

From: [Lamberton, Mindy](#)
To: [Madore, David](#)
Cc: [Richardson, Bill](#)
Subject: Public Records Request - Personal Devices
Date: Friday, April 01, 2016 11:16:37 AM
Attachments: [RecordsRequest.Madore.Texts.03.31.16.pdf](#)
[Affidavit - PDR Madore Texts.pdf](#)

Good morning Councilor Madore,

Attached you will find Mr. Ferguson's public records request seeking text messages on your personal cell phone.

I've also attached an Affidavit for you to fill out and return to me after you've conducted your search.

If you could please (1) acknowledge receipt of this email; and (2) advise me early next week how much time you believe you'll need to respond, I can then acknowledge the requestor's request and provide an estimate for production, if there are any responsive records.

Should you have any questions or concerns, please contact DPA Bill Richardson at ext. 4745.

Thank you in advance for your attention to this matter.

Mindy Lambertson

Public Records Program Coordinator I

Clark County Prosecutor's Office

Civil Division

(360) 397-2478

mindy.lamberton@clark.wa.gov

LAW OFFICES OF
GREGORY D. FERGUSON, PC
EMPLOYMENT LAW, OPEN GOVERNMENT & CIVIL LITIGATION

March 31, 2016

Via Email [Mindy.Lamberton@clark.wa.gov]

Mindy Lamberton
Clark County Prosecutor's Office

Re: Public Records Request Re: Madore Text Messages

Dear Ms. Lamberton:

Please accept this letter as a request for public records pursuant to Washington's Public Records Act, RCW 42.56. This request is directed to you based upon your prior indication that requests relating to potential litigation are ultimately directed to you.

We hereby request all text messages from Councilor David Madore's personal cell phone sent or received during his term in elected office relating in any way to Clark County business, i.e. pertaining to or referencing the conduct of County government or "the performance of any governmental or proprietary function". See *Nissen v. Pierce County*, 183 Wn.2d 863 (2015). The *Nissen* court emphasized that text messages from a public official's private cell phone qualify as public records "if they contain any information that refers to or impacts the actions, processes, and functions of [County] government." This request by its nature, as noted by the *Nissen* Court, "casts a broad net" for such information.

Please notify my office of any copy charges in advance. We prefer to receive the records electronically. Time is of the essence. Thank you for your prompt attention.

Very truly,



Gregory D. Ferguson
Attorney at Law

GDF:bm

cc: client

112 W 11th Street, Suite 100 – Vancouver WA 98660
Tele: 360.906.1167/Fax: 360.695.5800
Email: greg@greg-ferguson.com
Web: www.greg-ferguson.com

In the matter of a
Public Record Request
Pursuant to RCW 42.56

RE: Text Messages on Personal Cell Phone,

Requester: Greg Ferguson

Affidavit of:

Councilor David Madore,

Regarding search of a Personal
Communication Device

STATE OF WASHINGTON
COUNTY OF CLARK

I, David Madore, being first duly sworn, upon oath, depose and state:

1. I received notice of the above captioned public record request;
2. I understand that the record request seeks:

All text messages from Councilor David Madore's personal cell phone sent or received during his term in elected office relating in any way to Clark County business, i.e. pertaining to or referencing the conduct of County government or "the performance of any governmental or proprietary function".

I am the owner of personal/private communication devices, described as:

_____.

3. I have conducted a diligent search, in good faith, of the above-described communication devices for records responsive to the above-captioned public records request.
4. As a result of my search, I find:
 There are no records related to the governance of Clark County on any of the devices.
 There are records related to the governance of Clark County, but they are not responsive to the above captioned request, or they are not public records, for the following reasons:

_____.

- There are records related to the governance of Clark County on the personal devices. I am providing a portion of those records, attached to this affidavit, to the County for evaluation and production to the above-captioned requester pursuant to the Public Records Act, RCW 42.56. The remaining records are not responsive to the above-captioned request, or they are not public records, for the following reasons:

_____.

- There are records related to the governance of Clark County on the personal devices. I am providing all of the records to the County for evaluation and production to the above captioned requester pursuant to the Public Records Act, RCW 42.56.

- The requested records, or portions thereof, are publicly available and can be found at _____. Any record in my possession that is not publicly available is attached to this affidavit.

Affiant

SUBSCRIBED AND SWORN to before me this _____ day of April, 2016.

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My commission expires: _____

From: [Lamberton, Mindy](#)
To: ["Greg Ferguson"](#)
Cc: [Brenda Merryman](#)
Subject: RE: Public Records Request - Councilor Madore Text Messages
Date: Monday, April 04, 2016 4:13:13 PM

Good afternoon.

Thank you for your request. I have yet to hear back from Councilor Madore on how much time he thinks he'll need to search his devices. Since I am heading out of town this evening for Spring Break, I'll go ahead and acknowledge your request and state that responsive records should be available on or before April 22nd. Of course, I intend to follow up with Councilor Madore when I return to work on Monday, April 11th.

Thank you,

Mindy Lamberton
Public Records

From: Greg Ferguson [mailto:greg@greg-ferguson.com]
Sent: Thursday, March 31, 2016 4:17 PM
To: Lamberton, Mindy
Cc: Horne, Chris; Brenda Merryman
Subject: Public Records Request - Councilor Madore Text Messages

Mindy:

Attached is a public records request for Councilor Madore's text messages to and from his personal cell phone. Please acknowledge your receipt of this request. Thank you.

Best regards,
Greg

Law Offices of Gregory D. Ferguson, PC

112 West 11th Street, Suite 100

Vancouver, WA. 98660

Phone: [360.906.1167](tel:360.906.1167)

Fax: [360.695.5800](tel:360.695.5800)

Web: www.greg-ferguson.com

Employment, Open Government and Litigation

“OUR WORK IS ALL ABOUT YOURS”

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From: [LaRocque, Linnea](#)
To: [Lamberton, Mindy](#)
Subject: All text messages from my iPhone
Date: Monday, April 11, 2016 8:50:09 AM
Attachments: [CC-Chris Horne.pdf](#)
[CC-Mike Cook.pdf](#)
[CC-Rob Klug.pdf](#)
[David Madore.pdf](#)
[Home-Redinger Well Drilling.pdf](#)
[jeffreytshafer_icloud.com.pdf](#)
[Pol-Commander Steve Fischer.pdf](#)
[Pol-David Kelly-SWAAD.pdf](#)
[Pol-Dr John Barber.pdf](#)
[Pol-John McKibbin.pdf](#)
[Pol-Julie Olson.pdf](#)
[Pol-Kevin Peterson Bridge Architect-zz1 \(Ann\).pdf](#)
[Pol-Linda Figg \(Richard\).pdf](#)
[Pol-Lisa Schmidt.pdf](#)
[Pol-Maria Salazar \(Roger\).pdf](#)
[Pol-Mike Bomar.pdf](#)
[Pol-Mike Burgess.pdf](#)
[Pol-Peter Van Nortwick-Assessor.pdf](#)
[Pol-Steve Hornstein.pdf](#)
[Pol-Wayne Folkers-zz1.pdf](#)

From: Madore, David
Sent: Saturday, April 09, 2016 9:26 PM
To: Madore, David; LaRocque, Linnea
Subject: All text messages from my iPhone

Linnea,

I emailed all the text messages from my iPhone to my email account and they are all attached. This is in response to the pending public records request.

Now that they have been retained here, I have deleted them from my phone.

Thank you,

David

Thursday, June 4, 2015

Me

Chris, I assume that you are good with all the agenda items of the RSN today. Right?

12:05 PM

Thursday, September 24, 2015

CC-Mike Cook

C Do you have time for Chuck and I to come over and talk about the 2% proposal? Chuck is getting inquiries so we want to talk it through with you. 10:27 AM

Me

I have a COG meeting that should wrap up by 3-ish. I can see you at your office after that if you wish. 11:46 AM

CC-Mike Cook

C That works. See you at 3 at Chuck's office. 11:50 AM

Me

Got it. Thanks 2:24 PM

Friday, October 16, 2015

Me

Rob, a citizen just related that the light near NE 139th Street and 10th Ave near the park and ride is ridiculously long. I told her that I would let you know. Thanks
David Z Madore

11:41 AM

Me

No Z in Madore. My iPhone takes liberties with my typing fingers.

11:43 AM

Wednesday, October 14, 2015

Me

Mike, your voice mailbox is full. Please call me: David Madore. Thanks

On a conference call until 2:30. Will do

Thanks

I'm available now until 3 and again after 4

Hey David, I'm available until 5 now if you would like to connect.

I've been in solid meetings. I will let you know when I am free. I can talk any time after hours too.

Same. Just call when convenient and I'll do my best to catch you.

Sorry I missed your call. Will try in the morning unless you prefer I wait until Monday

I can talk now if you like.

I have heard back from every city except Washougal. All so far have expressed opposition to updating the population number (and would not subsequently ask for more land) citing concerns about the cost they have spent in their CFP's to date and the need to add more employment land over residential as a priority. La Center stressed their proposed 56 acres for employment lands under Alt 3. We support that request. I hope that is helpful. Mike, great work. If I understand correctly, they do not want to increase their population forecasts, but favor zoning for more employment land for improved economic development. Right? Thank you!

Correct.

4:52 PM

Friday, October 16, 2015

Me

Thank you for calling me back and for your willingness to take the lead to ensure that the well drilling industry submit a letter addressing the viability of wells in Clark County.
David Madore
David.madore@clark.wa.gov
Cell: 360-601-3056
Call me any time up to 11 pm each night.
The DSEIS consultant argues against continuing to continue drill wells here in any significant scale because doing so would drain our acquirers, ruin existing neighboring wells, and contaminate our acquirers. They provide no evidence or documentation, just opinions. I welcome informed credible documentation that confirms or refutes their assertions. Thank you.
David Madore

11:16 AM

Monday, November 9, 2015

Home-Redinger Well Drilling

H

Did you receive the email we sent?

10:34 AM

Me

I received a letter this morning from Mark Collier regarding skeptics and a bit about well clearance requirements. That is the only one I received.

12:12 PM

Me

Oh. I just now found it.

12:13 PM

Me

Thanks for the text to prompt me to find it. I will dive in to study it now.

12:13 PM

Me

The letter looks very good. However, the last line of page 1 appears to be missing.

12:29 PM

Friday, October 16, 2015

jeffreytshafer@icloud.com



8:46 AM



8:46 AM



8:46 AM



jeffreytshafer@icloud.com



Our daily commute. Someone is gonna get killed. You didn't stop it.

8:46 AM

jeffreytshafer@icloud.com



Good luck in heaven.

8:47 AM

Me

Jeff, road law enforcement is the role of the sheriff. Work with him since the sheriff alone has that authority.

8:49 AM

jeffreytshafer@icloud.com
 They have not responded to several complaints. 8:57 AM

jeffreytshafer@icloud.com
 They say they don't have the resources. 8:58 AM

Me
I encourage you to meet with our sheriff. Make an appointment with him. We've given them 8 new deputies and more support staff. 8:59 AM

jeffreytshafer@icloud.com
 Ok. But it won't fix the road. 9:00 AM

Me
The Sheriff's office # is (360) 397-2366 9:01 AM

jeffreytshafer@icloud.com
 Thanks 9:01 AM

Me
For law enforcement, tackle that with the sheriff. Be careful not to confuse or lump different problems together. Let's logically break them down for the most effective solutions. 9:03 AM

jeffreytshafer@icloud.com
 Both are issues. 9:04 AM

jeffreytshafer@icloud.com
 Separate. 9:04 AM

jeffreytshafer@icloud.com
 Thanks! 4:53 PM

Tuesday, November 19, 2013

Pol-Commander Steve Fischer

David, this is Randy Overton, previously the Coast Guard Bridge Administrator in Seattle. I am still in the CG Bridge Program but I have relocated to Miami, primarily because of the CG's disastrous handling of the CRC project. I'm writing today to find out if you are aware of any action Clark County, or the State of Washington may be taking against the CG for issuing a permit for the CRC. From what I have reviewed from the CG Headquarters the permit was issued completely contrary to normal agency practices. If Clark County or the State of Washington wishes to bring action against the CG, I am available and willing to assist in anyway possible please feel free to call email or text anytime. My contact information: my Cell phone (305) 205-0795 my home email: Randall.Overton@yahoo.com

4:50 AM

P

Me

Randy, thank you for contacting me and for the integrity that compelled you to reach out. No one that I know is legally challenging the CG. I have been working as hard as I can to defend our community from this travesty. I am finishing up an Integrity Resolution that documents dozens of violations of integrity that corrupt this process. Our county's prosecuting attorney office will likely be dispatched to join a lawsuit to invalidate the Record Of Decision on different grounds. If you are willing, I would welcome your help in challenging the CG permit. I invite you to call this cell# and to email to my non-county address at David.m@usdigital.com.

