48601-6-II
NO. 90912-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Respondent,

v.

STEVE VERMILLION AND CITY OF PUYALLUP,

Petitioners.

BRIEF OF PETITIONER CITY OF PUYALLUP

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I. INTRODUCTION

The City of Puyallup, Defendant below and Petitioner herein, acknowledges fully that the people of Washington do not give public agencies the right to determine "what is good for the people to know." RCW 42.56.030. Accordingly, the Public Records Act (PRA), chapter 42.56 RCW, is an appropriately strong mandate for disclosure of public records. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). In bringing this appeal, the City does not ask this Court to question, weaken, or diminish the importance of PRA or its end goals of governmental transparency and accountability. The City merely urges this Court to consider other important, and at times countervailing, interests: the rights of privacy, free speech, and political association guaranteed to all citizens by the U.S. and Washington Constitutions.

Council member Vermillion has asserted his right to maintain a personal website and e-mail address to receive and send communications in his capacity as an elected representative and "politician." This Court has never interpreted the PRA to reach records Council member Vermillion has in his sole possession: communications concerning political activities and private communications with his constituents, which no public agency has reviewed or possessed.

Furthermore, Council member Vermillion has asserted that the communications associated with his personal website are his "personal papers" and are constitutionally protected, and on that basis has declined to make the materials available to the City. Therefore, the unresolved question from *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010), is directly implicated. In *O'Neill*, the five-member majority expressly assumed that Deputy Mayor Fimia would voluntarily consent to a search of her home computer. *Id.* at 150 n.4. The four-member dissent, on the other hand, sided with constitutional rights, stating:

> I dissent because I do not believe that what is contained on the hard drive of a public employee's personal home computer, whether it is deemed "metadata" or something else, is a public record. That seems obvious since what is on the hard drive of an employee's computer is not a writing that is "retained by any state or local agency." More significantly, the majority provides no authority of law for the proposition that a city employee's home computer is subject to such a search or inspection by the employing city. In my opinion, the home computer hard drive is not subject to search or inspection by the City without permission of the employee.
>
> My views on this subject are prompted to a great extent by the fact that the hard drive on an individual's home computer very likely contains personal information. That information is not public, and the private nature of it would necessarily be compromised by an "inspection" or "search" of the sort the majority orders. Even if by some stretch it can be said that an employee's computer hard drive is a public record, the disclosure of it should be precluded pursuant to RCW 42.56.050,

> which prohibits a records requester from obtaining such a record if it "[w]ould be highly offensive to a reasonable person."
>
> Because a public employee, including an elected official like Fimia, would be well within his or her rights to refuse an inspection or a search by the employer of his or her home computer, the employee's privacy right trumps any direction to the public employer to examine the hard drive of the employee's home computer. Therefore, the City should not, as the majority holds, be held to have violated the Public Records Act (PRA), chapter 42.56 RCW, by failing to conduct an impermissible search or inspection.

Id. at 155-56 (citations and footnotes omitted).

In light of the constitutional issues at stake, the City sees two paths to resolve this case: (1) interpret the PRA's definition of "public record" in a manner that does not reach records Council member Vermillion has in his sole possession; or (2) confront the unresolved question from *O'Neill*—whether a Council member's assertion of constitutional privacy rights "trumps" the PRA.

Whatever path the Court chooses, the City urges the Court to acknowledge that even if constitutional rights overcome the PRA in isolated cases, state law still strongly safeguards the public's right to information about government. Moreover, simple legislative fixes could fill any perceived gaps in the PRA while ensuring that constitutional rights are respected.

II. ASSIGNMENTS OF ERROR

The City asserts the following assignments of error in the trial court decision issued on July 25, 2014, by The Honorable Stanley J. Rumbaugh of Pierce County Superior Court:

1. The trial court erred when it granted partial summary judgment in favor of the Plaintiff, based on the finding that communications associated with Council member Vermillion's personal website are "public records."

2. In determining that communications associated with Council member Vermillion's personal website are public records if they "are related to the public's business," or "concern his role in city governance, are related to communications with the Council and Mayor, and are related to his membership on the Council," the trial court erred by employing an overly-broad reading of the PRA.

3. The trial court erred in finding that the PRA requires public agencies to disclose communications between elected officials and constituents, when those communications have not been forwarded, shared with the agency, publicly discussed or cited in conjunction with agency action.

4. The trial court erred by sweeping within the ambit of "public record" (1) communications related to the Council member's "political

activities;" and (2) communications revealing constitutionally-protected political associations.

