

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 04, 2015, 3:58 pm
BY RONALD R. CARPENTER
CLERK

NO. 90875-3

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

GLEENDA NISSEN, an individual, Respondent,

v.

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

v.

PROSECUTOR MARK LINDQUIST, Petitioner

**BRIEF OF AMICUS CURIAE ALLIED DAILY NEWSPAPERS
OF WASHINGTON, WASHINGTON NEWSPAPER
PUBLISHERS ASSOCIATION, THE MCCLATCHY COMPANY,
PIONEER NEWS GROUP, SOUND PUBLISHING, AND THE
WASHINGTON COALITION FOR OPEN GOVERNMENT**

Filed 
Washington State Supreme Court

MAY 13 2015

Ronald R. Carpenter
Clerk 

Judith A. Endejan, WSBA #11016
GARVEY SCHUBERT BARER
Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
(206) 464-3939



ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND INTEREST OF AMICUS CURIAE.....	1
II. ISSUES TO BE ADDRESSED BY AMICI.....	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	5
A. Public Employees and Officials Should Not Be Allowed to Skirt Public Disclosure Laws By Using Personal Communications Devices.....	5
B. Lindquist’s Personal Cell Phone Records Are “Public Records.”.....	7
1. Lindquist’s records relate to the conduct of government	8
2. The claim that Lindquist is not an “agency” and only “agency” records need be disclosed is preposterous	9
3. Just because the records are not within the possession of Lindquist or the County does not mean they are not public records	11
C. Both Lindquist and the County Have an Obligation to Retain and Disclose the Text Messages and Billing Records	16
D. The Records at Issue are Not Exempt for Privacy or Constitutional Reasons.....	18
V. CONCLUSION.....	19

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>ACLU v. Blaine Sch. Dist.</i> , 86 Wn. App. 688, 937 P.2d 1176 (1997).....	8
<i>Broyles v. Thurston County</i> , 147 Wn. App. 409, 195 P.3d 985 (2008).....	9
<i>Castaline v. City of Los Angeles</i> , 47 Cal.App.3d 580 (1975).....	16
<i>Caston v. Hoaglin</i> , No. 2:08-CV-200, 2009 WL 1687927, *3 (S.D. Ohio June 12, 2009).....	16
<i>Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1</i> , 138 Wn.2d 950, 983 P.2d 635 (1999).....	8, 12, 13
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993).....	9
<i>Evertson v. City of Kimball</i> , 767 N.W.2d 751 (Neb. 2009).....	13
<i>Forum Publ'g Co. v. City of Fargo</i> , 391 N.W.2d 169 (N.D. 1986).....	13
<i>Geonerco, Inc. v. Grand Ridge Properties IV, LLC</i> , 159 Wn. App. 536, 248 P.3d 1047 (2011).....	15
<i>Gray v. Faulkner</i> , 148 F.R.D. 220 (N.D. Ind. 1992).....	15
<i>Koenig v. Thurston County</i> , 155 Wn. App. 398, 229 P.3d 910 (2010).....	9
<i>Mechling v. City of Monroe</i> , 152 Wn. App. 830, 222 P.3d 808 (2009).....	10, 11
<i>Netbula, LLC v. Chordiant Software, Inc.</i> , No. C08-00019 JW (HRL), 2009 WL 3352588, *1 (N.D. Cal., Oct. 15, 2009).....	15
<i>Nissen v. Pierce County</i> , 183 Wn. App. 581, 333 P.3d 577 (2014).....	2, 5
<i>O'Neill v. City of Shoreline</i> , 170 Wn.2d 138, 240 P.3d 1149 (2010).....	10, 12, 17
<i>Prog. Animal Welfare Soc'y. v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	2, 9
<i>State ex rel. Gannett Satellite Info. Network v. Shirey</i> , 678 N.E.2d 557 (Ohio 1997).....	13
<i>State ex rel. Johnston v. Superior Court</i> , 2 Wn.2d 575, 98 P.2d 985 (1940).....	14
<i>United States v. Santiago</i> , 46 F.3d 885 (9th Cir. 1995).....	16
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	12

