No. _____
(COA No. 86195-6)

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

RAMIRO VALDERRAMA,

Petitioner/Plaintiff,

v.

CITY OF SAMMAMISH,
a Washington municipal corporation,

Respondent/Defendant.

PETITION FOR REVIEW

FOSTER GARVEY PC

Patrick J. Schneider, WSBA No. 11957
Angelo Marchesini, WSBA No. 57051
1111 Third Avenue, Suite 3000
Seattle, Washington 98101
Telephone: (206) 447-4400
pat.schneider@foster.com
angelo.marchesini@foster.com

Attorneys for Petitioner Ramiro Valderrama

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER & INTRODUCTION 1

II. COURT OF APPEALS DECISION 2

III. ISSUES PRESENTED FOR REVIEW 2

IV. STATEMENT OF THE CASE 3

A. Factual Background 4

B. Procedural Background 11

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 14

A. The Court of Appeals Decision Conflicts With This Court's Precedent In *Nissen*. RAP 13.4(b)(1). 14

B. The Court of Appeals Decision presents an issue of substantial public interest. RAP 13.4(b)(4). 18

VI. CONCLUSION 23

Appendix A: Court of Appeals Decision

TABLE OF AUTHORITIES

Page(s)

CASES

Drueding v. Travelers Home & Marine Ins. Co.,
No. 22-CV-00155-LK, 2022 WL 17092736
(W.D. Wash. Nov. 21, 2022) 21

Freedom Found. v. Gregoire,
178 Wn.2d 686, 310 P.3d 1252 (2013) 23

Jones v. Riot Hosp. Grp. LLC,
95 F.4th 730 (9th Cir. 2024) 21

Neighborhood All. of Spokane Cnty. v. Spokane Cnty.,
172 Wn.2d 702, 261 P.3d 119 (2011) 18, 19

Nissen v. Pierce County,
183 Wn.2d 863, 357 P.3d 45 (2015) ..... *passim*

Progressive Animal Welfare Soc. v. Univ. of Washington,
125 Wn.2d 243, 884 P.2d 592 (1994) 19

Doe ex rel. Roe v. Washington State Patrol,
185 Wn.2d 363, 374 P.3d 63 (2016) 22

Valderrama v. City of Sammamish,
No. 86195-6-I, 2024 WL 5116865
(Wash. Ct. App. Dec. 16, 2024) ..... *passim*

Wade's Eastside Gun Shop, Inc. v. Dep't of Lab. & Indus.,
185 Wn.2d 270, 372 P.3d 97 (2016) 22

West v. City of Tacoma,
12 Wn. App. 2d 45, 80–82, 456 P.3d 894 (2020) 18, 19

West v. Vermillion,
196 Wn. App. 627, 384 P.3d 634 (2016) 17

STATUTES

Public Records Act, chapter 42.56 9

RCW 40.14.020 4

RCW 42.56.030 22

OTHER AUTHORITIES

RAP 13.4(b)(1) 2, 14

RAP 13.4(b)(4) 2, 18

I. IDENTITY OF PETITIONER & INTRODUCTION

The Court of Appeals decision in this Public Records Act ("PRA") case recognizes that Petitioner Ramiro Valderrama presented evidence of bad faith at summary judgment: evidence that an elected official asked a subordinate for assistance in deleting records from a phone while a request seeking records on that phone was pending. Nonetheless, the Court of Appeals concluded that this evidence, together with other evidence of bad faith that the decision does not address, did not create a genuine issue of material fact regarding the City's fulfillment of its obligation to conduct an adequate search in good faith.

This case involves plain and substantial evidence of bad faith searches for public records, which both the City and the Court of Appeals ignored or deemed not material, even though the PRA places the burden on the City to prove that its search was adequate. The PRA and this Court's precedent demand that public records be accessible to the public, to safeguard the public interest and enable an informed democracy.

Petitioner asks this Court to accept review of the Court of Appeals decision attached as Appendix A to this Petition. Such review is appropriate under RAP 13.4(b)(1) in order to address the conflict between the Court of Appeals decision and this Court's opinion in *Nissen*, and under RAP 13.4(b)(4) to address and explain a municipality's obligation under the PRA in the face of bad faith searches by its officials or employees—a question of substantial public interest.

II. COURT OF APPEALS DECISION

A copy of the December 16, 2024 Court of Appeals decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Is review warranted under RAP 13.4(b)(1) due to a conflict with this Court's precedent—namely *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015)—when the Court of Appeals affirmed the trial court's decision granting summary judgment that the City of Sammamish conducted an adequate search despite evidence that affidavits filed by elected officials of the City of Sammamish were provided in bad faith?

B. Is review warranted under RAP 13.4(b)(4) to address a question of substantial public interest, where the Court of Appeals concluded the City has no obligation to conduct a

further search for public records when presented with evidence that a public official provided a *Nissen* affidavit in bad faith—a question not yet addressed by this Court?

IV. STATEMENT OF THE CASE

This case raises a fundamental unresolved issue under the PRA: what must an agency do to conduct an adequate search for public records when presented with evidence that its government officials acted in bad faith when searching for public records on their personal devices? In this case, the City of Sammamish chose not to take any action to enforce the PRA when presented with evidence that elected City councilmembers conducted City business on private devices but submitted affidavits in bad faith stating otherwise, and even tried to destroy such records.

Despite finding that there were disputed facts about whether at least one City official (Councilmember Treen) acted in bad faith, the Court of Appeals concluded that the City had met its burden to show that it conducted an adequate search under the PRA and had no further duty to search for records. But that decision either ignores the good faith requirement in *Nissen* or

grants the City a presumption of an adequate search when it relies on affidavits it knows were executed in bad faith.

