

Washington Law Review

Volume 90 | Number 1

3-1-2015

Public Records in Private Devices: How Public Employees' Article I, Section 7 Privacy Rights Create a Dilemma for State and Local Government

Philip Paine

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Privacy Law Commons](#)

Recommended Citation

Philip Paine, Notes and Comments, *Public Records in Private Devices: How Public Employees' Article I, Section 7 Privacy Rights Create a Dilemma for State and Local Government*, 90 Wash. L. Rev. 545 (2015). Available at: <https://digitalcommons.law.uw.edu/wlr/vol90/iss1/11>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

PUBLIC RECORDS IN PRIVATE DEVICES: HOW PUBLIC EMPLOYEES' ARTICLE I, SECTION 7 PRIVACY RIGHTS CREATE A DILEMMA FOR STATE AND LOCAL GOVERNMENT

Philip Paine

Abstract: The Washington Public Records Act (PRA or “the Act”) is a wide-ranging law that heavily weighs in favor of public disclosure of government processes. Initially enacted as a citizen initiative in 1972, the Act has many beneficial uses. For example, it provides insight into a local government’s decision-making process and ensures that citizens have access to their own government. However, the PRA’s potential to be used to invade personal privacy raises significant constitutional concerns. When an employee in possession of a public record invokes the protection of article I, section 7 of the Washington State Constitution, which protects an individual’s right to privacy, and refuses to consent to, for example, inspection of the employee’s personal computer, the agency’s obligation to produce the record should be at an end. This Comment argues that neither an agency nor a court may compel production of a public employee’s private electronic device for inspection under the PRA because employee privacy interests in the device are protected under article I, section 7 of the Washington State Constitution. The PRA does not provide the necessary “authority of law” to justify such an invasion. While this constitutional protection may, in certain situations, frustrate the efforts of requestors to access the workings of their government agencies, it also provides the public employees of Washington some measure of comfort that their private affairs are entitled to the same level of constitutional protection as their fellow citizens. Ultimately, the legislature should amend the PRA to clarify the obligations of agencies and to strike an appropriate balance between employee privacy and governmental transparency.

INTRODUCTION

As state and local governments complete their move into the digital age, important questions concerning the intersection of the Washington Public Records Act (PRA or “the Act”),¹ privacy, and personal electronic devices remain unresolved. Recent lawsuits illustrate a growing tension between the PRA and Washington’s constitutional right to privacy.² As courts struggle to define the PRA’s mandates in an era of electronic records and mobile devices, the resulting decisions have the potential to create a considerable dilemma for state and local government. Under current PRA case law, a local government or state

1. Washington Public Records Act, WASH. REV. CODE ch. 42.56 (2014).

2. *E.g.*, *O’Neill v. City of Shoreline*, 170 Wash. 2d 138, 141–45, 240 P.3d 1149, 1151–53 (2010); *Nissen v. Pierce Cnty.*, 183 Wash. App. 581, 581–82, 333 P.3d 577, 581–82 (2014).

agency could face a situation where it has a duty to produce public records it does not possess and cannot constitutionally obtain.³ The problem is that while agencies have a duty to produce public records, the PRA does not provide the necessary tools, such as a warrant provision, that would allow an agency to acquire records protected by article I, section 7 of the Washington State Constitution.⁴ While this Comment focuses on the dilemma as it relates to public records contained in a private computer or email account, an analogous situation arises where a public employee sequesters records in his or her home. To illustrate the general problem, consider the following hypothetical:

A public employee of a Washington city decides to take his city laptop computer home with him. The next day, the city receives a public records request demanding documents contained on the employee's city computer. The employee claims he has no idea where the computer has gone, but city officials are reasonably certain that the computer is in the employee's home. The employee insists the computer is not at his home and that the city may not search his home to look for it. Can the city, solely on the basis of PRA, inspect the employee's home in order to recover and produce responsive public records?

The answer to this question should be a definitive no. A government search of the employee's home would clearly implicate the employee's state and federal constitutional rights, including the employee's right to privacy under article I, section 7 of the Washington State Constitution.⁵ That provision provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."⁶ Historically, courts have interpreted the "authority of law" requirement to mean a validly issued search warrant.⁷

While the above hypothetical envisions a public computer contained inside a private home, it is not clear how the analysis would be

3. *Cf.* *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1 of Clark Cnty., Wash.*, 138 Wash. 2d 950, 962, 983 P.2d 635, 642 (1999) (holding that engineering plans were "used" by the agency and were thus subject to disclosure under the PRA even though the plans were never possessed by the agency and remained in the possession of a private firm). A similar situation could arise where public records are contained on an employee's private device but are inaccessible to the agency because of article I, section 7 protections. In that situation, the records would be "public" within the meaning of the PRA but would be in the possession of a private individual.

4. The PRA does not include any provision that authorizes the issuance of a warrant or an administrative subpoena. *See* WASH. REV. CODE. ch. 42.56 (2014) (codifying the Public Records Act).

5. *See* U.S. CONST. amend. IV; WASH. CONST. art. I, § 7.

6. WASH. CONST. art. I, § 7.

7. *See* Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 SEATTLE U. L. REV. 431, 450 (2008).

materially different for a public record contained inside a private computer. A private computer or smartphone may contain considerable information on the private affairs of an individual.⁸ Recently, the United States Supreme Court held that a person's smartphone is entitled to Fourth Amendment protection against searches, much the same way as a person's home.⁹ In other words, the government may not search either without a warrant.¹⁰

This Comment argues that agencies lack the necessary "authority of law" under the PRA to compel inspection of a public employee or elected official's private device. This Comment further argues that public employees do not forfeit their constitutional rights merely by working for government. Like the prohibition against government searching of a public employee's home,¹¹ government should not be permitted to search an individual's private smartphone or computer without a valid warrant based on probable cause. However, the dilemma this creates for local governments and state agencies is substantial.¹² It is plausible that agencies will be obligated under the PRA to disclose records that they cannot constitutionally access.¹³ In this situation, agencies should not face statutory penalties for failing to do the impossible.

Tension between the PRA and Washington's constitutional right to privacy has created a dilemma in which governments may have a duty to produce records they cannot constitutionally access. Part I of this Comment provides background on the PRA and its expansion in the digital age. Part I also provides background on the privacy protections of article I, section 7 of the Washington State Constitution and details the tensions that have arisen between article I, section 7 and the PRA. Part II of this Comment explores the dilemma facing Washington governments, details how the dilemma arose, and examines its causes. Part III suggests steps that the legislature should take to address the dilemma and ensure

8. See *Riley v. California*, __ U.S. __, 134 S. Ct. 2473, 2493–95 (2014) (explaining that, for many Americans, modern smartphones contain the "privacies of life").

