

No. 90875-3

No. 44852-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON

GLEND A NISSEN, an individual,

Petitioner,

vs.

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

Respondent.

v.

MARK LINDQUIST,

Intervenor

ANSWER OF INTERVENOR TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

Four organizations recently submitted amicus briefs in this matter. Intervenor Mark Lindquist answers these briefs in a single pleading.

II. FACTS

In the interest of openness and transparency, Intervenor assisted Pierce County in responding to plaintiff's public records request for his personal cell phone records, though such are not public records as a matter of law. Neither Intervenor nor the County possessed the records at the time of the initial request. CP 15-16, 171, 173, 205, 207, 570.

Intervenor authorized his designee to obtain records from his personal service provider, Verizon, for his review. CP 58, 81, 444-46, 490, 598, 616. Verizon provided billing records to Intervenor, but also advised that the requested "text content" was unavailable. *Id.* Intervenor provided to the County, and authorized release, of redacted billing records that disclosed calls that "may be" work-related. CP 16, 18, 32-36, 40, 86, 334-38, 340-350, 445-46. The County provided those records to plaintiff. *Id.*

Prosecutor Lindquist intervened when Plaintiff sued to obtain all of his personal and family phone records. Plaintiff's theory is that all phone records of a public employee are public records if the employee ever uses his personal phone for any purpose during "work hours," or for a "work-

related” conversation. A more complete recitation of the facts is available in previous briefing, *see* Resp. Br. at 3-7.

Amicus Washington Coalition for Open Government (“WCOG”) devotes a page to what it mistakenly claims are “undisputed facts.” WCOG Br. at 3. Apparently unaware of what is disputed, WCOG cites only to plaintiff’s submissions. *Id.* This case involves many records and declarations filed by all three parties. Some of the “facts” cited by WCOG are not facts, but rather unsupported allegations.

For example, WCOG mistakenly claims this case involves a request for “personal cell phone records documenting communications of a public official about his public employment.” *WCOG* Br. at 4. Instead, the undisputed record is that all billing records for the dates requested that may have been work-related were provided after Intervenor obtained them from his private service provider. *See also* CP 16, 18, 32-36, 40, 86, 334-38, 340-350, 445-46. The “only records at issue in the instant action” are “private in nature and were not prepared, owned, used, or retained by any government agency.” CP 82.

Plaintiff’s lawsuit expressly demands compelled production of all of Intervenor’s personal cell phone records, claiming the County was prohibited “from parsing out public and non-public portions.” CP 18. Further, plaintiff claims all “records showing calls made on public time by a public

official contain ‘information relating to the conduct of government’ and thereby are subject to disclosure as ‘public records.’” CP 17-18; *see also* Brief of App. at 45-46. Plaintiff never defines work hours or public time.

Additionally, at the hearing on the motions, plaintiff argued that private records had to be produced for *in camera* review, made the subject of discovery, and disclosed to show "the amount of time [Prosecutor] Lindquist spends on purely private calls" on his personal cell phone during “public time.” *See* CP 571-73; 12/23/11 VRP at 57-58, 63-64.

Similarly, WCOG mistakenly claims it is “undisputed” that Intervenor “prefers to use his ‘personal’ cell phone ... for work business.” WCOG Br. at 3, citing CP 24. This specious argument, improperly presented as a “fact,” cites plaintiff’s hearsay-based and argumentative declaration. *Id.* (citing CP 26). WCOG ignores contrary sworn declarations of Intervenor and an office assistant, based on their personal knowledge, that unequivocally state Intervenor only “occasionally used [his] personal cellular telephone for County business” and two County “land lines are the telephones on which Prosecutor Lindquist conducted at the time in ques-

tion, and continues to conduct, most of his government-related communications.”¹ He also used a county-issued cellular phone. CP 453, 682.

In summary, WCOG mistakenly characterizes plaintiff’s request as one for records that pertain solely to undefined “work business,” when the record shows plaintiff later removed the qualifier “work-related” from her request. CP 17. Plaintiff seeks a search and seizure of Intervenor’s personal family phone records from his service provider, Verizon.

The brief of the Attorney General (“AG”), which largely agrees with the County and Intervenor, acknowledges but avoids the constitutional issues by suggesting “it is quite possible” Intervenor may waive his constitutional rights.² AG Br. at 15. In an abundance of openness, Intervenor disclosed personal records that were not public records. Intervenor will not consent to requestors searching his family home to see if there may be work-related records on his kitchen table, nor will he consent to requestors searching his family phone records.³ Intervenor suc-

¹ WCOG mistakenly suggests that public servants who use personal cell phones do so to “avoid public scrutiny[.]” WCOG Br. at 5. Ascribing such motives to public servants is unfair, unwarranted, and in disregard of work place realities. Public servants typically place calls on land lines that create no call records, but such use is not to avoid scrutiny.