The decision leaves the public without a remedy where bad faith affidavits and other evidence indicate that a government employee or official is withholding or destroying public records on private devices. In short, the Court of Appeals overemphasized the private rights of public employees and officials to the detriment of the public's right to know the content of public records, which are public property. RCW 40.14.020. The Court of Appeals decision conflicts with this Court's precedent in *Nissen* and also highlights a gap in Washington case law (not directly addressed in *Nissen*) about what the PRA requires when an affidavit is not submitted in good faith by public officials who use their private devices to conduct agency business. This case squarely presents that issue for resolution.

A. Factual Background

This case involves PRA requests submitted to the City of Sammamish by Ramiro Valderrama, a former Deputy Mayor

who served on the City Council for eight years. CP 1938. After he left office, Mr. Valderrama submitted multiple PRA requests to the City out of concern that City councilmembers serving in 2021 and 2022 were not engaging in an "open legislative process." CP 1938.

In particular, Mr. Valderrama was concerned that councilmembers were conducting City business through encrypted, external, and personal channels. Mr. Valderrama therefore submitted three related public records requests ("PRRs") (PRR 4241, 4244, and 4280), which asked for all communications councilmembers had through such channels. CP 16, 1939, 2883.

The City has policies instructing councilmembers to conduct City business only through authorized channels, and to forward to the City any communications received through other channels. CP 2881. But evidence in the record demonstrates that councilmembers were not complying with those policies at the time of Mr. Valderrama's PRRs, and that the City knew of this

noncompliance. *See e.g.*, CP 2881 (Michael Scoles during public comment stated he received confidential information from Councilmember Malchow and others, which Mr. Valderrama had not received in response to PRR); *see also* CP 2881–82. For example, one resident, Stephanie Rudat, testified during the public comment portion of a City Council meeting in May 2022 that she had information of thousands of encrypted City-related communications (WhatsApp texts and data) involving multiple councilmembers. CP 2881–82; CP 746. Ms. Rudat had already offered to show these messages to an attorney conducting an investigation for the City; that attorney declined the offer, and the City never requested the records. CP 2988–89.

Worse, as will be discussed more below, there is also evidence in the record of a culture of noncompliance with the PRA by City leadership, including the destruction of relevant records. CP 2519; CP 1808 (chief executive of the City Dave Rudat telling Councilmembers Malchow and Treen by text message: "Delete this email and all others with me, miki, etc.

Kimsey and some guy named c.m. cutter are requesting emails between miki and contractors, city council, attorneys, city staff . . . pass the word and delete . . .").

Moreover, while Mr. Valderrama's PRA request was pending, the City Council enacted a policy that violates the PRA on its face by acquiescing in a former official's refusal to submit a declaration that complies with *Nissen*. CP 1542–43. A city cannot meet its burden to demonstrate that it conducted an adequate search by adopting a policy that authorizes no search when an official declines to cooperate.

These issues became apparent in the City's response to the PRRs issued by Mr. Valderrama. Affidavits of Councilmembers Treen, Ross, and Moran were incomplete, insufficient, and/or contained false statements.[1] Although there are other examples

[1] *See* Appellant's Br. at 41–55 (discussing evidence of bad faith); CP 1334–35 (Councilmember Malchow's January 31, 2023 affidavit regarding PRR 4280 indicating she deleted unredacted versions of records); CP 146 (Councilmember Malchow's deposition testimony that one of her Nissen affidavits is not accurate) ("Q. Well, you didn't produce any WhatsApp, Signal, Slack or Telegram records in response to when you said you had

of bad faith regarding the *Nissen* affidavits by councilmembers, cited extensively in Petitioner's briefing to the Court of Appeals, this Petition focuses on Councilmember Treen in light of the Court of Appeals' discussion of Councilmember Treen's search for records in its decision.

---

provided all records, had you? A. No, because I had still -- no. I probably -- no, I hadn't."). *Compare* CP 1293 (Councilmember Ross's October 17, 2022 affidavit for PRR 4280 which does not identify Telegram account), *with* CP 1296 (Councilmember Ross's December 19, 2022 affidavit for PRR 4280 which admits he has a Telegram account). *Compare* CP 1302–03 (Councilmember Gamblin's January 29, 2023 affidavit for PRR 4280 indicating he does not use messaging platforms other than WhatsApp, Telegram), *with* CP 1869 (Scoles deposition testimony that Councilmember Gamblin communicated via Slack). *Compare* CP 1381 (Treen's May 30, 2023 affidavit for PRR 4241 stating he has not communicated with citizen Miki Mullor or Michael Scoles about City business through WhatsApp, Slack, Telegram and/or Facebook private messenger); CP 1386–87 (Councilmember Treen's May 30, 2023 affidavit for PRR 4244 stating has not communicated with Mullor, Scoles about City business through WhatsApp, Slack, Telegram and/or Facebook private messenger); CP 1396–97 (Treen's May 9, 2023 affidavit for PRR 4280 stating to the best of knowledge he did not communicate with citizens about City business through WhatsApp, Slack, Telegram, or Facebook Private Messenger), *with* CP 1869 (Scoles deposition testimony that he is "certain that Treen and Gamblin were on it," referring to Slack).