9. *Id.*

10. *Id.*

11. WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.")

12. See *infra* Part II (discussing the origins of the dilemma and possible solutions).

13. See *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1 of Clark Cnty., Wash.*, 138 Wash. 2d 950, 954 n.6, 962, 983 P.2d 635, 638 n.6, 642 (1999) (holding that agency had a duty to produce records apparently held subject to the discretion of a third party); *infra* Part II.B (arguing that agencies should not face statutory penalties for failing to produce records they do not have access to).

that the PRA strikes an appropriate balance between personal privacy and open access to government records.

I. SETTING THE STAGE: CONSTITUTIONAL PRIVACY IN THE PUBLIC RECORDS ERA

A. *The Washington Public Records Act*

On November 7, 1972 the voters of Washington State overwhelmingly adopted ballot Initiative Measure 276 (“Initiative 276”), enacting into law what would become the Washington Public Disclosure Act (PDA).¹⁴ The initiative was part of a broad societal push to provide transparency in government operations, particularly in the area of campaign finance.¹⁵ The initiative was enormously popular and enjoyed the support of seventy-two percent of Washington voters.¹⁶ Today we know the public records part of the original PDA as the Washington Public Records Act (PRA),¹⁷ a “strongly worded mandate for broad disclosure of public records.”¹⁸

Initiative 276 was more focused on campaign finance transparency than on the disclosure of government records.¹⁹ The 1972 law prescribed a variety of disclosure rules for government officials, candidates, and lobbyists,²⁰ and it was these campaign finance provisions that drew the majority of debate and media coverage at the time.²¹ Candidates for

14. DAVID CUILIER ET AL., THE HISTORY AND INTENT OF INITIATIVE 276, WHICH WAS PASSED BY VOTERS IN WASHINGTON STATE TO CREATE THE PUBLIC DISCLOSURE ACT 1 (2004); *see also* Initiative Measure No. 276, ch. 1, §§ 25–34, 1973 Wash. Sess. Laws 21–25.

15. CUILIER ET AL., *supra* note 14, at 1–2.

16. *Id.*

17. In 2005 the Washington State Legislature recodified, renumbered, and restyled the public records part of the larger public disclosure statute from title 42, chapter 17 to title 42, chapter 56 of the Revised Code of Washington. *See* Act of May 4, 2005, ch. 274, 2005 Wash. Sess. Laws 893. For the purposes of this Comment, “Public Records Act” and “PRA” refer to the modern codification.

18. *Freedom Found. v. Gregoire*, 178 Wash. 2d 686, 694–95, 310 P.3d 1252, 1257 (2013) (citing *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 127, 580 P.2d 246, 249 (1978)).

19. *See* CUILIER ET AL., *supra* note 14, at 2 (explaining that “[t]he impetus and main focus of the initiative was on campaign finance disclosure”); Initiative Measure No. 276, ch. 1, §§ 25–34, 1973 Wash. Sess. Laws 21–25.

20. *See* Initiative Measure No. 276, §§ 3–14, 1973 Wash. Sess. Laws at 5–12 (requiring candidates to disclose campaign contributions); *id.* §§ 15–23, 1973 Wash. Sess. Laws at 12–18 (requiring lobbyists to register and barring lobbyists from certain activities); *id.* § 24, 1973 Wash. Sess. Laws at 18–20 (requiring candidates, elected officials, and family members to disclose financial interests).

21. *See* CUILIER ET AL., *supra* note 14, at 2.

political office were made to disclose both the source and size of their campaign contributions²² and lobbyists were required to register with the state government.²³ However, a lasting impact of the initiative would be its requirement that state agencies and municipalities provide access to government records for inspection and copying.²⁴

The PRA generally requires state agencies, including municipal corporations, to make all records reflecting the workings of government available for public inspection and copying.²⁵ The PRA defines “public record” expansively to include 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.”²⁶ Generally, Washington courts have, consistent with the declared intent of the Act,²⁷ construed the PRA’s disclosure provisions expansively, limited only by narrowly construed exceptions.²⁸ In other words, the PRA sweeps broadly, and only records that fit within the specific statutory exemptions may be withheld from its grasp.²⁹

The PRA provides a variety of procedural rules that agencies must follow to fully comply with the PRA’s mandate. For example, agencies must respond to records requests promptly.³⁰ This means that within five business days an agency must either (1) provide the requested records, (2) provide a reasonable estimate of the time needed to fill the request, or (3) deny the request.³¹ If the request appears unclear, the agency may

22. Initiative Measure No. 276, §§ 35–37, 1973 Wash. Sess. Laws at 25–27.

23. *Id.* § 15, 1973 Wash. Sess. Laws at 12–13.

24. *See id.* §§ 25–34, 1973 Wash. Sess. Laws at 21–25.

25. *See* WASH. REV. CODE § 42.56.070(1) (2014) (establishing the duty of agencies to make records available for public inspection and copying).

26. *Id.* § 42.56.010(3).

27. *Id.* § 42.56.030 (“The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.”).

28. *Id.* (“This chapter shall be liberally construed and its exemptions narrowly construed . . .”); *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash. 2d 398, 408, 259 P.3d 190, 194 (2011) (quoting the same); *Livingston v. Cedeno*, 164 Wash. 2d 46, 50, 186 P.3d 1055, 1057 (2008) (same).

29. *See Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wash. App. 688, 695, 937 P.2d 1176, 1179 (1997) (describing the purpose of the PRA as to “provide full access to nonexempt public records”).

30. *See* WASH. REV. CODE § 42.56.520.

31. *Id.*

ask the requestor to provide clarification on the records being sought.³² If the requestor fails to clarify the request, the agency need not respond to it.³³ However, the extent to which a requestor must clarify a request is not apparent from the statute,³⁴ but generally the requestor must request “identifiable public records.”³⁵ This does not, however, mean that requests must be narrowly tailored, or even specific.³⁶ It is not uncommon for government agencies to be called on to produce thousands of documents in a single request.³⁷

The PRA imposes a duty on agencies to make such records available for inspection and copying.³⁸ Essentially, the PRA requires agencies to produce, upon request, any document or “writing” that relates to the conduct of government or the performance of a government function, so long as that “writing” was used, prepared, owned, or retained by the agency.³⁹ The PRA applies to most every type of government agency at the state, regional, county, and local level.⁴⁰ The PRA, however, applies differently to the state legislature.⁴¹ The Act provides the legislature

32. *Id.*

33. *Id.*

34. *See id.* (providing that agencies may, in acknowledging the receipt of a public records request that is unclear, seek clarification from the requestor but providing no standard or definition for “clarification”).

35. *Id.* § 42.56.080; *see also* Bonamy v. City of Seattle, 92 Wash. App. 403, 960 P.2d 447 (1998) (citing former WASH. REV. CODE § 42.17.270).

