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**APR 29 2016**

Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
FOR THE COUNTY OF CLARK

OLIVER ORJIAKO,

Petitioner,

v.

CLARK COUNTY WASHINGTON,

Respondent.

No.

**16 2 00873 2**

**COMPLAINT FOR DISCLOSURE OF  
PUBLIC RECORDS**

COMES NOW, petitioner OLIVER ORJIAKO, by and through his attorneys, the Law Offices of Gregory D. Ferguson, PC, and Gregory D. Ferguson, for his complaint against respondent, and alleges as follows:

**Nature of the Case**

This legal action for disclosure of public records is brought on behalf of petitioner, Oliver Orjiako, to require Clark County Washington to comply with the mandates of *Nissen v. Pierce County*, 183 Wn.2d 863 (2015). The respondent County has (1) failed to supply the required affidavit signifying that a comprehensive search of Councilor David Madore's cell phone was performed, (2) failed to provide all responsive text messages (and attachments), and (3) permitted Councilor Madore to delete or otherwise destroy public records after being served with the public records request at issue in this case, and after having received a notice to preserve evidence ("litigation hold"). Further,

1 the court should order a forensic review of Councilor David Madore's personal iPhone to  
2 determine what responsive records remain, and to what extent he has permitted the  
3 destruction of public records.

4 There is no legal justification for respondent's actions and thus maximum  
5 penalties should be awarded of \$100 per day for each day Councilor Madore delays  
6 providing the mandatory affidavit, \$100 a day per text message withheld, and monetary  
7 and other sanctions for improper destruction of public records together with an award of  
8 petitioner's attorney's fees and costs of suit.

9  
10 **The Public Records Request for Councilor Madore's Text Messages**

11 1. On March 31, 2016, petitioner, through his legal counsel, made a request to  
12 respondent Clark County for the following records:

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

16 2. The written request cited controlling Washington Supreme Court case  
17 law, *Nissen v. Pierce County*, 183 Wn.2d 863, requiring public employees who use  
18 personal cell phones to turn over text messages relating to the conduct of government in  
19 response to public records requests.

20 3. The scope of the request was unambiguous:

21 The *Nissen* court emphasized that text messages from a public official's  
22 private cell phone qualify as public records "if they contain any  
23 information that refers to or impacts the actions, processes, and functions  
24 of [County] government." This request by its nature, as noted by the  
*Nissen* Court, "casts a broad net" for such information.

25 The petitioner's public records request is attached hereto as "Exhibit A".  
26  
27

1           **The Washington Supreme Court Case of *Nissen v. Pierce County***

2           4.       In *Nissen v. Pierce County* (opinion filed 8/27/2015) the Washington  
3 Supreme Court held that an elected prosecuting attorney's text messages were public  
4 records subject to disclosure to the extent that they related to county business or "the  
5 performance of any governmental or proprietary function".

6           5.       Further, the *Nissen* Court formalized a procedure whereby a public  
7 employee may satisfy her or his legal duty to search their personal cell phone for public  
8 records. The procedure requires supplying an affidavit signed under oath signifying that  
9 a good faith search was conducted and that any text messages not provided in response  
10 to the request are unrelated to the conduct of government.

11          6.       At some point following the *Nissen* decision, respondent Clark County  
12 developed a form affidavit to be signed by each employee in circumstances where a  
13 public records request targeted text messages from a private cell phone. The County's  
14 form affidavit is attached hereto as "Exhibit B".

15  
16           **A Notice to Preserve Electronic Evidence is Served**

17          7.       On March 15, 2016, petitioner filed a whistleblower and discrimination  
18 complaint with County Human Resources implicating Councilor David Madore.

19          8.       The same day the County received petitioner's public records request,  
20 March 31, 2016, petitioner's counsel also served a notice to preserve evidence  
21 ("litigation hold"). The litigation hold is attached hereto as "Exhibit C".

22          9.       The purpose of the litigation hold was to "ensure that all documents, data,  
23 and tangible things . . . [were] properly retained by County officials, including and  
24 specifically by Councilor David Madore, and not destroyed or altered in any manner."  
25



1           10.     The litigation hold called for the immediate preservation of, among other  
2 things, all ***“data and text messages relating to each cell phone account Councilor***  
3 ***Madore has utilized since running for office to the present.”*** Emphasis added.

