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NO. 90875-3

THE SUPREME COURT FOR THE STATE OF WASHINGTON

GLEND A NISSEN, an individual,

Respondent,

v.

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

Petitioner,

v.

PROSECUTOR MARK LINDQUIST,

Petitioner.

Filed
Washington State Supreme Court

MAY 13 2015

Ronald R. Carpenter
Clerk

BRIEF OF AMICUS CURIAE

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I. INTRODUCTION

Statutes may not infringe on constitutional rights. This fundamental principle applies to the Public Records Act (“PRA”).¹ The Court of Appeals decision in this case loses sight of that fundamental principle, seeking instead to “balance” the PRA’s principle of open government with a government employee’s right to be free from unreasonable searches and intrusions into their private affairs.² The civil discovery contemplated by the Court of Appeals is unnecessary in light of the undisputed facts and such discovery violates the public employee’s constitutional rights.

This amicus brief will discuss the impropriety of compelling production of a public employee’s personal, non-government provided, cell phone records in a PRA lawsuit between a requester and the public employee’s government employer. This amicus brief will also explain why the tardily asserted Fourth Amendment *O’Connor*³ exception to the warrant requirement provides no basis for searching a government employee’s personal cell phone records.

¹*See Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013) (“PRA must give way to constitutional mandates”).

²*Nissen v. Pierce County*, 183 Wn. App. 581, 589-90, 333 P.3d 577 (2014), *review granted*, 182 Wn.2d 1008 (2015).

³*O’Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).

II. INTEREST OF AMICUS CURIAE

Amicus Curiae Washington Association of Prosecuting Attorneys (WAPA) is a statewide association of the thirty-nine elected prosecuting attorneys. WAPA assists the prosecuting attorneys in carrying out the statutory duties found at RCW 36.27.020. One of the ways WAPA accomplishes its purpose is by appearing as *amicus curiae* or intervenor in pending lawsuits, proposing legislation, or testifying regarding legislation proposed by others.

Prosecutors statewide are keenly interested in protecting the privacy rights of themselves, their deputies, their staffs, their clients, and their clients' staff. Prosecutors are also concerned with their ability and the ability of their clients to recruit and retain qualified employees. Finally, prosecutors fear the potential for harassment if prisoners and other disgruntled individuals can, by filing a PRA request for a government employee's personal records or documents, require the government employee to hire counsel and/or to file suit.⁴

⁴This concern is well-supported by the case law. *See, e.g., DeLong v. Parmelee*, 157 Wn. App. 119, 131, 236 P.3d 936 (2010) (inmate PRA requester who wrote several letters to DOC staff stating that he intends to misuse the information that he receives about DOC staff), *modified on remand*, 164 Wn. App. 781, 267 P.3d 410 (2011), *review denied*, 173 Wn.2d 1027 (2012); *King County v. Sheehan*, 114 Wn. App. 325, 340-41, 114 P.3d 307 (2002) (acknowledging the stress and risk of identity theft and harassment experienced by police officers and their families by the posting of information gained, in part, through PRA requests on web sites).

The requestor in the instant action took the position in the trial court that the

III. ISSUES PRESENTED

Glenda Nissen made a PRA request for a government employee's personal cell phone records. The government employee waived his Fourth Amendment and article I, § 7 rights to some of the records and provided those to the agency for release in response to the PRA request. Ms. Nissen is dissatisfied with the response and wishes to utilize civil discovery, including subpoenas, to obtain all of the government employee's personal cell phone records.

May a PRA requester, by subpoena or other civil discovery, defeat a government employee's assertion of his Fourth Amendment and article I, section 7 rights in a PRA lawsuit?

Would such compelled production violate the government employee's right to be free from unreasonable searches and intrusions into their private affairs?

government employee's agency lacks standing to assert the government employee's Fourth Amendment and article I, § 7 rights. *See, e.g.*, CP 572 ("At the outset, Defendants—the County and Prosecutor's Office—have no standing to assert the privacy interests of Lindquist, who has intervened in this case as a private person."). Although the requestor's position compels a public employee to intervene in many PRA actions, Ms. Nissen also took the position that the government employee had no legal ground to intervene when the County is resisting production of the government employee's personal wireless cell phone records. *See* CP 609 at n.2 ("there is no subject matter jurisdiction for Intervener's intervention" because Mr. Lindquist and the County "want the same thing: the records to be withheld").

IV. *AMICUS CURIAE'S* STATEMENT OF THE CASE

WAPA's prior *amicus curiae* brief contains a concise statement of the case. The following facts, however, establish that additional trial court proceedings are unnecessary.

