NO. 90875-3

SUPREME COURT OF THE STATE OF WASHINGTON

GLENDA NISSEN,

Appellant,

v.

PIERCE COUNTY, ET. AL.,

Respondents.

AMICUS BRIEF OF ATTORNEY GENERAL OF WASHINGTON

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I. INTRODUCTION

The Public Records Act was adopted on the principle that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011) (citations omitted) (internal quotations omitted). But another important principle of our society is the right of individuals—including public employees—to be free from unreasonable searches and intrusions into private affairs. Const. art. I, § 7; U.S. Const. amend. IV. In this case, these two principles intersect, but the lack of a factual record makes it particularly difficult to resolve definitively how they apply here. The Attorney General submits this brief to suggest the proper legal standard for resolving these disputes and to encourage the Court to remand this matter for application of the proper test.

Statutes and case law make clear that public officials cannot escape the Act by conducting public business on private devices. But they also make clear that the use of such devices for public business does not mean that every piece of information on the device becomes subject to public scrutiny. Rather, records contained on an official's personal device are public records under the Act if they relate to the conduct or performance

of government *and* were prepared, owned, used, or retained for the purpose of performing the official's duties. Public employees do not have a right to keep such public records private and have an obligation to provide such records to their relevant government agencies.

The Court should articulate these principles here and leave it to the superior court to apply them when the relevant facts of this case are established. By doing so, this Court can sustain the purpose and language of the Act without invading public employees' personal privacy rights and without being forced to speculate about the true facts of this case.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the Attorney General of Washington. As the legal officer for the State, the Attorney General advises state officers and agencies in interpreting and applying the Public Records Act and, when necessary, represents them in legal actions under the Act. Const. art. III, § 21; RCW 43.10.030, .040. The Attorney General also fulfills specific statutory roles in administering the Act, including providing training and technical assistance (RCW 42.56.155), issuing written opinions concerning state agency denials (RCW 42.56.530), and adopting advisory model rules for state and local agencies (RCW 42.56.570). Accordingly, the Attorney General has a significant interest in the scope and construction of the Act.

The Attorney General also has a significant interest in ensuring that the important public policy of open government and disclosure of public records is balanced against the constitutional right to privacy. While the Act shows the State's strong interest in allowing access to public records, the Washington and United States Constitutions guarantee the rights of all individuals to privacy and freedom from unwarranted government intrusions. Because this case involves the intersection of these two important public interests, the Attorney General submits this amicus curiae brief to assist the Court.

III. STATEMENT OF THE CASE

In this amicus brief, the Attorney General accepts the facts as stated by the Court of Appeals in its opinion, *Nissen v. Pierce County*, 183 Wn. App. 581, 586-89, 333 P.3d 577 (2014). To the extent there are questions regarding the facts of this case, the Attorney General is mindful that this matter comes before the Court following the trial court's ruling to dismiss under Civil Rule 12(b)(6). The Court of Appeals appropriately presumed—without deciding—the truthfulness of the underlying complaint's allegations. *See Nissen*, 183 Wn. App. at 589 (citing *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005)). The Court of Appeals noted that the record was inadequate to determine which of the requested records met the Act's definition of "public record." *Id.* at 593.

For that reason the Court of Appeals remanded for further fact-finding. *Nissen*, 183 Wn. App. at 598. The Attorney General agrees with that approach, taking no position on whether the specific records at issue are in fact "public records" subject to the Act, but rather suggesting that this Court articulate the proper standard to be applied on remand.

IV. ISSUE ADDRESSED BY AMICUS

Whether records located in or created by a public employee's personal electronic device can be subject to disclosure under the Public Records Act.

V. ANALYSIS

A. Writings Located In Or Created By A Public Employee's Personal Electronic Device Can Be Public Records

As this Court has consistently recognized, the Public Records Act "is a 'strongly worded mandate' aimed at giving interested members of the public wide access to public documents to ensure governmental transparency." *Worthington v. Westnet*, 182 Wn.2d 500, 506, 341 P.3d 995 (2015). "The [Act's] language 'reflects the belief that the sound governance of a free society demands that the public have full access to information concerning the workings of government.'" *Id.* at 507 (citing *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997)). Here, the key question before the Court is whether the Act gives the public a

right to records located in or created by a public employee's personal communications device. In the Attorney General's view, the public does have such a right *if* the record relates to the conduct of government *and* was prepared, owned, used, or retained for the purpose of performing the employee's duties. [1] The language of the Act and existing case law support this view.