5. The trial court erred in finding that e-mails that are solely in the possession of an elected Council member must be produced when the Council member has asserted his constitutional privacy rights under the Fourth Amendment to the U.S. Constitution and article I, section 7 of the Washington Constitution.

6. The trial court erred in failing to recognize that ample safeguards preserve the vital interests of governmental transparency and accountability, even if the communications solely possessed by a Council member are not produced to the public, and that the Legislature is the appropriate body to fill any perceived gaps in the PRA.

III. STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Whether the trial court erred when it granted partial summary judgment in favor of the Plaintiff, based on the finding that communications associated with Council member Vermillion's personal website are "public records."

2. Whether communications associated with Council member Vermillion's personal website and e-mail account are public records simply

by virtue of being "related to the public's business," or because they "concern his role in city governance, are related to communications with the Council and Mayor, and are related to his membership on the Council," without satisfying the entire statutory definition of a public record.

3. Whether the PRA requires public agencies to disclose communications between elected officials and constituents, when those communications have not been forwarded, shared with the agency, publicly discussed or cited in conjunction with any agency action.

4. Whether the State law requirement that elected officials exclusively use personal websites and e-mail for communications related to their "political activities" removes such communications from the definition of public record.

5. Whether the First Amendment rights of elected officials and constituents to associate and communicate privately remove such communications from the definition of public record.

6. Whether an elected official's assertion of his constitutional privacy rights "trumps" the PRA in this case.

7. Whether ample safeguards preserve the vital interests of governmental transparency and accountability, even if materials associated

with a Council member's personal website and e-mail account are not produced to the public.

8. Whether the Legislature could amend the PRA to better promote the laudable goal of governmental transparency while still respecting constitutional rights.

IV. STATEMENT OF THE CASE

Council member Steve Vermillion was elected as a Council member for the City of Puyallup in November 2011, and took office on January 1, 2012. CP 29. In 2009, prior to taking office, he created a personal website and e-mail account. CP 69. Council member Vermillion uses the website for "political activities," including his campaigns for state legislature and City Council, and "to coordinate with other candidates for city council." CP 69-70. He also uses the website and personal e-mail account for civic activities including his membership in a Vietnam veterans' association. CP 70.

In the past, Council member Vermillion has posted information about current City projects on his website in an attempt to keep citizens informed. CP 20. He has used his website to encourage citizens to call or meet with him with questions and concerns. *Id.* ("If you have questions, concerns, or just want to "chat," please contact at your pleasure. I will not

have formal office hours at City Hall but do have an office and meeting space where we can sit down and talk. I am happy to come to your home, a group meeting or whatever and talk. And I am more than happy to do a site walk with you if you have a road, drainage, or other property problem that falls within the City's scope.").

Council member Vermillion's constituents "infrequently" contact him through the personal e-mail account associated with his website. CP 70. Most of these e-mails come from people who want to communicate only with him. *Id.* ("Usually, however, such correspondence is meant only for me as an elected representative and does not require any response from the City."). If Council member Vermillion receives an e-mail through his personal account that requires City involvement, he forwards the message to City staff. CP 70 ("If any such e-mail requires an official response from or action by the City of Puyallup, I will forward it to the appropriate person at the City. Once I forward the email, I regularly delete the e-mail from my account.").

Like all Council members, Council member Vermillion has a city-issued e-mail account, which he uses for communications concerning agency business. CP 70 ("I use my city e-mail account to conduct city business."). The City's website advertises his city-issued e-mail address as

the means of contacting Council member Vermillion. *See* http://www.cityofpuyallup.org/government/puyallup-city-council/at-large-steve-vermillion/. If Council member Vermillion forwards any e-mails to the City for follow-up, those communications are retained on the City's servers and available for disclosure. CP 192-93; *see Mechling v. City of Monroe*, 152 Wn. App. 830, 851, 222 P.3d 808 (2009) (e-mails from Council members' personal e-mail accounts that are forwarded to the City are public records). The City has agreed to produce to Mr. West all the forwarded e-mails. CP 192-193.

City policy prohibits Puyallup employees from using any personal e-mail address, cell phone, or personal technology for work-related communications. CP 25 ("City employees or volunteers shall not use personal technology resources or third party technology resources to perform City business, including electronic or digital communication, or to access or interface with City technology resources, and shall refrain from commingling personal data files or third party data files with City data files."). As the trial court found, the Policy applies only to staff members, not to elected officials. CP 184.