<i>Wisner v. City of Tampa Police Dept.</i> , 601 So.2d 296 (Fla. Ct. App. 1992)	13
Statutes	
18 U.S.C. §§ 2701-12	16
RCW 40.14.070	17
RCW 42.56	1, 7
RCW 42.56.100	17
RCW 42.5b.010(3)	4, 5, 7, 8
Other Authorities	
30 C.J.S. <i>Employer-Employee Relationship</i> § 108	14
30 C.J.S. <i>Employer-Employee Relationship</i> § 3(c) (1992)	14
Rules	
CR 34(a)(1)	15
Fed. R. Civ. P. 34(a)(1)	15

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

Allied Daily Newspapers of Washington (ADNW”), Washington Newspaper Publishers Association (“WNPA”), The McClatchy Company, Pioneer News Group, Sound Publishing, and The Washington Coalition for Open Government (“AMICI”)¹. As media companies, and a watch-dog citizen’s group they believe in open government processes, monitored by the press, who assist an informed citizenry to supervise government’s actions. This is the cornerstone of democracy. AMICI believe state and local agencies exercise their authority by consent of the governed, and therefore have a duty to act in a transparent manner, including through compliance with the Public Records Act, Chapter 42.56 RCW (“PRA”).

The PRA requires the disclosure of all non-exempt public records. This case presents the challenging question posed by “mixed” records created by a public employee’s use of a personal communications device to conduct both personal and public business. There should be no question that records that pertain to the conduct of public business are public records even if created or maintained on a personal device or by a third party.

¹ AMICI are described in more detail in their companion Motion for Leave to File Amicus Brief, filed herewith.

Pierce County, Mark Lindquist and government amici want this Court rule that they are not public records because to extract them could violate the civil rights of public employees. Nonsense. This case raises no constitutional issues. Despite their constitutional lamentations this case can, and should, be resolved on the facts and straightforward application of the PRA, which occurred in *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014) (“*Nissen*”). This decision should be upheld or public employees or officials will circumvent public accountability through modern technology.

AMICI urges this Court to hold that records relating to the conduct of government generated from personal devices² must be preserved as public records and made accessible to the public through the PRA. This is the only way to fulfill the PRA’s purpose. “The stated purpose of the Public Records Act (“PRA”) is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” *Prog. Animal Welfare Soc’y. v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

² This Court’s decision will apply to all types of personal communications tools, ranging from laptops to tablets to cellular phones to the latest Apple watch to devices not yet invented. The legal principle for public records created on these devices should be the same as for public records created by use of “old” technologies, such as paper notepads..

II. ISSUES TO BE ADDRESSED BY AMICI

(1) Are work-related text messages, and carrier call records for work-related calls, made by a public employee on a personal cellular phone public records?

(2) If they are public records, what are the duties of a public employee, and public agency, respectively, to retain them and disclose them?

III. STATEMENT OF THE CASE

The Court of Appeals correctly presented the facts in *Nissen*. The facts most germane to the issues AMICI will address in this brief are: Pierce County Prosecutor Lindquist chose to use his personal cell phone for public business instead of the county-provided cell phone. Lindquist admitted in the Complaint (¶ 16) that he “uses this [personal] cellular phone to make work-related phone calls pertaining to his employment with the County.” CP 15. The record demonstrates that such usage was not occasional, but an intentional preference of Lindquist. *See* CP 4-6, 23-26, 81, 171, 173, 175, 177, 205, 207, 216, 299, 301, 326, 445.