² Amicus AG states it was the county who raised these constitutional issues, however, Intervenor also raised these issues. *See* Intervenor’s Initial Brief at 13-28.

³ Judge Pomeroy recognized the clear constitutional and statutory limits of the PRA, stating, “I do think that I have absolutely no power to require the third-party service provider, without a search warrant application with probable cause, to disclose records. I have no power to do so under this Act.” *See also* Respondent’s Answer to AG Br. 9-13.

cessfully defended the statutory and constitutional rights of public servants before the trial court, and continues to do so on appeal.⁴ CP 494-519.

III. ARGUMENT

A. The Trial Court Correctly Held that Intervenor's Personal Phone Records Held by Verizon Are Not Public Records.

Adopting the Colorado Supreme Court's analysis in *Denver Post v. Ritter*, 255 P.3d 1083 (Col. 2011), the AG agrees with Intervenor that third-party-held telephone service records are not "public records" because they were not prepared, owned, used, or retained by the agency itself. *AG Amicus* at 9.⁵ *Amicus WSAMA* agrees. *WSAMA Amicus*, at 9-10.

Significantly, the AG does not assert text content differs from other telephone call data under *Denver Post* where such content and call data are both created and held by third-party phone service providers for their own purposes. Indeed, no material distinction exists. As *Denver Post* indicates, such text data, like call record data, is generated and stored by

⁴ This was necessary because, as expected, Plaintiff argued agencies cannot assert employees' privacy rights (CP 572), though RCW 42.56.070(1) is contrary. Employees may incur considerable expense to defend PRA actions designed to monitor personal phones.

⁵ The AG agrees with the County that "the unredacted portions of the cell phone bills were not related to the conduct of government and thus are not public records, and that review by staff for purposes of determining whether a record is a public record does not automatically change the record into one relating to the conduct of government." AG Br. 11. Support for the AG's position is found in *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012). Further, release of such data by agencies to third parties absent customer authorization could lead to criminal or civil liability. See RCW 9.26A.140.

companies like Verizon for their own purposes, to include billing customers or responding to a lawfully issued search warrant under 18 U.S.C. 2703(a). Where a public agency has not prepared, owned, used, or retained such third-party data for government conduct, it cannot be deemed a public record under RCW 42.56 pursuant to the reasoning of *Denver Post*.

Public agencies have no duty or ability to obtain data held by its employees' privately paid telephone providers. Nor do agencies have a duty or ability to access data from a physical cell phone or telephone service provider of a private citizen, such as a reporter or citizen who received a call or text from a public agency or public employee.

B. The Trial Court Correctly Held Intervenor's Personal Phone Records Are Protected by State and Federal Constitutions.

No amicus, nor plaintiff, attempts to refute Intervenor's or Respondent's constitutional analysis. Indeed, after discussing the PRA, the AG opens its brief by acknowledging it as a critical principle in this case:

But another important principle of our free society is the right of individuals - including government employees - to be free from unreasonable searches and intrusions into private affairs. Wash. Const. art. I, § 7; U.S. Const. amend. IV.

AG Amicus, at 1. The AG concludes: "The Court should uphold the principles of open government while also acknowledging and protecting the

personal right to privacy of government officials and employees.” *Id.* at 15. Intervenor agrees. The AG then declines to address the constitutional issues that are before this court. *AG Amicus* at 15.

WCOG also does not challenge the constitutional analysis of Intervenor or Respondent. While the AG avoids it by speculation, WCOG evades it by concocting a waiver theory that fails to comprehend or discuss the Fourth Amendment, Art. I, § 7, or common law doctrines of waiver. In lieu of legal analysis, WCOG offers misleading recitations of “undisputed facts,” (*id.* at 3-4) *ad hominem* attacks, (*id.* at 4-5, 8), and clearly distinguishable law. Ironically, in seeking to expand the reach of the PRA, WCOG’s unconstitutional interpretation would render it invalid.

1. PRA Provides No Authority Of Law To Disturb the Personal Property Rights Of Intervenor.

In addition to the Fourth Amendment prohibition against unreasonable search and seizure, and Art. I, § 7 protections, a search of Intervenor’s phone is also precluded by his property rights. Intervenor adopts the analysis of amicus WAPA (WAPA Br. at 5-17) concerning the constitutional limitations placed upon a public agency.