7:01 AM

Tuesday, May 26, 2015

Me

David. We just got out of our Public Hearing. Do you have a quorum?

1:33 PM

Pol-David Kelly-SWAAD

Commissioner
Our COG meeting is scheduled for this Thursday May28th at 1pm. All indications are that with you we would have 4 attendees and therefore a quorum on Thursday. Dave

1:41 PM

P

Monday, May 4, 2015

Me

Send info

5:27 PM

Tuesday, May 5, 2015

Pol-Dr John Barber

P I sent you the public access TV RFP via email earlier this morning. Thanks again for your support of my vision yesterday. John Barber

9:19 AM

Me

Got it and just now emailed a reply. It is a pleasure working with you.

9:32 AM

Friday, May 8, 2015

Pol-Dr John Barber

P The County representative on the public access screening committee is Axel Swensen. I said I would let you know . . .

8:58 AM

Saturday, May 30, 2015

Pol-Dr John Barber

P I have have just sent your proposal for public access television provider. I will submit this to the search committee next week. Any suggestions/discussion before then is appreciated. John Barber

8:41 AM

Monday, May 4, 2015

Me

I've arrived at the Jerusalem Cafe. See you shortly for our 12:30 lunch?

12:28 PM

Sunday, November 8, 2015

Pol-Julie Olson

P Hi David- I just looked at my calendar again and I have a 12:00 appointment tomorrow. Could we meet at 10:00 instead of 11:00 tomorrow? 7:17 PM

Me

Julie, I already have a meeting scheduled then. It looks like we will need to schedule another day. I hope to see you at the work session. Thank you. 7:23 PM

Pol-Julie Olson

P Ok let's reschedule. My apologies. Yes, I will be at the work session and have been reviewing the additional documents. Let me know how the rest of your week looks. Thanks. 7:25 PM
Julie

Me

Will do. Thank you: 7:25 PM

Thursday, November 12, 2015

Pol-Julie Olson

P Hi David, would you have time to meet tomorrow some time? 10:51 AM

Monday, November 16, 2015

Me

Julie, I've been tied up with the comp plan project. Staying on target. I will look for an opportunity very soon. Thanks 3:47 PM

Friday, March 13, 2015

Pol-Kevin Peterson Bridge Architect-zz1 (Ann)

Hi David

I'll pass on today's meeting - too late to pull the airplane out of the hangar and be to your office in time for an 11am meeting.

When you get a chance to call please do as I'd like to discuss the GOP and transportation infrastructure. This weekend's GOP state leadership retreat and our county GOP will raise the question and discuss how the party approaches planning for transportation. I'm trying to push for stronger GOP policies.

Hope today's meeting goes well.

Kevin

7:48 AM

P

Me

Kevin, thanks for your intent to fly down. No problem on your no being able to make it this morning. Larry Morgan would still like to meet with me. So I will be glad to do so. We can refer to the EastCountyBridge.com website and pull up Google Maps in the conference room to brainstorm the Troutdale location. I am committed to this project and confirmed that commitment in our State of the County address yesterday.

8:53 AM

Tuesday, August 25, 2015

Me

Good morning Kevin. I will be meeting with the mayors of Troutdale, Woodville, and Fairview on Monday. They've asked me to bring helpful info on the potential new location. I welcome your input.

10:47 AM

Thank you, David

Wednesday, August 26, 2015

Pol-Kevin Peterson Bridge Architect-zz1 (Ann)

Hi David,

Please volunteer I'm looking forward to doing an alignment study of potential corridors. Doing this helps alleviate questions of fit and purpose providing insight on costs/benefits.

12:58 PM

If you like I'll put together a listing of benefits and concerns regarding technical issues. Done in a manner supporting the need for policy actions this list

P

Pol-Kevin Peterson Bridge Architect-zz1 (Ann)

...shares the need to get the project moving.

Kevin

12:59 PM

P

Me

Kevin, your help, as you suggest, would be most appreciated.
Thank you!

1:16 PM

Thursday, May 28, 2015

Pol-Linda Figg (Richard)

Hi David!
Sorry I missed your call. I know this is very short notice but I am passing through the area tomorrow and thought if you were around and available tomorrow afternoon sometime I would stop by and say hello. This is very spur of the moment but thought I would check to see if you in town with a few minutes after 3 by some random chance?
Best,
Linda

8:17 PM

P

Me

Linda, I would love to visit with you. My afternoon is wide open. If you like, I can invite some leaders from Troutdale to join us.

8:19 PM

Me

The are so wanting the bridge to move east to their area.

8:20 PM

Pol-Linda Figg (Richard)

Whatever you would like to do is great. Kevin and I have not connected yet on possible bridge locations to the east but am happy to listen and share ideas on bridges wherever you like.

8:22 PM

P

Me

Give me a few minutes to see if I can reach someone.

8:24 PM

Me

Thank you for the quick plans to meet and includes me if our east county community leaders. A city council candidate from Washougal and perhaps someone from Camas will join us at 4 pm at Stanfords in Lloyd Center. See you then.

9:01 PM

Pol-Linda Figg (Richard)

Sounds great! I just got off the phone with Kevin. It was great to talk some about the alignment possibilities. Looking forward to seeing/meeting everyone tomorrow!

9:12 PM

P

Me

So good to hear you two touch bases.

9:13 PM

Me

I made the reservations at Stanford so they are expecting us. State Rep Luz Pike with join us and possibly Stare Rep Lynda Wilson. You are a very popular CEO!

10:04 PM

Pol-Linda Figg (Richard)

P

Wow! So amazing to get together with so many area leaders! What a great compliment to all that you are doing to make a difference in this community!

10:10 PM

Me

The credit goes to you and the example you have shown us by believing in the future of our community more than many of our leaders here at home.

10:12 PM

Me

I enjoyed talking with Kevin Peterson right after you this evening. Such a competent professional with great practical sense.

10:13 PM

Friday, May 29, 2015

Pol-Linda Figg (Richard)

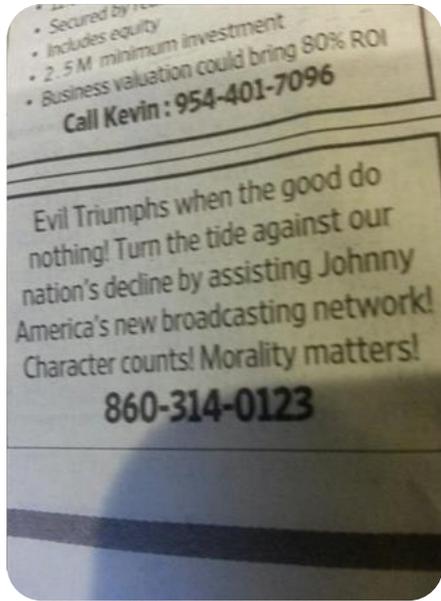
P

Hi David....got some traffic getting there and will be a little after 4.
Linda

4:03 PM

Saturday, January 23, 2016

Pol-Lisa Schmidt



7:53 AM



Hello David, do you know anything about this new media?
It's in today's WSJ. Lisa!

7:53 AM

Friday, June 5, 2015

Pol-Maria Salazar (Roger)

I really wish our county HR would allow applicants to apply until a position is filled. Doesn't make any sense to close because they think they have enough applications. Would think you would want to keep looking through applications until you find the best candidate.

1:46 PM

P

Me

Good point. I will look into it. Thanks

1:47 PM

Pol-Maria Salazar (Roger)

Thank you! Saves me a trip to a meeting. I have contacted your other board members also.

1:51 PM

P

Friday, June 12, 2015

Pol-Maria Salazar (Roger)

David,
Something interesting at last night's Ridgefield City Council meeting. Mayor Onslow mentioned he had met with city attorney about C-tran but never revealed what? Plan on finding out or at least get some information.
Maria

7:47 AM

P

Me

Maria, I am so thankful for your diligence. You're not afraid to challenge the status quo. You have what most office holders lack - courageousness.

7:50 AM

Pol-Maria Salazar (Roger)

Thanks! :)

7:59 AM

P

Friday, October 9, 2015

Me

Mike, your voice mailbox is full. Please call me: David Madore. Thanks

1:57 PM

Pol-Mike Bomar

P On a conference call until 2:30. Will do

2:01 PM

Me

Thanks

2:02 PM

Pol-Mike Bomar

P I'm available now until 3 and again after 4

2:21 PM

Pol-Mike Bomar

P Hey David, I'm available until 5 now if you would like to connect.

3:49 PM

Me

I've been in solid meetings. I will let you know when I am free. I can talk any time after hours too.

3:53 PM

Pol-Mike Bomar

P Same. Just call when convenient and I'll do my best to catch you.

3:54 PM

Pol-Mike Bomar

P Sorry I missed your call. Will try in the morning unless you prefer I wait until Monday

8:13 PM

Me

I can talk now if you like.

8:16 PM

Wednesday, October 14, 2015

Pol-Mike Bomar

P I have heard back from every city except Washougal. All so far have expressed opposition to updating the population number (and would not subsequently ask for more land) citing concerns about the cost they have spent in their CFP's to date and the need to add more employment land over residential as a priority. La Center stressed their proposed 56 acres for employment lands under Alt 3. We support that request. I hope that is helpful.

3:02 PM

Me

Mike, great work. If I understand correctly, they do not want to increase their population forecasts, but favor zoning for more employment land for improved economic development. Right? Thank you!

3:40 PM

Pol-Mike Bomar

P

Correct.

3:53 PM

Friday, June 5, 2015

Me

Mike, please oppose house bill 2263, the cultural development tax hike bill. Thanks

1:37 PM

Pol-Mike Burgess

P

Got it Councilor, heard from you colleagues as well, I'll pass it along

2:00 PM

Me

Thanks

2:00 PM

Thursday, July 16, 2015

Pol-Peter Van Nortwick-Assessor

P On Bloomquist we have a lot of time. He hasn't gotten a removal letter, he just got an audit letter, so we are 90 days at least from removal and then he could appeal. I thought the way everyone was acting he got a notice of removal.

4:30 PM

Tuesday, October 20, 2015

Pol-Peter Van Nortwick-Assessor

P What is this Assessor data you are referring to and where did it come from. I don't know anything about it.

7:06 PM

Monday, January 11, 2016

Me

Too late. It needs to be today, please.

2:56 PM

Friday, January 15, 2016

Pol-Peter Van Nortwick-Assessor

P We need to talk. I think I understand how I thought you approved the tax increases and you didn't think you approved the tax increases. Maybe we can avoid this in the future.

2:54 PM

Saturday, January 16, 2016

Me

Peter, that's why I kept asking to talk with you before it was too late. You have been such a great example saving money, getting the assessor's work done on time in contrast to your predecessor, and we were all so glad that you held your seat as a conservative.

9:34 AM

Me

You have a right to oppose the property tax cut as you expressed publicly and as the C3G2 hate group and liberals sided with you and have cheered and celebrated your actions.

9:38 AM

Pol-Peter Van Nortwick-Assessor

P It isn't that simple an issue and I think the council didn't have a legal choice, but it did come very clear to me that you and Tom didn't think you were approving the additional revenues in property taxes. I think the issue is in the way the budgets are presented.

9:42 AM

Me

Remember the conservative principles of less government, lower taxes, more freedom?

9:43 AM

Pol-Peter Van Nortwick-Assessor

P

Yes but that won't address the problem. That we recently had.

9:45 AM

Pol-Peter Van Nortwick-Assessor

P

The issue is as I see it how did you approve increased revenue from property taxes in the budget when you did not think that is what you were doing in 2014.

9:48 AM

Me

For 5 weeks, you said nothing? Our PA and Budget office confirmed that there was no problem. All was in order. If you had concerns, why didn't you act on those with the PA or budget office?

9:49 AM

Pol-Peter Van Nortwick-Assessor

P

I told you a number of times you were too late. I told you that you had to cut spending first. I felt you weren't listening to what I was saying.

9:54 AM

Me

Peter, that does not make sense. Why didn't you talk with our PA or budget office about your concerns. They are the authorities that are far better than our opinions.

9:57 AM

Pol-Peter Van Nortwick-Assessor

P

You are assuming I didn't.

9:59 AM

Me

It still does not make sense because the expenditures still are higher than the \$1.2 million. If the assertion is valid, then you should still have refused to certify because with that logic, the Council needed not just set zero percent, they needed to raise them be 3%. Right?

10:00 AM

Me

The PA office and PA have informed us all along of legal requirements.