36. For an example, in *Forbes v. City of Goldbar*, 171 Wash. App. 857, 288 P.3d 384, 386 (2012), Susan Forbes requested, in a single request, “[a]ll emails sent by or received by Dorothy Croshaw and all elected or appointed council, the Mayor and all City Staff, and Christopher Wright which in any way relates to Susan Forbes.” Forbes further noted that her request was “a purposeful broad public records request intended to obtain all emails (including any attachments to those emails) sent to or received by Dorothy Croshaw from any Gold Bar official, whether a governmental or private computer system or electronic device was used.” *Id.*

37. *See, e.g.,* West v. Wash. State Dep’t of Natural Res., 163 Wash. App. 235, 251, 258 P.3d 78, 86 (2011) (discussing the agency’s “Herculean efforts in producing thousands of pages of documents in response to West’s broad and complex request”).

38. *See* WASH. REV. CODE § 42.56.070(1) (imposing a duty on agencies to make public records available for inspection and copying); *id.* § 42.56.010(2) (defining “public record”).

39. *Id.* § 42.56.070(1) (requiring agencies to make public records available for inspection and copying); *id.* § 42.56.010(2) (defining “public” record).

40. *Id.* § 42.56.010(1) (“‘Agency’ includes 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.”).

41. *See id.* § 42.56.010(3) (“For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any

increased flexibility in responding to records requests to minimize interference in legislative business.⁴² Notably, courts are not included within the definition of “agency” and, therefore, the PRA does not apply to them.⁴³ Recently, the Washington Court of Appeals for Division III applied the PRA to private entities in narrow cases where they are “functional equivalents” of governmental entities.⁴⁴

In 1999, the Washington State Supreme Court considered what it means for a document to be “used” within the meaning of the PRA.⁴⁵ The case, *Concerned Ratepayers Ass’n v. Public Utility District No. 1 of Clark County, Washington*,⁴⁶ led to a very broad definition of “use.”⁴⁷ In that case, the Court held that a record is used when there exists a nexus between the “information at issue and an agency’s decision-making process.”⁴⁸ In other words, “information that is reviewed, evaluated, or referred to and has an impact on an agency’s decision-making process” falls within the parameters of the PRA and must be disclosed to a requestor.⁴⁹ Surprisingly, this remains true for records that the agency does not possess, or in fact, never possessed.⁵⁰

other record designated a public record by any official action of the senate or the house of representatives.”); *id.* § 42.56.070(9) (generally prohibiting the secretary and the chief clerk from selling records for commercial purpose); *id.* § 42.56.090 (requiring the secretary of the senate and chief clerk of the house, along with all other agencies, to post hours for public access to records on their respective websites).

42. *See id.* § 42.56.100 (allowing the secretary of the senate and the office of the chief clerk of the house to adopt “reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions”).

43. *City of Federal Way v. Koenig*, 167 Wash. 2d 341, 345–46, 217 P.3d 1172, 1173–74 (2008) (holding that the PRA does not apply to the judiciary because a court is not a “state or local agency”); *see also* *Nast v. Michels*, 107 Wash. 2d 300, 307, 730 P.2d 54, 58 (1986) (holding that the PRA does not apply to the courts).

44. *See* *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 191–92, 181 P.3d 881, 884–85 (2008) (holding that a privately run animal care center that contracted with the county animal control authority was a public agency subject to PRA requests). For more discussion on this case and its implications, see Jeffrey A. Ware, *Clarke v. Tri-Cities Animal Care & Control Shelter: How Did Private Businesses Become Government “Agencies” Under the Washington Public Records Act?*, 33 SEATTLE U. L. REV. 741 (2010).

45. *Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1 of Clark Cnty., Wash.*, 138 Wash. 2d 950, 983 P.2d 635 (1999).

46. 138 Wash. 2d 950, 983 P.2d 635 (1999).

47. *Id.* at 960–61, 983 P.2d at 641 (reasoning that the critical inquiry necessary for determining “use” under the PRA is whether the “requested information bears a nexus with the agency’s decision-making process”).

48. *Id.*

49. *Id.*

50. *See id.* at 954–55, 983 P.2d at 639 (explaining that the Public Utility District did not possess the technical document sought by requestors).

In *Concerned Ratepayers*, the public utility district (PUD) had reviewed technical specifications for a certain type of turbine generator built by Cogentrix and General Electric (GE).⁵¹ The agency never possessed the technical plans sought by the requestors, but had instead reviewed them with Cogentrix and GE employees at Cogentrix's North Carolina offices.⁵² Ultimately, the PUD decided not to purchase the turbines and at no point came to possess the technical portion of the plans.⁵³ Nonetheless, the Court held that the technical specifications were public records subject to disclosure, remanding the case only for determination of whether an exemption applied.⁵⁴ In so doing, the Court created a situation where an agency might have a duty to disclose a "public record" that (1) it never possessed, and (2) it likely could not obtain.⁵⁵ There is no mention anywhere in the Court's opinion of what steps the agency should take to secure the requested records from GE should no exemptions apply to prevent its disclosure.⁵⁶ Thus it appears that an agency may have a duty to produce a "public record" that it does not possess and may have no reliable way to obtain.

As government has moved into the computer age, the PRA has been adapted to encompass the wide variety of digital records that are now produced by agency employees. However, the PRA's adaption to electronic records has not been without problems. In particular, the tension between the powerful disclosure law and the personal privacy of public employees has become an issue that is starting to find its way into Washington's courts.⁵⁷

B. *The Public Records Act in the Digital Age*

The number of records available under the PRA has been greatly expanded by the information age.⁵⁸ The original PDA initiative was

51. *Id.* at 961, 983 P.2d at 641.

52. *Id.* at 954, 983 P.2d at 639.

53. *Id.* at 954–55, 983 P.2d at 639.

54. *See id.* at 963–64, 983 P.2d at 643.

55. The Court's discussion of the PUD's interaction with GE about the technical specifications suggests that the PUD would only have been able to obtain the records with GE's consent. *See id.* at 954 n.6, 983 P.2d at 638 n.6.

56. *See generally id.* It is difficult to imagine a legal mechanism that would allow a public utility district to secure copies of a private corporation's technical product documents for disclosure to a citizen's group.

57. *See, e.g.,* *Nissen v. Pierce Cnty.*, 183 Wash. App. 581, 333 P.3d 577 (2014).

