an appropriate safeguard to address any legitimate privacy concerns of the Prosecutor. In camera review is the process identified in the civil rules for addressing privilege claims. CR 26(b)(6). In camera review is designed to effectively enforce the constitutional right of a plaintiff to civil discovery. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 362, 16 P.3d 45 (2000), citing Wash. Const. art. I § 10. In camera review is essential to addressing the constitutional interests at stake. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990). In camera review is proper in a public records case. RCW 42.56.550, *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998).("The only way that a court can accurately determine what portions, if any, of the file are exempt from disclosure is by an in camera review of the files").⁸ The trial court improperly dismissed this case without examining the texts. The trial court also improperly denied Det. Nissen's request that the texts be preserved. The trial court had the

⁸ Balancing competing constitutional interests is permitted for discovery purposes, but not when the court decides whether an exemption with a privacy element applies: "Employees privacy interest may not be balanced against the public interest." *Dawson v. Daly*, 120 Wn.2d 782, 795, 845 P.2d 955 (1993), citing *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990), limited by *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994)(Privacy is not a stand alone exemption from public disclosure, the public interest outweighs individual privacy claims, absent a specific exemption.

power under the discovery rules to compel the Prosecutor to produce the texts under *Diaz v. WA State Migrant Council*, 165 Wn. App. 59, 265 P.3d 956 (2011). The trial court erred when it did not order the Prosecutor to preserve the texts.

E. Det. Nissen Entitled to Penalty, Fees, and Costs On Appeal And At Trial Level

1. Penalty, Fees, and Costs On Appeal

Washington's PRA mandates the award of attorney's fees and costs to any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public records within a reasonable period of time. RCW 4.56.550(4). An award of fees and costs is not discretionary. *Francis v. DOC*, 2013 WL 6086919, __ Wn.2d __, __ P.3d __ (Nov. 19th, 2013 Div. II). Det. Nissen should be the prevailing party in this matter. She requests an award of her attorney's fees and costs under the PRA.

In addition, the PRA authorizes an award not to exceed one hundred dollars for each day that the requester is denied the right to inspect or copy the public record. While the agency's failure to act in good faith in responding may be considered; the court is not obligated to consider the agency's bad faith in denying the request. *Id.* at 3. A showing of good faith does not exonerate an agency from the imposition

of a penalty. *King County v. Sheehan*, 114 Wn. App. 325, 351, 57 P.3d 307 (2002). Strict enforcement of the penalty provision discourages improper denial of access to public records. *Id.*

Det. Nissen requests an award of \$100.00 per day as a penalty for having been denied access to the texts that are public records. The statutory maximum should be awarded here because this case involves the particularly egregious acts of an elected public official hiding work related texts for personal reasons and in violation of his retention obligations. Also, other divisions within the same agency did not hesitate to disclose work related communications from personal technology, including cell phone records. CP 838-851. Pierce County's specially deputized prosecutor compelled Det. Nissen turn over her personal cell phone records for an entire year. CP 856. Further, Lindquist used this action to continue to disparage Det. Nissen by including inflammatory and irrelevant commentary into the record.⁹ Mark Lindquist has authorized the expenditure of hundreds of thousands in public dollars to protect his claimed personal privacy interests while allowing the examination of personal phone records of mere employees who lack his level of authority. His deliberate abuse of power and blatant disregard of his obligations to transparency while in public office should be sanctioned.

⁹ CP 190 - 191 (Trial Court's Order granting Det. Nissen's Motion to Strike Immaterial, Impertinent, and Scandalous Material In Defendant's Answer.)

2. Penalty, Fees, and Costs at the Trial Level

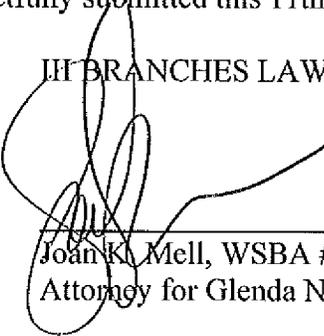
For the same reasons articulated above, Det. Nissen requests she be awarded attorney's fees, costs, and the maximum statutory penalty at the trial level.

V. CONCLUSION

The trial court's dismissal of *Nissen II* based upon *Nissen I* was in error. Collateral estoppel is an equitable doctrine erroneously applied here to work a substantial injustice. The PRA promises government transparency. The trial court's ruling invites public officials to conduct the public's business offline on personal technology to avoid public scrutiny in violation of the PRA. The Prosecutor holds a powerful public office and he should not be allowed to secretly use his power without public accountability. The Prosecutor erroneously and in violation of the PRA withheld work related text communication from Det. Nissen. The Prosecutor's Office should pay Det. Nissen her attorney's fees, costs, and a statutory penalty.

Respectfully submitted this 11th day of December 2013.

JH BRANCHES LAW, PLLC



JoAnn K. Mell, WSBA #21319
Attorney for Glenda Nissen

Declaration of Service

I, Jonathan Tretheway, make the following declaration:

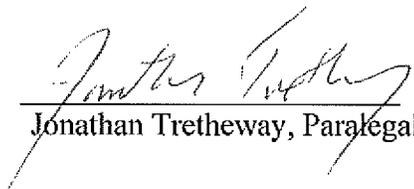
I am over the age of 18, a resident of Pierce County, and not a party to the above action. On December 11, 2013, I caused to be served true and correct copies of the foregoing: Glenda Nissen's Opening Brief, and this Declaration of Service by Electronic mail through the Washington State Court of Appeals Div. II filing system as follows:

Philip A. Talmadge
18010 Southcenter Parkway
Tukwila, WA 98188
phil@tal-fitzlaw.com

Michael A. Patterson
2112 3rd Ave., Ste. 500
Seattle, WA 98121
map@pattersonbuchanan.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 11th day of December 2013 at Fircrest, WA.


Jonathan Tretheway, Paralegal

III BRANCHES LAW

December 12, 2013 - 11:20 AM

Transmittal Letter

Document Uploaded: 450399-Appellant's Brief.pdf

Case Name: Nissen v. Pierce County

Court of Appeals Case Number: 45039-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jonathan Trethewey - Email: jonathan@3brancheslaw.com