10:01 AM

Pol-Peter Van Nortwick-Assessor

P

Not from my perspective. Remember that you are just one of my districts. You can't ask for more than what is budgeted for property taxes in the certification. In my opinion you can't ask for less than the budget if it means property taxes won't be sufficient for the budget. You may be right the entire budget revenue was insufficient but that isn't my area of concern.

10:06 AM

Me

There are so many shenanigans going on to sabotage our conservative actions. Did the PA office, the budget office, treasurer, county manager or anyone else tell you that you could not certify because there was a problem?

10:06 AM

Me

Simple math, Peter. What were the actual numbers?

10:07 AM

Pol-Peter Van Nortwick-Assessor

P Remember that is what I provided in my testimony. Based what was budgeted and provided we had a \$1.3M variance from budget to certification.

10:09 AM

Me

Please show your work. I love math. 2% was \$1.2 million, not \$1.3 million. It still fell \$100,000 short. So if it needed to balance, it still did not. Where's the logic?

10:12 AM

Pol-Peter Van Nortwick-Assessor

P Remember I testified in my opinion they had 2 options. 1 cut \$1.3 Million immediately or 2 send me a certification that matches the budget.

10:14 AM

Me

Neither happened. It was still \$100,000 short. Right?

10:15 AM

Pol-Peter Van Nortwick-Assessor

P I don't know that for sure. I only checked the one sent to me because it was brought out in public that the certification didn't match the budget. We accept the certification as correct unless a tax district informs us otherwise.

10:19 AM

Me

Peter, I think you missed my questions about who told you that you could not act. Please address let me know. I want to know if you were being told something different than we were.

10:23 AM

Pol-Peter Van Nortwick-Assessor

P I was told that they wanted to send me a certification that fulfilled the budget as required. I told them fine I haven't got everything from the other tax districts so I can wait, but I won't miss my date in the RCWs while the county fixes their issue.

10:26 AM

Me

It still does not make sense that you would check the math on one and not the other. If it's a math problem, and that math was the reason that you objected, the only sensible decision is to know that the correction was made and the math added up. Right? Please share you math.

10:26 AM

Me

Who is "they"?

10:27 AM

Pol-Peter Van Nortwick-Assessor

David, the tax districts certify to me that what they send is true and correct and DOR indicates we should accept that and we do. The difference here is in a public meeting it was made public that the County certification did not reflect the budget and then the concerns happened as the RCWs indicate and the certification indicate they should match.

P

10:30 AM

Pol-Peter Van Nortwick-Assessor

They is always budget as they communicate the information. It was budget that provided me the numbers reflected in the budget as per my testimony.

P

10:31 AM

Me

Was there a document that our staff withheld from you until the tax cut repeal?

10:32 AM

Pol-Peter Van Nortwick-Assessor

Do you want to re-hash or solve the issue?

P

10:32 AM

Pol-Peter Van Nortwick-Assessor

No they only document they send me is the certification.

P

10:33 AM

Me

I want the whole truth.

10:33 AM

Me

Adriana told you there was a legal problem?

10:34 AM

Pol-Peter Van Nortwick-Assessor

After I heard about the shortage I asked Budget for the numbers approved in the budget and also my disapproval that a certification was sent that didn't reflect the budget.

P

10:34 AM

Pol-Peter Van Nortwick-Assessor

No when it was brought up about the 2% property tax cut repeal and why it could happen I was concerned.

P

10:36 AM

Pol-Peter Van Nortwick-Assessor

Remember Tom's motion? His motion was that the Certification sent to the Assessor should reduce the general fund property taxes. The motion in my opinion should always be to send a Certification that matches the approved budget. Remember when I walked up to Chris Horn in the meeting to talk to him? I told him I felt the motion they should be making is a Certification that correctly reflects the budgeted amount for property taxes.

10:39 AM

P

Me

Peter, I will always support and back you up in all things legal. No one ought ever to ask you to compromise the law. If your objection to the 2% cut was legal and math needed to satisfy the law, then no one ought ever to pressure you to compromise. That's why I need to know that facts. Facts, logic, law, math and truth are always to be respected. So far, I have nothing except generalities and feelings. Please Peter, help.

10:41 AM

Me

The levy has always been decided after the budget is adopted. The post-budget decision of setting the levy to zero increase, 1% increase, something in between, or a cut. That decision was always completely independent of the budget approval. If the levy was simply automaticity determined by the budget, then a separate independent decision where we can set the amount at our discretion, would not be possible or legal, ever. Right?

10:47 AM

Me

Autocorrect: automatically, not automaticity. iPhone

10:51 AM

Pol-Peter Van Nortwick-Assessor

OK Here is why I think you didn't know you were raising the property taxes. In the revenue budget the budget calls for certain increases in revenue to different funds. The commission approved those increases in the funds in the two year budget in 2014. I don't think when you approved the increases in the revenues that it was probably made clear that some of these increases in the base line budget are coming from increasing property tax revenues. But the revenue figures did reflect increasing the property taxes by new construction in 2015 and 2016. Therefore to back them out would require a supplement to the budget. The budget office has set guidelines as to when changes to the budget can be presented to the budget office. September 1 is the cut off. To legally do a 2% cut the revenues in the budget would need to be reduced. The issue is so would spending, but budget could not legally go back to the departments and offices because of RCW laws on budgets and their published calendar. That put budget in a tough spot.

10:55 AM

P

Me

I need to pause for a bit to attend to something here. Thank you for engaging. In the meantime, please answer my unanswered questions above. Thanks

10:58 AM

Pol-Peter Van Nortwick-Assessor

David the resolutions and certification are to reflect the budget. It is the way to provide transparency to the public as to what has been done in the budget. Actually many of the Mayor agree with you that why do these separate acts when it is already suppose to be reflected in the budget. It is more of a formality that doesn't make a lot of sense.

10:58 AM

P

Pol-Peter Van Nortwick-Assessor

Except to provide transparency to the public as to what was done in the budget. When you decide to not do a resolution you forego the transparency step where the public in informed as to what was done in the budget.

11:06 AM

P

Monday, February 29, 2016

Pol-Peter Van Nortwick-Assessor

Are you trying to get sued by staff? Your on thin ice here with your latest post. I think it could be considered defamation of character when you actually named Chris Cook. If you must refer to Tony as the PA. He is the public figure responsible

9:47 PM

P

Tuesday, March 29, 2016

Pol-Peter Van Nortwick-Assessor

I saw where you figured out baseline budgeting in today's meeting and asked the right questions. You don't see what's in the budget. When you see those lines for Revenue increases those are often property tax increases. Baseline budget hides it well and that is the purpose of the resolution. Now keep track of those funds and know those are the ones to cut.

P

12:58 PM

Wednesday, October 28, 2015

Pol-Steve Hornstein

Hi David, we promised you a meeting regarding the Q179th project and the Killian DA. How about Monday 11/9 at either 9:30 AM or 2 PM. Also, Wednesday 11/11 at 10 AM is available. If those don't work we will find some other dates. Please advise...Steve H.

3:45 PM

P

Me

All three times work. I will pick Monday, Nov 9 at 9:30 am to help move things along. Thanks

8:19 PM

Thursday, October 29, 2015

Pol-Steve Hornstein

We have it down. See you at your office then. Thx David.

8:59 AM

P

Wednesday, November 25, 2015

Pol-Wayne Folkers-zz1

P

Thanks David, I think, or I may be just speculating,, but I got a message of good news from Jon tonight. Dont know what the good news is but I hope i

8:04 PM

Pol-Wayne Folkers-zz1

P

t is I dont need to spend \$4500 for a geo tech on a level building site.

8:04 PM

Thursday, November 26, 2015

Pol-Wayne Folkers-zz1

P

Wishing a Happy thanksgiving to the Madore family

3:33 PM

Tuesday, April 5, 2016

Pol-Wayne Folkers-zz1

P

Give me a call tomorrow, I will call you too

8:30 PM

From: [LaRocque, Linnea](#)
To: [Lamberton, Mindy](#)
Subject: All text messages from my iPhone
Date: Monday, April 11, 2016 9:39:37 AM

From: Madore, David
Sent: Saturday, April 09, 2016 9:31 PM
To: LaRocque, Linnea; Richardson, Bill
Subject: RE: All text messages from my iPhone

Linnea,

Before sending all of these records, the PA office may likely redact the private contact information for some of the citizens such as their private email address and phone numbers.

Thank you,

David

From: Madore, David
Sent: Saturday, April 09, 2016 9:26 PM
To: Madore, David; LaRocque, Linnea
Subject: All text messages from my iPhone

Linnea,

I emailed all the text messages from my iPhone to my email account and they are all attached. This is in response to the pending public records request.

Now that they have been retained here, I have deleted them from my phone.

Thank you,

David

From: [Lamberton, Mindy](#)
To: [Madore, David](#)
Cc: [Richardson, Bill](#); [LaRocque, Linnea](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 11:13:16 AM
Attachments: [Affidavit - PDR Madore Texts.pdf](#)

Good morning Councilor Madore,

Thank you for forwarding responsive text messages on your personal cell phone to Linnea. I am now in possession of the text messages and our office will process them accordingly.

However, I still need you to fill out the Affidavit which will indicate you did locate text messages on your personal device, and that you forwarded them to our office for review.

When can I expect to receive the Affidavit?

Thank you,

Mindy Lamberton
Clark County PA – Civil Unit
360-397-2478

From: Lamberton, Mindy
Sent: Friday, April 01, 2016 11:17 AM
To: Madore, David
Cc: Richardson, Bill
Subject: Public Records Request - Personal Devices

Good morning Councilor Madore,

Attached you will find Mr. Ferguson's public records request seeking text messages on your personal cell phone.

I've also attached an Affidavit for you to fill out and return to me after you've conducted your search.

If you could please (1) acknowledge receipt of this email; and (2) advise me early next week how much time you believe you'll need to respond, I can then acknowledge the requestor's request and provide an estimate for production, if there are any responsive records.

Should you have any questions or concerns, please contact DPA Bill Richardson at ext. 4745.

Thank you in advance for your attention to this matter.

Mindy Lambertson

Public Records Program Coordinator I

Clark County Prosecutor's Office

Civil Division

(360) 397-2478

mindy.lamberton@clark.wa.gov

In the matter of a
Public Record Request
Pursuant to RCW 42.56

RE: Text Messages on Personal Cell Phone,

Requester: Greg Ferguson

Affidavit of:

Councilor David Madore,

Regarding search of a Personal
Communication Device

STATE OF WASHINGTON
COUNTY OF CLARK

I, David Madore, being first duly sworn, upon oath, depose and state:

1. I received notice of the above captioned public record request;
2. I understand that the record request seeks:

All text messages from Councilor David Madore's personal cell phone sent or received during his term in elected office relating in any way to Clark County business, i.e. pertaining to or referencing the conduct of County government or "the performance of any governmental or proprietary function".

I am the owner of personal/private communication devices, described as:

_____.

3. I have conducted a diligent search, in good faith, of the above-described communication devices for records responsive to the above-captioned public records request.

4. As a result of my search, I find:

There are no records related to the governance of Clark County on any of the devices.

There are records related to the governance of Clark County, but they are not responsive to the above captioned request, or they are not public records, for the following reasons:

_____.

- There are records related to the governance of Clark County on the personal devices. I am providing a portion of those records, attached to this affidavit, to the County for evaluation and production to the above-captioned requester pursuant to the Public Records Act, RCW 42.56. The remaining records are not responsive to the above-captioned request, or they are not public records, for the following reasons:

_____.

- There are records related to the governance of Clark County on the personal devices. I am providing all of the records to the County for evaluation and production to the above captioned requester pursuant to the Public Records Act, RCW 42.56.

- The requested records, or portions thereof, are publicly available and can be found at _____. Any record in my possession that is not publicly available is attached to this affidavit.

Affiant

SUBSCRIBED AND SWORN to before me this _____ day of April, 2016.

NOTARY PUBLIC in and for the State of
Washington, residing at: _____
My commission expires: _____

From: [LaRocque, Linnea](#)
To: [Lamberton, Mindy](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 11:22:03 AM

I printed and put in his office, just in case.

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:13 AM
To: Madore, David
Cc: Richardson, Bill; LaRocque, Linnea
Subject: RE: Public Records Request - Personal Devices

Good morning Councilor Madore,

Thank you for forwarding responsive text messages on your personal cell phone to Linnea. I am now in possession of the text messages and our office will process them accordingly.

However, I still need you to fill out the Affidavit which will indicate you did locate text messages on your personal device, and that you forwarded them to our office for review.

When can I expect to receive the Affidavit?

Thank you,

Mindy Lamberton
Clark County PA – Civil Unit
360-397-2478

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Should you have any questions or concerns, please contact DPA Bill Richardson at ext. 4745.

Thank you in advance for your attention to this matter.