Glenda Nissen, a detective in the Pierce County Sheriff’s Office, submitted two PRA requests for Lindquist’s personal wireless phone

records, including text messages for specific dates.³ The responsive records fall into two categories. The first are the text messages from Lindquist's cell phone which were not disclosed to Nissen but which apparently have been retained by Lindquist's cellular provider, Verizon Wireless. (Lindquist Petition for Review, p. 2, n. 1.) The second are Verizon's billing records for Lindquist's cellular phone. It is undisputed that Lindquist voluntarily brought these Verizon billing records to Pierce County officials for review and redaction. Nissen was provided a copy of these billing records, which disclosed work-related calls but were redacted for information relating to private calls. The redacted bills show 9 work-related calls of 41 total minutes on August 3, 2011, 13 calls of 72 total minutes on August 2, 2011, and 10 calls of 46 total minutes on June 7, 2010. CP 25-26, 32-36.

Nissen sued the County under the PRA claiming that the County had wrongfully redacted the records and asserted improper exemptions. The Superior Court dismissed her complaint and Nissen appealed to the Court of Appeals. It reversed the dismissal and remanded the case to the trial court to determine if the bills were "used" for government purposes

³ The language of the first request sought work-related records while the second request did not specifically request "work-related records." The Court of Appeal's ruling on disclosability applies only to work-related records and remanded the case for the trial court to determine whether the produced records satisfies the third criteria for a public record in RCW 42.5b.010(3).

so as to satisfy the third element of a public record pursuant to RCW 42.56.010(3). 183 Wn. App. at 595-96. The Court of Appeals found that records regarding personal calls and personal texts are not public records subject to disclosure under the PRA.

Pierce County and Lindquist sought direct review of the appellate decision with this court asserting that all Lindquist records at issue are non-disclosable, even those that relate to the performance of his work.

IV. ARGUMENT

A. Public Employees and Officials Should Not Be Allowed to Skirt Public Disclosure Laws By Using Personal Communications Devices.

Increasingly, government officials are using “private” technology such as personal e-mail accounts, cell-phone texting or other devices to conduct public business to avoid open records laws. The most recent alarming illustration is Hillary Clinton’s choice to use her personal computer to perform her job as Secretary of State. Her decision has created huge concern among national archivists and government watchdog groups who called it “a serious breach”⁴ of her duties.

Last year in New Jersey, a top aide to Governor Chris Christie used a private e-mail account to ask an official of the Port Authority to

⁴ http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html?_r=0

shut down three lanes on the busy George Washington Bridge for political purposes.⁵ New York Governor Andrew Cuomo used an untraceable Blackberry message system to conduct public business, creating no written e-mail of how he conducts business.⁶

Health and Human Services Secretary Kathleen Sebelius used secret, unpublished email accounts for her work.⁷ In San Jose, California, city council members took instructions during council meetings on how to vote based upon text messages sent by representatives of unions and other special interests.⁸

The above are only recent well-publicized examples of the problem caused by public officials' use of private communication tools to conduct public business. The potential of new digital technologies to wreak havoc on government transparency by allowing public officials to skirt public records laws, cannot be understated. How will the public know if their elected officials act in the public interest if secret text messages direct their actions? The only way to prevent certain harm to the public's right to open and transparent government is to find that any and

⁵ "Christie Aide is Latest to Use Private Emails." <http://bigstory.ap.org/article/christie-aide-latest-use-private-emails> (Jan. 11, 2014) (last visited Jan. 23, 2014).

⁶ *Id.*

⁷ *Id.*

⁸ See "Government officials use personal email and texting to avoid public access laws. Why not use technology to enhance accountability instead of to subvert it?" at <http://firstamendmentcoalition.org/2009/08/government-officials-use-personal-email-and-text> (last visited Jan. 23, 2014).

all records relating to the conduct of public business must be retained and disclosed unless covered by a specific exemption. It is irrelevant whether the records are created by or maintained by a personal digital device.

B. Lindquist's Personal Cell Phone Records Are "Public Records."

Lindquist and the County float a number of claims that the records at issue are not even "public records" so they need not be disclosed. These sink under their own weight.