58. *See* Joshua Brustein, *Cop Cams Face Threat from Transparency Law in Washington State*, BLOOMBERG BUSINESSWEEK (Nov. 26, 2014), <http://www.businessweek.com/articles/2014-11-26/cop-cams-face-threat-from-transparency-law-in-washington-state> (explaining that the cost of

conceived in the 1970s without the benefit of foresight to the proliferation of e-mail and other electronic record keeping. Historically, records were available only locally and were often difficult and time-consuming to inspect.⁵⁹ By contrast, today, public records across the nation are increasingly stored in centralized databases in electronic format, allowing requestors to retrieve and examine records anywhere.⁶⁰

Importantly, the internet revolution has fundamentally changed the nature of intra-agency communication and work product since the PDA was originally voted into law.⁶¹ Email and other electronic messaging services preserve almost every aspect of an agency's operation for subsequent inspection under the PRA.⁶² Business that was once done over the phone or in person migrated to email and other forms of electronic communication.⁶³ These changes have allowed employees to

complying with PRA requests for body cam footage may prevent police departments from deploying the cameras in Washington State); Chris Luther, *Rising Costs of Public Records Requests Concerns Cities Across Washington*, NBC RIGHT NOW (Dec. 1, 2014, 6:45 PM), <http://www.nbcrightnow.com/story/27521079/rising-costs-of-public-records-requests-concerns-cities-across-washington> (explaining that the number of records requests received by the City of Yakima has increased by 280% since 2011).

59. See Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1139 (2002).

60. *Id.* at 1139–40.

61. Consider, for example, that much of the communication that was once done over the phone or in person is today done via email. Unlike a phone call or in-person meeting, emails are “writings” and most must be preserved as public records. See WASH. REV. CODE § 42.56.010(3) (2014); *O’Neill v. City of Shoreline*, 170 Wash. 2d 138, 147–48, 240 P.3d 1149 (2010) (explaining that both an email and its embedded metadata are public records subject to disclosure under the PRA).

62. Cf. WENDY GINSBURG, CONG. RESEARCH SERV., R43165, *RETAINING AND PRESERVING FEDERAL RECORDS IN A DIGITAL ENVIRONMENT: BACKGROUND AND ISSUES FOR CONGRESS 3* (2013) available at <http://www.fas.org/sgp/crs/misc/R43165.pdf> (noting that “[n]ew and emerging technologies have continuously allowed federal agencies to create and accumulate more records, complicating and adding costs to record collection, retention, and preservation”). The administrative burden of responding and complying with public records requests is tremendous. Consider the broad language used to define “public record” and the substantial number of records that are produced, and must then be stored and cataloged, every single day at a large agency. WASH. REV. CODE § 42.56.010(3) provides: “‘Public record’ includes 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” This broad definition of a “public record” is supplemented by an equally broad definition of a “writing.” WASH. REV. CODE § 42.56.010(4) provides:

‘Writing’ means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

63. See Natalia Burg, *How Technology Has Changed Workplace Communication*, FORBES (Dec.

be far more productive from a variety of locations and have led to a surge in the amount of work that is done remotely and through private devices.⁶⁴ Facing increasingly broad records requests, cities and agencies are forced to expend considerable sums to identify and disentangle private information from records that relate to public business.⁶⁵ Some “transitory” documents may be deleted, but most must be preserved according to a retention schedule published by each agency.⁶⁶

Modern record-keeping technology provides the public unparalleled access to the inner workings of government, but that access is not without cost.⁶⁷ Cities, counties, and state agencies must dedicate significant staff time to responding to and complying with public record requests, all of which comes at an increasing cost to taxpayers.⁶⁸ During the early 1970s, opponents of Initiative 276 highlighted the substantial cost to taxpayers of the proposed law, noting that increased costs of \$2 million was a conservative estimate, but that the true cost to the state, cities, and towns was impossible to project.⁶⁹ In the modern era of electronic record keeping, the cost to taxpayers of complying with

10, 2013, 2:54 PM), <http://www.forbes.com/sites/unify/2013/12/10/how-technology-has-changed-workplace-communication/> (explaining how face-to-face meetings have given way to conference calls and email chains).

64. See Neil Shah, *More Americans Working Remotely*, WALL ST. J. (March 5, 2013, 5:49 PM), <http://online.wsj.com/news/articles/SB10001424127887324539404578342503214110478> (arguing that more Americans are working remotely than ever before).

65. See, e.g., Mike Schechter, *Gold Bar Meets Gold Standard of Records Request Response; Still Costs City a Pretty Penny*, LOCAL OPEN GOV'T BLOG (Nov. 14, 2012), <http://www.localopengovernment.com/tags/washington-state-court-of-appe/>.

66. “Transitory” emails may generally be deleted under most agencies’ retention schedules, but if they are not, they then become public records under the PRA. See, e.g., *Sound Cities Ass’n Records Retention Policy*, SOUND CITIES ASS’N, <http://soundcities.org/wp-content/uploads/pdfs/public-records-request/Records%20Retention%20Policy.pdf> (last visited Feb. 4, 2015). Retention schedules differ, but most require emails to be stored for several years at a minimum.

67. The monetary cost to taxpayers grows out of the substantial administrative burden of storing and complying with public record requests as well the costs related to litigating public records lawsuits. For example, the State of Washington paid out nearly \$1.7 million relating to public record lawsuits in 2011. See *State Paying Record Amount for Records Lawsuits*, KING5.COM (Oct. 26, 2013, 4:06 PM), <http://www.king5.com/news/investigators/Public-records-lawsuits-138457009.html>.

68. See, e.g., Robin S. Jenkinson, *An Approach to Responding to Public Records Requests*, WASH. ST. ASS’N OF MUN. ATT’YS, available at <http://mrsc.org/getmedia/749F84D3-B29B-4E52-AC1C-6F0FC080754D/f13-pra.aspx> (last visited Feb. 4, 2015) (explaining that the City of Kirkland spends approximately 4500 employee hours responding to public records requests at an annual cost of about \$375,000).

69. WASH. SEC’Y OF STATE, OFFICIAL VOTERS PAMPHLET (GENERAL ELECTION, NOVEMBER 7, 1972) 11 (1972), available at <http://digitalarchives.wa.gov/WA.Media/do/DFC8D5869319A6C935A0699CFB0C027A.pdf>.

Washington's Public Records Act suggests that the opponent's concerns were well founded.⁷⁰ However, administrative costs are only part of the cost equation; agencies and municipalities may face aggressive statutory penalties and significant attorney fee awards when they fail to adequately respond to often voluminous and wide-ranging public record requests.⁷¹ The availability of a potential windfall creates an incentive for requestors to over-request desired records, and then pursue litigation if the agency fails to adequately comply with the PRA's strict provisions.⁷² There is no relevancy requirement and agencies may not deny a request for being overbroad.⁷³ This windfall incentive is arguably behind the increasing size and scope of public record requests.⁷⁴

70. A recent public records request filed against Energy Northwest by a Portland-based consulting firm may take two years and cost as much as \$3 million to comply with. The broad request may contain over 150,000 documents and will require the utility to hire outside assistance in producing the requested records. Ultimately, the cost of the request will be passed on to Energy Northwest's ratepayers. As is the case with all public records requests, it is the public that ends up paying. *See Our Voice: Public Records Requests Shouldn't be Vindictive*, TRI-CITY HERALD, Apr. 1, 2014, at A6; Jenkinson, *supra* note 68, at 3 (describing administrative costs of complying with the PRA for the City of Kirkland).