Mindy Lambertson

Public Records Program Coordinator I

Clark County Prosecutor's Office

Civil Division

(360) 397-2478

mindy.lamberton@clark.wa.gov

From: [Madore, David](#)
To: [Lamberton, Mindy](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 11:26:17 AM

Mindy,

If the requested records were simply for written messages on my personal devices, then to the best of my ability, you have them all.

Please let me know if you need anything further. I want to make sure that I have not overlooked anything. If there is any documentation that specifies that anything more is required, please provide that.

Thank you,

David

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:13 AM
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Mindy Lambertson

Public Records Program Coordinator I

Clark County Prosecutor's Office

Civil Division

(360) 397-2478

mindy.lamberton@clark.wa.gov

From: [Lamberton, Mindy](#)
To: [Madore, David](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 11:30:30 AM

Councilor,

Thank you. At this point, all I need is the Affidavit to be filled out. I believe there is a section in the Affidavit which states you did locate work-related texts on your personal device. Sign, notarize and return to me.

Thank you for addressing this so quickly.

Regards,

Mindy Lamberton
Public Records
PA - Civil

From: Madore, David
Sent: Thursday, April 14, 2016 11:26 AM
To: Lamberton, Mindy
Subject: RE: Public Records Request - Personal Devices

Mindy,

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Clark County Prosecutor's Office
Civil Division
(360) 397-2478
mindy.lamberton@clark.wa.gov

From: [Madore, David](#)
To: [Lamberton, Mindy](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 11:35:45 AM

Mindy,

I was not aware that county councilors were required to sign Affidavits when they provide public records. Is that standard practice for Clark County elected officials? Or is there something unique about me?

David

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:30 AM
To: Madore, David
Subject: RE: Public Records Request - Personal Devices

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360-397-2478

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Clark County Prosecutor's Office

Civil Division

(360) 397-2478

mindy.lamberton@clark.wa.gov

From: [Lamberton, Mindy](#)
To: [Madore, David](#)
Cc: [Richardson, Bill](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 11:41:05 AM

Hello,

Nothing unique, I don't believe 😊

I understood that when a PDR is requesting county, work-related text messages on one's personal device, the affidavit is required.

Bill, can you weigh in please?

Thank you,

Mindy Lamberton
Public Records

From: Madore, David
Sent: Thursday, April 14, 2016 11:36 AM
To: Lamberton, Mindy
Subject: RE: Public Records Request - Personal Devices

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Public Records Program Coordinator I
Clark County Prosecutor's Office
Civil Division
(360) 397-2478
mindy.lamberton@clark.wa.gov

From: [Madore, David](#)
To: [Lamberton, Mindy](#); [Richardson, Bill](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 12:13:34 PM

Mindy and Bill,

Please confirm that the requirement has been a standard practice and the norm for my colleagues as well. We all need to adhere to equal application of the law.

Thank you,

David

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:40 AM
To: Madore, David
Cc: Richardson, Bill
Subject: RE: Public Records Request - Personal Devices

Hello,

Nothing unique, I don't believe 😊

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Public Records Program Coordinator I
Clark County Prosecutor's Office
Civil Division
(360) 397-2478
mindy.lamberton@clark.wa.gov

From: [Richardson, Bill](#)
To: [Madore, David](#)
Cc: [Lamberton, Mindy](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 12:29:13 PM
Attachments: [Nissen Opinion \(Supreme Final\).pdf](#)

Councilor,

Ms. Lamberton is correct. Not only do we request affidavits from *all* councilors, but we also request affidavits from *all* employees of Clark County. The practice was put in place shortly after August 2015, when the Washington Supreme Court addressed the issue in *Nissen v Pierce*. You have been the subject of several requests for records potentially held on your personal devices, your fellow councilors have not. However, please understand that any request for records on *any* employees personal device will be (and has been) met with the same equal process. I hope this answers your question.

Sincerely,

Bill Richardson

Attorney

Clark County Prosecutor's Office

Civil Division

(360) 397-2478 ext: 4745

Bill.Richardson@clark.wa.gov

From: Madore, David
Sent: Thursday, April 14, 2016 12:14 PM
To: Lamberton, Mindy; Richardson, Bill
Subject: RE: Public Records Request - Personal Devices

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Thank you,

David

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:13 AM
To: Madore, David
Cc: Richardson, Bill; LaRocque, Linnea
Subject: RE: Public Records Request - Personal Devices

Good morning Councilor Madore,

Thank you for forwarding responsive text messages on your personal cell phone to Linnea. I am now in possession of the text messages and our office will process them accordingly.

However, I still need you to fill out the Affidavit which will indicate you did locate text messages on your personal device, and that you forwarded them to our office for review.

When can I expect to receive the Affidavit?

Thank you,

Mindy Lamberton
Clark County PA – Civil Unit
360-397-2478

From: Lamberton, Mindy
Sent: Friday, April 01, 2016 11:17 AM
To: Madore, David
Cc: Richardson, Bill
Subject: Public Records Request - Personal Devices

Good morning Councilor Madore,

Attached you will find Mr. Ferguson's public records request seeking text messages on your personal cell phone.

I've also attached an Affidavit for you to fill out and return to me after you've conducted your search.

If you could please (1) acknowledge receipt of this email; and (2) advise me early next week how much time you believe you'll need to respond, I can then acknowledge the requestor's request and provide an estimate for production, if there are any responsive records.

Should you have any questions or concerns, please contact DPA Bill Richardson at ext. 4745.

Thank you in advance for your attention to this matter.

Mindy Lambertson

Public Records Program Coordinator I

Clark County Prosecutor's Office

Civil Division

(360) 397-2478

mindy.lamberton@clark.wa.gov

FILE
IN CLERKS OFFICE
SUPREME COURT, STATE OF WASHINGTON

DATE AUG 27 2015

Fairhurst, J.
for CHIEF JUSTICE

This opinion was filed for record
at 8:00am on Aug. 27, 2015



Ronald R. Carpenter
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GLEND A NISSEN, an individual)
)
Respondent,)

No. 90875-3

v.)

En Banc

PIERCE COUNTY, a public agency,)
PIERCE COUNTY PROSECUTING)
ATTORNEY'S OFFICE, a public)
agency, and PROSECUTOR MARK)
LINDQUIST,)
Petitioners.)

Filed AUG 27 2015

YU, J.—Five years ago we concluded that the Public Records Act (PRA), chapter 42.56 RCW, applied to a record stored on a personal computer, recognizing that “[i]f government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined.” *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010). Today we

consider if the PRA similarly applies when a public employee uses a private cell phone to conduct government business. We hold that text messages sent and received by a public employee in the employee's official capacity are public records of the employer, even if the employee uses a private cell phone.

BACKGROUND

This case involves two requests for public records that Glenda Nissen, a sheriff's detective, sent to Pierce County (County). Both requests asked for records related to Pierce County Prosecutor Mark Lindquist. One request stated:

Please produce any and all of Mark Lindquist's cellular telephone records for number 253-861-[XXXX¹] or any other cellular telephone he uses to conduct his business including text messages from August 2, 2011.

Clerk's Papers (CP) at 15. The other stated:

The new public records request is for Mark Lindquist's cellular telephone records for number 253-861-[XXXX] for June 7, [2010].^[2]

Id. at 17 (second alteration in original). The telephone number identified in these requests is connected to Lindquist's private cell phone. There is no dispute that Lindquist personally bought the phone, pays for its monthly service, and sometimes uses it in the course of his job.

¹ Though redacted in the record before us, the requests contained the full 10-digit telephone number.

² The County has not challenged the breadth or specificity of these requests, and we pass no opinion.

In response to these requests, Lindquist obtained and provided the County with two types of records. The first, which the parties refer to as the “call log,” is similar to an itemized statement customers might receive from their service provider each month. It contains information about the dates and times of calls made and received, the length of those calls, and the telephone number of the incoming or outgoing call. Lindquist’s service provider, Verizon Wireless, generated the call log and provided it to Lindquist at his request. He voluntarily produced it to the County.

The second type of record reveals information about text messages Lindquist sent and received over two days (“text message log”). The text message log does not reveal the content of those messages. Instead, similar to the call log, it itemizes the date and time of each message and provides the telephone number of the corresponding party. Lindquist also obtained the text message log from Verizon after receiving Nissen’s PRA requests and produced it to the County.

The County reviewed the call and text message logs and disclosed partially redacted copies to Nissen. Accompanied by an exemption log, the redactions conceal line items for calls and text messages that Lindquist self-described as personal in nature. The remaining unredacted portions relate to calls and text messages that the County and Lindquist admit might be work related. *See* CP at 490 (Decl. of Mark Lindquist in Supp. of Mot. To Intervene & Join) (“I authorized the release of records of calls that were related to the conduct of government or the

performance of any governmental or proprietary function.”); Pierce County’s Pet. for Review at 3 (“[T]he Prosecutor authorized the release of records of calls that ‘may be work related.’”); Lindquist’s Pet. for Review at 10 (“[T]he Petitioner provided those communications that may be ‘work related.’”). Thus nearly half of the text messages Lindquist sent or received and many of his phone calls during the relevant period potentially related to his job as the elected prosecutor. The County did not produce the contents of any text message, however, though copies of them exist on Verizon’s servers.³

Dissatisfied with the County’s disclosures, Nissen sued the County in Thurston County Superior Court. She sought an in camera review of Lindquist’s text messages and the call and text message logs to determine if all of the information is a public record. Lindquist intervened and moved for a temporary restraining order and preliminary injunction to enjoin further disclosure of records related to his cell phone. He argued that compelling him to disclose his text messages would violate the state and federal constitutions and was prohibited by state and federal statutes. CP at 502-18. That same day the County moved to dismiss Nissen’s complaint under

³ The messages apparently no longer exist on Lindquist’s phone. In conjunction with her PRA requests, however, Nissen’s lawyer contacted Verizon and asked it to preserve all “communications and data [on Lindquist’s account] . . . pending the issuance of a subpoena or other legal process.” CP at 200. The propriety of that request is not before us.

Nissen v. Pierce County, No. 90875-3

CR 12(b)(6). It argued the records at issue could not be public records as a matter of law, because they related to a personal cell phone rather than a county-issued one.

The trial court consolidated the two motions for a hearing. After argument, the trial judge granted the County's CR 12(b)(6) motion, determining as a matter of law that records of private cell phone use can never be public records under the PRA. The Court of Appeals reversed. *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014). Applying the PRA's definition of "public record," the Court of Appeals held that Lindquist's text messages were public records because he "prepared" them in his official capacity. *Id.* at 593-94 (citing RCW 42.56.010(3)). The court further held that the factual record was not sufficiently developed on the issue of whether the call logs also qualify as "public record[s]," noting that the issue turned on whether Lindquist used or retained the logs in his capacity as prosecuting attorney. *Id.* at 595.

We granted the County's and Lindquist's petitions for review, *Nissen v. Pierce County*, 182 Wn.2d 1008, 343 P.3d 759 (2015), and now affirm in part and remand with further instructions.

STANDARD OF REVIEW

We review de novo a CR 12(b)(6) order dismissing a complaint. Dismissal is proper only if we conclude that "the plaintiff cannot prove 'any set of facts which would justify recovery.'" *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)

Nissen v. Pierce County, No. 90875-3

(quoting *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). Motions to dismiss are granted “only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE § 357, at 604 (1969)).

Our standard of review in PRA cases is also de novo. *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).

ANALYSIS

Before turning to the questions this case presents, it is helpful to clarify the questions it does not. This case does not involve a public employer seizing an employee’s private cell phone to search for public records. It does not involve a records request for every piece of data on a smartphone. And it does not involve a citizen suing a public employee for access to the employee’s phone. Instead, this is an action against an agency for two types of records that, while potentially related to the agency’s public business, are in the exclusive control of the agency’s employee. This case asks whether those records can nonetheless be “public records” the agency must disclose and, if so, whether there are limits to how the agency may search for and review those records.

With that in mind, we first interpret the PRA to determine if a record of government business conducted on a private cell phone is a “public record,” as the PRA defines the term. We then apply that definition to the specific records here—the call and text message logs and text messages. Finally, we address the mechanics of searching for and obtaining public records held by or in the control of public employees. As explained below, we hold that text messages sent or received by Lindquist in his official capacity can be public records of the County, regardless of the public or private nature of the device used to create them; and we order Lindquist to obtain, segregate, and produce those public records to the County.

I. THE PRA REACHES EMPLOYEE-OWNED CELL PHONES WHEN USED FOR AGENCY BUSINESS

Our analysis begins with the text of the PRA. By its plain language, the PRA applies “when an ‘agency’ is requested to disclose ‘public records.’” *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993). Because those are both defined terms, we must interpret the statutory definitions to decide if records of public business an employee conducts on his or her private cell phone are public records. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm’n*, 133 Wn.2d 229, 239, 943 P.2d 1358 (1997). The PRA defines “agency” very broadly as

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). This definition in turn affects what information is a “public record” since it is incorporated into the statutory definition of that term. Under the PRA, a “public record” is

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) (emphasis added).