Property rights in a physical thing, such as a phone, have been described as the rights “to possess, use and dispose of it.” *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311

(1945). The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982). As the court has repeatedly confirmed, the right to exclude others is perhaps the quintessential property right. *See Hodel v. Irving*, 481 U.S. 704, 716, 107 S. Ct. 2076, 95 L.Ed.2d 688 (1987); *Loretto, supra* at 433; *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979). *See also International News Service v. Associated Press*, 248 U.S. 215, 250, 395 S. Ct. 68, 63 L. Ed. 211 (1918) (“An essential element of individual property is the legal right to exclude others from enjoying it.”)(J. Brandeis, dissenting).

Although a great public interest may justify a compensated taking, no public interest in personal phone records or personal devices, if one exists, can avoid or extinguish the requirements of the Fourth Amendment, Art. I, §§ 7, 16, or the Stored Communications Act. Further, if a statute exacts a taking of private property under Art. I, § 16, such an outcome may invalidate the PRA rather than merely requiring compensation. *See e.g. Manufactured Housing Communities of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000) (taking under Art. 1, sec. 16 is broader than the Fifth Amendment and extends to a limited property right).

2. **Intervenor Has Not Made a Knowing, Intentional and Voluntary Waiver of His Constitutional Rights.**

WCOG contends that Intervenor⁶ “had no reasonable expectation of privacy in those call records and texts” because he may have discussed work on his private cell phone. WCOG Br. at 8. WCOG neither cites nor discusses any authority for this absurd conclusion, and there is none.

The law is clear there can be no implied consent to a search because “waiver” is the “act of waiving or intentionally relinquishing or abandoning . . . a known right ... or privilege.” *City of Seattle v. Klein*, 161 Wn.2d 554, 559, 166 P.3d 1139 (2007). Where constitutional rights are at issue, there must be proof of “an intentional relinquishment” of such rights. *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)); *State v. Campos–Cerna*, 154 Wn. App. 702, 709, 226 P.3d 185 (waiver of *Miranda*), *rev. den.* 169 Wn.2d 1021 (2010); *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978)(waiver of constitutional rights requires knowing, intelligent, voluntary relinquishment).

Similarly, the common law doctrine of waiver, applicable to non-constitutional claims, provides that waiver cannot be found unless it is es-

⁶ WCOG emphasizes Intervenor is an attorney. WCOG Br. at 4. Such employment does not waive the constitutional and statutory rights held by Intervenor or his spouse. Constitutional protections extend even to attorneys. All lawyers who act as public servants, prosecutors, public defenders or assistant AGs, hold these rights to the same degree as any other public employee or private citizen. Intervenor’s practice of law does increase his awareness of the Orwellian threat to privacy posed to all public servants by Plaintiff’s theories. WCOG mischaracterizes belief in the constitution as disregard of the PRA.

established that the individual “intend[s] to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-10, 239 P.3d 190 (2011) (applying the common law doctrine of waiver, court rejected assertion officer waived his PRA privacy claims reasoning that his “lawsuit [against the city] to prevent production is consistent with an intention to protect [his] right to privacy, not to forever waive it.”) This is well settled law.

Intervenor’s actions clearly do not constitute a waiver of his constitutional privacy interests in the personal phone he and his wife pay for, or in Verizon’s records of text content and billings records regarding their family phones. WCOG’s argument, bereft of citation or discussion of any legal authority, fails to assist this court.

Nor could the PRA prospectively, and by vague implication, waive the constitutional rights of its citizens even if the Legislature had desired to do so. LaFare, 4 *Search and Seizure*, 8.2(I) (5th ed.) (If inspection is not reasonable, “a statute may not produce a contrary result via the fiction of implied consent.”); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008) (once a matter is deemed private by Art. I, § 7, a court must consider “whether a search has ‘authority of law’—in other words, a warrant”); *Cooper v. State*, 587 S.E.2d 605 (Ga. 2003) (“To

hold that the legislature could nonetheless pass laws stating that a person ‘impliedly’ consents to searches under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment.”).

