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IN THE WASHINGTON STATE SUPREME COURT

GLEND A NISSEN, an individual,

Respondent,

v.

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

Petitioners

v.

PROSECUTOR MARK LINDQUIST,

Petitioner

**NISSEN'S ANSWER TO AMICUS BRIEFS OF WASHINGTON
ASSOCIATION OF MUNICIPAL ATTORNEYS, WASHINGTON
ASSOCIATION OF PROSECUTING ATTORNEYS, and "PUBLIC
EMPLOYEES UNIONS"
(COLLECTIVELY "GOVERNMENT AMICI")**

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ORIGINAL

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I. INTRODUCTION

Respondent Nissen incorporates herein her 11/5/14 Answer to the Petitions for Review, her 1/23/15 Answer to the Amicus Curiae Briefs in support of the Petition for Review, and her 4/20/15 Supplemental Brief and the authorities cited in all. She answers the following Amici herein: WAPA, WASAMA and Public Employees Unions, collectively referred to herein as “the Government Amici.”¹

II. STATEMENT OF RELEVANT FACTS

Nissen has fully described the relevant facts in previous briefing and does not address again here all factual misstatements or misunderstandings conveyed by amicus supporting the agency and official. Petitioners acknowledge the text messages still exist at Verizon. Lindquist’s Pet. for Rev. at 2 n. 1. The text records still existed as of the Division Two decision in this case and must, barring an act of spoliation and unethical conduct, exist today.

¹ A separate Answer has been filed to the AGO and ACLU Amicus Briefs. No Answer is being filed or deemed appropriate to be filed to two Amicus Briefs entirely supporting Nissen (ADNW, et al., and League of Women Voters of Washington).

III. ARGUMENT

A. **The Vast Majority of the Government Amici's Constitutional Arguments are not Properly Before this Court and Have Been Waived by Petitioners.**

The Government Amici supporting the County and Lindquist argue again that records can never be public records or obtained when the records reside or were created on an official's "personal" device. These Amici allege that holding otherwise would amount to a taking, a privacy invasion, an infringement of Free Speech and association rights, and an unreasonable search and seizure. These Amici make clear they are making a facial challenge to the PRA stating that allowing any access to the records or deeming them to be public records would make the PRA unconstitutional. As explained in Nissen's Supplemental Brief, such a facial challenge must fail here, and in her Supplemental Brief and previous Answer to these Amici that the varied constitutional arguments asserted by these Amici are not properly before this Court and have been waived by the Petitioners. Petitioners secured amicus briefs supporting them—one of which was written entirely by a Pierce County prosecutor and served by County paid staff. (See Public Employee Unions Brief cover page, signature page and certificate of service confirming other attorneys merely "reviewed" and approved filing of the brief, but that it was written entirely, apparently at County expense, by an Assistant Pierce County

Prosecutor working under the direct chain of command of Lindquist, his boss.) Petitioners then answered these briefs which had entirely supported Petitioners and tried to adopt the Amici's newly-asserted arguments as Petitioners' own. The only Constitutional issue before this Court is the Petitioners' facial challenge to the PRA based on alleged unreasonable search and seizure.

Obtaining access to work-related text messages and phone logs from this elected prosecutor who (1) chose to use his "personal" cell phone instead of his County-provided one to conduct business in 2010 when he was on notice that such messages were public records, and (2) chose to delete the texts from his phone and not forward them to the County for retention, could not be shown to constitute a taking, an invasion of privacy, a First Amendment violation or any of the other constitutional claims the Government Amici assert in an effort to help this prosecutor keep his work-related texts and call logs from the public and create a black hole in which to hide public records going forward.

B. The Parade of Horribles or Offered Examples Do Not Justify a Denial of Access Here.

The Government Amici now offer slightly different examples of text messages in their parade of horrible but none show a justification for a denial of access. Lindquist is not a member of a union nor a union official

and none of the emails here could appropriately be deemed communications about union grievances between union members. Whistleblower laws afford protections for whistleblowers, and there is no allegation that any of the communications at issue involve Lindquist acting as a whistleblower. If they evidenced his efforts to investigate and retaliate against whistleblowers—which they well might—one would expect that the Government Amici would agree such a communication, showing an abuse of power and office, merits exposure and access. The arguments made by WASAMA—that officials and public employees should have the right to use the power and resources of their offices to lobby for legislation or their own personal or other’s campaigns—should send up a red flag as the types of abuse of power and behind-the-scenes improper use of resources supporting access to these records and the necessity of the PRA generally. And yes, employees texting one another about a specific work event and danger imposed on them as a result of an agency action or regulation, that is the type of communication that can be a public record and needs disclosure regardless of the device on which it was sent or read. Similarly, if an official uses his power and role to pressure media via texts and phone calls to change news stories to impugn his detractors like Detective Nissen then those are communications that

fall within the definition of “public record” regardless on the device from which they were sent or received by the official.