Three elements are required for a "public record" under RCW 42.56.010(3). The first requires a "writing." No one appears to dispute that the text messages and billing records are "writings." The second requires the writing to contain "information relating to the conduct of government or the performance of any governmental or proprietary function." As discussed herein Lindquist and the County interpret this provision narrowly to exclude the text message and billing records from the definition of "public record." They also do so regarding the third element that requires the writing to be "prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics."

In doing so Lindquist and the County ignore the PRA's directive in RCW 42.56.030 to liberally construe the PRA. The PRA's "mandate of liberal construction requires the court to view with caution any

interpretation of the statute that would frustrate its purpose.” *ACLU v. Blaine Sch. Dist.*, 86 Wn. App. 688, 693, 937 P.2d 1176 (1997).

1. *Lindquist's records relate to the conduct of government.*

Lindquist and the County misconstrue the PRA when they claim that in order to be “relat[ed] to the conduct of government” (and a public record) a record must have a “nexus with the agency’s decision-making process,” citing *Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 960-61, 983 P.2d 635 (1999). This case did not turn on whether the record at issue “related to the conduct of government,” but on whether it was “used” by government. Thus, it does not support their claim.

Further, the construction by Lindquist and the County disregards the explicit alternative in RCW 42.56.010(3) which defines a public record as relating to “the performance of any governmental ... function.” Lindquist admitted in his complaint (CP15) and in his Supplemental Brief (p. 3) that the records at issue “may be work-related.” This means Lindquist was performing a governmental function in sending the texts and placing the wireless calls so the records at issue are “public.” Any other construction would violate the mandate for liberal construction.

Indeed, if the Lindquist/County interpretation were correct a host of PRA cases that involve records clearly not related to an agency

“decision-making process” would be invalid because they would not involve “public records.” *See, e.g., Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993) (deputy prosecutor’s personnel file/performance evaluation); *Koenig v. Thurston County*, 155 Wn. App. 398, 229 P.3d 910 (2010) *aff’d in part on other grounds*, 175 Wn.2d 837, 287 P.3d 523 (2012) (SSOA evaluations for convicted sex offenders); *Prog. Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d, 243, 884 P.2d 592 (1994) (university researcher’s unfunded grant proposal involving use of animals in scientific research).

2. *The claim that Lindquist is not an “agency” and therefore his records need not be disclosed is preposterous.*

It defies logic for the County and Lindquist to claim that his records are not public because they belong to him individually and not the agency. While this may have some merit for records of truly personal communications it has none for work-related communications. First, for purposes of this request Lindquist is the agency; which is the Pierce County Prosecutor’s Office. The actions of a county prosecutor performing his job are the actions of the county. *Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008) (county sued for acts of prosecutor in firing deputy prosecutor). Agencies can only act through their public officials and employees who create, review, retain and use

records to perform their public job duties. At a minimum, Lindquist is an agent acting on behalf of the Pierce County Prosecutor's Office.

Second, this position begs the question of whether the County should own the texts and billing records for work-related calls. As discussed in Section IV.C., Lindquist and the County have a legal obligation to preserve records relating to the performance of county officials' and public employees' jobs. Accordingly, Lindquist's work-related texts and billing records should be deemed agency records and disclosed as such.

Third, case law has resolved Lindquist's claim against him, finding that individuals using private computers for government business were required to turn over such communications, which were public records. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010), squarely held that communications on a government employee's private computer are disclosable public records if they relate to official city business. Otherwise:

“... government employees could circumvent the PRA by using their home computers for government business, [and] the PRA could be drastically undermined.”

Id.

Mechling v. City of Monroe, 152 Wn. App. 830, 222 P.3d 808 (2009), held that private e-mail addresses used by public officials

discussing City business are not exempt under the PRA. In *Mechling*, the Court said “E-mail messages of public officials or employees are subject to a public records request if the e-mails contain information related to the conduct of government.” *Id.* at 843-44.