The definitions of “agency” and “public record” are each comprehensive on their own and, when taken together, mean the PRA subjects “virtually any record related to the conduct of government” to public disclosure.⁴ *O’Neill*, 170 Wn.2d at 147. This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government. *See* LAWS OF 1973, ch. 1, § 1(11). As we so often summarize, the PRA “is a strongly worded mandate for broad disclosure of public records.” *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 791, 246 P.3d 768 (2011) (quoting *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978))).

⁴ Disclosing that a public record exists in response to a request does not mean the record will ultimately be produced. Agencies must consider whether any applicable exemption precludes production of part or all of a record. *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010).

A. Agency Employees Working within the Scope of Employment Create Public Records

Despite that mandate, the County argues public employees can avoid the PRA simply by using a private cell phone, even if they use it for public business and even if the same information would be a public record had they used a government-issued phone instead.⁵ The County finds this large gap in the PRA by isolating the statute's definition of "agency," which does not expressly refer to individual employees as agencies. RCW 42.56.010(1). Since county employees like Lindquist are not literally a "county," the County argues its employees and the records they control are completely removed from the PRA's scope.

While that reasoning may have superficial appeal, it misses the central question here. We cannot interpret statutory terms oblivious to the context in which they are used. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002). As this case does not ask if a public employee is an "agency" with independent obligations separate from those the PRA imposes on the employer, interpreting "agency" in isolation is unhelpful. Nissen's request was directed at the County, not Lindquist.⁶ Our task instead is to decide if *records* that a public

⁵ The County admits that this is the natural result of its interpretation of the PRA. Wash. Supreme Court oral argument, *Nissen v. Pierce County*, No. 90875-3 (June 11, 2015), at 3 min., 4 sec., and 6 min., 57 sec., *audio recording* by TVW, Washington State's Public Affairs Network, <http://www.tvw.org>.

⁶ Whether an elected official is independently subject to the PRA is an unsettled question. *See Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 746, 218 P.3d 196 (2009). Here,

employee generates while working for an agency are “public records” that the agency must disclose. Thus we must interpret the statutory definitions of “agency” and “public record” together, keeping in mind the purpose those definitions are intended to further. *See Hearst Corp.*, 90 Wn.2d at 128.

One characteristic of a public record is that it is “prepared, owned, used, or retained by any state or local agency.” RCW 42.56.010(3). The County is correct that every agency the PRA identifies is a political body arising under law (e.g., a county). But those bodies lack an innate ability to prepare, own, use, or retain any record. They instead act exclusively through their employees and other agents, and when an employee acts within the scope of his or her employment, the employee’s actions are tantamount to “the actions of the [body] itself.” *Houser v. City of Redmond*, 91 Wn.2d 36, 40, 586 P.2d 482 (1978) (as to cities); *Hailey v. King County*, 21 Wn.2d 53, 58, 149 P.2d 823 (1944) (as to counties). Integrating this basic common law concept into the PRA, a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record “prepared, owned, used, or retained by [a] state or local agency.” RCW 42.56.010(3).

however, Nissen did not sue Lindquist, either in his individual or official capacity. She instead sued the County, alleging that Lindquist’s use of his cell phone resulted in public records of the County; Lindquist is a party only because he intervened to enjoin disclosure. The relevant question then is not whether Lindquist is individually subject to the PRA but, rather, whether records he handles in his capacity as the prosecutor are county public records.

That interpretation is the only logical one considering how agencies conduct business and carry out their obligations under the PRA. *See Dawson*, 120 Wn.2d at 789 (public records were “prepared by the prosecutor’s office” because two employees created and compiled them). If the PRA did not capture records individual employees prepare, own, use, or retain in the course of their jobs, the public would be without information about much of the daily operation of government. Such a result would be an affront to the core policy underpinning the PRA—the public’s right to a transparent government. That policy, itself embodied in the statutory text, guides our interpretation of the PRA. RCW 42.56.030; LAWS OF 1973, ch. 1, § 1(11); *Hearst Corp.*, 90 Wn.2d at 128.

B. The PRA Captures Work Product on Employee Cell Phones

With that understanding, it is clear that an agency’s “public records” include the work product of its employees. And we find nothing in the text or purpose of the PRA supporting the County’s suggestion that only work product made using agency property can be a public record. To the contrary, the PRA is explicit that information qualifies as a public record “regardless of [its] physical form or characteristics.” RCW 42.56.010(3). In *O’Neill* we held that a city official stored a public record on a private computer in her home by using the computer for city business, 170 Wn.2d at 150, which is consistent with the idea that employees can use their own property and still be within the scope of their employment.

Nissen v. Pierce County, No. 90875-3

Dickinson v. Edwards, 105 Wn.2d 457, 467-68, 716 P.2d 814 (1986). There is no reason to treat cell phones differently. We hold that records an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be a public record if they also meet the other requirements of RCW 42.56.010(3).

Applying the PRA to employee cell phone use is not new. Though an issue of first impression in this court, many state and local agencies implementing the PRA already conclude that using a private cell phone to conduct public business can create a public record. Over the last several years, agencies have begun adopting policies about private cell phone use and advising employees of the agencies' obligation to preserve all public records. Just as examples:

- “Employees utilizing cell phones for City business must not utilize written cell phone capabilities such as text messaging or email for City business unless such phone is synchronized with the City’s computer system so that such electronic records can be maintained according to the State records retention requirements.” CITY OF PROSSER, PERSONNEL POLICY MANUAL 32 (2009) (Policy 403: Cell Phone Allowance).
- “All county business generated on personal mobile devices are subject to the Public Records Act. . . . Text messages sent and received on a personal mobile device are not stored in any other form. Employees shall not use texting for any County business.” THURSTON COUNTY ADMINISTRATIVE MANUAL (2012) § 10 (Personal Mobile Device Policy).
- “Employees should be aware that work-related texts and voice messages on cell phones are public records subject to the Public Records Act. Employees have a duty to maintain such records in

accordance with the Washington Local Government Record Retention Schedules.” CITY OF GRANDVIEW, PERSONNEL POLICY MANUAL 88 (2013) (use of personal cellular telephones to conduct city business), <http://www.grandview.wa.us/wp-content/uploads/2013/03/Personnel-Policy-Manual1.pdf>.

These policies are comparable to many others around the state and are consistent with the attorney general’s understanding of the PRA. *See* WAC 44-14-03001(3). While these interpretations do not bind us, *O’Neill*, 170 Wn.2d at 149, they discredit the County’s assertion that private cell phone use has always been treated as outside the PRA.

Similarly unpersuasive is the County’s warning that every “work-related” personal communication is now a public record subject to disclosure. Traditional notions of principal-agency law alleviate this concern. For information to be a public record, an employee must prepare, own, use, or retain it *within the scope of employment*. An employee’s communication is “within the scope of employment” only when the job requires it, the employer directs it, or it furthers the employer’s interests. *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958) (citing *Lunz v. Dep’t of Labor & Indus.*, 50 Wn.2d 273, 310 P.2d 880 (1957); *Roletto v. Dep’t Stores Garage Co.*, 30 Wn.2d 439, 191 P.2d 875 (1948)). This limits the reach of the PRA to records related to the employee’s public responsibilities. For instance, employees do not generally act within the scope of employment when they text their spouse about working late or discuss their job on

social media. Nor do they typically act within the scope of employment by creating or keeping records purely for private use, like a diary. None of these examples would result in a public record “prepared, owned, used, or retained” by the employer agency in the usual case.⁷

Agencies can act only through their employee-agents. With respect to an agency’s obligations under the PRA, the acts of an employee in the scope of employment are necessarily acts of the “state and local agenc[ies]” under RCW 42.56.010(3). We therefore reject the County’s argument that records related to an employee’s private cell phone can never be public records as a matter of law. Instead, records an employee prepares, owns, uses, or retains within the scope of employment are public records if they meet all the requirements of RCW 42.56.010(3). This inquiry is always case- and record-specific. *Cf. Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015).

II. APPLYING THE PRA TO THE CALL AND TEXT MESSAGE LOGS AND TEXT MESSAGES

We next apply RCW 42.56.010(3) to the records at issue here—the call and text message logs and text messages. To be a public record under RCW 42.56.010(3), information must be (1) a writing (2) related to the conduct of

⁷ We offer these generic illustrations in response to hypotheticals raised by the County and some amici. Of course, the facts of every case vary. We do not intend these illustrations to have precedential effect.

government or the performance of government functions that is (3) prepared, owned, used, or retained by a state or local agency. *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746, 958 P.2d 260 (1998). The first element is not in dispute—the parties agree that the call and text message logs and text messages are “writings” under the PRA. *See* RCW 42.56.010(4). The remaining two elements are discussed in turn.

A. Records Relating to the Conduct of Government

Public records must “relat[e] to the conduct of government or the performance of any governmental or proprietary function.” RCW 42.56.010(3). This language casts a wide net. In *Confederated Tribes*, for example, we held that records of money paid by Indian tribes into a common fund related to the conduct of the government even though the records related primarily to tribal gaming operations. 135 Wn.2d at 739-43. Since the state received money from the common fund, we determined tribal contributions impacted state government and therefore records of those contributions were public records. *Id.* at 748.

We adopted a similarly broad interpretation in *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 618 P.2d 76 (1980), which involved medical records of patients hospitalized at a state-owned facility. The records there unquestionably related to individual patients and did not explicitly discuss government operations, but we still held that the records “relat[ed] to the conduct of government” under RCW

Nissen v. Pierce County, No. 90875-3

42.56.010(3). From them the public could learn about the “administration of health care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs, all of which are carried out or relate to the performance of a governmental or proprietary function.” *Oliver*, 94 Wn.2d at 566.

Together these cases suggest records can qualify as public records if they contain any information that refers to or impacts the actions, processes, and functions of government.⁸

B. Records Prepared, Owned, Used, or Retained by an Agency

As explained previously, a public record must also be “prepared, owned, used, or retained” by an agency, which includes an agency employee acting within the scope of employment. But the parties still quarrel over the meaning of these verbs, which requires that we further interpret RCW 42.56.010(3). Statutory interpretation starts with the plain meaning of the language; the plain meaning controls if it is unambiguous. *Campbell*, 146 Wn.2d at 11-12. We may use a dictionary to discern the plain meaning of an undefined statutory term. *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citing *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1996)).

⁸ It is worth repeating that records an employee maintains in a personal capacity will not qualify as public records, even if they refer to, comment on, or mention the employee’s public duties.

Nissen v. Pierce County, No. 90875-3

“*Prepared.*” “Prepare” is defined as “to put together”; to “MAKE, PRODUCE”; “to put into written form.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1790 (2002). This interpretation is consistent with previous cases that treat “preparing” a record as creating it. *See Dawson*, 120 Wn.2d at 787 (agency prepared record by “creat[ing] one of the files”); *Oliver*, 94 Wn.2d at 566 (records of patient’s hospitalization prepared by the hospital).

“*Owned.*” To “own” a record means “to have or hold [it] as property.” WEBSTER’S, *supra*, at 1612; *see also O’Neill v. City of Shoreline*, 145 Wn. App. 913, 925, 187 P.3d 822 (2008).

“*Used.*” We previously addressed what it means for an agency to “use” a record. We broadly interpreted the term in *Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1 of Clark County*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999), holding that the “critical inquiry is whether the requested information bears a nexus with the agency’s decision-making process.” A record that is prepared and held by a third party, without more, is not a public record. But if an agency “evaluat[es], review[s], or refer[s]” to a record in the course of its business, the agency “uses” the record within the meaning of the PRA. *Id.* at 962.

“*Retained.*” To “retain” a record means “to hold or continue to hold [it] in possession or use.” WEBSTER’S, *supra*, at 1938.

C. The Text Messages Are Potentially Public Records; the Call and Text Message Logs Are Not

We now apply those definitions to decide if the complaint sufficiently alleges that the call logs and text messages are “public records.” Absent an allegation that the County used the call and text message logs, the logs in this case are not public records. The call and text message logs were prepared and retained by Verizon, and Nissen does not contend that the County evaluated, reviewed, or took any other action with the logs necessary to “use” them. *Concerned Ratepayers*, 138 Wn.2d at 962. Though they evidence the acts of a public employee, the call and text message logs played no role in County business as records themselves. We hold that the complaint fails to allege the call and text message logs are “public records” of the County within the meaning of RCW 42.56.010(3) because the County did nothing with them.