First, and most concerningly, there are sufficient facts in the record to show that Councilmember Treen acted in bad faith. The record contains a text message from then-City Manager Dave Rudat to Councilmember Treen stating, "Delete this email and all others with me, miki, etc., Kimsey . . . pass the word and delete . . ." because the records were being requested. CP 1808 (identifying Exhibit 3 to Treen deposition); CP 3138–39 (Treen deposition transcript identifying Exhibit 3). The City Council censured Councilmember Treen for "knowingly fail[ing] to report" this request "to violate the Washington State Public Records Act, chapter 42.56 RCW," but the City took no further action to identify, recover, and produce the records that the City Manager asked Treen to delete. CP 1811–12.

Second, Treen asked a City vendor for help "scrubbing" his cell phone. CP 1877–80. Treen later denied that this was true, CP 1882, but a sworn declaration of the vendor stated that "Councilmember Kent Treen approached me at the staff table and asked me for help 'scrubbing' his phone." CP 1876–77.

Treen refused to provide the City with his personal devices even though the City requested them, and the City again took no further action. CP 1882 (City's request to search phone); CP 99.

And finally, Treen falsely stated in multiple affidavits that he did not use personal devices for City business. CP 1377 (Treen's March 1, 2022 affidavit for PRR 4241 falsely stating he does not use any personal devices or accounts for City business); CP 1383 (Treen's March 1, 2022 affidavit for PRR 4244 falsely stating he does not use personal devices or accounts for City business); CP 1389 (Treen's March 1, 2022 affidavit for PRR 4280 falsely stating he does not use personal devices or accounts for City business). The record shows over 30 pages of text messages between Councilmembers Treen and Malchow, many of which were about City business. CP 2989 (letter); CP 2997–3031 (text messages).[2]

[2] CP 1869–72 (Scoles testimony he communicated with Treen via Slack); CP 1857–58 (email regarding City business sent to Treen's personal email account); CP 1823–55 (text messages between Treen and Malchow).

B. Procedural Background

Mr. Valderrama ultimately filed this lawsuit for violations of the PRA in March 2023, over a year after he submitted his request. CP 1. The City continued to produce records following the filing of the lawsuit. CP 1947–48.

The City filed a summary judgment motion seeking a dismissal of the suit on the ground that it had conducted an adequate search. CP 362. Conversely, Mr. Valderrama filed a motion for partial summary judgment that the City violated the PRA by failing to conduct an adequate search of the records. CP 1464, 1467. The trial court granted the City's motion and denied Mr. Valderrama's motion, CP 3231–45, and concluded that the City had conducted an adequate search, CP 3242–44.

In its written order, the trial court resolved multiple disputed factual issues in favor of the City regarding the existence of bad faith, even though the City was the moving party and also the party with the burden of proof under the PRA. *See* CP 3242–43 at ¶ 30 ("But the undisputed evidence shows that

the councilmembers updated their *Nissen* Declarations after obtaining new facts or clarifications and then conducting different searches. Even if the declarations initially lacked sufficient details, the declarants provided additional details to explain the efforts undertaken. The undisputed facts show that they were made in good faith."); CP 3243 ¶ 34; CP 3238–39 ¶ 19 (wrongly noting there is no dispute regarding material facts). The superior court's order also states that there is no allegation of record destruction, which was also not correct. CP 3238.

Mr. Valderrama appealed the trial court's order. The Court of Appeals upheld the trial court's summary judgment dismissal of Valderrama's claims and concluded that the City had met its burden to demonstrate it performed an adequate search under the PRA. *Valderrama v. City of Sammamish*, No. 86195-6-I, 2024 WL 5116865 (Dec. 16, 2024). In its decision, the Court of Appeals noted that there were disputed facts about Treen's conduct and whether his affidavit was made in bad faith: "In any event, Valderrama is correct that this evidence presents a

disputed issue of fact as to whether Treen sought to delete information from his cell phone." *Id.* at *6.

Nonetheless, the Court of Appeals concluded Valderrama was "incorrect that the disputed fact is material to whether the City conducted an adequate search." *Id.* The Court of Appeals held that the City was not required to do any further searching of Councilmember Treen's personal devices for public records even taking the evidence of bad faith as true: "Indeed, while our Supreme Court has not specifically addressed whether an agency suspecting bad faith must sue to forensically examine an employee's personal device, it has suggested that such an infringement on employees' privacy rights is unnecessary to conduct an adequate search." *Id*. at *7. The Court of Appeals relied exclusively on this Court's statements in *Nissen* that deference to a public employee in their search balances the interest employees have in personal devices with the public's interest in such information: "And, despite its imperfections, the

process strikes an acceptable balance between personal liberty and government accountability." *Id.*

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals Decision Conflicts With This Court's Precedent In *Nissen*. [RAP 13.4(b)(1)]

This Court should grant review because the Court of Appeals decision conflicts with this Court's precedent in *Nissen*, which states that a public entity can conduct an adequate search of personal devices for public records under the PRA if that employee provides a good faith affidavit of their search. *Nissen v. Pierce Cnty.*, 183 Wn.2d 863, 884–85, 888, 357 P.3d 45 (2015).

In *Nissen*, this Court rejected the contention that public records are beyond the reach of the PRA merely because a public official conducts public business on a private cell phone:

> Yet the ability of public employees to use cell phones to conduct public business by creating and exchanging public records—text messages, e-mails, or anything else—is why ***the PRA must offer the public a way to obtain those records.*** Without one, the PRA cannot fulfill the people's mandate to have

> "full access to information concerning the conduct of government on every level." Laws of 1973, ch. 1, § 1(11).

Id. at 884 (emphasis added).