The theme of both cases guided the Court of Appeals in *Nissen*; namely, **if the communication relates to the conduct of government it must be disclosed no matter where it resides.**

Fourth, common sense says that it is the nature of the record and not where or how it is prepared that determines whether the record is “public.” Otherwise, a city clerk could type up the minutes of city council meetings on her personal computer at home and the city could try to withhold them on the basis that they are “personal” records not within the possession of the agency. Clearly, such a result would violate common sense, as well as the PRA.

3. *Just because the records are not within the possession of Lindquist or the County does not mean they are not public records.*

Lindquist and the County argue that the fact that Verizon generated the billing records and retains the texts means they cannot be public records. This argument also fails because case law holds that public records exist and are disclosable even if they reside outside of an agency’s

direct possession. *See, e.g., O'Neill, supra* (metadata on e-mail sent to Deputy Mayor's home computer hard drive).

In *Concerned Ratepayers, supra*, the plaintiff sought technical documents no longer in the agency's possession relating to a turbine design abandoned by the agency.⁹ 138 Wn.2d at 953-57. Nevertheless, the Supreme Court held that because the agency had "used" documents relating to that design within the meaning of the PRA the documents were public records. It held that:

A document relating to a governmental function is "used" by the agency if it is applied to a given purpose or instrumental to an end or process. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523 (1969) and BLACK'S LAW DICTIONARY 1541 (6th ed. 1990) (defining "use" as employing for or applying to a given purpose or making instrumental to an end or process). Thus, an agency may have used a document not in its possession
....

Id. at 959. The Court noted the "expansive" definition of the word "use:"

regardless of whether an agency ever possessed the requested information, an agency may have "used" the information

⁹ Lindquist and the County cite to *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012) which held that a County did not "use" law firm invoices for defending the county in litigation. That case is readily distinguishable. The invoices at issue in *West* for amounts over the county's \$250,000 deductible, were sent directly to the county's Risk Pool by outside counsel for payment, and there was no dispute that the county did not prepare, receive, review, or otherwise benefit from the creation of the invoices. *Id.* In contrast, the records at issue here were either created by, or related to actions (calls) of, a public official and were "used" in the performance of his duties.

within the meaning of the Act if the information was either: (1) employed for; (2) applied to; or (3) made instrumental to a governmental end or purpose. We are thus persuaded that the Court of Appeals' definition is consistent with the Act's purpose of broad disclosure.

Id. at 959-60 (emphasis added).

Thus, this case stands for the proposition that a record in the hands of a third party may nonetheless be a public record if "used" by a public agency. Lindquist's texts represent a clear "use" because he created them while performing his public duties and the billing records relate to calls he placed while on duty.¹⁰

While Verizon may physically possess or have generated the records here this does not mean they are beyond the reach of the PRA. That is because Lindquist, as the cellular subscriber, and the County, as his employer, have the legal right to obtain the Verizon records.

¹⁰ Other courts have confirmed that an agency may not circumvent the reach of, and public policy underlying open records laws by refusing to produce documents held by third parties. *See, e.g., Evertson v. City of Kimball*, 767 N.W.2d 751, 761 (Neb. 2009) (public record laws do "not permit public bodies to conceal public records by delegating their duties to a private party;" "[a]ccepting the City's argument would mock the spirit of open government"); *Forum Publ'g Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986) ("these documents are not any less a public record simply because they were in the possession of [a private company] ... [the] purpose of the open-record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records"); *State ex rel. Gannett Satellite Info. Network v. Shirey*, 678 N.E.2d 557, 561 (Ohio 1997) (city managers may not circumvent the state public records law by hiring a private entity to assist the city in filling a position); *Wisner v. City of Tampa Police Dept.*, 601 So.2d 296, 298 (Fla. Ct. App. 1992) (polygraph chart retained by private entity was public record, and city "may not allow a private entity to maintain physical custody of public records to circumvent the public records chapter").

The County has the legal right to require Lindquist to obtain public records he created from Verizon under black letter principles of employment law. Lindquist as a county officer is a servant of the county. *State ex rel. Johnston v. Superior Court*, 2 Wn.2d 575, 580, 98 P.2d 985 (1940).