The Government Amici have backed away from their claims that emails between spouses about being late for dinner are the type of records at issue here. They never were. But yes, when an official chooses to send a text or make a call on his personal device that involves his acting in his official role and using his power and discussing matters related to his official role—whether he is acting appropriately or abusing his power—then yes, the public is entitled to access to the records of that communication under the PRA unless a specific exemption precludes it the same as they would be if he had used his government-provided device.

C. The Stored Communications Act Does Not Preclude Access to these Records and the Court has the Power to Obtain Them and Allow Access.

Contrary to the assertions of several of the Government Amici, the Stored Communication’s Act (“SCA”) does not prevent civil discovery of text messages. **Flagg v. City of Detroit**, 252 F.R.D. 346 (2008). In **Flagg**, a civil suit against the City of Detroit related to the death of the plaintiff’s mother, the plaintiff sought through discovery all text messages sent or received by 34 City officials or employees during a four hour window on the date the plaintiff’s mother was killed. The City of Detroit refused to consent to the release of text messages from the phone carrier that stored

them. Detroit claimed civil discovery subpoenas were not applicable because the SCA makes no reference to civil discovery subpoenas. The court dispensed with such “sweeping assertion” pointing out the records must be disclosed to the user, and the user may be compelled to produce the texts for in camera review. Id. Privacy is not implicated by in camera review. A corporate party may be deemed to have control over documents lawfully obtainable by its employee.

The SCA also does not apply to individuals who use the communications services. Nucci v. Target Corp., --So.3d --, 40 Fla.L. Weekly D166 (2015)(Photos posted on social media discoverable). A party who has the power to consent to a third party’s release of the documents may be compelled to produce the documents as the documents are within that party’s “possession, custody, or control” under FRCP 34. I.E.E. Intern. Electronics & Engineering, S.A. v. TK Holdings Inc., 2014 WL 6909855 (E.D. Mich. Dec. 8, 2014) (Improper withholding of consent to obtain records erroneous where party fails to identify any legitimate basis for withholding consent to obtain discoverable records). Text messages must be obtained and produced. In Passlogix, Inc. v. 2FA Technology, LLC, 708 F. Supp. 2d 378 (2010), the court held that deletion of ninety-one text messages amounted to spoliation of evidence even where texts were on personal rather than work technology. The

personal user must obtain the texts for production. Where a user chooses to consent in the face of a discovery order imposing discovery sanctions, the consent is lawful for purposes of the service provider producing the records. **Negro v. Superior Court**, 230 Cal. App. 4th 879, 179 Cal.Rptr. 3rd 215 (2014)(Google must produce e-mails where user was ordered to give consent under rules of discovery and he did so by e-mailing Google while still objecting that his consent was coerced in violation of the SCA).

Text messages are subject to civil production and discovery just as all other types of records are subject, and the SCA does not place them beyond the reach of the power of the courts or access by parties. Here Lindquist can consent to release of the records. His agency can, and should, order him to produce the records. The court could order disclosure of the records. The SCA does not preclude access here.

A trial court similarly retains all its normal powers to access records and perform in camera review and order access to records not shown to be exempt. Trial courts examine records all the time where parties dispute whether or not an opponent has a right to access it or to decide the issues of a case. Trial courts examine secret formulas and operating designs and trade secrets to assess whether a competitor's product constitutes infringement. Diaries are examined and personal medical records to determine if what they reveal are sufficiently connected to the issues in a

litigation to order access. In a PRA case, judges are tasked with examining records claimed to be exempt to determine if an exemption has been proven, and when it is argued that a record is not a “public record” due to its content, they examine the record to make that determination. Here, Lindquist admitted several records were or “may be” work-related texts or calls and claimed that others were not. A trial court must be allowed to review such records and decide for itself whether the test for a public record has been established. A trial court has the same power and rights it has in all other civil cases, and it is irrelevant that the records here are text messages held by a service provider or phone records held by the official.

D. Open Courts Provisions Do Not Preclude In Camera Review.

The Public Employee Unions argue that in camera review by judges should be disallowed because court proceedings and court records are governed by Article I Section 10 of the Washington Constitution. Pub. Emp. Union Br. at 8-9. The cases they cite make clear that this Court has set forth tests to determine when court records may be sealed, and it should be well-understood that records are frequently lodged for an in camera review and sealed as part of that review process while review is completed. Records reviewed in camera in PRA cases and deemed exempt or partially exempt sit sealed in courts throughout this State, as these

Amici, some of whom have been parties to such cases, ought to know. The open court provision is not grounds to deny a court power to perform an in camera review.