Nissen identified a specific procedure to balance the public's interest in public records with an employee's privacy interest in a personal device: permitting officials to search their own devices and provide reasonably detailed affidavits. *See id.* This Court emphasized that such affidavits strike the requisite balance only when given in good faith: "When done in good faith, this procedure allows an agency to fulfill its responsibility to search for and disclose public records without unnecessarily treading on the constitutional rights of its employees." *Id.* at 886–87 (emphasis added).

Here, the Court of Appeals recognized that this case involves bad faith affidavits by elected officials. Indeed, the Court of Appeals recognized that Valderrama raised disputed facts regarding Councilmember Treen's bad faith concerning statements made in his affidavit: "In any event, Valderrama is

correct that this evidence presents a disputed issue of fact as to whether Treen sought to delete information from his cell phone." *Valderrama*, 2024 WL 5116865, at *6.[3]

Nonetheless, in the face of disputed facts about bad faith destruction of public records, the Court of Appeals concluded Valderrama was "incorrect that the disputed fact is material to whether the City conducted an adequate search." *Id.* The Court of Appeals reasoned the City had conducted an adequate search in spite of the bad faith, relying exclusively on this Court's statements in *Nissen* that deference to a public employee in their search balances the interest employees have in personal devices with the public's interest in such information. *Id.*

But the Court of Appeals glossed over *Nissen's* requirement that affidavits must be executed in <u>good faith</u> to strike that balance, and in doing so rendered meaningless the

[3] While the Court of Appeals focused on Treen, the record demonstrates many other instances of bad faith as well. *See* Appellant's Br. at 41–55 (describing misstatements in many *Nissen* affidavits and bad faith by multiple elected officials).

"good faith" requirement. *See Nissen*, 183 Wn.2d at 885. The Court of Appeals overweighted the private interest in personal devices to the detriment of the public's interest in records of its government: there is no privacy interest in public records, even when located on a personal device. *West v. Vermillion*, 196 Wn. App. 627, 638, 384 P.3d 634 (2016) (councilmember had no privacy interest in public records contained in personal e-mail account). Indeed, the requirement of good faith in the affidavit is necessary to ensure public records cannot be hidden or destroyed by government employees. The Court of Appeals' conclusion that no further action was needed by the City when bad faith is plainly demonstrated contradicts *Nissen*.

The Court of Appeals opinion further conflicts with *Nissen* because it can be read to allow agencies to avoid their burden to show an adequate search by granting a presumption that a city's search is compliant with the PRA when any affidavit is provided by an official using private devices to conduct city business, even when there is evidence that the affidavit was not made in good

faith. This completely undermines *Nissen*'s holding requiring good faith affidavits in the first instance. *See West v. City of Tacoma*, 12 Wn. App. 2d 45, 80–82, 456 P.3d 894 (2020). Review is warranted because the Court of Appeals opinion lessens the City's burden to demonstrate an adequate search as articulated in *Nissen* and other cases.[4]

B. The Court of Appeals Decision Presents an Issue of Substantial Public Interest. [RAP 13.4(b)(4)]

This Court should also grant review to address an issue of substantial public interest that *Nissen* left unanswered: what does the PRA require of an agency's search of personal devices when there is evidence that an employee or official's search was not

[4] Similarly, the need for this Court's review is further evidenced by the City's policy allowing it to close a records request after former City officials refuse or fail to submit a *Nissen* declaration. CP 1542–43. This procedure violates the PRA on its face and, if allowed in this case, could allow other agencies to avoid their duties to conduct adequate searches. *See Neighborhood All. of Spokane Cnty. v. Spokane Cnty.*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011) ("[A]gencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered" and must search locations records are "*reasonably likely* to be found." (emphasis in original)).

done in good faith. *Nissen* removed any doubt that the PRA "must offer the public a way to obtain those records." 183 Wn.2d at 884.

A public agency bears the burden to establish its search was adequate "beyond material doubt." *City of Tacoma*, 12 Wn. App. 2d at 80. "Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered." *Neighborhood All. of Spokane Cnty*., 172 Wn.2d at 720 (internal citations omitted). Such a search should be consistent with the PRA's purposes: "The stated purpose of the Public Records Act 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." *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

The Court of Appeals here concluded that a "forensic" search was not required, even though that issue was not before it

because the trial court granted the City's motion that its search was adequate. *See Valderrama*, 2024 WL 5116865, at *6. But the Court of Appeals likewise recognized the lack of precedent for what is required of a public agency when bad faith is suspected: "Indeed, while our Supreme Court has not specifically addressed whether an agency suspecting bad faith must sue to forensically examine an employee's personal device, it has suggested that such an infringement on employees' privacy rights is unnecessary to conduct an adequate search." *Id.* at *7.

Valderrama is not advocating for a forensic examination every time bad faith is suspected, but it is clear that the *Nissen* procedure, permitting government officials to search their own devices, is premised on government officials acting in good faith. *Nissen*, 183 Wn.2d at 886–87. When government officials do not act in good faith, and less intrusive means of conducting an adequate search fail, a forensic examination may become the only way to conduct an adequate search. In such a case, a forensic examination can be structured to safeguard privacy, just as is

routinely done in the context of civil litigation when public records are not at stake. *See Jones v. Riot Hosp. Grp. LLC*, 95 F.4th 730, 737–38 (9th Cir. 2024) (discussing protective order permitting review records obtained from forensic examination of phone for privilege and relevance); *Drueding v. Travelers Home & Marine Ins. Co.*, No. 22-CV-00155-LK, 2022 WL 17092736, at *6 (W.D. Wash. Nov. 21, 2022) ("Ms. Drueding's repeated misrepresentations and foot-dragging raise serious concerns about her future efforts to comply with discovery obligations in good faith and lead the Court to conclude that an independent forensic examination of her electronic devices is necessary and appropriate.") (citing multiple examples of forensic examinations including *Krishnan v. Cambia Health Sols., Inc.*, No. 2:20-CV-574-RAJ, 2021 WL 3129940, at *5 (W.D. Wash. July 23, 2021); *Lee v. Asplundh Tree Expert Co.*, No. C17-719-MJP, 2017 WL 6731978, at *2 (W.D. Wash. Dec. 29, 2017); *Ascar v. U.S. Bank, N.A.*, No. 2:13-CV-07496-DSF-VBK, 2014 WL 12639926, at *1 (C.D. Cal. Sept. 25, 2014)).