We reach a different conclusion as to text messages. Nissen sufficiently alleges that Lindquist sent and received text messages in his official capacity “to take actions retaliating against her and other official misconduct.” CP at 14. When acting within the scope of his employment, Lindquist prepares outgoing text messages by “putting them into written form” and sending them. Similarly, he “used” incoming text messages when he reviewed and replied to them while within the scope of employment. Since the County and Lindquist admit that some text

messages might be “work related,” the complaint sufficiently alleges that those messages meet all three elements of a “public record” under RCW 42.56.010(3).

Transcripts of the content of those text messages are thus potentially public records subject to disclosure, consistent with the procedure discussed below.

III. SEARCHING FOR PUBLIC RECORDS WITHIN AN EMPLOYEE’S CONTROL

We finally turn to the mechanics of searching for and obtaining public records stored by or in the control of an employee. The County and Lindquist suggest that various provisions of the state and federal constitutions categorically prohibit a public employer from obtaining public records related to private cell phone use without consent.⁹ Because an individual has no constitutional privacy interest in a *public* record,¹⁰ Lindquist’s challenge is necessarily grounded in the constitutional rights he has in personal information comingled with those public records. We are mindful that today’s mobile devices often contain “a ‘wealth of detail about [a person’s] familial, political, professional, religious, and sexual associations.’” *State v. Hinton*, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (alteration in original) (quoting *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring)). As nearly two-thirds of Americans can

⁹ They primarily cite to the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution.

¹⁰ See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (noting public officials have “constitutionally protected privacy rights in matters of personal life *unrelated to any acts done by them in their public capacity*” (emphasis added)).

now communicate, access the Internet, store documents, and manage appointments on their smartphone, cell phones are fast becoming an indispensable fixture in people's private and professional lives. Text messaging is the most widely used smartphone feature; e-mail is not far behind. Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CTR. (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015>.

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). As noted earlier, many counties, cities, and agencies around the state recognize the need to capture and retain public records created on personal devices. Some of those entities provide employees with a way to preserve public records and avoid any inquiry into their private affairs by, for example, syncing work-related documents, e-mails, and text messages to an agency server or other place accessible to the employer. The County apparently has no such policy.

While a policy easing the burden on employees of preserving public records is certainly helpful, it cannot be a precondition to the public's right to access those records. If it were, the effectiveness of the PRA would hinge on “the whim of the

public officials whose activities it is designed to regulate.” *Mead Sch. Dist. No. 354 v. Mead Educ. Ass’n*, 85 Wn.2d 140, 145, 530 P.2d 302 (1975). The legislature tasks us with interpreting the PRA liberally and in light of the people’s insistence that they have information about the workings of the government they created. RCW 42.56.030. Of course, the public’s statutory right to public records does not extinguish an individual’s constitutional rights in private information. But we do not read the PRA as a zero-sum choice between personal liberty and government accountability. Instead, we turn to well-settled principles of public disclosure law and hold that an employee’s good-faith search for public records on his or her personal device can satisfy an agency’s obligations under the PRA.

Though technology evolves, segregating public records from nonpublic ones is nothing new for agencies responding to a PRA request. Whether stored in a file cabinet or a cell phone, the PRA has never authorized “unbridled searches” of every piece of information held by an agency or its employees to find records the citizen believes are responsive to a request. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004). The onus is instead on the agency—necessarily through its employees—to perform “an adequate search” for the records requested. *Neigh. All.*, 172 Wn.2d at 720-21. 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” attesting to the nature and extent of

Nissen v. Pierce County, No. 90875-3

their search. *Id.* at 721. The PRA allows a trial court to resolve disputes about the nature of a record “based solely on affidavits,” RCW 42.56.550(3), without an in camera review, without searching for records itself, and without infringing on an individual’s constitutional privacy interest in private information he or she keeps at work.

Federal courts implementing the Freedom of Information Act (FOIA), Pub. L. No. 89-487, 80 Stat. 250, allow individual employees to use the same method to self-segregate private and public records. *See, e.g., Media Research Ctr. v. U.S. Dep’t of Justice*, 818 F. Supp. 2d 131, 139-40 (D.D.C. 2011) (declarations sufficient to determine e-mails were not sent in employee’s official capacity); *Consumer Fed’n of Am. v. Dep’t of Agric.*, 455 F.3d 283, 288-89 (D.C. Cir. 2006) (affidavits from employees about character of electronic calendars); *Bloomberg, LP v. U.S. Sec. & Exch. Comm’n*, 357 F. Supp. 2d 156, 163 (D.D.C. 2004) (affidavits about “telephone logs” and message slips); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11-12 (D.D.C. 1995); *Gallant v. Nat’l Labor Relations Bd.*, 26 F.3d 168, 171 (D.C. Cir. 1994). While “[a]n agency cannot require an employee to produce and submit for review a purely personal document when responding to a FOIA request[,] . . . it does control the employee to the extent that the employee works for the agency on agency matters.” *Ethyl Corp. v. U.S. Eenvt’l Prot. Agency*, 25 F.3d 1241, 1247 (4th Cir. 1994). Thus, where a federal employee asserts a potentially responsive record is

personal, he or she must provide the employer and “the courts with the opportunity to evaluate the facts and reach their own conclusions” about whether the record is subject to FOIA. *Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 480-81 (2d Cir. 1999). We already incorporate FOIA’s standard for adequate searches into the PRA, *Neigh. All.*, 172 Wn.2d at 720, and we similarly adopt FOIA’s affidavit procedure for an employee’s personally held public records.

Therefore, we hold agency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant PRA request. Employees must produce any public records (e-mails, text messages, and any other type of data) to the employer agency. The agency then proceeds just as it would when responding to a request for public records in the agency’s possession by reviewing each record, determining if some or all of the record is exempted from production, and disclosing the record to the requester. *See generally Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 436-37, 327 P.3d 600 (2013).

Where an employee withholds personal records from the employer, he or she must submit an affidavit with facts sufficient to show the information is not a “public record” under the PRA. 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. 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.

We recognize this procedure might be criticized as too easily abused or too deferential to employees' judgment. Certainly the same can be said of any search for public records, not just for records related to employee cell phone use. But we offer two specific responses. First, an employee's judgment would often be required to help identify public records on a cell phone, even in an in camera review. Text messages, for example, are short communications whose meaning may not be self-apparent. Unlike a chain of e-mails where the preceding messages are often replicated in the body of each new reply, text messages may contain only a few words. The employee then might be needed to put that message into context to determine if it meets the statutory definition of a "public record."

Second, those criticisms spotlight why agencies should develop ways to capture public records related to employee cell phone use. The people enacted the PRA "mindful of the right of individuals to privacy," LAWS OF 1973, ch. 1, § 1(11), and individuals do not sacrifice all constitutional protection by accepting public employment. *City of Ontario v. Quon*, 560 U.S. 746, 756, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010). Agencies are in the best position to implement policies that fulfill their obligations under the PRA yet also preserve the privacy rights of their employees. E-mails can be routed through agency servers, documents can be cached

to agency-controlled cloud services, and instant messaging apps can store conversations. Agencies could provide employees with an agency-issued device that the agency retains a right to access, or they could prohibit the use of personal devices altogether. That these may be more effective ways to address employee cell phone use, however, does not diminish the PRA's directive that we liberally construe it here to promote access to all public records. RCW 42.56.010(3).

CONCLUSION

We affirm the Court of Appeals in part. Records that an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be “public records” of the agency under RCW 42.56.010(3). Nissen’s complaint thus sufficiently alleges that at least some of the text messages at issue may be public records subject to disclosure. Because it is impossible at this stage to determine if any messages are in fact public records, on remand the parties are directed as follows. Lindquist must obtain a transcript of the content of all the text messages at issue, review them, and produce to the County any that are public records consistent with our opinion. The County must then review those messages—just as it would any other public record—and apply any applicable exemptions, redact information if necessary, and produce the records and any exemption log to Nissen. As to text messages that Lindquist in good faith determines are not public

records, he must submit an affidavit to the County attesting to the personal character of those messages. The County must also produce that affidavit to Nissen.

We note that the County responded to Nissen's records requests and produced records in a timely manner based on what we presume was its good-faith interpretation of the PRA. Though we now hold that interpretation is incorrect, penalties are not warranted at this early stage before the County has had the opportunity to comply with our opinion and supplement its response to Nissen's requests accordingly. We reserve for the trial court the issue of penalties going forward.

Law, J.

WE CONCUR:

Madsen, C. J.

Johnson

Orwin, J.

Fairhurst, J.

Stephens, J.

Wegman, J.

Conzales, J.

Geoff McLeod, J.

From: [Madore, David](#)
To: [Richardson, Bill](#)
Cc: [Lamberton, Mindy](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 1:19:34 PM

Bill,

You used the word "requested" instead of "required". Is this a requirement? Have my colleagues made it their practice to routinely sign affidavits for all public records requests?

Thanks

David

From: Richardson, Bill
Sent: Thursday, April 14, 2016 12:29 PM
To: Madore, David
Cc: Lamberton, Mindy
Subject: RE: Public Records Request - Personal Devices

Councilor,

Ms. Lamberton is correct. Not only do we request affidavits from *all* councilors, but we also request affidavits from *all* employees of Clark County. The practice was put in place shortly after August 2015, when the Washington Supreme Court addressed the issue in *Nissen v Pierce*. You have been the subject of several requests for records potentially held on your personal devices, your fellow councilors have not. However, please understand that any request for records on *any* employees personal device will be (and has been) met with the same equal process. I hope this answers your question.

Sincerely,

Bill Richardson

Attorney

Clark County Prosecutor's Office

Civil Division

(360) 397-2478 ext: 4745

Bill.Richardson@clark.wa.gov

From: Madore, David
Sent: Thursday, April 14, 2016 12:14 PM
To: Lamberton, Mindy; Richardson, Bill
Subject: RE: Public Records Request - Personal Devices

Mindy and Bill,

Please confirm that the requirement has been a standard practice and the norm for my colleagues as well. We all need to adhere to equal application of the law.

Thank you,

David

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:40 AM
To: Madore, David
Cc: Richardson, Bill
Subject: RE: Public Records Request - Personal Devices

Hello,

Nothing unique, I don't believe 😊

I understood that when a PDR is requesting county, work-related text messages on one's personal device, the affidavit is required.

Bill, can you weigh in please?

Thank you,

Mindy Lamberton
Public Records

From: Madore, David
Sent: Thursday, April 14, 2016 11:36 AM
To: Lamberton, Mindy
Subject: RE: Public Records Request - Personal Devices

Mindy,

I was not aware that county councilors were required to sign Affidavits when they provide public records. Is that standard practice for Clark County elected officials? Or is there something unique about me?

David

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:30 AM
To: Madore, David
Subject: RE: Public Records Request - Personal Devices

Councilor,

Thank you. At this point, all I need is the Affidavit to be filled out. I believe there is a section in the Affidavit which states you did locate work-related texts on your personal device. Sign, notarize and return to me.

Thank you for addressing this so quickly.

Regards,

Mindy Lambertson
Public Records
PA - Civil

From: Madore, David
Sent: Thursday, April 14, 2016 11:26 AM
To: Lambertson, Mindy
Subject: RE: Public Records Request - Personal Devices

Mindy,

If the requested records were simply for written messages on my personal devices, then to the best of my ability, you have them all.

Please let me know if you need anything further. I want to make sure that I have not overlooked anything. If there is any documentation that specifies that anything more is required, please provide that.

Thank you,

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From: Lambertson, Mindy
Sent: Thursday, April 14, 2016 11:13 AM
To: Madore, David
Cc: Richardson, Bill; LaRocque, Linnea
Subject: RE: Public Records Request - Personal Devices

Good morning Councilor Madore,

Thank you for forwarding responsive text messages on your personal cell phone to Linnea. I am now in possession of the text messages and our office will process them accordingly.

However, I still need you to fill out the Affidavit which will indicate you did locate text messages on your personal device, and that you forwarded them to our office for review.

When can I expect to receive the Affidavit?

Thank you,

Mindy Lambertson
Clark County PA – Civil Unit
360-397-2478

From: Lambertson, Mindy
Sent: Friday, April 01, 2016 11:17 AM
To: Madore, David
Cc: Richardson, Bill
Subject: Public Records Request - Personal Devices

Good morning Councilor Madore,

Attached you will find Mr. Ferguson's public records request seeking text messages on your personal cell phone.

I've also attached an Affidavit for you to fill out and return to me after you've conducted your search.

If you could please (1) acknowledge receipt of this email; and (2) advise me early next week how much time you believe you'll need to respond, I can then acknowledge the requestor's request and provide an estimate for production, if there are any responsive records.

Should you have any questions or concerns, please contact DPA Bill Richardson at ext. 4745.

Thank you in advance for your attention to this matter.