4           11.     Further, the County was notified of its duty to preserve all records  
5 including Madore’s cell phone data ***“in electronic format with metadata intact,***  
6 ***regardless of whether hard copies of that information exist[.]”*** Emphasis added.

7  
8 **Madore Deletes Original Texts from His Cell Phone Following Service of the Public**  
9 **Records Request and Litigation Hold**

10           12.     Upon information and belief, Councilor Madore was notified of petitioner’s  
11 whistleblower and discrimination complaint and the service of the litigation hold at or  
12 around the time each was served upon the County.

13           13.     On or about April 9, 2016, Councilor Madore emailed a sampling of text  
14 messages from his personal iPhone phone to his email, and forwarded them again by  
15 email to a County public records coordinator as .pdf attachments, stating: *“I have deleted*  
16 *them from my phone.”* Email from Councilor Madore attached as Exhibit “D”.

17           14.     Notwithstanding the specific terms of the litigation hold, respondent Clark  
18 County permitted Councilor Madore to alter the nature of, and delete, public records, and  
19 to disturb the electronic metadata associated with the original cell phone text messages.  
20

21 **Councilor Madore Refuses to Sign a Nissen Affidavit**

22           15.     Despite repeated requests by County staff, Councilor Madore was  
23 unwilling to sign a sworn affidavit regarding the search of his cell phone for public  
24 records.  
25  
26  
27



1           16.     Upon information and belief, Councilor Madore balked at signing the  
2 affidavit under oath because he had, in fact, not conducted a diligent search in good  
3 faith, had not provided all potentially responsive text messages, and had improperly  
4 deleted public records and electronic information from his personal cell phone.

5           17.     County legal counsel emailed the *Nissen* decision to Councilor Madore on  
6 April 14, 2016 along with another copy of the required affidavit for his signature.  
7 Notwithstanding, Madore again refused to sign the affidavit.

8           18.     On or about April 20, 2016 respondent County provided petitioner's  
9 counsel with text messages from Madore's personnel cell phone totaling a mere 30  
10 pages for the entire period of the request—January 2, 2013 to May 31, 2016—that  
11 covered over three (3) years and three months of his active time in elected office.

12           19.     The sampling of texts forwarded via email to the records coordinator and  
13 then deleted from Madore's cell phone contained only one brief text exchange for all of  
14 2013. Similarly, no text messages were provided for all of 2014.

15           20.     Final agency action occurred in connection with petitioner's public records  
16 request on or about April 21, 2016.

17           21.     Upon information and belief, respondent and Councilor Madore are  
18 currently in violation of the Public Records Act and the holding in *Nissen*, and continue to  
19 withhold an unknown number of text messages that may be responsive to petitioner's  
20 public records request and that still reside on the cell phone.

21  
22                   **Petitioner's Right to Judicial Review**

23           22.     RCW 42.56.550 provides that any agency action denying access to public  
24 records or inspection and copying, or denying an adequate response to such a request  
25 is subject to judicial review, and that:

26                   The burden of proof shall be on the agency to establish

1 that refusal to permit public inspection and copying is in  
2 accordance with a statute that exempts or prohibits  
3 disclosure in whole or in part of specific information or  
4 records.

5 23. RCW 42.56.550 also states that the court shall not defer to any  
6 determination made by the agency but shall review the matter *de novo*. In addition, the  
7 court must take into account the public policy in favor of disclosure and may examine  
8 any record *in camera*.

9 [C]ourts shall take into account the policy of this chapter  
10 that free and open examination of public records is in the  
11 public interest, even though such examination may cause  
12 inconvenience or embarrassment to public officials or  
13 others. Courts may examine any record in camera in any  
14 proceeding brought under this section.

15 RCW 42.56.550(3).

16 24. Significantly, RCW 42.56.040 proclaims:

17 The people of this state do not yield their sovereignty to  
18 the agencies that serve them. The people, in delegating  
19 authority, do not give their public servants the right to  
20 decide what is good for the people to know and what is not  
21 good for them to know. The people insist on remaining  
22 informed so that they may maintain control over the  
23 instruments that they have created. This chapter shall be  
24 liberally construed and its exemptions narrowly construed  
25 to promote this public policy and to assure that the public  
26 interest will be fully protected. In the event of conflict  
27 between the provisions of this chapter and any other act,  
the provisions of this chapter shall govern.