In the broadest sense the term “servant” includes any person over whom personal authority is exercised or who exerts himself or labors for the benefit of a master or employer and anyone who works for, and under the direction or control of, another for salary or wages.

30 C.J.S. *Employer-Employee Relationship* § 3(c) (1992) (emphasis supplied).

Because Lindquist is a servant of the County, which pays his salary¹¹ it can command him to obtain records held by a third party with whom Lindquist has a contractual relationship because these public records really belong to the County.

There is an obligation on the part of the servant implied from the contract of employment, to obey the lawful and reasonable commands of his employer.

30 C.J.S. *Employer-Employee Relationship* § 108.

The law recognizes an obligation to procure records that are

¹¹ RCW 36.17.010.

obtainable even if not directly possessed by a party. In the analogous context of civil discovery, both state and federal law provide that parties may discover items in the responding party's "possession, custody, or control." (See CR 34(a)(1) and Fed. R. Civ. P. 34(a)(1).) Because CR 34(a)(1) is based on Fed. R. Civ. P. 34(a)(i), federal authorities are relevant in interpreting the term "possession, custody, and control." *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 159 Wn. App. 536, 542, 248 P.3d 1047 (2011).

“[D]ocuments are deemed to be within the ‘possession, custody or control’ for purposes of Rule 34 if the party has *actual* possession, custody or control, **or has the legal right to obtain the documents on demand.**” (*Netbula, LLC v. Chordiant Software, Inc.*, No. C08-00019 JW (HRL), 2009 WL 3352588, *1 (N.D. Cal., Oct. 15, 2009) (emphasis added, italics in original) (*quoting In re Bankers Trust Co.*, 61 F.3d 465, 469) (6th Cir. 1995.)) Federal courts have made it clear that a party responding to a discovery request “cannot furnish only that information within his immediate knowledge or possession; he is under an affirmative duty to seek that information reasonably available to him **from his employees, agents, or others subject to his control.**” (*Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992) (*quoting* 10A Federal Procedure, Law Ed. § 26:377, p. 49 (1988)) (emphasis added); *see also Caston v. Hoaglin*, No.

2:08-CV-200, 2009 WL 1687927, *3 (S.D. Ohio June 12, 2009)

(defendant employer “has control over its current employees and the records within their possession.”.)

Similarly, “information is ‘in the possession of the government’ if the prosecutor ‘has knowledge of and access to the documents sought by the defendant.’” *United States v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995); *see also Castaline v. City of Los Angeles*, 47 Cal.App.3d 580, 588, n.7 (1975) (“While a corporation or public agency may select the person who answers interrogatories in its behalf, it has a corresponding duty to obtain information from all sources under its control).

C. **Both Lindquist and the County Have an Obligation to Retain and Disclose the Text Messages and Billing Records.**

Lindquist created public records when he sent texts and placed calls over his private phone that he admits related to public business. As such, both Lindquist and the County have the legal obligation to retrieve them, retain them and disclose them. These records belong to the agency -- the County. As discussed in Sec. IV.B.3, the County can demand of its employee that Lindquist consent to the release of the Verizon records,¹² which contain public records. Lindquist is an employee of an agency, and

¹² Such consent removes the legal impediments to obtaining Verizon records that might arise due to the Stored Communications Act, 18 U.S.C. §§ 2701-12.

whenever he creates work product in his role as an agency employee, that product belongs to the agency, even when the work is produced using personally-owned tools. Every agency employee has an obligation to turn over agency work product on demand, whether for a PRA request or whatever reason the agency desires to have possession of it. The agency paid for it, and it belongs to them.

The County would be violating its legal duty to preserve public records if it did not insist that Lindquist obtain the Verizon records. Public records may not be destroyed except pursuant to RCW 40.14.070. Even if they could, such destruction is prohibited if there is a pending public records request. RCW 42.56.100. The County must take action to prevent public records from “damage or disorganization.” RCW 42.56.100. The County would violate this duty if it did not take action to obtain Lindquist’s work-related records.

