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SUPREME COURT
STATE OF WASHINGTON
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No. 1037953

WASHINGTON SUPREME COURT

RAMIRO VALDERRAMA,

Petitioner,

v.

CITY OF SAMMAMISH,

Respondent.

MEMORANDUM OF AMICUS CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT
IN SUPPORT OF REVIEW

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I. IDENTITY AND INTEREST OF AMICUS

WCOG, a Washington nonprofit corporation, is an independent, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business. WCOG's mission is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy. WCOG's interest this case stems from the public's strong interest in timely access to accurate and complete information concerning the conduct of government and in maintaining government accountability to the people of the state of Washington. For more information about WCOG go to www.washcog.org.

II. STATEMENT OF THE CASE

WCOG relies on the parties' statements of the facts to present the following legal analysis.

III. ARGUMENT

A. Prior to anyone making a PRA request for the councilmembers' records the City had a legal duty under RCW 42.56.100 to protect those public records from disorganization or loss.

The City erroneously asserts that the PRA creates two “causes of action” that could only arise only after someone makes a PRA request: for (i) unreasonable delay, and (ii) withholding records. *Answer* at 15. The only authority cited by the City is RCW 42.56.550(4), which provides specific remedies for certain PRA violations, but does *not* support the City’s erroneous opinion that the rest of PRA is unenforceable.

Every part of the PRA is meant to be enforced, by an injunction if necessary. *See Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 327 P.3d 600 (2013), *amended* (2014) (affirming superior court injunction to adopt proper procedures). If the City also refuses to comply with the PRA it may be ordered to do so on remand. *Id.*

Since its enactment in 1973—more than fifty (50) years ago—the PRA has applied to all forms of electronic public

records. The original 1973 Act unambiguously applied to electronic records, citing specific examples of then-current electronic media technology such as “magnetic or punched cards, discs, drums or other documents.” Laws of 1973, ch. 1, § 2.

The drafters of the original Act understood that the disorganization or destruction of public records interferes with the purpose of the Act. Consequently, the original 1973 Act included a legal duty to keep all public records properly organized and safe by adopting and enforcing rules:

Sec. 29. PROTECTION OF PUBLIC RECORDS. Agencies shall adopt and enforce reasonable rules and regulations, consonant with the intent of this act to provide full public access to official records, to protect public records from damage or disorganization...

Laws of 1973, ch. 1, § 29 (recodified as RCW 42.56.100).

Almost 30 years later, this Court clarified that email messages on a private computer may be public records subject to the PRA, *and* that the agency’s obligation to comply with the PRA would be enforced regardless of the form or location of the public records:

The City has a duty to provide records to the public that are subject to the PRA. RCW 42.56.070(1). Information that must be disclosed under the PRA conceivably exists on the hard drive of Fimia's computer. **If it is possible for the City to retrieve this information, the PRA requires that it be found and released to the O'Neills...** (Emphasis added).

O'Neill v. Shoreline, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010).

B. *Nissen* told every agency in this state that they needed to take immediate action to protect public records on private devices or accounts.

Ten years ago this Court rejected the arguments of local agencies that the PRA could not be constitutionally applied to electronic records on privately owned devices or accounts. *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). Ignoring their obligations under the PRA, Pierce County, the culpable prosecutor, and a small army of agency amicus groups flooded the appellate courts with speculative, meritless arguments about the "privacy" of an elected official who was

intentionally and illegally circumventing the PRA by using his personal phone.¹

Numerous public interest amicus groups opposed the agencies' attack on the PRA. The ACLU, the League of Women Voters, WCOG and several media organizations all correctly explained that Pierce County had a duty under RCW 42.56.100 to protect the County's public records from "damage or disorganization."²

During oral argument³ Justice Stephens repeatedly asked the County's attorney to address *the County's* legal duties under the PRA:

¹ Amicus groups opposing the application of the PRA to personal devices and accounts included the Washington Association of Prosecuting Attorneys (WAPA), the Washington State Association of Municipal Attorneys (WSAMA), and six (6) different organizations representing fire fighters, police, sheriffs, State Patrol troopers, deputy prosecutors and educators. *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

² *Amicus ACLU Br.* at 12-13; *Amicus LWVWA* at 16-17; *Amicus Allied Daily Newspapers et al.* at 17; available online at https://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.searchRequest&courtId=A08.

³ Available online at <https://tvw.org/video/washington-state-supreme-court-2015061008/>

JUSTICE STEPHENS ...whether the County can force Mr. Lindquist to hand this over to the County or not, isn't the County still subject to the strictures of the Public Records Act?