### **Petitioner's Right to Conduct Discovery**

28 25. Deposition discovery and written discovery is allowed in public records  
29 cases. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d  
30 702 (2011). This is typically the case in situations where the adequacy of the search is  
31 in question. "[T]he focus of the inquiry is not whether responsive documents do in fact



1 exist, but whether the search itself was adequate. Id. at 719-720. Likewise, "the  
2 agency's motivation for failing to disclose or for withholding documents is relevant in a  
3 PRA action." Id. at 717.

4 26. Petitioner is entitled to conduct full discovery, to include the taking of  
5 depositions under oath, into the scope of the search for responsive public records by  
6 the respondent County and its employees and elected officials, including Councilor  
7 Madore.

8 27. Petitioner is entitled to conduct full discovery, to include the taking of  
9 depositions under oath, into whether additional text messages or public records have  
10 been deleted or destroyed.

11 28. Petitioner is entitled to conduct full discovery to include a forensic  
12 evaluation of Councilor Madore's iPhone (CR 34 inspection) at the County's expense,  
13 and to determine what responsive records remain and/or have been deleted from  
14 Councilor Madore's iPhone or other devices, and to include in camera review by the  
15 court if warranted.

16  
17 **Statutory Penalties Attorneys' Fees Are Mandatory**

18 29. RCW 42.56.550(4) provides that any person who prevails against an  
19 agency in any action seeking the right to obtain, inspect or copy any public record or  
20 the right to receive a response within a reasonable amount of time **shall** be awarded all  
21 costs, including reasonable attorneys' fees. Emphasis added.

22 30. The prevailing requester must also be awarded an amount imposed as  
23 a statutory penalty against the agency of up to \$100 per record for each day that the  
24 requestor remains in violation of the PRA or has been denied the right to inspect or  
25 copy a public record or denied an adequate response.



1           31.     Respondent's opposition to the mandates of the PRA, failure to provide  
2 a *Nissen* affidavit, and destruction or alteration of public records warrants a mandatory  
3 award of penalties and attorneys' fees. See *Yousoufian v. Office of Ron Sims, King*  
4 *County Exec.*, 152 Wn.2d 421, 433, 98 P.3d 463 (2004)(Once a violation of the PRA is  
5 found penalties are mandatory).

6           32.     Awarding a per-page penalty (or here, per text message) may be  
7 warranted. See *Wade's Eastside Gun Shop v. Department of Labor and Industries*, \_\_\_\_  
8 Wn.2d \_\_\_\_ (3/24/2016).

9           33.     Such award of fees should be calculated with a lodestar multiplier.  
10 *Sargent v. The Seattle Police Department*, 167 Wn. App. 1; 260 P.3d 1006; 2011  
11 Wash. App. LEXIS 2164 (2011)(The lodestar method is the accepted approach for  
12 determining the amount to award in attorney fees under RCW 42.56.550(4). A court  
13 does not abuse its discretion by using the lodestar method to calculate an award).

14  
15                   **Prayer for Relief**

16           WHEREFORE, petitioner prays for judgment against CLARK COUNTY  
17 WASHINGTON as follows:

18           1.     An order that the mandates of *Nissen v. Pierce County* be fulfilled and an  
19 adequate response provided;

20           2.     An order that an independent forensic review of Councilor Madore's  
21 iPhone be permitted at the County's expense to determine content and whether records  
22 have been altered or deleted;