Given these clear legal directives the County cannot disclaim responsibility for Lindquist’s records from Verizon. This Court should admonish agencies who fail to protect public records no matter where or how they were created.¹³ This case raises a serious archival issue, in addition to PRA issues. If agencies hide their heads in the sand, like the

¹³ In *O’Neill and Mechling* the courts directed the computers of the officials be searched and consent was not an issue.

County, scores of public records will be lost if agencies allow officials and agencies to conduct public business over private devices with no accountability for the records they create. Protocols and policies for record preservation such as forwarding and storing electronic communications on public servers could, and should, be developed. The County should not be absolved of liability simply because the records at issue reside with a third party.

D. The Records at Issue are Not Exempt for Privacy or Constitutional Reasons.

Lindquist, the County and government amici paint a parade of horrors that will befall every public employee if Lindquist's job-related communications are disclosed. Such disclosure will not place the civil rights of every public employee at risk for several reasons.

First, this case is not about compelled disclosures. Lindquist consented, as should be required by his employer, to the disclosure of work-related records.

Second, this case is not about private records, or even an invasion of privacy. *Nissen* held that only job-related records were subject to the PRA. Further, the fact that a trial court may have to review the records on remand does not invade Lindquist's privacy. Who else should decide whether the records are disclosable? If not an impartial judge the only option would be to trust Lindquist and the County to make self-serving

determinations about the records' disclosability. The Court of Appeals correctly concluded that the trial court was best suited to this task, rather than Lindquist and his office. That decision appropriately protects Lindquist's privacy interests and the public interest in obtaining records relating to Lindquist's job performance, which the public is entitled to see by Lindquist's own admission.

Third, the Court should recognize that Lindquist knowingly chose to use his private cell phone to do his public job, rather than use a County cell phone. By doing so, Lindquist had no reasonable expectation of privacy in those call records and texts, because he intentionally intermingled personal and public business, which exposes his cell phone records about his public conduct to public scrutiny.

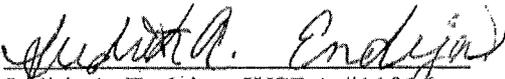
The Court need not decide whether an occasional call incidental to public business to a public official's private cell phone means that all private cell phone records become disclosable. This case does not involve such occasional calls (or even the issue of private calls), but multiple calls and texts from a prosecutor who chose to use his private cell phone to conduct public business. Hence, public employees who choose to act like Lindquist should be alerted to the consequences of that choice. Any finding that Lindquist's work-related records need not be disclosed would send the wrong signal to public officials and public employees at a time

when the risk to public transparency is increased due to new technologies.

V. CONCLUSION

AMICI urge this Court to uphold the decision of the Court of Appeals which is a pragmatic resolution to the modern, perplexing problem caused by a government official's use of a personal device to do his or her job. AMICI's overarching concern in this case is with the necessary disclosure of records documenting the communications of public officials and employees about the conduct of their job. That is the information that the public is entitled to have under Washington's PRA.

Dated: May 4, 2015


Judith A. Endejan, WSBA #11016
GARVEY SCHUBERT BARER
Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
(206) 464-3939

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 4, 2015, I served by email, pursuant to the agreement of counsel, the foregoing document and this certificate of service on:

Dan Hamilton
dhamilt@co.pierce.wa.us
*Attorney for Petitioners Pierce
County and Pierce County
Prosecutor's Office*

Stewart Estes
sestes@kbmlawyers.com
*Attorney for Petitioner Mark
Lindquist*

Michele Earl-Hubbard
Allied Law Group LLC
michele@alliedlawgroup.com
*Attorney for Respondent Glenda
Nissen*

Pam Loginsky, Staff Attorney
Washington Assoc. of Pros. Attys
pamloginsky@waprosecutors.org
Attorney for Amicus WAPA