Glenda Nissen made a number of PRA requests to the Pierce County Prosecuting Attorney's Office for a government employee's private, non-county provided, cell phone. CP 29-31, 276, 308, 322, 452 ¶ 3, 489 ¶ 3.

The Prosecutor's Office requested assistance from the government employee in providing Ms. Nissen with responsive records. CP 444-46. The employee voluntarily provided portions of his billing records. CP 81, ¶ 4; 444-46. The employee did not provide any text messages as those messages had been deleted from the employee's cell phone prior to the receipt of the PRA request. CP 490 ¶ 4.

The County provided Ms. Nissen with all of the records it received from the government employee. CP 444-46. The County explained the redactions on the documents, stating that those portions of the records were withheld because of "invasion of privacy" or because the records were "personal" or "residential." CP 16, ¶ 26; CP 17, ¶ 28; CP 18, ¶¶ 36-39; CP 265 ¶ 1.28; CP 315-20 CP 342-43.

Ms. Nissen filed suit against two agencies,⁵ the “Pierce County and the Pierce County Prosecutor's Office,” (collectively referred to as “County”) to compel production of the employee’s unredacted cell phone billing records and the text messages that were deleted by the employee prior to the PRA request. CP 13-21. The complaint contained no allegation that the County did not perform an adequate search for responsive documents. The complaint contained no allegation that the County withheld any records that the employee agreed to provide. The complaint solely alleged that the claimed exemptions were improper. *See* CP 19-20, ¶¶ 49-60.

The County filed a CR 12(b)(6) motion to dismiss, asserting that the records of a government employee’s privately owned cell phone are not subject to production pursuant to a PRA request. CP 520. Ms. Nissen resisted the motion, arguing that discovery was necessary. CP 114, 550-51, 567. The discovery Ms. Nissen seeks is the production of unredacted employee’s personal cell phone billing records and the contents of the text messages sent or received from the employee’s personal cell phone. *See* CP 7 ¶ 1.36, 425, 567, 605-06.⁶

⁵CP 13, ¶¶ 3 and 4. The complaint did not name the government employee, Mark Lindquist, as a defendant. The complaint identifies Mr. Lindquist as the “Pierce County Prosecutor,” CP 14, ¶ 8, but does not allege that Mr. Lindquist is an “agency.”

⁶Ms. Nissen also seeks a document that includes the phone number for the government employee’s personal cell phone and that authenticates the records produced in response to her PRA request. *See* CP 7 ¶ 1.35. RCW 42.56.250(3) precludes release by the County of the employee’s “personal wireless telephone number[.]” The fact that Ms. Nissen used that

The trial court dismissed Ms. Nissen's lawsuit, ruling that the employee's personal cell phone records are not subject to production pursuant to a PRA request. *See* VRP (Dec. 23, 2011) at 94-95.

Ms. Nissen appealed and the Court of Appeals reversed holding "that the PRA does not, as a matter of law, insulate Lindquist's personal cellular phone call logs and text messages from public records release requests." *Nissen v. Pierce County*, 183 Wn. App. 581, 589, 333 P.3d 577 (2014), *review granted*, 182 Wn.2d 1008 (2015). The court directed the superior court to review the government employee's personal cellular phone text messages and call logs to determine what portion, if any, pertain to the conduct of government business. *Id.*, at 596. The court's opinion leaves unaddressed the government employee's arguments that his Fourth Amendment and article I, section 7 rights preclude the forced production of his personal records. *Id.*

number in her request does not require the responsive document to include the employee's personal wireless telephone number. *Cf. Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) (the name of the minor child should be redacted prior to the release of records regarding the sexual molestation of the minor child in response to a PRA request that used the minor child's name).

V. ARGUMENT

A. A GOVERNMENT EMPLOYEE'S PERSONAL CELL PHONE RECORDS ARE PROTECTED FROM WARRANTLESS SEIZURE BY THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7

Individuals do not shed the protections of the Fourth Amendment and of article I, section 7 by accepting government employment. *O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1986) (“Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.”); *DeLong v. Parmelee*, 157 Wn. App. 119, 156 n. 22, 236 P.3d 936 (2010) (“an individual does not wholly surrender his or her constitutional right to privacy by virtue of his or her decision to seek employment with a governmental agency”), *review granted and remanded*, 171 Wn.2d 1004 (2011). Government employment does not alter the privacy interests that the employee possesses in her home, personal computer, cell phone, vehicle, and other possessions. *See generally* WAPA’s Court of Appeals *Amicus Curiae* Brief at pages 8-11; Philip Paine, *Public Records in Private Devices: How Public Employees’ Article I, Section 7 Privacy Rights Create a Dilemma for State and Local Government*, 90 Wash. L. Rev. 545 (2015).