Having ignored its duties under the PRA up to that point, the County had no answer, and attempted to change the subject back to employee privacy. After reminding the County's attorney that he represented the County—*not* Lindquist—Justice Stephens still got no meaningful answers from the County.

In contrast, amici explained, in response to Justice Gonzalez' question, that the County had a duty under RCW 42.56.100 to enforce rules to protect the County's public records:

COUNSEL FOR LWVWA ... The County is supposed to adopt reasonable rules that protect public records from disorganization and destruction.

And in response to Justice McCloud's question about whether the County's failings were sanctionable under the PRA counsel responded:

COUNSEL FOR LWVWA Absolutely. It's a clear violation of the obligation to protect public records from disorganization and destruction, and the obligation to pass rules, both of

which have been blatantly violated here.

After unanimously rejecting the agencies' attacks on the PRA, this Court remanded the case to the trial court. 183 Wn.2d at 863. Beyond reiterating that the PRA must be enforced, this Court wisely refrained from speculating about *how* the PRA would be enforced on remand.

Nonetheless, this Court informed the agencies that they needed to deal with these issues proactively by implementing policies for records on private devices and accounts:

Agencies are in the best position to implement policies that fulfill their obligations *under the PRA* yet also preserve the privacy rights of their employees. (emphasis added)

183 Wn.2d at 887.

It is unclear why the *Nissen* Court did not specifically cite RCW 42.56.100. But in *Kilduff v. San Juan County*, 194 Wn.2d 859, 453 P.3d 719 (2019), the Court confirmed that RCW 42.56.100 is the statutory basis for the agencies' "obligations" to adopt and enforce rules to protect records and enforce the PRA. This Court unanimously held that RCW 42.56.100 did *not* give

agencies the authority to adopt rules that weaken the PRA. “The purpose of RCW 42.56.100 is to protect and facilitate timely access to public records.” 194 Wn.2d at 871.

C. In the ten years that have elapsed since *Nissen* numerous agencies, like *Sammamish*, have totally failed to comply with the PRA and *Nissen*.

Because the issues in *Nissen* were novel, this Court did not hold Pierce County liable for PRA penalties and attorney’s fees. This Court generously assumed the County’s good faith in its erroneous interpretation of the PRA. 183 Wn.2d at 888. But there was no excuse for any agency to fail to comply with the PRA after *Nissen* was published in August 2015.

Unfortunately, agency compliance with the PRA and *Nissen* is still spotty to non-existent. Most agencies have failed to comply with the PRA as instructed in *Nissen*. The result has been an epidemic of illegal destruction of public records on private devices and accounts:

- In 2020 the Seattle Mayor destroyed controversial text messages on her personal phone, costing the city \$3.65 million.⁴
- On December 16, 2024 the Legislative Ethics Board acknowledged that Senator Jeff Wilson had destroyed his personal phone and lost public records.⁵
- On February 18, 2025, Governor Ferguson agreed to stop the state's illegal practice of auto-deleting text messages, paying out \$225,000 in settlement.⁶

⁴ <https://www.seattletimes.com/seattle-news/politics/seattle-to-pay-2-3-million-to-employees-who-blew-whistle-on-durkans-deleted-texts/#:~:text=In%20February%2C%20the%20city%20settled,Best%20deleted%20texts%20by%20hand.>

⁵ Available online at <https://leg.wa.gov/about-the-legislature/ethics/ethics-complaint-opinions/24-11/>

⁶ Available online at <https://www.seattletimes.com/seattle-news/politics/ferguson-suspends-auto-deletion-of-public-records-after-225k-settlement/>

- On February 20, 2025, King County announced legislation to stop King County’s ongoing illegal deletion of text messages.⁷

D. The City has willfully failed to comply with the PRA.

In 2018 the City adopted a PRA ordinance that explicitly acknowledged that the City had a legal duty under RCW 42.56.100 to adopt rules and procedures to protect public records from disorganization or destruction:

[A]s required by RCW 42.56.100, mindful of the further requirement that the Rules must also protect the records from damage or disorganization... (Emphasis added).