Ramsey Ramerman
Assistant City Attorney
City of Everett
RRamerman@everettwa.us
Attorneys for Amicus WSAMA

Peter B. Gonick
Deputy Solicitor General
Office of the Attorney General
peterg@atg.wa.gov;
wendyo@atg.wa.gov
*Attorney for Prospective Amicus
Attorney General of Washington*

Philip Talmadge
phil@tal-fitzlaw.com
*Attorney for Petitioners Pierce
County and Pierce County
Prosecutor's Office*

Anita Leigh Hunter
anitah@wfse.org
*Attorney for Amici
WFSE/AFSCME Council 28*

Martin Garfinkel
Schroeter Goldmark & Bender
garfinkel@sgb-law.com
Attorney for Amicus IAFF

Jared Ausserer, Deputy Pros. Atty
Scott Peters, Deputy Pros. Atty
Pierce County Prosecutor's Office
jausser@co-pierce.wa.us
speter3@co.pierce.wa.us
Attorneys for Amicus PCPAA

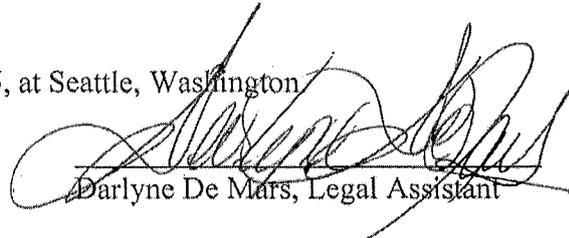
Jeffrey Julius
Vick, Julius & McClure
jeffj@vjmlaw.com
Attorney for Amici
WACOPS/WSPTA

Aimee Iverson
Washington Education
Association
aiiverson@washingtonea.org
Attorney for Amicus WEA

Nancy L. Talner
talner@aclur-wa.org
Douglas B. Klunder
klunder@aclu-wa.org
ACLUE of Washington Foundation
Attorneys for Prospective Amicus
ACLA

William Crittenden
wjcrittenden@comcast.net
Attorney for Prospective Amicus
League of Women Voters of
Washington

Dated this 4th day of May, 2015, at Seattle, Washington



Darlyne De Mars, Legal Assistant

GSB:7046809.2

OFFICE RECEPTIONIST, CLERK

To: Darlyne De Mars
Subject: RE: Nissen v. Pierce County - No. 9875-3

Received 5-4-15

From: Darlyne De Mars [mailto:ddemars@gsblaw.com]
Sent: Monday, May 04, 2015 3:40 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Judy Endejan; dhamilt@co.pierce.wa.us; sestes@kbmlawyers.com; michele@alliedlawgroup.com; pamloginsky@waprosecutors.org; rramer@ci.everett.wa.us; peterg@atg.wa.gov; wendyo@atg.wa.gov; phil@tal-fitzlaw.com; anitah@wfse.org; garfinkel@sbg-law.com; jausser@co-pierce.wa.us; speter3@co.pierce.wa.us; jeffj@vjmlaw.com; ajverson@washingtonea.org; talner@aclur-wa.org; klunder@aclu-wa.org; wjcrittenden@comcast.net
Subject: Nissen v. Pierce County - No. 9875-3

Dear Clerk:

Attached for filing (and service) please find the following:

- 1) Motion for Leave to File Amicus Brief by Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, the McClatchy Company, Pioneer News Group Co., Sound Publishing and the Washington Coalition for Open Government; and
- 2) Brief of Amicus Curiae.

Thank you.

DARLYNE De MARS

Legal Assistant | 206.464.3939 x 1495 Tel | 206.464.0125 Fax | ddemars@gsblaw.com

GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► GSBLaw.com

This e-mail is for the sole use of the intended recipient(s). It contains information that is confidential and/or legally privileged. If you believe that it has been sent to you in error, please notify the sender by reply e-mail and delete the message. Any disclosure, copying, distribution or use of this information by someone other than the intended recipient is prohibited.