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CASE REPORT - PUBLIC RECORDS UPDATE

PUBLIC RECORDS ACT - UNSUBSTANTIATED ALLEGATIONS - CELL PHONE CALL LOGS AND TEXT MESSAGES - ERRORS IN RESPONDING WHILE REQUEST PENDING - ADEQUATE SEARCHES - REASONABLE ESTIMATES OF TIME. An employee's right to privacy is not violated by production of the employee's name and identifying information in an internal investigation relating to unsubstantiated allegations of governmental misconduct. *West v. Port of Olympia*, No. 44964-1-II, Wash. Ct. of Appeals Div. II (Aug. 26, 2014). Call logs for a government official's private cellular phone constitute public records with regard to the calls that relate to government business and if the logs are used or retained by a government agency; text messages sent or received by a government official constitute public records if the text messages relate to government business. *Nissen v. Pierce County*, No. 44852-1-II, Wash. Ct. of Appeals Div. II (Sept. 9, 2014). Agencies may not be liable for potential errors while a public records request is still pending. *Hobbs v. State of Washington*, No. 44284-1-II, Wash. Ct. of Appeals Div. II (Oct. 7, 2014). The Public Records Act does not require an agency to provide a precise estimate of time for the agency to respond to a request nor does it limit the number of extensions that may be provided by an agency. *Andrews v. Washington State Patrol*, No. 32288-2-III, Wash. Ct. of Appeals Div. III (Sept. 16, 2014).

West v. Port of Olympia

Facts. Arthur West submitted a PRA request seeking records relating to the Port's investigation of a whistleblower complaint that alleged another Port employee "undertook improper governmental action." The investigation report addressed whether the accused employee had derived personal gain from Port activities, exceeded the scope of his or her authority, failed to follow accounting procedures, disposed of environmentally sensitive materials properly, and violated Port policies regarding work on holidays. The investigation concluded the allegations were unsubstantiated. The Port produced the investigation report but redacted all information that would identify the accused employee, including the employee's name, gender pronouns, job title, job duties, and details regarding the alleged improper governmental action. The Port redacted the identifying information under RCW 42.56.230(3) (personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy).

Applicable Law and Analysis. To determine whether the personal information exemption applies, the court considers whether (1) the employee's identity constitutes personal information, (2) the employee has a right to privacy in his or her identity in connection with the unsubstantiated allegations, and (3) disclosure of the employee's identity in connection with the

unsubstantiated allegations would violate that right. In *West*, the Court assumed that the first two factors were satisfied, but held that disclosure of the identifying information would not violate the employee's right to privacy because disclosure of unsubstantiated allegations of misconduct would not be highly offensive to a reasonable person.[1] While there is no definition of "highly offensive" in the PRA, the court noted that it means "something more than embarrassing." Previous Washington decisions have held that disclosure of identities in connection with allegations of sexual misconduct[2] and disclosure of employees' performance evaluations that do not discuss specific instances of misconduct[3] would be highly offensive. On the other hand, another decision determined that allegations of obnoxious behavior in the workplace relating to a hostile work environment complaint were "nowhere near as offensive as allegations of sexual misconduct" and did not rise to the level of "highly offensive."[4] Given this backdrop, the court easily concluded that disclosure of the allegations merely involving claims that the employee failed to follow Port procedures or policies was not highly offensive. In addition, the court found disclosure of the allegations that the employee improperly profited from Port activities (which may have amounted to theft) was not highly offensive because (1) the allegation was much less offensive than that of sexual abuse or sexual assault; (2) while the allegation technically may have amounted to criminal conduct, it did not involve "particularly reprehensible" conduct, *i.e.*, that the employee kept the proceeds of the sale of some items involving fairly small amounts of government funds; (3) the employee denied any wrongdoing and explained certain events in the body of the investigation report; and (4) the legislature has mandated the PRA must be liberally construed in favor of disclosure.

Conclusion. The extent to which disclosure of unsubstantiated allegations of misconduct would violate an employee's right to privacy is still in flux, with allegations of sexual misconduct being considered highly offensive and allegations of violation of work policies and theft in small amounts being considered not highly offensive. This decision did not address how an agency should protect an employee's privacy in the event that the employee is subject to multiple allegations of misconduct, some of which disclosure may be highly offensive to a reasonable person and others not. In such cases, an agency may consider drafting separate investigation reports.

Nissen v. Pierce County

Facts. Nissen made a PRA request for the Pierce County prosecutor's personal cell phone (1) call logs of incoming and outgoing calls, and (2) text messages. The prosecutor conducted government work on his personal cell phone, both by making business-related calls and sending text messages discussing government business. The trial court determined that private cellular phone records of government officials are not public records subject to the PRA.

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[1] A person's right to privacy is violated only when disclosure would (1) be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.

[2] *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199 (2008) (school teacher); *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398 (2011) (police officer).

[3] *Dawson v. Daly*, 120 Wn.2d 782 (1993).

[4] *Morgan v. City of Federal Way*, 166 Wn.2d 747 (2009).