This Court must resolve the issue that it did not resolve in *Nissen*: what must be done to provide the remedy that the PRA requires when a city official does not comply with *Nissen's* requirement to submit an affidavit demonstrating a good faith effort to conduct a search that complies with the PRA. The PRA is an essential tool of this state's electorate to remain informed about its government, and both the legislature and our courts have recognized the substantial public interest in a liberal construction of the PRA. RCW 42.56.030 ("The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected."); *Wade's Eastside Gun Shop, Inc. v. Dep't of Lab. & Indus.*, 185 Wn.2d 270, 277, 372 P.3d 97 (2016) ("The PRA is a strongly worded mandate for disclosure of public records."); *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016) ("The PRA's primary purpose is to foster

governmental transparency and accountability by making public records available to Washington's citizens."); *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013) ("To preserve the PRA's broad mandate for disclosure, [we] construe[ ] its provisions liberally and its exemptions narrowly.").

VI. CONCLUSION

This Court should grant review to address a question of substantial public interest and to address the conflict between the Court of Appeals decision and this Court's decision in *Nissen*. Upon accepting review the Court should reverse, grant partial summary judgment to Valderrama for the reason the City did not conduct an adequate search, and remand to the trial court for further proceedings.

* * *

RAP 18.17(b) Certificate of Compliance with Word Limitations: The undersigned attorneys certify that this pleading contains 4,112 words, in compliance with RAP 18.17(c).

Respectfully submitted this 15th day of January, 2025.

FOSTER GARVEY PC

By *s/Patrick J. Schneider*
Patrick J. Schneider, WSBA No. 11957

By *s/Angelo Marchesini*
Angelo Marchesini, WSBA No. 57051

1111 Third Avenue, Suite 3000
Seattle, Washington 98101
Tel: (206) 447-4400
pat.schneider@foster.com
angelo.marchesini@foster.com

Attorneys for Petitioner
Ramiro Valderrama

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RAMIRO VALDERRAMA, Appellant, v. CITY OF SAMMAMISH, Respondent.	No. 86195-6-I PUBLISHED OPINION

BOWMAN, J. — Ramiro Valderrama sued the city of Sammamish (City), alleging that the City violated the Public Records Act (PRA), chapter 42.56 RCW, by failing to adequately search for and produce records of communications between council members and citizens stored on the council members' private devices. The trial court granted summary judgment for the City. Because the City shows it performed an adequate search under the PRA, we affirm.

FACTS

Valderrama is a former City council member. On January 6, 2022, he submitted a public records request (PRR) to the City, seeking communications between council members and citizens on "external channels" like "WhatsApp, Signal, Slack, Telegram, etc." Specifically, he requested "all communications from all Council Members since 2019 with Miki Mullor . . . and also Michael Scoles using any of these or similar WeChat etc. channels." The City identified Valderrama's request as PRR 4241. At that time, the following council members

were in office: Amy Lam, Kali Clark, Karen Howe, Kent Treen, Ken Gamblin, Christie Malchow, and Karen Moran.

Two days later on January 8, Valderrama submitted the same PRR but expanded it to include "telephone call logs" and "any correspondence with the wife of Miki Mullor." The City identified Valderrama's second request as PRR 4244. On January 13, the City notified Valderrama that the first installment of records related to PRR 4241 and PRR 4244 would be available by February 28, 2022.

Then, on January 28, 2022, Valderrama filed a broader request that included "all Council Members since 2018."[1] The next day, he amended the request. That request stated:

> Council Members have been using external channels for communication with citizens/residents including but not limited to: WhatsApp, Signal, Slack, Telegram, etc. I would like to receive copies of all communications and copies of telephone call logs/lists of calls made to citizens from all Council Members since 2019 with any resident using any of these or similar channels [including] WeChat etc. channels.

The City identified Valderrama's third request as PRR 4280. On February 4, the City notified Valderrama that a first installment of records related to PRR 4280 would also be available by February 28.

On February 28, 2022, the City e-mailed the current and former council members to notify them about Valderrama's requests and ask them to search their personal devices and accounts for responsive records, provide responsive

[1] By the January 28 request, council member Gamblin had resigned.

records to the City, and complete *Nissen*[2] affidavits. The City attached blank template affidavits to its e-mails.

The City then worked with its own attorneys and sought advice from outside counsel to adequately respond to Valderrama's requests. It communicated with Valderrama about the status of his requests and worked with the council members to obtain affidavits, clarify the scope of the requests, and answer related questions. The City's public disclosure officer attested that she worked "extensively with the City's attorneys to draft *Nissen* Declarations/Affidavits for former Council[ ]members . . . and then work[ed] with council[ ]members to customize and finalize [them]."