On or about August 1, 2013, Plaintiff Arthur West made a public records request, subsequently clarified to be for "the communications

received or posted by Mr. Vermillion at or on his website" concerning the City of Puyallup. CP 40-42. The City indicated to Mr. West that its ability to respond would depend on a ruling from the Court, given that the records were not within the City's possession or control. CP 14. The requestor filed suit on January 24, 2014.

The parties filed cross motions for summary judgment in the trial court. Judge Rumbaugh heard oral argument on June 6, 2014, and on July 25, issued a written ruling which orders Council member Vermillion to produce responsive e-mails "under penalty of perjury." CP 185. The trial court broadly interpreted the PRA to require disclosure of all materials that concern the "public's business," or "concern [Council member Vermillion's] role in city governance, are related to communications with the Council and Mayor, and are related to his membership on the Council." CP 184.

The essence of the trial court ruling is that Council member Vermillion has no right to withhold any communications the trial court assumed were "public records." CP 183 ("The unlawful search and seizure provisions of the Fourth Amendment are not violated because there is no reasonable expectation of privacy in communications by a public official when the communications are related to the public's business."); CP 184

("Consequently, because Plaintiff is not seeking private information, no article I, section 7 violation is present."); CP 185 ("Otherwise, the public has a right to inspect, examine, or copy the records that are public, even though they are located on a private computer.").

Given that Vermillion's constitutional rights would be mooted by disclosure of the records, the court certified the case under CR 54(b). CP 185 ("Production of records in response to Plaintiff's records request would moot the constitutional and other issues, including the right to privacy and association, asserted by Defendants."). The Defendants sought direct review in this Court.

V. ARGUMENT

A. Summary of argument

The PRA definition of "public record" includes only "writings" relating to the "conduct of government or the performance of any governmental or proprietary function" that are "prepared, owned, used, or retained" by an agency. RCW 42.56.010(3). In ordering a Council member to produce records from his personal website and e-mail account, which no "agency" prepared, owned, used, or retained, the trial court interpreted the PRA in an overly-broad manner.

The court also discounted Council member Vermillion's sworn statement that his website and personal e-mail account contain materials related to his "political activities," which by law cannot be public records, and took too lightly the Council member's assertion of First Amendment rights. CP 154 ("How does a constituent writing a public official related to a public matter enjoy any reasonable expectation of privacy in that communication?"). The PRA should not be interpreted so broadly as to violate or chill important First Amendment rights to free speech and association.

Moreover, the PRA should not be interpreted so broadly as to penalize a public agency on account of an elected official asserting his constitutional rights to privacy rights under the Fourth Amendment to the U.S. Constitution and article I, section 7 of the Washington Constitution. The trial court's means of avoiding an unconstitutional search of a private e-mail account—order the Council member himself to produce the records and hold the City liable for his noncompliance—is as unworkable as it is unconstitutional.

The essence of the trial court's ruling is that the public's admittedly crucial interest in open government "trumps" constitutional rights. But this Court has ruled the opposite. *Freedom Foundation v. Gregoire*, 178

Wn.2d 686, 692, 310 P.3d 1252 (2013) ("We have recognized that the PRA must give way to constitutional mandates."); *see also City of Seattle v. Egan*, 179 Wn. App. 333, 335, 317, P.3d 568 (2014) (the PRA "is a legislatively created right of access" not "a general constitutional right of access"). The City urges the Court to acknowledge that protection of constitutional rights in specific contexts will not sound the death knell for open government. Existing safeguards are strong, such that individual constitutional rights can be respected without hindering the ability of the citizenry to monitor their government. Moreover, simple legislative fixes could maintain and strengthen governmental transparency while ensuring that constitutional rights are respected.

B. The PRA should be interpreted so as not to treat records in Council member Vermillion's sole possession as "public records."

A document is a "public record" only if it (1) contains information related to the "conduct of government or the performance of any governmental or proprietary function" and (2) was "prepared, owned, used, or retained by any state or local agency." RCW 42.56.010(3); *Sperr v. City of Spokane*, 123 Wn. App. 132, 136, 96 P.3d 1012 (2004). Each of these elements "must be satisfied for a record to be a public record." *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 444,

161 P.3d 428 (2007); *see also Seeber v. Pub. Disclosure Comm'n*, 96 Wn.2d 135, 141, 634 P.2d 303 (1981) (where a disclosure request exceeds the bounds of the statute under which the request is made, the person subject to the request has no duty to disclose more than the plain language of the statute requires).