E. A Warrant is Not Required to Obtain these Records.

Neither the County, nor a Court, is required to obtain a warrant to retrieve the text messages or phone records. Neither the County, nor a Court, is required to establish probable cause of a crime to retrieve these records. The cases cited by the Government Amici relate to searches for purposes of detecting and prosecuting crime and are irrelevant to the access here. As the United States Supreme Court made clear when a government employer conducts a “noninvestigatory work-related intrusion” of an employee or his property, or an investigatory search for evidence of suspected work-related employee misfeasance a warrant and probable cause is not required to comply with the 4th Amendment.

O’Connor v. Ortega, 480 U.S. 709, 715, 717, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). Rather, the proper test is whether the search was “reasonable” under all of the circumstances, looking at whether the employee had “an expectation of privacy that society is prepared to consider reasonable” in the area searched, and then whether the government employer violated this expectation by conducting an unreasonable search. **Id.**, 480 U.S. at 715, 717, 720. When considering whether a search conducted by an employer

for work-related purposes violates the 4th Amendment, courts must balance “invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace.” Id. at 719–20 .

Using this test, the O'Connor Court found no 4th Amendment violation from the warrantless search of an employee's office and seizure of personal items from the employee's desk and file cabinet during an investigation into workplace misconduct by the employee. Id. The US Supreme Court subsequently held that a government employer's seizure and search of records of an employee's government-provided pager did not violate the 4th Amendment in City of Ontario v. Quon, 560 U.S. 746, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010).

Here, the County was asked to obtain and inspect some text messages and phone records from a cell phone the elected Prosecutor chose to use to conduct agency business instead of his County-provided cell phone. The Prosecutor did not copy or forward the text messages to the County for storage. He sent several of the text messages within days after being told all such text messages were public records and were subject to production and more than a year after published appellate decisions in this State made clear records such as these were public records needing to be disclosed.

A court is to examine whether or not the employee has a reasonable expectation of privacy in the material to be searched or seized, and to examine further whether the alleged privacy interest is one which society is prepared to honor. Lindquist was on notice in 2010 that using his 861 cell phone as he did created public records on that device subjecting it to needed access by the County. There is nothing unreasonable about the County gaining access to those materials or a Court from being allowed to review them for purposes of an in camera review. Amicus ACLU cites to the publicly-available cell phone policies of several other Washington agencies, most in existence, and available, by 2010 when Lindquist made his work-related calls and sent his work-related texts from his 861 cell phone. See ACLU Amicus Br. at 14-16 citing <http://mrsc.org/home/explore-topics/legal/regulation/telecommunications/cellular-phone-policies.aspx>. The prevalence of such policies is additional evidence that any expectation of privacy in work-related texts and calls on a personal cell phone was not reasonable in 2010 and is not reasonable now.

F. Article I, Section 7 of the State Constitution is Not Violated Here.

Government Amici also make a facial challenge based on Article I Section 7 arguing there are no set of circumstances under which the PRA could constitutionally be read to reach texts and phone records of cell phones not paid for by the agency. The facial challenge must fail. An as applied challenge similarly must fail.

Again, there has been no order, seizure or compelled search. Lindquist voluntarily produced the unredacted phone records to the County. The County has made no request for or effort to obtain the text messages. And while Lindquist has belatedly claimed in more recent appellate briefing that he will refuse to provide the text messages if ordered or asked, the fact remains he has never been asked or ordered and thus never has officially refused. There has been no showing that Article I, Section 7 will be violated by providing the text messages and the unredacted phone records to the County and/or a Court for in camera review. (The Petitioners have further not established any claim of exemption.)

Article I, section 7 requires an intrusion into a person's "private affairs." **American Legion Post #149 v. Washington State Dept. of Health**, 164 Wn.2d 570, 596, 192 P.3d 306 (2008). Whether an intrusion into private affairs exists depends upon a two-step analysis: (1) what

privacy interests citizens have historically held and (2) whether the expectation of privacy is one that citizens should be entitled to hold. Id.; State v. McKinney, 148 Wn.2d 20, 26-32, 60 P.3d 46 (2002).

The assessment of whether a cognizable privacy interest exists under Const. art. 1, § 7 is thus not merely an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold.

City of Seattle v. McCready, 123 Wn.2d 260, 270, 868 P.2d 134 (1994).