Between February and June 2022, the City produced five installments of affidavits and records responsive to PRRs 4241, 4244, and 4280. With each production, the City provided Valderrama status updates and estimated dates for further installments. In June 2022, Valderrama agreed that the City could close PRR 4241 because the remainder of the request was duplicative of PRR 4244. PRR 4244 and PRR 4280 remained open.

After June 2022, the City's installments for PRR 4244 slowed as it awaited outstanding affidavits from former council members Chris Ross and Gamblin. The City asked Ross and Gamblin several times to provide responsive records and execute affidavits. On November 30, 2022, Ross provided the City

[2] *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). Under *Nissen*, if an employee stores or is in control of agency records, they must submit an affidavit with sufficient facts showing withheld personal records are not public records under the PRA. *Id.* at 886.

his affidavit, explaining that he completed his search and found no responsive records. The City sent the affidavit to Valderrama that same day.

In January 2023, the City reminded Gamblin that he had not provided records or an affidavit and warned him that it may take legal action against him to obtain any public records. On February 6, 2023, Gamblin e-mailed the City his completed *Nissen* affidavit, asserting that he searched his personal devices and accounts and declaring that he provided all responsive records. The same day, the City sent the affidavit to Valderrama and closed PRR 4244.

As to PRR 4280, between June 2022 and March 2023, the City provided Valderrama rolling record installments at least once every month except for November[3] and February. The records included screenshots, voice mails, WhatsApp transcripts, and Facebook messages. The City also provided signed affidavits that council members produced as they completed their searches.

On March 2, 2023, Valderrama told the City that the only outstanding records were those from council member Treen. A week later, Valderrama requested updated affidavits from two other council members, and the City provided them. In late March, the City provided Valderrama an affidavit from Treen, explaining that he had turned over all responsive records.

Meanwhile, on March 9, 2023, Valderrama sued the City, alleging that it violated the PRA by failing to conduct an adequate search for his requested

[3] In October 2022, the City told Valderrama that it believed it had fulfilled his request and closed PRR 4280. But after receiving a letter from Valderrama's attorney asking the City to reconsider, the City reopened PRR 4280 in November.

records and failing to promptly make those records available for inspection and copying.

After Valderrama filed suit, the City continued to produce responsive records and affidavits as it received them. By November 2023, the City had provided Valderrama hundreds of responsive documents and 43 *Nissen* affidavits from former and current council members and other City staff.

In November 2023, the City moved for summary judgment dismissal of Valderrama's lawsuit, arguing that it conducted an adequate search for the requested records and provided Valderrama all public records responsive to his requests. Valderrama moved for partial summary judgment, asserting the City violated the PRA by failing to conduct an adequate search for the records. He argued that the evidence showed council members Gamblin, Malchow, and Treen executed their affidavits in bad faith and that the City should have sued the council members, and he sought "forensic examination of [their] devices and accounts." After oral argument, the trial court issued a written order granting summary judgment for the City and denying Valderrama's motion.[4]

Valderrama appeals.

ANALYSIS

Valderrama argues the trial court erred by granting summary judgment for the City because the City failed to conduct an adequate search for records

[4] In its order, the court notes that Valderrama conceded at oral argument that there were no outstanding issues with PRRs 4241 or 4244. The record on appeal does not include a transcript of oral argument, but we presume the trial court's documented concession is accurate. The City notes the concession in its response brief on appeal and Valderrama does not dispute the concession in his reply. As a result, we address Valderrama's arguments as they apply to only PRR 4280.

relevant to his requests. According to Valderrama, evidence showed that council members Gamblin, Malchow, and Treen executed their affidavits in bad faith and that the City "took no effective action to compel compliance with the PRA."[5] We disagree.

We review de novo a grant of summary judgment and engage in the same inquiry as the trial court.[6] *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). A court should grant summary judgment when, "viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *West v. City of Tacoma,* 12 Wn. App. 2d 45, 69, 456 P.3d 894 (2020). Neither mere allegations nor conclusive statements raise issues of material fact sufficient to preclude summary judgment. *Id.* at 70.

We also review agency actions under the PRA de novo. *Neigh. All.*, 172 Wn.2d at 715. The PRA "is a strongly worded mandate for broad disclosure of public records." *Id.* at 714. Its purpose is to provide "the public access to information about every aspect of state and local government." *Nissen*, 183 Wn.2d at 874. "We liberally construe the PRA to promote the public interest." *West,* 12 Wn. App. 2d at 70.

---

[5] For the first time on appeal, Valderrama and amicus curiae the Washington Coalition for Open Government argue that the City's public records policies violate the PRA. Because Valderrama did not make that argument below, we decline to address it. RAP 2.5(a) (we "may refuse to review any claim of error which was not raised in the trial court").

[6] Valderrama argues that the trial court did not correctly apply the law under the PRA, improperly resolved questions of fact, and misconstrued the record. Because we review a grant of summary judgment de novo, we need not reach these issues.

A "public record" is any writing containing information relating to government conduct "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). An agency's public records include its employees' work product so long as an employee prepares, owns, uses, or retains it "*within the scope of their employment*." *Nissen*, 183 Wn.2d at 877.[7] This includes work product located on personal devices like cell phones. *Id.*

Once an agency receives a request for public records, it must perform "an adequate search" for the records. *Nissen*, 183 Wn.2d at 885. Courts determine the adequacy of a search using a reasonableness standard that depends on the facts of each case. *Neigh. All.*, 172 Wn.2d at 720. An agency's search must be more than perfunctory. *Id.* It must be "reasonably calculated to uncover all relevant documents." *Id.* Still, an agency need search only those places where a responsive record is "*reasonably likely*" to be found, not "*every* possible place a record may conceivably" exist. *Id*.