The Fourth Amendment protects cell phones from a warrantless search absent consent or exigent circumstances. *See Riley v. California*, _____

U.S. ____, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (the Fourth Amendment prohibits a warrantless search of a person's cell phone incident to arrest).

Article I, section 7 protects cell phones and text messages from a warrantless search absent consent or exigent circumstances. *See State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014) (text conversation is a "private affair" that is protected from a warrantless search by article I, section 7 of the Washington constitution). Article I, section 7 protects a cell phone's call log from a warrantless seizure absent consent or exigent circumstances. *See generally State v. Gunwall*, 106 Wn.2d 54, 63-64, 720 P.2d 808 (1986) (the privacy interests of citizens which are protected by article 1, section 7 of the Washington State Constitution prevent a person's long distance home telephone records from being obtained from the phone company, or a pen register to capture the local telephone numbers the person dials, without a search warrant or other appropriate legal process⁷ first being obtained).

⁷A subpoena may be issued by a grand jury or special inquiry judge upon reasonable suspicion of criminal activity or corruption. *See State v. Reeder*, 181 Wn. App. 897, 330 P.3d 786, *review granted*, 181 Wn.2d (2014). Private individuals and attorneys are not empowered to convene a grand jury or to petition a special inquiry judge. *See generally* RCW 10.27.030 (grand jury may be summoned upon the request of a public attorney, corporation counsel or city attorney); RCW 10.27.170 (only a public attorney, corporation counsel or city attorney may petition a special inquiry judge); RCW 10.27.020 ("public attorney" means the prosecuting attorney, the attorney general, or a special prosecutor appointed by the governor, and their deputies or special deputies).

B. A PUBLIC RECORD ACT REQUEST DOES NOT DEFEAT THE GOVERNMENT EMPLOYEE'S ARTICLE I, SECTION 7 RIGHTS

The Public Records Act (“PRA” or “Act”), chapter 42.56 RCW, provides a mechanism by which any person may obtain writings directly from an agency. The identity of the person making the request is largely irrelevant under the PRA. The use to which the person making the request intends to make of the writings is largely irrelevant under the PRA. *See* RCW 42.56.080 (“Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons.”).⁸

The PRA contains no provisions for the issuance of a search warrant, whether at the request of a citizen⁹ or of an agency. The PRA contains no provisions for obtaining writings that are owned by a private individual, rather than by an agency.

⁸RCW 42.56.565 contains special provisions that are solely applicable to a person who is serving a criminal sentence in a state, local or privately operated correctional facility on the date the request was made.

⁹This is consistent with the rule that a private person cannot maintain an action for a search warrant. *See generally Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 304 P.3d 914, *review denied*, 178 Wn.2d 1022 (2013).

An agency that receives a PRA request for writings generated by a government employee on the government employee's personal cell phone is powerless to compel production of the writings. All the agency may do is inquire whether the government employee will voluntarily provide any writings that are responsive to the PRA request, and then relay any documents the government employee provides to the requester. *See generally* WAPA's Court of Appeals *Amicus Curiae* Brief at pages 11-17; Philip Paine, *supra* at pages 567-570.

C. CIVIL DISCOVERY MAY NOT BE USED TO COMPEL PRODUCTION OF A GOVERNMENT EMPLOYEE'S PERSONAL CELL PHONE RECORDS IN A PUBLIC RECORDS ACT PROCEEDING

A plaintiff in a PRA case is entitled to discovery the same as in any other civil action. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011). Discovery, of course, must be relevant to the cause of action. *Id.* In the instant case, appropriate discovery would be directed toward: (1) whether the County asked the government employee if he would voluntarily provide any writings that are responsive to the PRA request that are stored within the government employee's personal cell phone or the records of the government employee's personal cell phone provider; and (2) whether the County provided the requester with all writings it received from the government employee.

Discovery is not a means for obtaining copies of the requested documents. *Cf. Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1179, 106 A.L.R. Fed. 83 (2d Cir. 1988) (Rule 37 may not be used to compel production of the documents that are the subject of a FOIA action); *Fuller v. City of Homer*, 113 P.3d 659, 666-67 (Alaska 2005) (documents requested pursuant to Alaska's public records access statute were not discoverable under Alaska R. Civ. P. 26(b)(1) because their production was the object of the suit); *City of Columbia v. ACLU*, 323 S.C. 384, 475 S.E.2d 747 (1996) (production of documents requested pursuant to South Carolina's FOIA law could not be compelled under Rule 34 in a FOIA litigation regarding the documents).