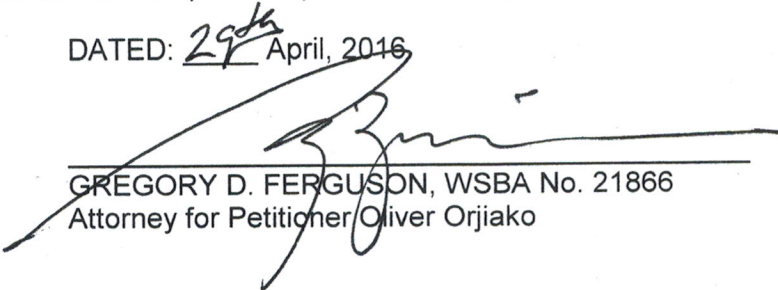
23           3.     An order that all text messages residing on Councilor Madore's cell phone  
24 be made immediately available to petitioner or provided to the court for in camera review  
25 for a determination of whether they "contain any information that refers to or impacts the  
26 actions, processes, and functions of [County] government" or bear upon the governance

1 of Clark County;

2 4. An award to petitioner of all costs, including reasonable attorneys' fees,  
3 incurred in connection with efforts to obtain the records, as provided in RCW  
4 42.56.550(4); and

5 5. An award to petitioner of monetary penalties pursuant to RCW  
6 42.56.550(4) of \$100 per day per record (or per text message withheld) for each day  
7 since the date of the request that records have been withheld, or until respondent  
8 provides an adequate response that complies with the PRA.

9 DATED: 29th April, 2016

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11   
12 GREGORY D. FERGUSON, WSBA No. 21866  
13 Attorney for Petitioner Oliver Orjiako  
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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

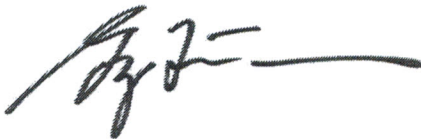
Dear Ms. Lamberton:

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

**EXHIBIT**  
A

112 W 11<sup>th</sup> Street, Suite 100 – Vancouver WA 98660  
Tele: 360.906.1167/Fax: 360.695.5800  
Email: [greg@greg-ferguson.com](mailto:greg@greg-ferguson.com)  
Web: [www.greg-ferguson.com](http://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: \_\_\_\_\_

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

March 31, 2016

Francine Reis  
Director of Human Resources  
Clark County, Washington  
1300 Franklin St., 5<sup>th</sup> Floor  
Vancouver, WA 98660

Re: Oliver Orjiako – **Notice to Preserve Evidence: Litigation Hold**

Dear Director Reis:

I write to ensure that all documents, data, and tangible things pertaining to my client's claims are properly retained by County officials, including and specifically by Councilor David Madore, and not destroyed or altered in any manner.

The information identified below will likely be requested for production in its native state in connection with future litigation. The duty to preserve potentially discoverable information ("litigation hold") extends beyond any County-issued devices and includes information retained on Councilor Madore's smart phone(s), personal computers or electronic devices, and that may from time-to-time be posted on his Facebook pages or other social media sites.

Those social media sites, and specifically Councilor Madore's Facebook page (his purported "newspaper"), should be regularly backed up on a separate server. Councilor Madore should immediately refrain from deleting any content therefrom, including wall posts, comments, "likes", private posts or private messages.

Further information that must be preserved includes, but is not limited to, the following:

- All email accounts Councilor Madore has used since running for public office to present, and all emails sent or received through each account.
- All data and text messages relating to each cell phone account Councilor Madore has utilized since running for office to the present.
- The hard drive of any personal computer used by Councilor Madore from 2010 to the present, whether desktop or laptop, back-up drives, thumb drives, or other computer accessory.
- The hard drive of any personal computer used by Councilor Mielke from 2010 to present, whether desktop or laptop, back-up drives, thumb drives, or other computer accessory.