71. *See* WASH. REV. CODE § 42.56.550(4) (2014) ("Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record."). In recent years, the size and frequency of taxpayer-funded payouts has been on the rise, increasing from \$108,000 in 2006 to \$1.7 million in 2011. *See State Paying Record Amount for Records Lawsuits*, *supra* note 67.

72. For example, a requestor seeking a wide range of information has little incentive to be specific in his request because if the agency fails to produce a responsive record, the requestor may enjoy a significant windfall in subsequent litigation, including attorney's fees. *See* WASH. REV. CODE § 42.56.550(4); Wash. State Dep't of Transp. v. Mendoza de Sugiyama, 182 Wash. App. 588, 592-93, 330 P.3d 209, 211 (2014) (requestor's broad request covered over 174,000 emails). The availability of attorney's fees arguably also removes much of the disincentive to pursue litigation.

73. WASH. REV. CODE § 42.56.080 ("Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons.").

74. Former Washington State Attorney General Rob McKenna suggested that the increase in State payouts relating to public records lawsuits was at least partially caused by people gaming the system. He noted that "[t]he fact is something very important has happened over the last decade. There are a relative handful of individuals, including inmates, who have figured out they can make a lot of money gaming the system." *State Paying Record Amount for Records Lawsuits*, *supra* note 67 (quoting former Washington State Attorney General Rob McKenna). McKenna further elaborated on the cost to taxpayers, arguing that "the whole regime, the whole system of public records and transparency is threatened by ridiculous litigation . . . I don't think that's what the public records

Nonetheless, there are exemptions contained in the PRA, including a scant few designed to protect the privacy of public employees and elected officials.

C. *Statutory Privacy Protection in the PRA*

The PRA contains several statutory provisions designed to prevent the release of records that might seriously compromise the privacy interests of public employees or elected officials. Public employees, appointees, and elected officials have their personal information specifically protected from disclosure, but only to the extent that disclosure would violate their “right to privacy” as defined in RCW 42.56.050. The Act provides that “personal privacy,” as used within the PRA, “is invaded or violated only if disclosure of information about the person: (1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.”⁷⁵ Some additional provisions provide privacy exemptions for certain kinds of sensitive information such as confidential income data⁷⁶ and a variety of personal information that may be stored by government agencies, such as addresses, telephone numbers, and social security numbers.⁷⁷

However, the statutory privacy exemptions⁷⁸ do not protect against many releases of private employee information as the exemptions are limited by their text to preventing only a narrow scope of disclosures. On the whole, the Act provides only very limited privacy exemptions for public employees, and generally requires that, where feasible, redacted documents be released to protect privacy interests in lieu of total exemption.⁷⁹ Moreover, a requestor may still obtain otherwise exempt “private” records “if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual’s right of privacy.”⁸⁰ The privacy provisions operate to exempt from disclosure only a narrow slice of

act was intended for. I don’t think it was intended for people to make money.” *Id.*

75. WASH. REV. CODE § 42.56.050 (defining invasion of privacy for purposes of the privacy exemptions contained in the PRA).

76. *Id.* § 42.56.210(1) (exempting confidential income data from disclosure under the PRA).

77. *Id.* § 42.56.230(3) (exempting a variety of personal, financial, and tax information such as addresses, telephone numbers, email addresses, social security numbers, credit card numbers).

78. *See id.* §§ 42.56.210, 42.56.230.

79. *See id.* § 42.56.210 (providing that the privacy exemptions listed in the PRA are inapplicable to the extent that [private] information can be deleted from the specific records sought).

80. *Id.* § 42.56.210(2).

personal information and in a sense, their language more closely resembles a privacy tort than Washington's constitutional privacy right.⁸¹

D. Article I, Section 7: Washington's Constitutional Right to Privacy

Article I, section 7 of the Washington State Constitution grants individuals a broad right of personal privacy that is independent of the federal Bill of Rights. The section states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”⁸² For roughly sixty years, the Washington State Supreme Court construed the language of article I, section 7 to be functionally equivalent to the privacy protections provided by the Fourth Amendment to the federal constitution.⁸³ However, this began to change with the 1980 case *State v. Simpson*,⁸⁴ when the Court finally gave effect to the “significant disparity in language between the two provisions.”⁸⁵ Today, under the Washington State Constitution, an individual has a clearly recognized right to privacy with no express limitations.⁸⁶

Article I, section 7 is “qualitatively different from the Fourth Amendment and provides greater protections.”⁸⁷ Rather than a court inquiring whether a person had a reasonable expectation of privacy, a search occurs under article I, section 7 whenever the government disturbs “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.”⁸⁸ Article I, section 7 has produced a substantial and sustained divergence between the Washington State Supreme Court and the United

81. Compare *id.* § 42.56.050 (defining invasion of privacy for purposes of the PRA), with RESTATEMENT (SECOND) OF TORTS § 652(D) (1977) (outlining the tort of “publicity given to private life”), and WASH. CONST. art. I, § 7 (outlining the right to personal privacy guaranteed by the Washington State Constitution).

82. WASH. CONST. art. I, § 7.

83. Johnson & Beetham, *supra* note 7, at 431.

84. 95 Wash. 2d 170, 622 P.2d 1199 (1980).

85. Johnson & Beetham, *supra* note 7, at 432; see also ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION 31 (2013) (explaining that the Washington State Supreme Court's swing away from Fourth Amendment jurisprudence began in 1978).

86. *State v. Young*, 123 Wash. 2d 173, 180, 867 P.2d 593, 596 (1994) (citation omitted).

87. *State v. Hinton*, 179 Wash. 2d 862, 868, 319 P.3d 9, 12 (2014); see also *State v. Ringer*, 100 Wash. 2d 686, 698–99, 674 P.2d 1240, 1247 (1983), *overruled on other grounds by*, *State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986) (describing a return to article I, section 7's common law beginnings).

88. *Young*, 123 Wash. 2d at 181, 867 P.2d at 597 (quoting *State v. Myrick*, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984)).

States Supreme Court on the increasingly important questions of search, seizure, and privacy in the modern era.⁸⁹ Article I, section 7's drafters rejected a proposal to adopt language identical to the Fourth Amendment and instead opted for the more nebulous language of article I, section 7 despite the fact that the provision does not refer specifically to searches or seizures.⁹⁰ In fact, article I, section 7's drafters likely intended that the provision apply against "all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of his life."⁹¹

Courts analyze a potential article I, section 7 violation under what is essentially a two-step process.⁹² First, a court examines whether there has been a disturbance of one's "private affairs" or an invasion of one's home.⁹³ Such a disturbance triggers the protection of the constitutional provision.⁹⁴ Second, a court examines whether "authority of law" justifies the government's disturbance or invasion.⁹⁵

The first step of the analysis examines whether the privacy interest invaded is one that "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass."⁹⁶ These interests may be quite broad. For example, the Washington State Supreme Court has recognized cognizable privacy interests in telephone numbers called,⁹⁷ garbage,⁹⁸ and thermal heat waste.⁹⁹ The second step of the analysis focuses on the sufficiency of the government's "authority of law" underlying the invasion.¹⁰⁰ Generally, the authority of law required to access an individual's private affairs is a valid warrant except for several narrow and closely drawn exceptions to

89. UTTER & SPITZER, *supra* note 85, at 31.

90. *Id.*

91. Johnson & Beetham, *supra* note 7, at 442 (quoting *United States v. Boyd*, 116 U.S. 616, 629 (1886) (Miller, J., concurring)).