1. Public employees must comply with the Act

As an initial matter, the parties dispute whether an individual employee constitutes an "agency" for purposes of complying with the Act.[2] *Compare* Nissen Suppl. Br. at 14-16 *with* Pierce County Suppl. Br. at 4-6 and Lindquist Suppl. Br. at 14-15. But this Court and other Washington courts have already implicitly found that public employees must comply with the Act. *See O'Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010) (ordering city to obtain email and metadata on councilmember's home computer); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 859, 288 P.3d 384 (2012), *review denied*, 177

[1] While this case specifically concerns a public officer, the Attorney General does not draw a distinction between elected public officers and other public employees for purposes of construing the Act. Therefore, the Attorney General's use of the term "public employee" throughout this brief is meant to apply to all public officials, employees, or other personnel.

[2] "Agency" is defined in the Act as including "all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW 42.56.010(1).

Wn.2d 1002, 300 P.3d 415 (2013) (finding city's search of official's private email accounts that were used to conduct city business reasonable); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009), *review denied*, 169 Wn.2d 1007, 236 P.3d 206 (2010) (holding personal email addresses used by city councilmembers to conduct city business not exempt from public disclosure).[3] The courts' findings in these cases are consistent with the practicalities of government. Agencies cannot act without employees. Conversely, when public employees take some action or perform some function during the course of their public employment or duties, they are doing so in the name of the government agency.[4]

For instance, in *O'Neill*, this Court held that metadata associated with an email received by a city councilmember on her home computer was a public record. *O'Neill*, 170 Wn.2d at 150. The Court remanded for the city to search the councilmember's home computer, noting that it assumed that the councilmember would consent to the search and this "inspection is appropriate only because [the councilmember] used her personal computer for city business." *Id.* In support of its holding, the

[3] *See also* Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?*, 19 Comm. L. & Pol'y 293-326 (2014) (canvassing state law and finding that the majority of states favor public access to records created by public officials when conducting agency business).

[4] The Attorney General is not suggesting that public employees can be held individually liable under the Act. The Act is clear that only the responsible agency is subject to RCW 42.56.550's provisions.

court reasoned that "[i]f government employees could circumvent the [Act] by using their home computers for government business, the [Act] could be drastically undermined." *O'Neill*, 170 Wn.2d at 150.

The model rules for public records promulgated by the Attorney General are also consistent with these principles. The model rules recognize that agency employees sometimes work from home on agency business and that any records created there are public records. *See* Comment to WAC 44-14-030 at WAC 44-14-03001(3). The model rules also suggest a mechanism for obtaining those records: directing the employee to forward any responsive records to the agency and then having the agency process the records as per normal course. WAC 44-14--03001(3). Although the model rules are non-binding, they provide a reasonable means for balancing the personal convenience of employees who may on occasion use personal devices to conduct agency business with the requirement of open and accessible government. In addition, this Court has recognized the model rules as persuasive authority. *E.g.*, *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 753-54, 174 P.3d 60 (2007).

Finally, the Attorney General notes that, while these opinions and model rules specifically recognize that public employees sometimes use "personal computers" to conduct agency business, rather than a cellphone as is the case here, there is no legal or logical distinction among the types

of personal devices that may be used to prepare or create records related to the conduct of government.

As previously noted, the Act's purpose is to allow the public access to information related to the workings of government agencies. Because agencies must necessarily act through their employees, it would severely undermine the Act's purpose if public employees could escape its reach simply by using a personal device to conduct government business. The key inquiry should not be the identity of the public employee or the type of personal device used, but rather the nature and purpose of the record prepared, owned, used, or retained by the public employee.

2. To be a public record, the writing must be related to the conduct of government and be prepared, owned, used, or retained for the purpose of performing the employee's duties

Under the Act, a "public record" is broadly defined as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). This definition includes two criteria. The first relates to the record's content; the second to its use.

With respect to content, "virtually any record" related to state government can constitute a public record under the Act. *See, e.g.*, *O'Neill*, 170 Wn.2d at 147 (metadata associated with a government email received on a home computer was a "public record"); *Concerned Ratepayers Ass'n v. Pub. Util. Dist. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999) (technical specifications in the possession of a government contractor was a "public record" because it was used by the agency). But, under the second criteria, the record must also be prepared, owned, used, or retained for the agency by a public employee. And not every record on a public employee's personal device is a public record simply because it references or relates to the work of the employee. Rather, as this Court has noted in another context, "[i]f the term public record is to mean anything it must be more than who handles it. Instead, the issue of access to records should be determined by the role the documents play in our system of government[.]" *Cowles Publ'g Co. v. Murphy*, 96 Wn.2d 584, 587, 637 P.2d 966 (1981).