The PRA's definition of "public record" leaves ample room to find that the communications associated with Council member Vermillion's personal website and e-mail account—which were never forwarded, shared with the agency, publicly discussed or cited in support of any agency action—are not "public records."

First, an e-mail exchange between an individual Council member and a constituent is not "prepared" by an agency. The PRA's broad definition of "agency" does not include individual elected officials. *See* RCW 42.56.010(1) (defining "agency"); *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) (narrowly construing "agency" to exclude courts, when law does not expressly include "courts" as agencies).

Not only are individual elected officials not legislatively defined as "agencies," but in reality they do not, and cannot, function as agencies. Standing alone, individual Council members have no authority to take any action on behalf of the agency. 4 EUGENE MCQUILLIN, MUNICIPAL

CORPORATIONS § 13.01, at 803 (3d ed. 2002) ("A public corporation may act only as a body, properly convened and functioning as such; separate individual action of its members is ineffectual."); RCW 35A.12.120 ("The passage of any ordinance, grant or revocation of franchise or license, and any resolution for the payment of money shall require the affirmative vote of at least a majority of the whole membership of the council."); chapter 42.30 RCW (confining city council "action" to open public meetings and voiding actions that do not comply). As individuals, Council members represent the citizens; only acting as a body can the Council members act on behalf of the "agency."

Following the same logic, an e-mail exchange between a lone Council member and a constituent is not "owned" by the City. *See West v. Thurston Cnty.*, 168 Wn. App. 162, 275 P.3d 1200 (2012) (attorney invoices sent directly from County attorney to County insurer not "owned" by the County and therefore not public records). Nor is the e-mail "retained" by the City if it never occupies agency servers. *Id.*; *O'Neill*, 170 Wn.2d at 155, Alexander, J., dissenting ("That seems obvious since what is on the hard drive of an employee's computer is not a writing that is "retained by any state or local agency.")

Furthermore, the City has not "used" e-mail exchanges between individual Council members and their constituents when those e-mails were never forwarded, shared with the agency, discussed in any public meeting or cited in conjunction with any agency action. *See Concerned Ratepayers Ass'n v. Pub. Util. Dist.*, 138 Wn.2d 950, 959, 983 P.2d 635 (1999) (A record not possessed by a public agency is "used" by that agency if it is "made instrumental to an end or purpose" and has a "nexus" with the agency's decision-making). Council member/constituent e-mails that remain in the sole possession of a Council member lack a direct nexus with agency action.

Finally, the Legislature has confined the definition of "public record" to materials relating to the "conduct of government or the performance of any governmental or proprietary function." RCW 42.56.010(3). The City asks the Court to consider how communications between an individual elected official and a citizen—when those communications are never forwarded, shared with the agency, discussed publicly, or cited in conjunction with agency action—relate to the "conduct of government or the performance of any governmental or proprietary function."

In summary, the PRA's existing definition of "public record" can be read so as not to reach communications between a lone Council member

and his constituents. The Legislature could have chosen to include materials "sent, received, or reviewed by any elected official" among the types of records considered to be "public records," but it did not. Instead the Legislature used the phrase "conduct of government or the performance of any governmental or proprietary function" and required that an agency have prepared, owned, used, or retained the record. As discussed in more detail below, the PRA's definitions could potentially be amended to fill any perceived gaps in the existing law, but that is for the Legislature, not the courts.

C. When state law prohibits a Council member from using public resources for communications, such communications cannot be public records.

The Washington State Fair Campaign Practices Act categorically forbids elected officials from using any agency resources, including e-mail, for "political activities." *See* RCW 42.17A.555. The law unambiguously commands:

> No elective official . . . may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency.

See also PUBLIC DISCLOSURE COMMISSION, GUIDELINES FOR LOCAL GOVERNMENT AGENCIES IN ELECTION CAMPAIGNS, 9 (2013) available at, *http://www.pdc.wa.gov/archive/guide/pdf/04-02Revised052213.rev.pdf*

(A local elected official "May engage in political activities on his or her own time, if no public equipment, vehicle or facility is used," but "Shall not use public facilities or resources to engage in political activities."). Because of this mandate, elected officials *must* maintain personal e-mail accounts for any communications related to their own campaigns, the campaigns of others, ballot measures and other election-related matters. Thus, there is nothing inherently suspicious about an elected politician maintaining a personal website and e-mail account while in office; state law effectively requires it.

Due to the requirements of the Fair Campaign Practices Act, treating e-mail exchanges concerning an elected politician's activities as "public records" would be an absurd result. *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002) (laws must be harmonized to avoid absurd results). Elected officials would be prohibited from using public resources for such communications, but simultaneously required to disclose them to the public.