92. UTTER & SPITZER, *supra* note 85, at 32 (describing article I, section 7 analysis as involving "two discrete steps").

93. *City of Seattle v. McCready*, 123 Wash. 2d 260, 270, 868 P.2d 134, 139 (1994).

94. *State v. Young*, 123 Wash. 2d 173, 181, 867 P.2d 593, 597 (1994) (explaining that if no search has occurred then article I, section 7 is not implicated).

95. *Id.*

96. *Id.* (quoting *State v. Myrick*, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984)).

97. *See In re Maxwell*, 133 Wash. 2d 332, 340, 945 P.2d 196, 200 (1997) (citing *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986)).

98. *See id.* at 339–40, 945 P.2d at 199–200 (citing *State v. Boland*, 115 Wash. 2d 571, 800 P.2d 1112 (1990)).

99. *See id.* (citing *Young*, 123 Wash. 2d 173, 867 P.2d 593).

100. *City of Seattle v. McCready*, 123 Wash. 2d 260, 270, 868 P.2d 134, 139 (1994).

the warrant requirement.¹⁰¹

Today the Washington State Supreme Court continues to extend article I, section 7's privacy protections to new technologies. For example, in *State v. Hinton*,¹⁰² the court extended article I, section 7's privacy protections to text message communications.¹⁰³ The court explained that "[g]iven the realities of modern life, the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7's protection."¹⁰⁴ Moreover, "technological advancements do not extinguish privacy interests that Washington citizens are entitled to hold."¹⁰⁵ Indeed, the court explained in *Hinton* that article I, section 7's privacy protections are not confined to the subjective privacy expectations of modern citizens, which have likely been diminished by the increasing prevalence of surveillance technology.¹⁰⁶ Rather, the state constitution bars the government from intruding upon those privacy interests the citizens of Washington "have held, and should be entitled to hold."¹⁰⁷ In other words, the protections offered by article I, section 7 are not static. The protections are adaptable and focused on an individual's core privacy *interests* rather than being constrained by a specific type of technology.

Because the protection of Washington's article I, section 7 is distinct from that of the Fourth Amendment to the United States Constitution, it might apply differently to new technologies. For example, the word "reasonable" does not appear anywhere in article I, section 7's guarantee¹⁰⁸ and Washington citizens' privacy interests are not constrained by a "reasonable expectation" inquiry that might be affected by society's increasing acceptance of reduced privacy.¹⁰⁹ Washington

101. *State v. Hinton*, 179 Wash. 2d 862, 868–69, 319 P.3d 9, 12 (2014); *see also* *State v. Miles*, 160 Wash. 2d 236, 243–44, 156 P.3d 864, 867–68 (2007). Examples of exceptions to the warrant requirement include consent, exigent circumstances, and searches incident to a valid arrest. *See* *State v. Ladson*, 138 Wash. 2d 343, 349, 979 P.2d 833, 837–38 (1999).

102. 179 Wash. 2d 862, 319 P.3d 9.

103. *See id.* at 877–78, 319 P.3d at 16–17 (holding that text messages sent by convicted narcotics purchaser were "private affairs" subject protection under article I, section 7 of the Washington State Constitution).

104. *Id.* at 873, 319 P.3d at 15 (quoting *State v. Myrick*, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984)).

105. *Id.* at 870, 319 P.3d at 13.

106. *See id.* at 873–74, 319 P.3d at 14–15.

107. *State v. Young*, 123 Wash. 2d 173, 181, 867 P.2d 593, 597 (1994) (quoting *Myrick*, 102 Wash. 2d at 511, 688 P.2d at 154).

108. WASH. CONST. art. I, § 7.

109. *Hinton*, 179 Wash. 2d at 869–70, 319 P.3d at 12–13.

citizens hold significant privacy interests in their digital devices, such as laptops, tablets, or smartphones, despite the fact that some of the information those devices contain may be inadvertently viewed by others.¹¹⁰ While Washington's Constitution can be characterized as especially protective of privacy,¹¹¹ even the United States Supreme Court has recognized the extent to which one's personal identity and private life are stored and catalogued by their smartphones.¹¹²

Washington's constitutional protection for individual privacy protects a public employee's private affairs even where the PRA's privacy exemptions are not applicable.¹¹³ The statutory privacy protections contained in the PRA are fundamentally *different* from the constitutional guarantee.¹¹⁴ That the PRA's statutory privacy protections focus on protecting information that would be "highly offensive to a *reasonable person*" demonstrate that the protections' scope is constrained by a reasonableness inquiry not recognized by article I, section 7 jurisprudence.¹¹⁵ While an argument can be made that public employees may lose any reasonable expectation of privacy in their electronic devices after using them for work-related business, a reasonableness test is not the appropriate inquiry under the Washington Constitution.¹¹⁶ Instead, one's private device, such as a computer or cellphone, is protected from search and seizure absent a warrant.¹¹⁷ Moreover, a

110. *See id.* at 881, 319 P.3d at 18 (explaining that police may search a person's cellphone "only with a warrant, a valid exception to the warrant requirement, or the phone owner's express consent").

111. *See id.* at 868, 319 P.3d 9 at 12.

112. *See Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2494–95 (2014) (explaining that for many Americans, modern smartphones contain the "privacies of life").

113. *See In re Ways' Marriage*, 85 Wash. 2d 693, 703, 538 P.2d 1225, 1231 (1975) ("[I]t is our duty to avoid rendering a statute unconstitutional by interpretation if by an alternative interpretation we may render it constitutional."); *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wash. 2d 790, 816, 123 P.3d 88, 101 (2005) (Johnson, J., dissenting) (explaining that courts should avoid embracing statutory interpretations that will produce illegal or unconstitutional results).

114. The article I, section 7 privacy right is not subject to any express limitations. *See State v. Young*, 123 Wash. 2d 173, 180, 867 P.2d 593, 596 (1994). A reasonableness inquiry, such as the PRA's requirement that private information be "highly offensive to a reasonable person" would seem to be by definition an express limitation. WASH. REV. CODE § 42.56.50 (2014). Thus, while a public official may not rely on the statutory provision of the PRA to resist disclosure of private information that a reasonable person might find only moderately offensive, this does not mean that such disclosure could not be properly resisted on state constitutional grounds.