In the instant case, civil discovery directed at Mr. Lindquist would violate the very constitutional rights he has consistently asserted throughout this matter. Although CR 34 allows for the issuance of a request for production or a subpoena to a party¹⁰ seeking production of documents, the subpoena or request for production may not require disclosure or privileged or other protected matter. *See* CR 34(a)(1) (request for production limited to matters within the scope of rule 26(b)); CR 26(b)(6) (privileged matters not

¹⁰Mr. Lindquist intervened in this litigation in order to assert his personal constitutional rights. The relief he has sought is a protection order. CP 546, 575, and 626. This relief is identical to that available to a non-party who receives a CR 45 subpoena to produce and permit inspection of personal records in civil litigation. *See* CR 45(c). The trial court never ruled upon Mr. Lindquist's request for a protective order. *See* CP 790 ("Intervener's motion for temporary restraining order and preliminary injunction was not reached, as being unnecessary based on the above ruling.").

discoverable).

CR 34 and the other civil discovery rules, moreover, are subject to article I, section 7 and the Fourth Amendment. *See United States v. Morton Salt Co.*, 338 U.S. 632, 642, 70 S. Ct. 357, 94 L. Ed. 401 (1950) (the judicial subpoena power “is subject to specific constitutional limitations . . . such as those against self-incrimination, unreasonable search and seizure, and due process of law”); *Auburn v. Brooke*, 119 Wn.2d 623, 632, 836 P.2d 212 (1992) (“court rules cannot diminish constitutional rights”). A subpoena that orders a government employee to produce records of his private cell phone in a PRA action is as great a violation of the warrant requirement as an officer making a warrantless entry into the government employee’s home to secure the documents. *See, e.g., Delia v. City of Rialto*, 2010 U.S. App. LEXIS 26968 (9th Cir. Nov. 8, 2010)¹¹ (Fourth Amendment violated by an employer ordering an employee to enter his house and produce evidence of interest in an internal affairs investigation), *rev’d on other grounds by, Filarsky v. Delia*, ___ U.S. ___, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012). The constitutional violation is not lessened by a provision in the subpoena that Mr. Lindquist submit his personal records to the trial court for *in camera* review.

¹¹GR 14.1(b) permits the citation of this unpublished opinion. The opinion is reproduced in appendix A to WAPA’s Court of Appeals amicus brief.

In camera review of Mr. Lindquist's personal cell phone records is, moreover, unnecessary in this case. As noted by the Second Circuit, *in camera* review is only necessary if the court cannot sustain nondivulgence on the basis of affidavits or pleadings. *See Local 3*, 845 F.2d at 1180. Here, the ground for nondivulgence is fully established and a court may only overcome the government employee's Fourth Amendment and article I, section 7 rights with a search warrant or special inquiry judge subpoena.

D. THE O'CONNOR EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT DOES NOT EXTEND TO AN EMPLOYEE'S PERSONAL CELL PHONE RECORDS

In her opposition to the petition for review and in the Court of Appeals, Ms. Nissen took the position that the constitutional claims asserted by Mr. Lindquist are irrelevant in light of the PRA's policy of openness. Ms. Nissen contends that Mr. Lindquist is different from other government employees and he, by virtue of being a prosecuting attorney, is deemed to have waived his Fourth Amendment and article I, section 7 rights. *See generally* Nissen's Answer to Amicus Briefs of Washington State Association of Municipal Attorneys and Public Employee Organizations Re: Petition for Review, at 1-4; Nissen's Answer to Petitions for Review, at 5-8 and 16-19; Appellant's Amended Answer to *Amicus Curiae* Briefs of Attorney General's Office, WASAMA, WAPA, and Public Employee Unions

Pursuant to Court's February 25, 2014, Order, at 2-7; Corrected Reply Brief of Appellant, at 16-18; Brief of Appellant, at 40-43. Although Ms. Nissen solely asserted consent as a basis for avoiding the warrant requirements of both the Fourth Amendment and article I, section 7 in her initial appellate court pleadings, her supplemental brief contends that compelled production of the government employee's personal cell phone records is authorized by *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).¹² See Nissen's Supplemental Brief, at 9-11. This argument has been raised too late in the proceedings to be given consideration. See generally *State v. Collins*, 121 Wn.2d 168, 179, 847 P.2d 919 (1993) (not appropriate to consider an issue raised for the first time in a supplemental brief after review has been accepted); *Douglas v. Freeman*, 117 Wn.2d 242, 257-58, 814 P.2d 1160 (1991) (issue not raised in Court of Appeals or in answer to petition for review would not be heard after having been raised for first time in supplemental brief).