Mindy Lambertson

Public Records Program Coordinator I
Clark County Prosecutor's Office
Civil Division
(360) 397-2478
mindy.lambertson@clark.wa.gov

From: [Richardson, Bill](#)
To: [Madore, David](#)
Cc: [Lamberton, Mindy](#)
Subject: RE: Public Records Request - Personal Devices
Date: Thursday, April 14, 2016 1:32:06 PM

Councilor,

I don't personally recall getting a PRA request for public records on your colleagues' personal devices, so I can't say with any accuracy whether they "routinely" sign affidavits. I can, however, say that the affidavits are for use in PRA requests for public records potentially on personal devices without regard to the identity of the person who might be the subject of the record. Along those lines, I would not hesitate to send an affidavit to *any* Clark County employee or elected official if I had reason to believe that records responsive to a PRA request are located on their personal communication devices. However, I cannot "require" an independent elected official-or for that matter any employee-to do anything. That authority rests with the elected official, department heads and managers. I simply provide legal advice, and I hope that it is followed. My advice in this matter-and any matter involving a PRA request for public records on personal devices-is to complete the affidavit. Failing to do so unnecessarily exposes Clark County to potential litigation. If you have concerns about the legal advice, please read through the *Nissen* decision and let me know where you think I may have gone wrong (a copy was attached to my last email for your convenient review).

Sincerely,

Bill Richardson

Attorney

Clark County Prosecutor's Office

Civil Division

(360) 397-2478 ext: 4745

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Thank you in advance for your attention to this matter.

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Public Records Program Coordinator I

Clark County Prosecutor's Office

Civil Division

(360) 397-2478

mindy.lamberton@clark.wa.gov

From: [Lamberton, Mindy](#)
To: ["Greg Ferguson"](#)
Cc: ["Brenda Merryman"](#)
Subject: RE: Public Records Request - Councilor Madore Text Messages
Date: Thursday, April 14, 2016 1:38:17 PM

Good afternoon,

I have received Councilor Madore's responsive text messages. The records will now be reviewed by legal and then processed for production.

I stick with my April 22nd production date, but hope to have the records to you before then.

Please contact me with any questions or concerns.

Thank you,

Mindy Lamberton
Public Records

From: Lamberton, Mindy
Sent: Monday, April 04, 2016 4:13 PM
To: 'Greg Ferguson'
Cc: Brenda Merryman
Subject: RE: Public Records Request - Councilor Madore Text Messages

Good afternoon.

Thank you for your request. I have yet to hear back from Councilor Madore on how much time he thinks he'll need to search his devices. Since I am heading out of town this evening for Spring Break, I'll go ahead and acknowledge your request and state that responsive records should be available on or before April 22nd. Of course, I intend to follow up with Councilor Madore when I return to work on Monday, April 11th.

Thank you,

Mindy Lamberton
Public Records

From: Greg Ferguson [<mailto:greg@greg-ferguson.com>]
Sent: Thursday, March 31, 2016 4:17 PM
To: Lamberton, Mindy
Cc: Horne, Chris; Brenda Merryman
Subject: Public Records Request - Councilor Madore Text Messages

Mindy:

Attached is a public records request for Councilor Madore's text messages to and from his personal cell phone. Please acknowledge your receipt of this request. Thank you.

Best regards,
Greg

Law Offices of Gregory D. Ferguson, PC

112 West 11th Street, Suite 100

Vancouver, WA. 98660

Phone: [360.906.1167](tel:360.906.1167)

Fax: [360.695.5800](tel:360.695.5800)

Web: www.greg-ferguson.com

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From: [Lamberton, Mindy](#)
To: ["Greg Ferguson"](#)
Cc: [Brenda Merryman](#)
Subject: RE: Public Records Request - Councilor Madore Text Messages
Date: Friday, April 15, 2016 1:55:56 PM

Hi Greg,

Thanks for your email. Bill is out of the office today and the records are on his desk for review.

I'm hoping he'll get to them on Monday.

May I ask who Mr. Madore's attorney is?

Mindy

From: Greg Ferguson [mailto:greg@greg-ferguson.com]
Sent: Friday, April 15, 2016 1:31 PM
To: Lamberton, Mindy
Cc: Brenda Merryman
Subject: Re: Public Records Request - Councilor Madore Text Messages

Thanks, Mindy.

I need copies of any third party notice related to this request together with any communications from or to Mr. Madore or his representative(s) relating to this request or the review or production of his text messages. I need the records as soon as feasible. Madore's attorney told Brenda this morning that they are "filing papers on Monday."

Best regards,

Greg

Sent from my iPad

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From: [Lamberton, Mindy](#)
To: [Richardson, Bill](#)
Subject: FW: Public Records Request - Councilor Madore Text Messages
Date: Friday, April 15, 2016 1:58:54 PM

FYI

From: Greg Ferguson [mailto:greg@greg-ferguson.com]
Sent: Friday, April 15, 2016 1:31 PM
To: Lamberton, Mindy
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From: [Horne, Chris](#)
To: [Cook, Christine](#); [Richardson, Bill](#); [Lamberton, Mindy](#)
Subject: Counsel of Councilor Madore
Date: Friday, April 15, 2016 2:20:10 PM
Attachments: [Document2.docx](#)

[Home](#) » [Archives](#) » [May 2013](#) » New Member Of SJC Bar

[[Previous entry: "No Injuries On Roche Harbor Road"](#)] [[Next entry: "Thursday Sailing Team Fundraiser"](#)]

05/07/2013: "New Member Of SJC Bar"



(Nick Power sworn in by Judge Eaton -IG photo)

Nicholas Power was sworn in last week by Superior Court Judge Donald Eaton, who noted to those in attendance that at that moment Mr. Power was the newest lawyer in Washington state. However he said, Power had also been a member of the Illinois Bar, and was sworn in by a junior congressman who went on to become our current president.



(Penelope Haskew; Chiara Power; Alison Power & Nick Power -IG photo)

Power had an interesting childhood.

He was born in St. Louis and spent much of his childhood there, but as father's work took the family for year or longer stints in Afghanistan, India, Italy, Iran and Egypt.

Power graduated magna cum laude from Washington University in St. Louis with a degree in economics. He worked for the SEC in their research department in Washington D.C. and

later in the research department of the Federal Reserve Bank of St. Louis.

He attended the Law School of St. Louis University in fall 1994 and also studied law at the Vrije Universiteit Brussel, in Brussels, Belgium, graduating from law School in spring 1997, and passed the Illinois Bar several months later.

After graduating Law School he served as senior law clerk to Federal District Judge Michael M. Mihm, of the Central District of Illinois, where he worked on a wide variety of federal cases including the [Mitsubishi sex discrimination case](#) .

And also worked on the remedy portion of In [Re High Fructose Corn Syrup Antitrust Litigation](#) which was a spin off of the Lysine price fixing conspiracy made famous by the movie, The Informant, starring Matt Damon.

In late 1999 he and wife Penelope moved to San Miguel Allende, Mexico -initially temporarily to fix-up and sell property that another family member had inherited- with the intention of returning to St. Louis to practice law.

The booming real estate market proved lucrative and in addition to owning and operating a 6 room bed and breakfast, for the next 9 years or so.

Tourist visas turned into residency status, and dual national kids were born. By 2008, the drug war in Mexico had become more acute and with two daughters doing business in Mexico had just become too risky for comfort.

At that point Power decided to move: "Seeking greener pastures and a safe place to raise the girls my wife and I relocated to San Juan Island in 2008. Over the next few years, I wound down the real estate biz in Mexico and started to think about getting back into legal work after my detour through Mexico."

Now a duly sworn member of the bar, Power said "I hope to provide quality and affordable legal services to the residents of San Juan County and will be opening an office in Friday Harbor in the next month and am excited to consult with islanders who are in need of legal advice."

From: [Richardson, Bill](#)
To: [Lamberton, Mindy](#)
Subject: RE: Public Records Request - Councilor Madore Text Messages
Date: Monday, April 18, 2016 8:13:54 AM

Interesting. Let me know what you find out.

From: Lamberton, Mindy
Sent: Friday, April 15, 2016 1:59 PM
To: Richardson, Bill
Subject: FW: Public Records Request - Councilor Madore Text Messages

FYI

From: Greg Ferguson [<mailto:greg@greg-ferguson.com>]
Sent: Friday, April 15, 2016 1:31 PM
To: Lamberton, Mindy
Cc: Brenda Merryman
Subject: Re: Public Records Request - Councilor Madore Text Messages

Thanks, Mindy.

I need copies of any third party notice related to this request together with any communications from or to Mr. Madore or his representative(s) relating to this request or the review or production of his text messages. I need the records as soon as feasible. Madore's attorney told Brenda this morning that they are "filing papers on Monday."

Best regards,
Greg

Sent from my iPad

On Apr 14, 2016, at 1:38 PM, Lamberton, Mindy <Mindy.Lamberton@clark.wa.gov> wrote:

Good afternoon,

I have received Councilor Madore's responsive text messages. The records will now be reviewed by legal and then processed for production.

I stick with my April 22nd production date, but hope to have the records to you before then.

Please contact me with any questions or concerns.

Thank you,

Mindy Lamberton
Public Records

From: Lamberton, Mindy
Sent: Monday, April 04, 2016 4:13 PM
To: 'Greg Ferguson'
Cc: Brenda Merryman
Subject: RE: Public Records Request - Councilor Madore Text Messages

Good afternoon.

Thank you for your request. I have yet to hear back from Councilor Madore on how much time he thinks he'll need to search his devices. Since I am heading out of town this evening for Spring Break, I'll go ahead and acknowledge your request and state that responsive records should be available on or before April 22nd. Of course, I intend to follow up with Councilor Madore when I return to work on Monday, April 11th.

Thank you,

Mindy Lamberton
Public Records

From: Greg Ferguson [<mailto:greg@greg-ferguson.com>]
Sent: Thursday, March 31, 2016 4:17 PM
To: Lamberton, Mindy
Cc: Horne, Chris; Brenda Merryman
Subject: Public Records Request - Councilor Madore Text Messages

Mindy:

Attached is a public records request for Councilor Madore's text messages to and from his personal cell phone. Please acknowledge your receipt of this request. Thank you.

Best regards,
Greg

Law Offices of Gregory D. Ferguson, PC

112 West 11th Street, Suite 100

Vancouver, WA. 98660

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This e-mail and related attachments and any response may be subject to public disclosure under state law.

From: [Richardson, Bill](#)
To: [Madore, David](#)
Cc: [Lamberton, Mindy](#)
Subject: RE: Public Records Request - Personal Devices
Date: Monday, April 18, 2016 10:58:31 AM

Councilor,

I am not aware of a record request that seeks records from the other councilor's personal devices, so I don't have information about their position on signing the proposed affidavit. I am certain that I have not heard about a refusal to sign.

Bill

From: Madore, David
Sent: Thursday, April 14, 2016 3:17 PM
To: Richardson, Bill
Subject: RE: Public Records Request - Personal Devices

Bill,

Thanks for the clear answers. Sorry to press further for an answer to the one question not yet answered... Regardless of the type of public records requested or what device they may found be on, have each of my colleagues routinely signed the affidavits?

Hopefully, that will wrap up my questions.

Thanks

David

From: Richardson, Bill
Sent: Thursday, April 14, 2016 12:29 PM
To: Madore, David
Cc: Lamberton, Mindy
Subject: RE: Public Records Request - Personal Devices

Councilor,

Ms. Lamberton is correct. Not only do we request affidavits from *all* councilors, but we also request affidavits from *all* employees of Clark County. The practice was put in place shortly after August 2015, when the Washington Supreme Court addressed the issue in *Nissen v Pierce*. You have been the subject of several requests for records potentially held on your personal devices, your fellow councilors have not. However, please understand that any request for records on *any* employees personal device will be (and has been) met with the same equal process. I hope this answers your question.

Sincerely,

Bill Richardson

Attorney

Clark County Prosecutor's Office

Civil Division

(360) 397-2478 ext: 4745

Bill.Richardson@clark.wa.gov

From: Madore, David
Sent: Thursday, April 14, 2016 12:14 PM
To: Lambertson, Mindy; Richardson, Bill
Subject: RE: Public Records Request - Personal Devices

Mindy and Bill,

Please confirm that the requirement has been a standard practice and the norm for my colleagues as well. We all need to adhere to equal application of the law.

Thank you,

David

From: Lambertson, Mindy
Sent: Thursday, April 14, 2016 11:40 AM
To: Madore, David
Cc: Richardson, Bill
Subject: RE: Public Records Request - Personal Devices

Hello,

Nothing unique, I don't believe 😊

I understood that when a PDR is requesting county, work-related text messages on one's personal device, the affidavit is required.

