

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

OFFER OF SETTLEMENT - SUBJECT TO ER 408

June 23, 2016

Bill Richardson
Deputy Prosecuting Attorney
Clark County Prosecuting Attorney
Civil Division
1300 Franklin St., Ste. 380
PO Box 5000
Vancouver, WA 98666-5000

Sent Via Email

RE: Public Records Case: Orjiako v. Clark County

Bill:

As I conveyed earlier, continuing the process of bringing this matter to final judgment will be an expensive and time-consuming endeavor resulting in an avoidable waste of public funds. If this case is to be resolved short of a dispositive court decision, now is the time.

Calculating statutory penalties at this stage in light of a number of unique and egregious facts is somewhat difficult. Notably, however the following troubling facts are undisputed:

1. Councilor Madore was given ample opportunity to sign a *Nissen v. Pierce County (Nissen)* affidavit signifying that he made a good faith search for responsive records, but refused to do so.
2. Councilor Madore's refusal to sign a *Nissen* affidavit conclusively established the County's liability for daily penalties and attorney's fees under the PRA.
3. Councilor Madore does not intend to ever execute a *Nissen* affidavit, thus penalties will continue to accrue each passing day.
4. The County has not enlisted the services of its internal IT staff to search Madore's device(s) for responsive records. A County IT staff person's forensic search of

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

Madore's device(s) and subsequent completion of an affidavit chronicling the search efforts could perhaps satisfy the County's legal duty under the *Nissen* holding.

4. Councilor Madore admittedly deleted text messages relating to County governance notwithstanding having received adequate notice of the *Nissen* holding both at the time of the appellate level decision and at the Supreme Court level.

5. Councilor Madore most likely deleted additional text messages after service of my client's "litigation hold"/"notice to preserve electronic evidence" (text messages were specifically identified).

6. Councilor Madore has refused to adequately respond to a series of Requests for Admissions in this case. Indeed, his answers to the final five (5) requests are non-responsive and amount to non-answers, and are thus conclusively admitted.

As a consequence of the above, daily statutory penalties are justified at the height of the statutory range of \$100 per day, and for each text message withheld, destroyed or deleted (to perhaps be established upon a court-ordered independent forensic review of Councilor Madore's iPhone(s) at the County's expense).

To date we know that a minimum of a dozen text message exchanges between Madore and private citizens specifically relating to County governance occurred. It appears based on his answers to Requests for Admissions, dozens if not hundreds of additional text messages were perhaps sent or received from his device but were later intentionally and systematically deleted.

Eighty-five (85) days have passed since service of the public records request for Councilor Madore's text messages. For purposes of settlement and estimating daily penalties, we have subtracted ten (10) days from the date of the request as constituting a reasonable period of time to conduct a search and provide the required *Nissen* affidavit.

Thus, statutory damages for the estimated 12 text exchanges (an extremely conservative number) at \$100 per-day for 75 days totals \$90,000.00. Attorney's fees and costs at final judgment would exceed \$50,000.00 and be subject to a Loadstar multiplier.

A worst case scenario for the County would be that a forensic review of Madore's device(s) reveals dozens more texts and or deleted responsive texts justifying daily statutory penalties running into the hundreds of thousands of dollars.

Bill Richardson
Deputy Prosecuting Attorney - Civil
Offer of Settlement- ER 408
June 23, 2016
Page 3

Notwithstanding, in order to bring an expeditious end to this case, my client is willing to make a reasonable offer and resolve his PRA claim for \$75,000.00. **This offer will remain open until close of business Thursday June 30, 2016.**

This letter in its entirety is offered subject to ER 408. However, if it is necessary to bring this matter to final judgment it will be offered in support of petitioner's request for attorney's fees as evidence of his willingness to explore early settlement to avoid unnecessary expense.

Very truly,

A handwritten signature in black ink, appearing to read 'G. Ferguson', followed by a horizontal line extending to the right.

Gregory D. Ferguson
Attorney at Law

GDF:bm

cc: Client