Ms. Nissen's belated assertion of the *O'Connor* exception to the Fourth Amendment is problematic because this Court has not yet addressed the exception's applicability under the Washington Constitution.¹³ Given Mr.

¹²The *O'Connor* case does not appear in the table of authorities of any of Ms. Nissen's prior appellate court pleadings.

¹³To date, this Court has only recognized these exceptions to article I, section 7's warrant requirement: (1) consent; (2) exigent circumstances; (3) search incident to a valid arrest; (4) inventory searches; (5) plain view; (6) *Terry* investigative stops, *Terry v. Ohio*, 392 U.S. 1,

Lindquist's reliance upon article I, section 7 in addition to the Fourth Amendment and Ms. Nissen's failure to address whether the *O'Connor* exception is sufficient under the Washington Constitution, this Court should refuse to review Ms. Nissen's *O'Connor* argument. *Cf. State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994) (recognizing that allowing a party to raise a state constitutional claim for the first time in a supplemental brief leads to unbalanced and incomplete development of the issue); *State v. Thomas*, 128 Wn.2d 553, 562, 910 P.2d 475 (1996) (refusing to consider state constitutional claim on the grounds that the briefing was inadequate).

Finally, *O'Connor's* plurality decision that a government employee may retrieve work-related materials from a public employee's office does not allow a government employer to enter an employee's home, vehicle, or personal telephone without a search warrant. *See Delia v. City of Rialto, supra*; WAPA's Court of Appeals Amicus Curiae Brief at pages 8-11. While the *O'Connor* exception will allow a government employer, under limited circumstances, to conduct a warrantless review of an employee's messages on a government-provided device,¹⁴ Ms. Nissen identifies no case which

88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); and (7) school search exception. *See State v. Meneese*, 174 Wn.2d 937, 943, 282 P.3d 83 (2012); *State v. White*, 135 Wn.2d 761, 769 n. 8, 958 P.2d 982 (1998).

¹⁴*See* Nissen's Supplemental Brief, at 10 citing *City of Ontario v. Quon*, 560 U.S. 746, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010). The device at issue in *Quon* was a "pager the employer owned and issued to an employee." 560 U.S. at 750. The employer reviewed the

allows for a warrantless search of an employee's own device. Her failure to do so is evidence that none can be found. This is consistent with the Supreme Court's recognition that a personal e-mail account or pager is not subject to a warrantless search under the *O'Connor* government-employer exception. See *City of Ontario v. Quon*, 560 U.S. 746, 762-63, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010) (explaining that an audit of messages on an employer-provided pager is less intrusive than a search of an employee's personal e-mail account or pager). Accord *O'Connor*, 480 U.S. at 716 (government employer exception to the Fourth Amendment does not allow an employer to search an employee's closed personal purse).

VI. CONCLUSION

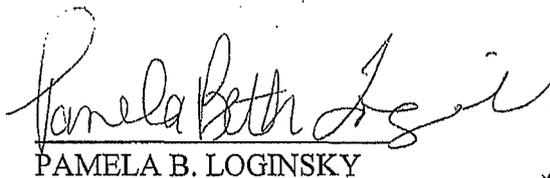
WAPA acknowledges that the PRA's principle that full access to information concerning the conduct of every level of government is a fundamental and necessary precondition to the sound governance of a free society can be undermined through the use of personal devices. The solution is not to violate the constitutional rights of government employees. Rather, the solution lies in the adoption of workplace rules that prohibit employees from using their personal devices for work related purposes.¹⁵

records of the government-provided pager to determine whether its service contract was adequate. 560 U.S. at 752-53.

¹⁵The Washington Legislature may also wish to adopt statutes similar to those enacted by Congress and some of our sister states. See generally Philip Paine, *supra* at 572-76.

When personal devices have been used for work purposes, government employees, including Mr. Lindquist, have demonstrated their commitment to open government by waiving their constitutional rights and voluntarily providing the “work related” records they possessed on the day of the request. The trial court’s dismissal of Ms. Nissen’s action should, therefore, be affirmed.

Respectfully submitted this 27th day of April, 2015.

A handwritten signature in cursive script, reading "Pamela Beth Loginsky". The signature is written in black ink and is positioned above the printed name.

PAMELA B. LOGINSKY

WSBA No. 18096

Staff Attorney