CP 1528⁸. But that ordinance did not actually contain any rules for organizing and protecting the City’s public records. The City’s efforts to comply with RCW 42.56.100 consisted of one conclusory paragraph embodying the City’s erroneous belief that



⁷ Available online at <https://kingcounty.gov/en/dept/council/governance-leadership/county-council/newsroom/2025/02-20-dunn-instant-messages>

⁸ See <https://sammamishwa.civicweb.net/filepro/documents/4085/?expanded=9024&preview=20965> (last visited 3/4/25).

the only purpose of RCW 42.56.100 is to protect public records *from the requestor*. CP 1531.

Due to the City's failure to comply with *Nissen*, five years later City councilmembers were using WhatsApp to discuss important City business with constituents:

:

← WhatsApp Chat with...  

3/3/20, 5:53 PM - Stephanie: I hope, for everyone's health, it's not a late meeting. It's been a long 24 hours

3/3/20, 7:29 PM - Stephanie: <Media omitted>

3/3/20, 8:30 PM - Christie Malchow: What post?



3/3/20, 8:30 PM - Stephanie: The one I sent a bit earlier on happiness.

3/3/20, 10:12 PM - Christie Malchow: Did you watch and see me bite Pam's head off for talking over me during the Sahalee discussion? That was pent up rage from today.

3/3/20, 10:14 PM - Stephanie: Yes, I watched. She's overbearing and rude. You also nailed the point on Sahalee Inglewood ELSP. You were really sharp.

3/3/20, 10:18 PM - Christie Malchow: I was a bit over the top, but damn if she wasn't over there answering the questions that I was asking of staff and talking to Karen. Fucking

23/20, 10:07 PM - Stephanie: Yay on school concurrency!
23/20, 10:22 PM - Stephanie: Can school concurrency be centered on capacity?
23/20, 11:09 PM - Christie Malchow: Hello! I know she's a liar. I wasn't saying it.
23/20, 11:10 PM - Christie Malchow: Yes, school concurrency could be based on existing hospital space. In order to build more homes beyond capacity would require a new school (portable) be available.
23/20, 11:13 PM - Stephanie: I understood recently that the district would want to focus on issuing capacity based concurrency certificates. Does that make sense? I think it was Karen who mentioned it. Can't think of anyone else who would have said it. Was awhile ago.
23/20, 11:13 PM - Stephanie: Pam was so wrong and I think Jason was putting on an act.
23/20, 11:19 PM - Stephanie: I guess regardless about school concurrency nothing will be fixed for decades. It's just too far gone.
23/20, 11:32 PM - Christie Malchow: I don't know any logistics of school concurrency other than that.

← WhatsApp Chat with...  

1/21/20, 9:29 PM - Stephanie: No vote?
1/21/20, 9:40 PM - Christie Malchow: Missed voice call
1/21/20, 9:41 PM - Christie Malchow: Missed voice call

CP 1618-1620.

The City complains about the “exhaustive” and “laborious” efforts it undertook to respond to Valderrama’s PRA requests. *Answer* at 9-11. **None of those efforts would have been necessary if the City had actually complied with the PRA as *Nissen* instructed back in 2015.** Long before anyone made a PRA request, the City had a legal duty to adopt and enforce rules to protect its own public records from disorganization or loss. It is *the City’s fault* that when Valderrama requested the City’s public records, many of those public records were not in the protected, organized custody of the City where they belonged. It is *the City’s fault* that it was difficult, expensive and time-consuming for the City to respond to Valderrama’s PRA requests.

In May 2023, the City of Sammamish amended its PRA policy in R2023-1010, apparently in direct response to this lawsuit. CP 1526-1543. These amendments did *not* fix any of the problems with the City’s existing policy. Instead the City amended the policy to state that the City will only “request” that

its own officials or employees comply with the PRA and *Nissen*. CP 1542. This bad faith attempt to limit the City's duties under the PRA was directly contrary to *Kilduff*, and facially violated the PRA.

Just like Pierce County in *Nissen*, the City has no idea what its PRA duties actually are or how to comply with those duties. At oral argument⁹ the Division One judges repeatedly asked the City's attorney to explain what the City's duties under *Nissen* were, and whether the City could have any legal duties beyond simply asking for *Nissen* affidavits. Like Pierce County ten years earlier in *Nissen*, the City had and still has no coherent understanding of its own duties under the PRA.

⁹ Available online at <https://tvw.org/video/division-1-court-of-appeals-2024091248/>.

E. The Court of Appeals misinterpreted the PRA and *Nissen*, and erroneously blessed the City's willfully noncompliant 'storage' of public records in private accounts.