An agency bears the burden of showing beyond material doubt that it conducted an adequate search. *Neigh. All.*, 172 Wn.2d at 720-21. When reviewing an agency's search, we focus on whether the search was adequate, not on whether unproduced responsive documents exist. *Id.* at 719-20; *see also West,* 12 Wn. App. 2d at 79 ("the mere fact that a record is eventually found does not itself establish the inadequacy of an agency's search"). "We review the scope of [an] agency's search as a whole." *West,* 12 Wn. App. 2d at 79.

[7] Emphasis added.

If an employee stores or is in control of agency records, we must interpret the PRA to balance the employee's privacy rights with the public's interest in government accountability. *See Nissen*, 183 Wn.2d at 884. So, the onus remains with an agency to perform an adequate search for records, but the "agency employees are responsible for searching their files, devices, and accounts for records responsive" to a PRA request. *Id*. at 885-86. Employees must produce responsive public records to the employer agency, and the agency then determines whether any of the records are exempt from production and discloses the records to the requestor. *Id.* at 886.

"To satisfy the agency's burden to show it conducted an adequate search for records, we permit employees in good faith to submit 'reasonably detailed, nonconclusory affidavits' " about the "nature and extent of their search." *Nissen*, 183 Wn.2d at 885 (quoting *Neigh. All.*, 172 Wn.2d at 721). The affidavit must explain why withheld information is not a "public record" under the PRA. *Id.* at 886. "So long as the affidavits give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive, the agency has performed an adequate search under the PRA." *Id.* When done in good faith, this procedure allows an agency to satisfy its duty to search for and disclose public records without unnecessarily infringing on its employees' constitutional rights. *Id.* at 886-87. An agency's affidavits are entitled to a presumption of good faith. *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 867, 288 P.3d 384 (2012).

Here, after receiving Valderrama's PRA requests for council members' communications using "external channels," the City determined that responsive records were likely located on current and former council members' private devices. So, the City contacted current and former council members who were in office during the time relevant to Valderrama's requests and informed them of each PRR. It asked the council members to conduct "adequate searches" of their personal devices and accounts for responsive records, provide responsive records, and complete *Nissen* affidavits describing the nature and extent of their searches. It told the council members that under the guidelines of the Municipal Research and Services Center, which cites *Nissen*,

> "[t]he affidavit must be 'reasonably detailed' and 'nonconclusory,' and should describe the accounts, devices and locations searched and the names and search terms used to locate responsive records."

The City then provided Valderrama rolling installments of responsive records as it received them from council members, maintaining frequent contact with Valderrama to answer his questions and give production updates. And when council members did not respond to the City's requests, it followed up and continued to ask for records, even warning some council members that it may take legal action if they failed to search for and provide responsive records and an affidavit.

As council members completed their searches, they sent the City responsive documents and executed *Nissen* affidavits explaining the nature and extent of their searches and why withheld documents were not responsive to the PRRs. For example, in council member Gamblin's January 2023 affidavit, he

explained that he searched his WhatsApp and Telegram applications on his personal phone for "messages . . . with Sammamish residents, related to [C]ity business." He conducted the search by reviewing "all of the chat sessions" with Sammamish residents and "messages sent or received" during his term. He also attested he reviewed Facebook and Facebook Messenger for responsive records and did not find any related to City business, but he was continuing to search those applications. He later testified that he had provided all responsive records. Gamblin certified that any records withheld "are either personal in nature . . . or are not responsive to the relevant request."

Council member Malchow submitted four affidavits describing her searches related to PRR 4280. She testified that she made copies of all the responsive public records she found on encrypted applications accessible to her and provided them to the City. She did this by "opening the [application]," "taking screenshots" of conversations, and redacting information unrelated to City business. The City later asked Malchow to provide the records unredacted. But by then, Malchow had deleted several of the records from her laptop and had trouble retrieving them. So, in a subsequent affidavit, she described how she contacted WhatsApp, Apple, and another council member for help and was ultimately able to recover "about 2/3 of [those] records." She attached the responsive records to her affidavits and certified that any withheld records are "either personal in nature . . . or are not responsive to the relevant request."

Finally, council member Treen submitted three affidavits related to PRR 4280. In a March 2023 affidavit, Treen testified that he searched his personal

devices and accounts, including Telegram and WhatsApp. And he specified that his search included terms like "city of Sammamish, "town center," and "STCA."[8] In a subsequent affidavit, Treen added that he also searched Slack and Facebook Messenger for records, where he reviewed the content of his message threads individually but did not find messages related to City business. Rather, the messages were related to family matters, campaign matters, or his capacity as a Sammamish resident. Treen attested that to his recollection, he had not communicated with citizens about City business through WhatsApp, Slack, Telegram, or Facebook Messenger. He certified that any records withheld "are either personal in nature . . . or are not responsive to the relevant request."

The record shows that the City timely responded to Valderrama's PRRs and promptly sought responsive records from those current and former council members most likely to possess them. The City then provided Valderrama all responsive public records received from the council members as well as reasonably detailed, nonconclusory affidavits showing the nature and extent of those searches and explaining why certain records were not responsive to the requests.