Reasonable expectations of privacy under the Fourth Amendment are and must be independent of what the Government enacts or does, or otherwise: “[I]f the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects.” *Smith v. Maryland*, 442 U.S. 735, 741 n. 5, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

Assuming the Legislature could prospectively waive individual citizen’s constitutional rights, nothing in PRA precedent places public employees on notice that their individual Art. I, § 7, and Fourth Amendment privacy and property rights in their personal devices and records can be encroached upon, much less seized under the guise of the PRA. The four dissenting justices in *O’Neill, supra*, concluded that “public employees, including an elected official like [the deputy mayor], would be well within his or her rights to refuse an inspection or a search by the employer of his or her home computer, the employee’s privacy right trumps any direction

to the public employer to examine the hard drive of the employee's home computer." *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 155, 240 P.3d 1149 (2010) (Alexander, J. dissenting). The five justices in the majority did not disagree, but stated they were only addressing whether the city should request an opportunity to inspect the deputy-mayor's computer if she provided actual consent. *Id.* at 150, n. 4. Nowhere does *O'Neill* notify public employees that the existence of a record on their personal device results in a waiver of their constitutional privacy in the device or records generated by a third-party service provider. Rather, *O'Neill* only assumed consent by the employee.

Further, WCOG misapprehends Art. I, § 7 of the Washington Constitution, which protects more than just "expectation[s] of privacy." *See State v. Miles*, 160 Wn.2d 236, 243-44, 156 P.3d 864 (2007)("[p]rivate affairs are not determined according to a person's subjective expectation of privacy because looking at subjective expectations will not identify privacy rights that citizens have held or privacy rights that they are entitled to hold.") Instead, our state constitution requires authority of law to access "private affairs," which is customarily found in a lawfully issued search warrant. *Id.* A statute cannot provide the "authority of law" required by Art. I, § 7 for a governmental intrusion into protected areas. *Id.* at 247-249.

In summary, 1) Intervenor has not actually or impliedly waived his constitutional rights, and 2) the PRA cannot authorize violation of Intervenor's privacy or property rights.

C. This Court Should Disregard Supposed "Trend" In Other States as Inapplicable To Washington PRA and Washington Law and Constitution.

WCOG claims Washington public servants and the Intervenor have "a duty to preserve cell phone records" related to work "and to disclose them" because an Alaskan court held that Alaska's Public Records Act and Records Management Act indicate "the duty to preserve emails exists as to both official accounts and private accounts" of Governor Sarah Palin if they concerned the "conduct of official business of the State of Alaska." WCOG Br. 11 (citing *McLeod v. Parnell*, 286 P.3d 509, 516 (2012)). Unlike our state's PRA, which regulates only agencies, the Alaska Public Records Act authorizes injunctive relief expressly against "[a] person having custody or control of a public record who denies, obstructs, or attempts to obstruct ... the inspection of a public record." 286 P.3d at 512 (quoting AS 40.25.125)(emphasis added). Further, *McLeod* nowhere addresses 18 U.S.C. §2703, the Fourth Amendment, or Washington's Art. I, § 7.

The Washington Legislature could create statutes modeled on the Alaska statute, so long as such statutes comport with the Federal Constitution, Washington Constitution, and federal statute, *see Pierce County v.*

Guillen, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003), but it has not. WCOG’s citation to news reports and decisions interpreting significantly different PRA law from other states, and that omit discussion of federal or state law at issue here, fails to assist this court. WCOG Br. at 10.

Contrary to WCOG’s wish, not every communication by a public employee that discusses work creates a public record. For example, calls on land lines do not, hallway conversations do not, and social event dialogues do not. Similarly, not every writing relating to work by public employees results in a public record. For example, notes at home about work, diaries, and scheduling on personal calendars or personal iPhones do not. Similarly, communications on personal devices do not result in a public record. All of these examples are outside of the definition of public record. This is particularly true when the records are created and held by a third-party service provider such as Verizon.

In summary, as the trial court held, personal phone records of public employees are not public records, nor can they be obtained “without a search warrant application with probable cause[.]” VRP 12/23/11, 94-95.

To the extent the Washington legislature is concerned about public servants using personal phones to discuss work, or for work-related pur-

poses, the legislature can amend the PRA or enact regulation, so long as it does so in a manner consistent with constitutional requirements.

IV. CONCLUSION

In the interest of openness, Intervenor voluntarily disclosed personal records that are not public records under the law. In response, plaintiff filed a lawsuit demanding all of his family phone records. Plaintiff's theory is that personal phone records of public employees are public records if the employee ever uses his or her personal phone during "work hours," or for a "work-related" conversation.

Because "the PRA must give way to constitutional mandates," *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013), it cannot compel production of private cell phone records. Plaintiff's PRA interpretation would render it unconstitutional.

On behalf of fire fighters, teachers, police officers, corrections officers, prosecutors and all public servants, Intervenor opposes plaintiff's attempts to violate the rights of Washington State citizens.

Respectfully submitted this 14th day of February, 2014.

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DECLARATION OF SERVICE

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