Division One misinterpreted *Nissen* as only a requirement that agencies search for public records “*store[d]*” on private devices or accounts *after* a PRA request is made. *Opinion* at ¶¶ 1, 5 n.2, 8. The court missed the larger point of *Nissen*: **public records are *not* supposed to be “stored” on personal accounts or devices of elected officials where such public records keep getting lost or destroyed.** See section C (above). While Prosecutor Lindquist’s text messages were in fact “stored” on his personal phone, nothing in *Nissen* suggests that this complied with the PRA. Division One ignored those parts of *Nissen* which state that (i) the PRA must be enforced and (ii) that agencies were supposed to take enforcement action ten years ago. *Nissen*, 183 Wn.2d at 884, 887.

Division One noted that the reasonableness of a search for public records depends on the facts of the case. *Opinion*, ¶ 20 (citing *Neigh. All. v. Spokane County*, 172 Wn.2d 702, 720, 561

P.3d 288 (2024)). But the court ignored the undisputed fact that the City had been out of compliance with the PRA and *Nissen* for years. By ignoring the City’s noncompliance in a published opinion Division One has erroneously normalized the City’s willful failure to comply with *Nissen* and the PRA.

F. The Court of Appeals should not have issued a published opinion that ignored the noncompliance elephant in the room.

The *first sentence* in Valderrama’s trial court motion asserted that “it is the official policy of the City of Sammamish to violate the [PRA].” CP 1467. Valderrama explained that the City’s 2023 policy violated the PRA by adopting a policy to not conduct adequate searches as required by *Nissen*. CP 1470. On appeal Valderrama specifically argued that the City’s PRA policy violated the PRA. *Resp. Br.* at 55-61. Amicus WCOG also argued that the City’s 2023 policy facially violated the PRA. *WCOG Amicus Br.* at 25. But Division One refused to reach the issue, erroneously asserting that the issue had not been raised in the trial court. *Opinion* n. 5.

Even if the issue had ***not*** been raised, that court should ***not*** have issued a *Published Opinion* that ignored the elephant in the room: the City was willfully out of compliance before Valderrama made his requests, and the City made matters worse by enacting its invalid 2023 policy. That court could have either (i) remanded the issue to the trial court or (ii) requested additional briefing on appeal. And if the court still felt that the issue was not well briefed then it should have issued an ***unpublished*** opinion. Instead, Division One threw the PRA case law into chaos by erroneously ignoring the issue, and refusing to even cite RCW 42.56.100.

At oral argument¹⁰ the appellate court complained that this Court did not provide more guidance in *Nissen*. Due to the procedural posture and briefing in *Nissen*, more specific guidance from this Court would have been dicta. But *Nissen* clearly told all agencies that they needed to proactively comply

¹⁰ See note ____ at 8:40-8:57.

with the PRA. The lower appellate court should ***not*** have expected further guidance from *Nissen* nor given any such guidance to the City. The court should have reversed and remanded.

G. The public importance of this case warrants review under RAP 13.4(b)(4).

In the ten years since *Nissen* no other published case has addressed the noncompliance and remedial issues left unanswered by *Nissen*. This appeal is the Court's first opportunity to revisit *Nissen*, and it is long overdue! By issuing a *Published Opinion* that ignores RCW 42.56.100 and the City's willful noncompliance the Division One has merely invited further PRA litigation, including direct challenges in the other divisions of the Court of Appeals.

The issues raised in this case are simply too important and too pressing for this Court to wait any longer. The Court should grant review under RAP 13.4(b)(4).

H. The Court of Appeals *Opinion* conflicts with *Nissen* for purposes of RAP 13.4(b)(1) by failing to enforce the PRA.

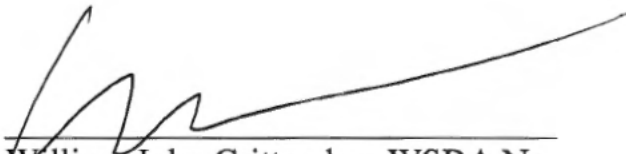
As explained in section E, the Court of Appeals missed the point of *Nissen*. By failing to actually enforce the PRA, and ignoring *Nissen*'s instruction to enforce the PRA, the *Opinion* conflicts with *Nissen* for purposes of 13.4(b)(1).

This memorandum contains 2477 words, excluding the parts of the brief exempted from the word count by RAP 18.17.

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RESPECTFULLY SUBMITTED this 13th day of March,
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 13th day of March, 2025, true and correct copies of this amicus memorandum and the *Motion for Leave to File Memorandum of Amicus Curiae* were served on the parties as follows:

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