

WASHINGTON SUPREME COURT APPLIES PUBLIC RECORDS ACT TO PUBLIC EMPLOYEES' PRIVATE CELL PHONES

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Commercial Disputes Alert

By: Kari L. Vander Stoep, Grace T. Yuan, Julie Anne Halter, Aaron E. Millstein, Michael K. Ryan, Erica R. Franklin

On August 27, the Washington Supreme Court unanimously held in *Nissen v. Pierce County* that text messages sent or received by a public employee in his or her official capacity are public records within the meaning of the Public Records Act (PRA), even if the employee is using a personal cell phone.

The plaintiff in *Nissen* made public records requests to Pierce County requesting cell phone records associated with a Pierce County official's private cell phone. In response, the County disclosed redacted versions of a "call log" and "text message log" generated by the official's service provider. These materials included itemized lists of potentially work-related calls and text messages but, importantly, did not include the content of the text messages.

Maintaining that these disclosures were insufficient, the plaintiff sued the County in Thurston County Superior Court, and the public official intervened. The trial court granted the County's motion to dismiss, holding that private cell phone records were not subject to the PRA. The Court of Appeals reversed, and the Washington Supreme Court granted the County's and the official's petition for review.

Addressing an issue of first impression, the Court concluded that records associated with the private cell phones of public employees may be subject to disclosure when used to conduct agency business. In so holding, the Court rejected the distinction the County attempted to draw between an agency's records and those of its employees. The Court explained that because a governmental agency necessarily acts through its employees and agents, any actions of its employees are "tantamount to" actions of the agency itself. *Nissan v. Pierce County*, No. 90875-3, at *10 (Wash. Aug. 27, 2015). By extension, the Court concluded, "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.'" *Id.* at *12 (quoting RCW 42.56.010(3)). The Court further reasoned that distinguishing between agency records and those of its employees would frustrate the purpose of the PRA by shielding the latter from public scrutiny.

Public agencies can take comfort in the Court's recognition that the Court's holding on this subject does not transform "every 'work-related' personal communication" into "a public record subject to disclosure." *Id.* at *13. To the contrary, records prepared, owned, used, or retained by a public employee only qualify as public records when the employee is acting within the scope of employment. For example, the Court explained that an employee's email to a spouse about working late, post on social media about his or her job, or private diary entry would not give rise to a public record subject to disclosure under the PRA.

Next, the Court turned its attention to the records at issue, concluding that the text messages the public official had identified as potentially business-related qualified as "public records" within the meaning of the PRA. In contrast, the court determined that the "call logs" and "text message logs" prepared by the official's service provider did not qualify as public records, because the County did not "use" them to conduct County business. In so holding, the Court reaffirmed its expansive reading of the PRA, announcing that "records can qualify as public records if they contain any information that refers to or impacts the actions, processes, and functions of government." *Id.* at *16.

The Court's holding and expansive reading of the PRA present public agencies with a challenge. Public agencies are responsible for producing these text messages but do not have direct control over accessing the employee's cell phones to obtain them. The Court acknowledged this challenge and held that public agencies may rely on an employee's good-faith search for public records on his or her own device. To the extent an employee withholds personal records from an agency, he or she must submit an affidavit establishing that the withheld records are not "public records." Thus, while public agencies must produce public records stored on an employee's cell phone, they may rely on the employee's good-faith search and need not conduct an independent search of the employee's cell phone. This reliance should help alleviate some of the burden facing public agencies in complying with this decision.

Based on this ruling, public agencies should consider how to manage the use of personal cell phones for agency business. Options may include: (1) providing training or adopting policies or procedures regarding the use of personal devices; (2) consider issuing agency cell phones; or (3) exploring the use of message capturing software for all agency-business related communications. If you have any questions or would like to discuss these or other recommendations in greater detail, please contact the authors of this alert.

KEY CONTACTS



KARI L. VANDER STOEP
PARTNER
SEATTLE
+1.206.370.7804
KARI.VANDERSTOEP@KLGATES.COM



GRACE T. YUAN
PARTNER
SEATTLE
+1.206.370.7814
GRACE.YUAN@KLGATES.COM



JULIE A. HALTER
PARTNER
SEATTLE
+1.206.370.7882
JULIEANNE.HALTER@KLGATES.COM



AARON E. MILLSTEIN
ASSOCIATE
SEATTLE
+1.206.370.8071
AARON.MILLSTEIN@KLGATES.COM

K&L GATES HUB

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