115. *See Young*, 123 Wash. 2d at 180, 867 P.2d at 596 (stating that the right to privacy granted by article I, section 7 is not subject to any express limitations); *Hinton*, 179 Wash. 2d at 868, 319 P.3d at 12 (explaining that article I, section 7 protects from government intrusion those privacy interests Washington citizens "have held, and should be entitled to hold").

116. *See Young*, 123 Wash. 2d at 181, 867 P.2d at 597 (internal quotation omitted).

117. *See id.* ("[Under the] Washington constitution the inquiry focuses on those privacy interests

warrant will only issue where there is a specific statutory provision authorizing its issuance.¹¹⁸ PRA violations are not criminal,¹¹⁹ and there is no authority to suggest that the Act can support the issuance of a warrant in Washington as no authorization statute can be found anywhere in the PRA's statutory scheme.¹²⁰ Finally, any argument that a public employee or elected official waives his article I, section 7 right to privacy by virtue of becoming a *public* employee or officer would seem to run counter to the supremacy of individual rights declared by article I, section 1 of the State Constitution.¹²¹ Moreover, such an argument is at odds with case law from the Washington State Court of Appeals.¹²²

II. APPLYING THE PRA TO “PRIVATE AFFAIRS” CREATES A DILEMMA

A. *Requiring Governmental inspection of a Private Computer Under the PRA Implicates the Protection of Article I, Section 7*

In the 2010 case *O’Neill v. City of Shoreline*,¹²³ the Washington State Supreme Court addressed, for the first time, the applicability of the PRA to public records contained on a private computer. A sharply divided court, underscoring the tension between personal privacy and the PRA, held that the City of Shoreline had a duty to inspect the personal hard drive of its deputy mayor, and disclose any public records held therein.¹²⁴ This remarkable result would set the stage for future public records lawsuits targeting public officials, including *Nissen v. Pierce County*,¹²⁵ recently decided by the Washington State Court of Appeals

which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” (internal quotations omitted)).

118. *City of Seattle v. McCreedy*, 123 Wash. 2d 260, 273–74, 868 P.2d 134, 140–41 (1994).

119. *See generally* WASH. REV. CODE ch. 42.56 (codifying the Washington Public Records Act).

120. *See generally id.* Careful review of the statute reveals no provision that authorizes the issuance of a warrant. This is likely because, by design, the PRA applies to agencies rather than to individuals.

121. *See* WASH. CONST. art. I, § 1 (“All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”).

122. *See Robinson v. City of Seattle*, 102 Wash. App. 795, 822, 10 P.3d 452, 466–67 (2000) (holding that applicants for public employment do not waive their privacy rights).

123. 170 Wash. 2d 138, 240 P.3d 1149 (2010).

124. *Id.* at 150, 240 P.3d at 1155 (“The City has a duty to provide records to the public that are subject to the PRA. RCW 42.56.070(1). Information that must be disclosed under the PRA conceivably exists on the hard drive of Fimia’s computer.”).

125. 183 Wash. App. 581, 333 P.3d 577 (2014).

for Division II.

In *O'Neill*, deputy mayor Fimia had received an email on her personal computer that accused the Shoreline City Council of improper conduct, supposedly sent on behalf of O'Neill.¹²⁶ After Fimia disclosed the existence of the email at a city council meeting, O'Neill, who was also present, made an immediate oral request for the email.¹²⁷ Fimia forwarded the email through her personal email account on her home computer, removing the "to" and "from" information, but otherwise providing the entire email to O'Neill.¹²⁸ However, O'Neill was not satisfied with the disclosure and subsequently requested *all information* relating to the email, including how it was received and from whom it was sent.¹²⁹ Fimia found the original unaltered email, including the forwarding information that indicated its original sender, and provided this to the city attorney for disclosure to O'Neill.¹³⁰

Despite this second disclosure, O'Neill remained unsatisfied, and she soon made a third request for all metadata¹³¹ associated with the entire email chain.¹³² Fimia was unable to find the metadata associated with the original email and concluded she must have inadvertently destroyed it; thus the city was unable to produce the requested information.¹³³ In its place, the city provided O'Neill with metadata taken from an identical email sent to city council member Janet Way; however, O'Neill remained unsatisfied and brought suit under the PRA to compel disclosure of the specific metadata she had requested.¹³⁴

When the case finally came before the Washington State Supreme Court, two primary issues required resolution: (1) was the metadata associated with the email a public record; and (2) did the city have a duty to inspect Fimia's personal computer in order to provide the

126. *O'Neill*, 170 Wash. 2d at 141–43, 240 P.3d at 1151–52.

127. *Id.* at 142, 240 P.3d at 1151.

128. *Id.*

129. *Id.* at 143–44, 240 P.3d at 1151–52.

130. *Id.*

131. *Id.* at 143, 240 P.3d at 1151 (stating that "[m]etadata is most clearly defined as 'data about data' or hidden information about electronic documents created by software programs") (citing Jembaa Cole, *When Invisible Electronic Ink Leaves Red Faces: Tactical, Legal and Ethical Consequences of the Failure to Remove Metadata*, 1 SHIDLER J.L. COM. & TECH. 7 (2005)). Metadata presents other interesting issues relating to the PRA because often, especially in the realm of telecommunications, metadata may only be stored in the private servers of a corporation that provides communication services.

132. *O'Neill*, 170 Wash. 2d at 143, 240 P.3d at 1151.

133. *Id.* at 143–44, 240 P.3d at 1151–52.

134. *Id.*

requested metadata?¹³⁵ The Court answered yes to both questions, suggesting that the City could be found to have violated the PRA if it failed to “search” Fimia’s home computer for the requested record.¹³⁶ However, the court noted in a footnote that “[w]e address only whether the City may inspect Fimia’s home computer if she gives consent to the inspection. We do not address whether the City may inspect Fimia’s home computer absent her consent.”¹³⁷ This qualification means the court did not consider the constitutional privacy questions raised by a mandated inspection. However, it also means the Court did nothing to help resolve the tension between the PRA and a public employee’s right to privacy. That task has been left, so far, to the lower courts though nothing approaching a resolution has yet emerged.¹³⁸ Nonetheless, the majority’s qualification suggests that the Justices were acutely aware of the potential constitutional dimension the case could undertake if Fimia refused to produce the requested hard drive.

Justice Alexander authored a dissent in *O’Neill*, which was joined by the three other justices who similarly took issue with the majority’s reasoning.¹³⁹ In particular, Justice Alexander argued that the even if the metadata on Fimia’s home computer was a public record; it was exempt from disclosure under the statutory privacy exceptions of RCW 42.56.050¹⁴⁰ and 42.56.230.¹⁴¹ Those provisions provide statutory exemptions from disclosure when certain privacy rights of public employees would be implicated by the requested materials, though the

135. *See id.* at 144–45, 250 P.3d at 1152.