**EXHIBIT**  
C



Litigation Hold  
Clark County, WA/Councilor David Madore  
March 31, 2016

- Any electronic tablet device Councilor Madore has used since 2010.
- Any electronic tablet device Councilor Mielke has used since 2010.
- All photographs, videos, voicemails, recordings, or other tangible items reflecting a likeness or voice recording of Councilor Madore, Councilor Mielke, former County Commissioner Steve Stuart or Oliver Orjiako.
- All applications, resumes, CVs, emails, written directives, or other materials related to any application for employment, inquiry or hiring decision regarding the employment of Don Benton, Peter Silliman, Chris Clifford and any other County employee hired, or proposed to be hired, by or with the recommendation or support of Councilor Madore, Councilor Mielke or Don Benton.
- All email to, from or copied to Councilor David Madore relating in any way to Oliver Orjiako, the County's Planning Department or its staff, GIS Department or its staff, and/or relating to Madore's proposed "Alternative 4", including all communications with outside consultants.
- All documents, emails, correspondence, or any other materials related to any staff complaint or report of improper conduct by Councilor Madore or Councilor Mielke.
- Any flyers, applications, filings, documents, emails, complaints or other paper or electronic materials related to appointment to, or campaign for, political or public office by Councilor Madore (including but not limited to all emails to and from supporters, political action committees, advocacy groups or campaign committee members).
- Any documents, emails, statements, disclosure forms and evidence of pledges or payments related to any funding or financial support by Councilor Madore to any candidate for public office, political action committee, or any media, public relations or advocacy group.
- All notes, diaries, journals, blog posts, or other written records or recollections written or prepared by Councilor Madore since 2009, whether regarding his employment with Clark County, other matters involving Clark County, his personal life, or any other public or private matters.
- All electronic or other calendars, calendaring programs, scheduling programs and file fragments for Councilor David Madore, used privately or in connection with his elected office.

To the extent any of the above-referenced materials may be subject to attorney-client or work product privileges asserted by the County, Mr. Orjiako requests that such records still be maintained and not altered or destroyed for purposes of producing privilege logs to any such related documents or items and in the event of disputes among the parties regarding the applicability of any such privileges.

Insofar as Councilor Madore has publicly accused County counsel of potential crimes and other misconduct, any privilege Councilor Madore may have once enjoyed has likely been waived.

Litigation Hold  
Clark County, WA/Councilor David Madore  
March 31, 2016

The County and its agents should construe the terms "documents, data, and tangible things" as broadly as that phrase is interpreted under Washington State Superior Court Civil Rule 34, its Federal counterpart, FRCP 34. Furthermore, any potentially discoverable electronic information, to the extent it currently exists as active, archived, deleted or legacy data, should be preserved in electronic format with metadata intact, regardless of whether hard copies of that information exist, and which is contained in any personal computer systems, removable electronic media (such as flash drives), and any other locations.

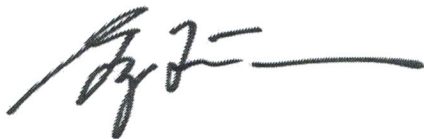
To the extent that the County or its elected officials' and administrator's practices involve the routine destruction, recycling, relocation, overwriting, or mutilation of potentially discoverable information, then it/they should: (i) halt such processes, or (ii) sequester or remove such material from those processes, or (iii) arrange for the preservation of complete and accurate duplicates or copies of such material, suitable for later discovery in the event that Mr. Orjiako requests that material pursuant to the court rules governing discovery.

Failure to preserve (i.e., permit the spoliation of) potentially discoverable information may result in sanctions by a court. Those sanctions may include monetary fines, adverse inference jury instructions, default judgment, or any other relief a court would deem just and appropriate under the circumstances. See e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Pier 67, Inc. v. King Co.*, 89 Wn.2d 379 (1977); and *Hampson v. Ramer*, 47 Wn. App. 806 (Div. 1, 1987). Moreover, a court can hold an organization's managers personally responsible for failure to preserve relevant evidence. See e.g., *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991); and *Nat'l Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556 (N.D.Cal. 1987). Thus, the County has an affirmative obligation to specifically communicate this litigation hold to any individuals who may be in a position to prevent spoliation of evidence, including Councilor Madore.

This initial duty to preserve potentially discoverable information should remain in full effect until such time as a court modifies that duty, or until final adjudication or resolution of this dispute.

Thank you for your anticipated cooperation. Please feel free to contact me if you have any questions or wish to discuss this matter further.

Very truly,

A handwritten signature in black ink, appearing to read "Gregory D. Ferguson", followed by a long horizontal line.

Gregory D. Ferguson  
Attorney at Law

GDF:bm

CC: Chris Horne, Chief Civil Deputy, Prosecuting Attorney's Office



**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 Northwick-Assessor.pdf  
Pol-Steve Hornstein.pdf  
Pol-Wayne Folkers-zz1.pdf

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**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

EXHIBIT  
D