This case does not involve a search or seizure for purposes of a criminal investigation. If records are requested from this elected official, it will be a request by the County to its elected Prosecutor or a request by a Court to lodge records for in camera review, both solely for purposes of a determination whether the records are public records in order to comply with the PRA. The records at issue will first be the unredacted phone records the Prosecutor voluntarily provided the County (which thus cannot constitute a search and seizure since the records were already freely provided) and second the text messages the Prosecutor has not yet been asked by the County or trial court to provide but which the Prosecutor concedes at least 16 of which are likely work-related texts. The text messages and phone records are from calls and texts the Prosecutor chose to send from his 861 cell phone instead of from the County-provided cell he possessed at the same time, and they will be texts he could have

forwarded to the County for safekeeping and chose not to do so. These are also text messages the Prosecutor chose to send on his 861 days after being warned that text messages on the 861 cell and phone records from that cell were public records that had to be disclosed and a year after published appellate case law made clear these types of records were public records requiring disclosure regardless of the nature of the device on which they were created, stored or read.

Petitioners cannot show these records constitute the “private affairs” of the elected Prosecutor. Rather, they are records meeting the definition of public records in the PRA. Petitioners further cannot show that the “privacy” interest the Prosecutor seeks to claim is one an elected official who has acted as he has acted should be entitled to hold.

G. Government Employees and Officials Have Methods to Prevent any Intrusion into Personal Devices.

The Government Amici have numerous methods to prevent intrusion into personal devices. As Amicus AGO reminds us, the Attorney General Model Rules, which were drafted pursuant to an Act of the Legislature, recommends that employees forward work-related messages and communications received on personal devices to the agency for safekeeping and production. See AGO Amicus Br. at 7-8. Employees can use agency-provided devices when available. They can avoid sending

work-related message via text messaging and use agency emails instead. Employees can have their text messages automatically converted to emails as a backup and forward the work-related messages to an agency email or servers. Just as numerous individuals in the private sector have had to find ways to ensure their work-related records and messages inadvertently or intentionally received on personal devices and email boxes find their way back to their employer, public employees and officials can appropriately be required to send any government-related records to an agency repository for safekeeping. Doing so precludes the need to access a personal device for retrieval.

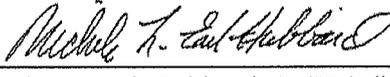
Here, Lindquist had a choice to ensure records were kept with the agency, and instead made a choice not to forward such messages or create them on the workplace devices, but further to destroy them within days of their being sent after being warned such messages were public records. This official was on notice that the records he created were public records that had to be maintained. All current and future public officials and employees have also been placed on notice of the same thing. The Secretary of State has clearly stated in an advisory that work-related messages are public records that must be preserved and provided even when created on personal devices. See App. B to League of Women Voter's Amicus.

H. Lindquist is the “Agency”

Nissen has briefed several times the issue of why Lindquist, as the Prosecutor, is “the Office” and thus falls within the definition of “agency” under the PRA. See Nissen Supp. Br. and Nissen Briefing in Division Two Court of Appeals. As Amicus AGO acknowledges, agencies act through individuals and acts of such individuals are acts of the agency. See AGO Br. at 5-8. The Government Amici’s claims that Lindquist is not the “agency” or that employees cannot be subject to the PRA, as the AGO notes, would mean no record could be subject to the PRA as few records are created automatically by agency computers and do not involve the actions of human beings. Human beings who work for agencies create public records. In this case, the human being at issue is the elected prosecutor himself, the office of the prosecuting attorney, and the agency involved. Amicus WASAMA’s attempts to remove officials and employees from the reach of the PRA, based on this Court’s holdings finding the judicial branch of government is not covered by the PRA, has no application to this case, which deals with an agency that is clearly covered by the PRA as well as the executive for such agency.

RESPECTFULLY SUBMITTED this 27th day of May, 2015

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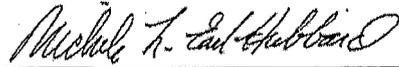
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I certify under penalty of perjury under the laws of the State of Washington that on May 27, 2015, I served by email pursuant to agreement the foregoing document and this certificate of service on:

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Dated this 27th day of May, 2015, at Shoreline, Washington.



Michele Earl-Hubbard

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Subject: RE: Nissen v. Pierce County Cause No. 90875-3

Dear Clerk:

Attached please find for filing the following:

Nissen's Answer to

- (1) Nissen's Answer to Amicus Briefs of Attorney General of Washington and ACLU of Washington and
- (2) Nissen's Answer to Amicus Briefs of Washington Association of Municipal Attorneys, Washington Association of Prosecuting Attorneys, and "Public Employees Unions:" (Collectively "Government Amici") and attached certificates of service for same.

The attorney filing this document is Michele Earl-Hubbard, WSBA #26454, attorney for Respondent Nissen. My contact information is below.

Thank you.

This email further constitutes email service upon all recipients pursuant to an email service agreement.

Michele Earl-Hubbard



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