For instance, a public employee may use a personal phone to send a text message to his or her spouse stating that the employee is working late on an issue and will not be home for dinner. Such a message would not be prepared for the purpose of carrying out the employee's official duties, but instead would be for a personal purpose. And it would be

absurd to suggest that the text message would constitute a "public record," even though it tangentially relates to the employee's work.

The key inquiry therefore must be whether the public employee prepared, owned, used, or retained the record for the purpose of performing the employee's public duties or public function. If so, then under the plain language of the Act and existing case law, the records are "public records" subject to disclosure absent a specific exemption. If not, then the record created is personal and not subject to disclosure. Applying this two-part standard fully realizes the purpose of the Act, which is public disclosure of information relating to conduct of government, not disclosure of the personal lives of public employees.

B. Public Employees Have No Right To Keep Public Records Private And Have An Obligation To Disclose Such Records, But The Court Should Remand For Application Of These Rules Here

As extensively briefed by the parties, records stored on the personal device of a public employee implicate the constitutional rights of the employee to be free from unreasonable search and seizure and from unwarranted government intrusion into private affairs. U.S. Const. amend. IV; Const. art. I, § 7; *see also Riley v. California*, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (cell phone seized incident to an arrest may not be searched absent warrant); *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9

(2014) (text message conversation was a private affair protected from warrantless search). Public employees do not lose their constitutional rights to privacy "merely because they work for the government." *City of Ontario v. Quon*, 560 U.S. 746, 756, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010). At the same time, public employees do not have a privacy interest in truly "public records" and cannot evade public disclosure simply by using their personal devices to conduct government business. *O'Neill*, 170 Wn.2d at 150. These principles can be reconciled by placing an obligation on the public employee to release only "public records" found on their personal devices to their respective agencies.

There may be multiple methods to achieve this goal. For example, the Attorney General's model rules outline the following suggested approach:

> Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work e-mails back to the employee's agency e-mail account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers.

WAC 44-14-03001(3).

This Court has not detailed exactly what approach courts should use when faced with a situation where it is clear that public records are stored on a private device and that the public employee who possesses the device will not provide those records to his or her agency. That issue has enormous implications for agencies and public employees, and the Court should not attempt to resolve it on the bare and hotly disputed record here.

For one thing, no court has yet decided whether any of the records at issue here actually qualify as "public records." The Court of Appeals remanded to the superior court "to develop a record for determining which of Lindquist's personal cellular phone text messages and call logs, *if any*, pertained to the conduct of government business; and . . . to determine which portions of the records Nissen requested, *if any*, constitute public records that must be disclosed under the PRA." *Nissen*, 183 Wn. App. at 596 (emphasis added).

The superior court's resolution of that issue could significantly narrow the constitutional dispute the parties present here. Depending on the actual facts, it may be possible for the superior court to resolve this case without requiring any sort of seizure or inspection of Mr. Lindquist's personal cell phone. For example, once this Court specifies the legal standard for determining what qualifies as a "public record" on a private device, the superior court may be able to resolve any remaining dispute

based on affidavits from Mr. Lindquist and Pierce County. *See, e.g.*, *Neighborhood Alliance of Spokane County*, 172 Wn.2d at 720-21 (holding that disputes regarding the adequacy of searches may be decided on the basis of affidavits); *see also O'Neill*, 170 Wn.2d at 153; *Forbes*, 171 Wn. App. at 867 (an agency's affidavit setting forth its good faith search efforts must be accorded a presumption that cannot be overcome by a requestor's purely speculative claims about the existence and discoverability of other documents). Alternatively, any dispute may dissipate if Mr. Lindquist agrees to provide whatever records, if any, qualify as "public records" under this Court's legal definition. This wait-and-see approach would allow the Court to avoid resolving constitutional issues unnecessarily. *See Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000) (court avoids deciding constitutional issues if it can be resolved on statutory grounds).

VI. CONCLUSION

This Court should uphold the principles of open government while also acknowledging public employees' right to privacy. The legal test proposed by the Attorney General, which accords with the Act's text and purpose, would achieve both goals. This Court should leave application of that test to the superior court in the first instance to clarify what, if any, constitutional dispute truly remains.

RESPECTFULLY SUBMITTED this 4th day of May 2015.

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