Council member Vermillion stated under oath that he uses his personal website for communications he cannot use agency resources to generate or receive. CP 69 ("Originally, this website and account were used for my unsuccessful campaign for the State House of Representatives in 2010"); CP 70 ("In 2011, I began using the website and associated e-mail account for my campaign activities related to my current city council position . . . . In 2013, I used the e-mail account to coordinate with other candidates for City Council."). Such a practice is in perfect alignment with the mandates of Washington law.

In this case the trial court conceded that Council member Vermillion's "political" e-mails may not be public records. But any ruling that applies the statutory definitions so broadly as to reach any communication "related" to an "agency" or to the "public's business" has the potential to sweep political communications within its ambit. Moreover, it may be quite difficult for elected officials—and impossible for unwary constituents contacting them—to separate "political" discourse from discussions "relating to the public's business" or to a Council member's "role on the Council;" communications will inevitably be commingled. In responding to a records request, an agency may be unable to redact the election or campaign-related information from the record.

Mechling, 152 Wn. App. 830. This is an additional reason why it is important not to interpret the PRA in such a broad manner as to potentially reach *all* Council member communications that somehow relate to the business of the agency.

D. The PRA must be interpreted in a manner that does not chill the right to political association.

1. The constitution protects the right to associate privately for political purposes

The First and Fourteenth Amendments to the U.S. Constitution protect the right of elected officials to associate privately for political purposes. *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed.2d 659 (1976) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.") (citation omitted). U.S. Supreme Court opinions have collectively protected:

> [F]reedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses the right to associate with the political party of one's choice.

Id. (citations omitted); *see also Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 465-67, 97 S. Ct. 2777, 53 L. Ed.2d 867 (1977) (politician's activities are private records and forced disclosure could violate First Amendment rights).

Washington Courts have also acknowledged and protected rights of association. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990); *Eugster v. City of Spokane*, 121 Wn. App. 799, 807, 91 P.3d 117 (2004) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."); *State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014) ("Awareness that the Government may be watching chills associational and expressive freedoms."). "Correspondence" between elected city council members and their constituents is protected association. *Eugster*, 121 Wn. App. at 808 (including "correspondence regarding political activities" within ambit of protected documents).

Here, the trial court found that only "lists" of political associates—not communications with those associates—enjoy First Amendment protections. CP 173 (citing "contribution lists, supporter lists, membership lists for political organizations" as protected political associations, and stating "None of Mr. West's requests fall into this category."). This leads to a paradoxical holding: lists of associates would not be publicly available, but all the Council member's communications with those associates would be. Broader protection is needed to preserve freedom of association. *See Eugster*, 121 Wn. App. at 808 (extending First Amendment protection to

"communications about various political issues to political candidates, officials, and media organizations.")

The trial court further suggested that Council member Vermillion should simply disclose all his e-mails and claim exemptions for materials he considers protected by his associational rights. CP 158 ("And if he thinks there are issues that relate to constituent communications that are subject to an associational nondisclosure, he can list them and cite the exemption which is required by RCW 42.56.520.") Such a rationale is unworkable for two reasons. First, as argued above, individual "political" e-mails that are not forwarded, shared with the agency, publicly discussed or cited in conjunction with agency action should not be treated as public records the first instance; thus, they are not subject to disclosure to the agency, to the public, to the Council member's political rivals, to anyone.

Second, requiring an elected official to disclose in an exemption log communications that are protected by associational rights could waive those rights. *See Rental Housing Assoc. v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009) (setting forth components of exemption log). Simply enumerating the communications in an exemption log would unconstitutionally disclose a "list" of those associations, unless the information in the exemption log were so limited as to be of no use.

2. The trial court's ruling chills associational privacy

A broad ruling that forces public disclosure of all Council member/ constituent communications—even those intended to be private—would chill the associational rights of elected officials and their constituents. *Eugster*, 121 Wn. App. at 809 ("Such requests create a potential chilling effect on Metropolitan's First Amendment rights, as well as the rights of those elected officials the Developer requested information about."). Interpreting the PRA in a manner that respects rather than chills constitutional rights will necessarily require the exclusion of a Council member's individual communications with constituents from the ambit of "public record"—but again, only when those communications are not forwarded, shared with the agency, publicly discussed or cited in conjunction with any agency action, or have a direct nexus with agency action in some other manner.