Bill, can you weigh in please?

Thank you,

Mindy Lambertson
Public Records

From: Madore, David
Sent: Thursday, April 14, 2016 11:36 AM
To: Lambertson, Mindy
Subject: RE: Public Records Request - Personal Devices

Mindy,

I was not aware that county councilors were required to sign Affidavits when they provide public records. Is that standard practice for Clark County elected officials? Or is there something unique about me?

David

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:30 AM
To: Madore, David
Subject: RE: Public Records Request - Personal Devices

Councilor,

Thank you. At this point, all I need is the Affidavit to be filled out. I believe there is a section in the Affidavit which states you did locate work-related texts on your personal device. Sign, notarize and return to me.

Thank you for addressing this so quickly.

Regards,

Mindy Lamberton
Public Records
PA - Civil

From: Madore, David
Sent: Thursday, April 14, 2016 11:26 AM
To: Lamberton, Mindy
Subject: RE: Public Records Request - Personal Devices

Mindy,

If the requested records were simply for written messages on my personal devices, then to the best of my ability, you have them all.

Please let me know if you need anything further. I want to make sure that I have not overlooked anything. If there is any documentation that specifies that anything more is required, please provide that.

Thank you,

David

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:13 AM
To: Madore, David
Cc: Richardson, Bill; LaRocque, Linnea
Subject: RE: Public Records Request - Personal Devices

Good morning Councilor Madore,

Thank you for forwarding responsive text messages on your personal cell phone to Linnea. I

am now in possession of the text messages and our office will process them accordingly.

However, I still need you to fill out the Affidavit which will indicate you did locate text messages on your personal device, and that you forwarded them to our office for review.

When can I expect to receive the Affidavit?

Thank you,

Mindy Lamberton
Clark County PA – Civil Unit
360-397-2478

From: Lamberton, Mindy
Sent: Friday, April 01, 2016 11:17 AM
To: Madore, David
Cc: Richardson, Bill
Subject: Public Records Request - Personal Devices

Good morning Councilor Madore,

Attached you will find Mr. Ferguson's public records request seeking text messages on your personal cell phone.

I've also attached an Affidavit for you to fill out and return to me after you've conducted your search.

If you could please (1) acknowledge receipt of this email; and (2) advise me early next week how much time you believe you'll need to respond, I can then acknowledge the requestor's request and provide an estimate for production, if there are any responsive records.

Should you have any questions or concerns, please contact DPA Bill Richardson at ext. 4745.

Thank you in advance for your attention to this matter.

Mindy Lamberton

Public Records Program Coordinator I
Clark County Prosecutor's Office
Civil Division
(360) 397-2478
mindy.lamberton@clark.wa.gov

From: [Lamberton, Mindy](#)
To: [Madore, David](#)
Cc: [Richardson, Bill](#)
Subject: RE: Public Records Request - Personal Devices
Date: Tuesday, April 19, 2016 1:05:35 PM

Good afternoon Councilor Madore,

I'm checking to see if I could come up today and pick up your signed Affidavit.

Thank you in advance,

Mindy Lamberton
PA Civil
Public Records

From: Lamberton, Mindy
Sent: Thursday, April 14, 2016 11:41 AM
To: Madore, David
Cc: Richardson, Bill
Subject: RE: Public Records Request - Personal Devices

Hello,

Nothing unique, I don't believe 😊

I understood that when a PDR is requesting county, work-related text messages on one's personal device, the affidavit is required.

Bill, can you weigh in please?

Thank you,

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Subject: RE: Public Records Request - Personal Devices

Councilor,

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Regards,

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PA - Civil

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Subject: RE: Public Records Request - Personal Devices

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Thank you,

David

From: Lamberton, Mindy
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Cc: Richardson, Bill; LaRocque, Linnea
Subject: RE: Public Records Request - Personal Devices

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360-397-2478

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Thank you in advance for your attention to this matter.

Mindy Lamberton

Public Records Program Coordinator I
Clark County Prosecutor's Office
Civil Division
(360) 397-2478
mindy.lamberton@clark.wa.gov

From: [Lamberton, Mindy](#)
To: ["Greg Ferguson"](#)
Cc: [Brenda Merryman](#)
Subject: RE: Public Records Request - Councilor Madore Text Messages
Date: Wednesday, April 20, 2016 10:54:37 AM
Attachments: [SMSPAX00316042010570.pdf](#)

Hi Greg,

I just talked w/Bill, he will be reviewing the text messages today.

Just a suggestion but if you guys would sign up with the county's public records portal, GovQA, you'd have access to all kinds of records. Linnea up in the BOCC office publishes all of her requests and the responsive records. The letter is on the portal.

I'll contact you this afternoon with the status of the text messages.

Very truly yours,

Mindy Lamberton
Public Records

From: Greg Ferguson [mailto:greg@greg-ferguson.com]
Sent: Wednesday, April 20, 2016 9:46 AM
To: Lamberton, Mindy
Cc: Brenda Merryman
Subject: Re: Public Records Request - Councilor Madore Text Messages

Hi Mindy? What is the status of this request? I also need a copy of Nick Power's letter that *The Columbian* got a copy of.

Thanks!

Best regards,
Greg

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Vancouver, WA. 98660

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On Fri, Apr 15, 2016 at 1:55 PM, Lamberton, Mindy <Mindy.Lamberton@clark.wa.gov> wrote:

Hi Greg,

Thanks for your email. Bill is out of the office today and the records are on his desk for review.

I'm hoping he'll get to them on Monday.

May I ask who Mr. Madore's attorney is?

Mindy

From: Greg Ferguson [mailto:greg@greg-ferguson.com]

Sent: Friday, April 15, 2016 1:31 PM

To: Lamberton, Mindy

Cc: Brenda Merryman

Subject: Re: Public Records Request - Councilor Madore Text Messages

Thanks, Mindy.

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Sent from my iPad

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Thank you,

Mindy Lamberton

Public Records

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To: 'Greg Ferguson'
Cc: Brenda Merryman
Subject: RE: Public Records Request - Councilor Madore Text Messages

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Thank you,

Mindy Lamberton
Public Records

From: Greg Ferguson [<mailto:greg@greg-ferguson.com>]
Sent: Thursday, March 31, 2016 4:17 PM
To: Lamberton, Mindy
Cc: Horne, Chris; Brenda Merryman
Subject: Public Records Request - Councilor Madore Text Messages

Mindy:

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Best regards,
Greg

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LAW OFFICE OF
NICHOLAS E.D. POWER
540 GUARD STREET, SUITE 150
FRIDAY HARBOR, WA 98250
360-298-0464

Prosecuting Attorney Anthony F. Golik
1300 Franklin St., Suit 380
PO Box 5000
Vancouver WA 98666-5000

April 18, 2016

Councilor Marc Boldt
Councilor Jeanne E. Stewart
Councilor Julie Olson
Councilor Tom Milke
Public Service Center
1300 Franklin Street
Vancouver, WA 98666

Re: Prosecutor Golik to BOCC Letter of April 13

Via: Email and U.S. Mail

Dear Prosecutor and Councilors,

I have been retained by Mr. David Madore to serve as his legal counsel.

I write to offer for your consideration what I perceive as unresolved legal issues which are raised in Prosecutor Golik's letter of April 13, 2016 wherein he offers the option -- and intimates favor of -- the execution of a waiver allowing Deputy Prosecuting Attorney Chris Horne and Deputy Prosecutor Christine Cook to resume providing legal advice to and representation of the BOCC.

It is my legal opinion that such a waiver would violate ethical legal cannons both for attorneys and public officers. Additionally, it would also run afoul of the common-sense policy of having elected officials scrupulously avoid the appearance of impropriety.

For the reasons stated below, on behalf of Mr. Madore, I ask that Prosecutor Golik carefully reconsider his advice that the BOCC could waive a conflict in the present situation and allow Deputies Horne and Cook to resume representing and advising the BOCC.

Mr. Madore has accused Deputies Horne and Cook of knowingly making material misstatements of the law during the course of the BOCC's deliberations on the Comprehensive Plan that is now under consideration. If it is true what Mr. Madore has alleged, the BOCC cannot consent to a waiver allowing Deputies Horne and Cook to resume their work. This is so because Mr. Madore's allegations in essence implicates the majority of the BOCC.

Specifically, Mr. Madore has accused Deputies Horne and Cook of making a false statement of material fact or law to the BOCC, and that these false statements were designed to further the political agenda of Councilors Boldt, Olson and Stewart to block the adoption of Alternative 4. Given that this is indisputably the political dynamic at work, it would be grossly improper for Councilors, Boldt, Olson and Stewart to absolve Deputies Horne and Cook of their failures or otherwise waive any conflict.

Mr. Madore's allegations against the Deputies are covered by RPC 4.1 regarding the truthfulness of statements to others. Mr. Golik's letter of April 13 however transmutes this accusation into one of an alleged conflict of interest that would be governed by RPC 1.8 – while I agree that a conflict might indeed exist – this in no way alters how the primary ethical problem should be dealt with. Until there is resolution whether (and why) the Deputies said what Mr. Madore alleges, no waiver is possible.

Accordingly, at least until the accuracy of Deputy Horne's and Deputy Cook's representations to the BOCC is resolved, I would submit that it is impossible within the widely recognized norms of ethical practice, both in the field of law and public service, to allow Deputies Horne and Cook to represent and advise the BOCC. Unlike a garden-variety conflict of interest scenario that can often be solved with knowing and intelligent waiver, the current situation is an entirely different animal – an allegation by one public official of the willful disregard for truth by attorneys assigned to advise the Board upon which the complaining public official sits.

Moreover, to the extent that Deputies Horne and Cook – and Prosecutor Golik for that matter – are publicly employed attorneys, it is essential to recognize that attorneys in the Prosecutor's office have a special duty to protect the general public and further the public's interest in fair, functional and transparent government.

Allowing Counselors Boldt, Olson and Stewart to consent on behalf of the Board is to run roughshod over the interests of the minority and the constituents the minority represents.

I also would note that Prosecutor Golik's absolution to Horne's and Cook's action without the benefit of external review makes me very suspect of the advice he seeks to give -- i.e. that it is ethically appropriate for Deputy Horne and Cook to return as counsel to the BOCC.

When all of this is examined in the context of the current political backdrop it is impossible to come to a conclusion that Deputies Horne and Cook should return to their prior roles at this time.

It is no secret that the three Commissioners who disfavor Alternative 4 are the same that are likely to vote in favor of waiver on Tuesday April 19th. That the statements of Deputies Horne and Cook that Mr. Madore challenges as counter factual relate to the viability of Alternative 4

severely diminishes the propriety of such a decision. Indeed, such a decision would rightfully be seen by a large segment of Clark County citizens as patently illegitimate.

I also would be remiss if I did not immediately relate my perception of how the return of Deputies Horne and Cook would be especially inappropriate given the recent allegations leveled against my client by Mr. Oliver Orjiako who, like Boldt, Olson and Stewart, is an outspoken critic of Alternative 4. Without too much imagination, it can be reasonably deduced that Mr. Orjiako's unsubstantiated allegation of racism has all the indicia of a late-in-career shake-down where a claim by Mr. Orjiako is settled by Boldt, Olson and Stewart, not for reasons of perceived liability, but rather for reasons of political expediency and to financially reward ideologically loyal staff.

I am in agreement with Prosecutor Golik that this matter is of sufficient complexity, importance and delicacy that the Washington State Attorney General should be consulted and I am doing that on behalf of Mr. Madore and would welcome a dialog fostered under the auspices of the Attorney General's office. Until an examination of the issues is fully undertaken any vote on the return of the Deputies is premature.

I welcome any and all comments, thoughts and suggestions as we work together to resolve the instant situation.

Very truly yours,

LAW OFFICE OF NICHOLAS POWER

A handwritten signature in black ink, appearing to read "N. Power", written over the typed name below.

Nicholas E. D. Power

NEDP:

cc. Client

From: [Richardson, Bill](#)
To: [Lamberton, Mindy](#)
Subject: RE: Public Records Request - Councilor Madore Text Messages
Date: Friday, April 01, 2016 7:40:51 AM

Sure.

From: Lamberton, Mindy
Sent: Thursday, March 31, 2016 5:12 PM
To: Horne, Chris; Richardson, Bill
Subject: FW: Public Records Request - Councilor Madore Text Messages

Let's meet please, Friday a.m. if possible.

Thank you,
Mindy

From: Greg Ferguson [<mailto:greg@greg-ferguson.com>]
Sent: Thursday, March 31, 2016 4:17 PM
To: Lamberton, Mindy
Cc: Horne, Chris; Brenda Merryman
Subject: Public Records Request - Councilor Madore Text Messages

Mindy:

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Best regards,
Greg

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