Still, Valderrama contends that the City's search was inadequate. He argues evidence shows that council members Gamblin, Malchow, and Treen executed their affidavits in bad faith and that the City "took no effective action to

[8] STCA LLC is a land developer with many projects in the City.

compel compliance with the PRA."[9]

As to Gamblin and Malchow, Valderrama fails to show evidence of bad faith. Valderrama argues that Gamblin executed his affidavit in bad faith because he delayed responding to the City's search request and did not search his Slack account for responsive documents. But Valderrama fails to explain how Gamblin's delay in responding to the City amounts to bad faith. And he points to no evidence that Gamblin used his Slack account for City business.[10]

Valderrama alleges that Malchow acted in bad faith because text messages from 2020 "show she intentionally used encrypted applications to keep her communications secret" and intentionally deleted public records. But Malchow's stated reasons for using encrypted applications are not evidence that she searched for responsive documents to Valderrama's PRR in bad faith. And the evidence does not support the argument that Malchow intentionally deleted responsive records. Instead, Malchow explained that she timely provided all responsive records in redacted form. Then, after "a substantial amount of time" had passed, she deleted records from her laptop because its storage disc was "full." Even so, Malchow was able to retrieve about 2/3 of those documents and

[9] Valderrama also challenges in passing several other council members' affidavits as technically deficient. But he does not support his argument with citations to legal authority and analysis, so we do not address those claims. RAP 10.3(a)(6); *see also West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (when an appellant fails "to present developed argument for our consideration on appeal," we do not address the challenge).

[10] Valderrama also alleges Gamblin told a former colleague that he could manipulate depositions by feigning a lack of memory. But again, Valderrama fails to explain how that amounts to evidence Gamblin executed his *Nissen* affidavits in bad faith.

provide them in unredacted form. Valderrama offers no evidence that Malchow redacted responsive information or deleted responsive records in bad faith.

Finally, Valderrama says evidence shows that council member Treen executed his *Nissen* affidavits in bad faith. Valderrama points to a City information technology (IT) employee's testimony that Treen "asked him for help 'scrubbing' his phone" in February 2023, about three months before Treen executed his last affidavit.[11] Treen claimed in deposition testimony that the request was to obtain information from his City-issued phone, not to delete information from his personal cell phone. In any event, Valderrama is correct that this evidence presents a disputed issue of fact as to whether Treen sought to delete information from his cell phone. But he is incorrect that the disputed fact is material to whether the City conducted an adequate search.

Valderrama insists that the evidence suggesting Treen may have acted in bad faith compelled the City to take additional action to ensure Treen complied with the PRRs. Specifically, Valderrama suggests the City should have sued Treen to forensically examine his cell phone. But the City did take additional action to confirm that Treen responded fully to Valderrama's requests. It asked Treen if he would allow the City's IT director to search his private devices and accounts for public records responsive to outstanding PRRs. But Treen refused. And Valderrama cites no authority suggesting that to conduct an adequate

[11] Valderrama also points to a 2020 message that the then-City manager sent to Treen directing him to delete e-mails and the City's failure to require Treen to disclose those records as evidence of bad faith. But Valderrama did not include e-mails as requested documents in his PRRs. *See Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 81-82, 514 P.3d 661 (2022) (a party seeking records under the PRA must identify the documents with reasonable clarity).

search for public records, an agency must sue its employee to forensically search their private devices for public records. *See State Constr., Inc. v. City of Sammamish*, 11 Wn. App. 2d 892, 906, 457 P.3d 1194 (2020) ("Where a party fails to cite to relevant authority, we generally presume that the party found none.").

Indeed, while our Supreme Court has not specifically addressed whether an agency suspecting bad faith must sue to forensically examine an employee's personal device, it has suggested that such an infringement on employees' privacy rights is unnecessary to conduct an adequate search. In *Nissen*, our Supreme Court recognized that its procedure for obtaining public records from employees' private devices "might be criticized as too easily abused or too deferential to employees' judgment." 183 Wn.2d at 887. But it reasoned that the procedure is not uniquely deferential because "an employee's judgment would often be required to help identify public records on a cell phone, even in an in camera review." *Id*. And, despite its imperfections, the process strikes an acceptable balance between personal liberty and government accountability. *See id.* at 884.

Because the record shows that the City conducted an adequate search for records responsive to Valderrama's requests, we affirm the grant of summary judgment for the City.

Valderrama also seeks attorney fees on appeal under RAP 18.1(a) and the PRA. Under RAP 18.1(a), we may award attorney fees on appeal if

"applicable law grants to a party the right to recover reasonable attorney fees."

And RCW 42.56.550(4) provides, in relevant part:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

A party "prevails" and is entitled to fees "when an agency wrongfully refuses to disclose or produce requested records." *See Neigh. All.*, 172 Wn.2d at 728.

Because the City conducted an adequate search and it did not wrongfully withhold records, Valderrama did not prevail on appeal and is not entitled to attorney fees.

We affirm summary judgment for the City.

Brennan, J.

WE CONCUR:

Chung, J.

Dwyer, J.

FOSTER GARVEY PC

January 15, 2025 - 2:33 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Ramiro Valderrama, Appellant v. City of Sammamish, Respondent (861956)

The following documents have been uploaded:

- PRV_Petition_for_Review_20250115143231SC220400_1273.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- angelo.marchesini@foster.com
- bill@billcrittenden.com
- jendejan@gmail.com
- klester@omwlaw.com
- lesliehunterboston@outlook.com
- pabbey@omwlaw.com

Comments:

Sender Name: Nikea Smedley - Email: nikea.smedley@foster.com
Filing on Behalf of: Patrick John Schneider - Email: pat.schneider@foster.com (Alternate Email: litdocket@foster.com)

Address:
1111 Third Avenue, Suite 3000
Seattle, WA, 98101
Phone: (206) 447-4400

Note: The Filing Id is 20250115143231SC220400