All governmental limitations on political speech are disfavored by this Court, and must be authorized by a "narrow and precise statute" in order to be constitutional. *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 503, 166 P.3d 1174 (2007). This constitutional mandate exists in order to avoid a chilling effect on political speech. *Id.* Broadly requiring the disclosure of all correspondence between Council

member Vermillion and his constituents, so long as the correspondence in some way "concerned" City business would not be narrow or precise. Overbroad compelled disclosure would have a significant chilling effect on such communications in violation of the state and federal constitutions.

This Court has recognized that in order to assure political speech is not unconstitutionally chilled, some speech may have to go unregulated. *See Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 266, 4 P.3d 808 (2000), interpreting *Buckley v. Valeo*, 424 U.S. 1. This is especially true for sitting incumbents like Council member Vermillion, who are "intimately tied to public issues including legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. In other words, the Constitution requires the government to err on the side of under-regulating, rather than over-regulating, political speech.

Associational rights are especially vulnerable because today's technology creates endless opportunities for invasion of privacy. Virtually any means of communication creates a "writing"—even the constituent's cell phone call or text message setting up a meeting with a Council member (*Nissen v. Pierce Cnty.*, ___ Wn. App. ___, 333 P.3d 577 (Div. II 2014); or the e-mail and its metadata doing the same (*O'Neill*, 170 Wn.2d 138).

In summary, the trial court's conclusion that citizens have "no expectation of privacy" in their communications with Council members (CP 183) disregards an important constitutional right. Associational rights *do* protect a Council member's freedom to associate with his or her constituents; these rights *do* protect the constituent's right to speak privately with a Council member. Treating every record of every interaction with every constituent as a public record would endanger the confidence of the citizenry. And, it would endanger the political process by discouraging citizens from contacting their elected officials.

E. The PRA does not authorize the City to infringe the personal privacy rights of Council members.

As argued to the trial court and briefed in detail by Council member Vermillion, the Fourth Amendment to the U.S. Constitution and article I section 7 of the Washington Constitution prevent the unlawful search and seizure of private papers. CP 51-57. The trial court sought to avoid the constitutional privacy issues by ordering Council member Vermillion to produce the requested records, rather than ordering the City to forcibly seize them. CP 185.

But ordering an individual Council member to produce records from his personal website and e-mail account is not a workable or constitutional solution. First, the PRA applies to *agencies*, not individuals. RCW

42.56.070(1). A suit can be brought for noncompliance only against the agency. RCW 42.56.550. In the context of a PRA case, the Court has no authority to order Council member Vermillion, as an individual, to produce records.

Second, if the Court were to order the City to search Council member Vermillion's computer or personal e-mail account, the City could not comply absent the Council member's consent. The City has no authority to forcibly seize materials held in highly private locations, including (historically) a person's abode and (in the 21st Century) personal computer or cell phone. *See* Wash. Const. Art. 1, sec. 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); *Hinton*, 179 Wn.2d at 877 ("Viewing the contents of people's text messages exposes a wealth of detail about familial, political, professional, religious, and sexual associations. Text messages can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically been strongly protected under Washington law."); *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (search of a cell phone "would typically expose to the government far more than the most exhaustive search of a house").

A "search" of personal effects can occur only pursuant to a valid warrant, and a warrant may only be issued under express statutory authority. *City of Seattle v. McCready*, 123 Wn.2d 260, 272, 868 P.2d 134 (1994) ("*McCready I*"). Nowhere does the PRA authorize a warrant to search a personal computer or e-mail account.

Nor do the civil discovery rules allow an agency to compel a search and production of alleged public records. Should the City issue a subpoena, Council member Vermillion could move to quash it, citing constitutional issues as well as practical ones. *See Pollard v. FBI*, 705 F.2d 1151, 1154 (9th Cir. 1983) (denying plaintiff's request to take discovery concerning the contents of withheld documents because that was "precisely what defendants maintain is exempt from disclosure to plaintiff pursuant to FOIA").

Puyallup has no desire to deprive the public of information about government or to violate the PRA. But it also has no desire to violate the constitutional rights of its Council member. Without an appropriately narrow interpretation of "public record," as discussed above, or a Legislative amendment to the PRA, as discussed below, the City is in a no-win situation.