Applicable Law and Analysis. The Court of Appeals reversed, concluding that at least some of the prosecutor's personal cell phone call records and text messages were "public records." Public records are those records which consist of three elements: (1) any writing; (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function; and (3) prepared, owned, used, or retained by any state or local agency, regardless of physical form or characteristics. With regard to call logs, the court held that the logs qualified as "public records" if the calls reflected in the logs related to government business and were reviewed, referred to, or otherwise "used" for government purposes by the prosecutor or another public employee or were stored at a public office. For example, the court noted that if the prosecutor consulted the logs to determine when he talked to a particular person about government business or to track the number of calls relating to a particular government issue, he would have been "using" the logs in his official capacity. Similarly, text messages were considered "public records" if they related to government business.

Conclusion. This case is the first in Washington to address whether text messages are "public records" as defined in the PRA. Importantly, text messages sent or received on personal devices are considered public records to the extent that they relate to government business. Because such texts are written by government employees or officials and are, consequently, prepared and used in their official capacity, they are considered public records without regard to whether they are stored at a government office or on a government-owned device. In addition, call logs for personal cell phones will be considered public records to the extent they list calls made relating to government business and are stored at the government agency's offices or reviewed or used by the government agency for some purpose.

Hobbs v. State of Washington

Facts. Hobbs submitted a PRA request for records relating to the Auditor's investigation of a whistleblower complaint relating to DSHS. Within five business days of receiving the request, the public records officer responded by informing Hobbs that the records would be provided in installments and giving an estimate of time of when the first installment would be available. Two days after the Auditor provided the first installment of records, Hobbs filed a PRA lawsuit, complaining about certain redactions made in the first installment. Subsequently and while the PRA lawsuit was pending, the Auditor's office prepared an updated exemption log, using codes to identify the individual redactions. In addition, the Auditor's office provided two additional installments of records and worked with Hobbs and his attorney to correct deficiencies they identified in the production. For example, the public records officer consulted with a technology expert to provide documents in the electronic format requested by Hobbs. Hobbs also alleged in the lawsuit that the Auditor's search for records was not adequate. The Auditor's office filed declarations of at least five employees describing the search terms used and locations searched for responsive records, which included paper records, electronic file share systems, and e-mail folders.

Applicable Law and Analysis. The Court of Appeals reached four different legal issues raised by Hobbs's PRA lawsuit. First, the court determined that a requestor is not permitted to

initiate a lawsuit *prior to* an agency's denial and closure of a public records request. To the contrary, requestors may only initiate a lawsuit after the agency has engaged in some final action denying access to a record. The court stated that this would occur "when it reasonably appears that an agency will not or will no longer provide responsive records." Because Hobbs was initially informed that records would be provided in installments, his PRA lawsuit was untimely. Second, the court rejected Hobbs's contention that once an agency has allegedly violated the PRA, that violation exists as a basis for penalties and costs from the time of alleged violation until it is cured, even if it is cured before the agency takes final action in denying public records. The court found that agencies have the opportunity for "do-overs" until they take final action in denying access to records, effectively allowing the agency to cure a violation without incurring penalties or costs. Third, the court held that, in providing reasonable estimates of time when records will be produced in installments, the agency may provide the requestor with an estimated date of completion for the first installment only. The agency is not required to provide an estimated date for completing the entire response. The court reasoned that to conclude otherwise would insert the words that an agency is required to provide a reasonable estimate of time to respond "fully and completely" to a request and would be in conflict with other provisions of the PRA allowing for production of records on a partial or installment basis. Finally, the court rejected Hobbs's claims relating to the adequacy of the Auditor's search. Hobbs pointed out that the search did not uncover particular documents, did not include disaster backup tapes, and did not include certain Outlook appointment calendars. The court reaffirmed that searches are not to be judged by the outcome of the search, but by whether the agency's search process was reasonable. The court concluded that it was reasonable, given the declarations of the five individuals stating that multiple locations and search methods had been used to locate thousands of pages of responsive documents.

Conclusion. This case clarifies that the reasonable estimate of time when providing records on an installment basis need only be a date for production of the first installment. Also helpful was the court's ruling that agencies are not precluded from voluntarily curing alleged PRA violations while they are actively making reasonable efforts to fully respond to a PRA request. This case underscores the importance of communicating effectively with requestors before a final action denying records is taken such that any potential violations can be corrected. Finally, this case reaffirms that agencies should be prepared to provide detailed evidence in a PRA lawsuit regarding searches that were performed to locate responsive records.

Andrews v. Washington State Patrol

Summary. This office previously prepared a full-length case report on *Andrews*, which established that agencies will not be required to strictly comply with estimates of time given in response to a PRA request if the agency acts diligently in pursuing completion of the request. For further details, please see the previously distributed report.

The courts have been very active in publishing PRA-related cases over the last several months. This update is intended to provide a comprehensive overview of the court's recent activity in this field. Should you have any questions regarding the PRA or its application, please do not hesitate to contact your city attorney.