F. Through existing law and legislative fixes, the public interest in open government can be balanced with constitutional rights

The trial court communicated significant concern that Council member Vermillion was using his personal website and e-mail account to promote his own "agenda" (CP 203)[1]; thus, non-disclosure of records would undermine the public's right to obtain information about the conduct of government. This mirrors the concern of this Court in *O'Neill*. *O'Neill*, 170 Wn.2d at 150 (unfettered use of personal electronic devices and e-mail could "drastically undermine" the PRA). Indisputably, the right to information about the conduct of government is of paramount importance in Washington State, and the City does not ask or expect this Court to issue any ruling that discounts this. However, existing laws allow for the protection of constitutional rights can co-exist with the mandate of open government. And, if the Legislature determines the need, the PRA could be amended to further promote transparency and accountability amidst evolving technology.

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[1] While the desire to preserve transparency in government is laudable, the trial court's comment reveals a cynicism that is perhaps unjustified under the facts. The content of Council member Vermillion's website suggests a Council member who is merely trying to stay in touch with the citizenry. CP 20 ("If you have questions, concerns, or just want to 'chat,' please contact at your pleasure.") There was no factual basis on which to presume any bad faith actions. This Court has "long and consistently indulged the presumption that public officers will properly and legally perform their duties until the contrary is shown." *Rosso v. State Pers. Bd.*, 68 Wn.2d 16, 20, 411 P.2d 138 (1966).

1. Existing laws rigorously promote transparency and accountability

(a) The Public Records Act

Although the PRA must yield to constitutional rights, it remains a broad mandate for disclosure of public records. *Hearst Corp.*, 90 Wn.2d at 127. Its exemptions are narrowly construed and its provisions broadly construed to promote transparency and accountability in government. *O'Neill*, 170 Wn.2d at 146. The PRA broadly applies to virtually all records "retained" by an agency, including records on any employee or Council member's publicly-issued e-mail address or within agency servers and files. *Id.* at 147 ("In sum, 'public record' is defined very broadly, encompassing virtually any record related to the conduct of government."). Public agencies must promptly respond to records requests, conduct diligent searches, and produce responsive records in a reasonably timely manner. *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane,* 172 Wn.2d 701, 261 P.3d 119 (2011); RCW 42.56.520. Agencies incur strict liability for PRA violations, incurring attorney fees, penalties, or both. RCW 42.56.550; *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010).

The PRA is not a mandate that the City of Puyallup, or any public agency these days, takes lightly. Accordingly, Puyallup not only endeavors to provide records in a prompt and diligent manner, but also takes measures

to maintain records on agency servers so that they are readily accessible in the event of a request. As noted, the City issues every Council member a public e-mail address and links it to its website. Any e-mail sent or received from a Council member's public e-mail address is treated as a potential "public record" because it has been "retained" by the agency. Moreover, Puyallup requires every employee to refrain from using personal e-mail accounts or electronic devices for agency business. CP 25. Employees violating City policy can be disciplined or fired.

Thus, the very broad PRA, along with Puyallup's efforts to comply with it, already promote transparency and accountability by maintaining the availability of public records in general.

(b) The Open Public Meetings Act

The Open Public Meetings Act ("OPMA"), chapter 42.30 RCW, provides an arguably greater source of information about the actions of Council members than the PRA, and the OPMA's protections will continue in force regardless of whether individual Council member e-mails are found to be public records. In contrast to the PRA's focus on "agencies," the OPMA applies directly to the "governing body" and the individual officials making up the governing body. RCW 42.30.030; .120 (individual liability

for violations). The OPMA promotes the same broad mandate for transparency and accountability as the PRA:

> The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010. The OPMA voids any "action" taken by a City Council that does not comply. RCW 42.30.060. "Action" is broadly defined to include not only a final vote, but also "receipt of public testimony, deliberations, discussions, considerations, reviews, and evaluations." RCW 42.30.020(3). The OPMA precludes Council members from discussing any matters as a quorum via e-mail. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 562 (2001).

In many respects, the OPMA is not hindered by the assertion of individual constitutional rights in the same manner as the PRA. Unlike under the PRA, individual Council members, along with the agency, can be liable for OPMA violations. RCW 42.30.120. Broad discovery may be had

to determine whether a Council member, or group of Council members, has violated OPMA by using e-mail to conduct "serial meetings." Civil Rule 26 (allowing discovery "relevant to the subject matter" and "reasonably calculated to lead to the discovery of relevant evidence").[2]

(c) The Fair Campaign Practices Act

The Fair Campaign Practices Act ("FCPA"), chapter 42.17A RCW—which was adopted via the same citizen's initiative as the PRA—is also a mandate for transparency by elected officials. It requires elected officials and candidates to make publicly available the information that the Legislature and the voters (through the initiative process) determined must be disclosed in order to prevent corruption and quid pro quo governing. *See* RCW 42.17A.400; *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 278, 4 P.3d 808 (2000). For instance, the Act requires disclosure by candidates and political committees of all donor contributions, including the amount of each contribution and the name and address of each donor. *See* RCW 42.17A.240(2). The Act also closely regulates lobbyists, requiring them to register with the state and to disclose

[2] In the trial court, the requestor posed the valid question, "How are we to know if Councilman Vermillion has not made contacts that are inconsistent with the Appearance of Fairness Doctrine or hasn't conferred with other members of the City Council in violation of the Open Public Meetings Act?". CP 149. The answer to this question is, through the OPMA and its enforcement mechanisms.

all expenditures made and the legislation that the lobbyist is supporting or opposing. *See* RCW 42.17A.615(2)(d).

In adopting the FCPA, the legislature stopped short of requiring disclosure of the identity of citizens with whom politicians communicate, and certainly did not require disclosure of the content of those communications. Instead, the FCPA limits its purview to the sort of activities that could lead to corruption and undue influence—contributions, lobbying, and the like.

To the extent the courts might suspect corruption—or, to use the trial court's word, an "agenda"—by elected officials, the FCPA addresses such concerns. The expansive public policy of Washington, as declared by the voters in passing the PRA and FCPA via Initiative 276, stops short of requiring Council member Vermillion to disclose the identity of every citizen with whom he communicates, or the content of those communications.

2. The PRA could be amended to ensure the maximum possible disclosure while protecting constitutional rights

As a further hedge against secrecy beyond what the triumvirate of open government laws already provide, the Legislature could amend the PRA so that it constitutionally includes documents that may otherwise be out of reach. For one idea, the Legislature could amend the definition of

"public record" to continue to apply broadly to all records relating to the conduct of government that are "prepared, owned, used, or retained" by any "agency," but add a definition that more precisely includes communications by elected officials. For example, the Legislature might mandate disclosure of all records related to City Council "action," as defined under the OPMA. RCW 42.30.020(3). The required nexus between agency "action" and the record could be defined as any material that has been forwarded, shared, publicly discussed, or cited in conjunction with agency action. With a more precise definition of "public record" that allows for exclusion of political activities and confidential associations, the Legislature could allow for an administrative warrant process without exceeding constitutional boundaries. In addition, with a precise, narrowly-tailored but appropriately broad definition of "public record," the Legislature could expressly require agencies to retain all "public records" on agency servers and e-mail, and make failure to do so a *per se* violation of the PRA.

VI. CONCLUSION

The PRA is a very broad statute designed to help safeguard transparency and accountability in government. But despite its broadness, the PRA does have limits. One such limit is that it requires the disclosure

only of "public records." A Council member's e-mails that (1) are "political" in nature; or (2) are protected associations with his constituents; and (3) are never forwarded, shared with the agency, publicly discussed or cited in conjunction with any agency action should not be found to meet the PRA definition of "public record." Where a Council member has asserted constitutional privacy rights in his personal e-mail account and declined to make records available to the agency, such records should not be treated as "public records." Doing so puts the City in a no-win situation under the PRA as it is currently constituted.

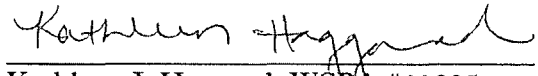
The drafters of the PRA were mindful of other important interests besides governmental transparency, including privacy. Initiative 276, Laws of 1973, Chap. 1, Sec. 1(11) (directing courts to be "mindful of the rights of individuals to privacy"). With its singular focus on records held by "agencies," the PRA was not intended as a tool for discovery of all the confidential discussions of individuals. *See* RCW 42.56.030 (protecting public's right to maintain control over "instruments" (agencies) of government, not "individuals"). No law prevents a Council member from talking with his constituents over coffee, nor compels that Council member to share the content of such discussions with the agency, his political rivals, or the general public. To preserve our free democracy and avoid crippling

the political process, the PRA should not be interpreted so broadly as to require the public disclosure of similar communications simply because they occur in writing.

For the foregoing reasons, the City of Puyallup requests reversal of the trial court's ruling and a finding that records sought by the Plaintiff do not meet the statutory definition of "public record."

RESPECTFULLY SUBMITTED this 9th day of February, 2015.

PORTER FOSTER RORICK LLP



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Attached for filing is the **BRIEF OF PETITIONER CITY OF PUYALLUP** for the City of Puyallup.

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