136. *Id.* at 150–51, 240 P.3d at 1155 (“If, on remand, the City refuses to inspect Fimia’s home computer’s hard drive for the metadata, the trial court should find that the City violated the PRA, as the City will not have provided the O’Neills with the requested metadata.”).

137. *Id.* at 150 n.4, 240 P.3d at 1155 n.4.

138. *See, e.g.,* *Nissen v. Pierce Cnty.*, 183 Wash. App. 581, 333 P.3d 577 (2014). This case presented an opportunity for the Court of Appeals to explore the relation of article I, section 7 to an elected official’s privacy in the context of the PRA. However, the court ultimately remanded the case without reaching the constitutional arguments. *Id.* at 596, 333 P.3d at 585.

139. *See O’Neill*, 170 Wash. 2d at 154–56, 240 P.3d at 1157–58 (Alexander, J., dissenting).

140. *Id.*; WASH. REV. CODE § 42.56.050 (2014) (“A person’s ‘right to privacy,’ ‘right of privacy,’ ‘privacy,’ or ‘personal privacy,’ as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public’s right to inspect, examine, or copy public records.”).

141. *See O’Neill*, 170 Wash. 2d at 155, 240 P.3d at 1157–58; WASH. REV. CODE § 42.56.230 (exempting from disclosure under the PRA some personal information that would violate the privacy rights of public employees, including elected officials).

bar for exemption is quite high.¹⁴² Moreover, he took issue with the majority's determination that an unsolicited email sent to a city official's private email account, accessed on her home computer, could be considered a "public record" subject to disclosure under the PRA.¹⁴³ In Justice Alexander's view, the city had fully met its obligations under the PRA and should not be penalized for failing to conduct an impermissible search of Deputy Mayor Fimia's private computer.¹⁴⁴

Although Justice Alexander never expressly invoked article I, section 7 of the State Constitution in the text of his dissent, he did reference it in a footnote and it seems to undergird much of his argument.¹⁴⁵ Specifically, Justice Alexander noted that the private nature of Fimia's personal hard drive "would necessarily be compromised by an 'inspection' or 'search' of the sort the majority orders."¹⁴⁶ Thus, he argued, because the information on Fimia's personal hard drive would be private and protected by article I, section 7, Fimia would be within her rights to refuse to consent to the City's inspection absent a warrant.¹⁴⁷ Consequently, under this scenario the City should not be held to have violated the PRA and should not be assessed statutory penalties if it failed to conduct an illegal search.¹⁴⁸

Eventually, however, the Washington State Supreme Court may have to resolve the tension between article I, section 7 and the disclosure requirements of the PRA. *Nissen v. Pierce County*¹⁴⁹ may be a case that eventually requires the Court to confront analogous issues. In the lead-up to the *Nissen* case, Pierce County Prosecutor Mark Lindquist explicitly refused to turn over text messages and certain phone records relating to the allegations of misconduct against deputy Nissen, relying both on the statutory privacy protections of the PRA and the constitutional privacy protection of article I, section 7.¹⁵⁰ The case is significant because it directly raises the issue of whether work-related

142. See WASH. REV. CODE §§ 42.56.050, 42.56.230; *supra* notes 67–72 and accompanying text.

143. See *O'Neill*, 170 Wash. 2d at 156, 240 P.3d at 1158 (Alexander, J., dissenting).

144. *Id.* at 156–57, 240 P.3d at 1158.

145. *Id.* at 155 n.1, 240 P.3d at 1157 n.1.

146. *Id.* at 155, 240 P.3d at 1157.

147. *Id.* at 155, 240 P.3d at 1158. ("Because a public employee, including an elected official like Fimia, would be well within his or her rights to refuse an inspection or a search by the employer of his or her home computer, the employee's privacy right trumps any direction to the public employer to examine the hard drive of the employee's home computer.").

148. *Id.* at 156, 240 P.3d at 1158.

149. 183 Wash. App. 581, 333 P.3d 577 (2014).

150. Brief of Respondent at 27, 39, *Nissen v. Pierce Cnty.*, 183 Wash. App. 581, 333 P.3d 577 (2014).

text messages sent from a private phone are disclosable under the PRA when the agency involved cannot retrieve the requested messages.¹⁵¹

The background facts are somewhat convoluted, but the case boils down to a public records request by Pierce County Sheriff's Deputy Glenda Nissen for text messages and corresponding phone records from Pierce County Prosecutor Mark Lindquist.¹⁵² Nissen believes that text messages sent by Lindquist on his private cell phone may support her claim that he falsely accused her of sending a death threat to a former sheriff's department employee.¹⁵³ Lindquist initially provided redacted phone records to the County to disclose to Nissen; however, Lindquist never volunteered to provide the text messages and the sum of his disclosures was not sufficient to stop Nissen from filing suit under the PRA.¹⁵⁴

The posture of *Nissen* ultimately led the Court of Appeals for Division II to a fairly limited holding that did not resolve the underlying suit. The case reached the court of appeals as an appeal of the superior court's grant of Pierce County's CR 12(b)(6) motion to dismiss. Because of this posture, the court of appeals concluded that additional fact-finding in the superior court was necessary and that it could not, on the record before the court on appeal, conclude whether Lindquist's private phone records were "public records" within the meaning of the PRA.¹⁵⁵

The court of appeals explicitly did not reach the constitutional question.¹⁵⁶ The court remanded the case to the superior court with orders that Nissen's complaint be reinstated and a record developed sufficient to determine whether Lindquist's personal cell phone text messages and call logs pertained to the conduct of government business and thus were public records.¹⁵⁷ Nonetheless, *Nissen* provides insight into how courts determine whether records that share private and public qualities are ultimately "public," subject to disclosure under the PRA.¹⁵⁸

151. Pat Jenkins, *Can a Public Official's Private Phone be Public?*, DISPATCH (Apr. 1, 2014, 1:28 PM), <http://www.dispatchnews.com/2014/04/01/can-a-public-officials-private-phone-be-public/>.

152. *Id.*

153. *Id.*

154. *Id.*

155. *See Nissen v. Pierce Cnty.*, 183 Wash. App. 581, 596, 333 P.3d 577, 585 (2014) (remanding for discovery to establish the record necessary to determine whether requested records are public records).

156. *Id.* ("Because we remand to the superior court, we do not address Nissen's and Lindquist's constitutional privacy arguments.").

157. *Id.* at 598, 333 P.3d at 585–86.

158. *See generally id.*

Because the court did not determine that the requested records were public records within the reach of the PRA,¹⁵⁹ it did not reach the applicability of the statutory privacy protections of the Act. Nonetheless, in granting Pierce County's CR 12(b)(6) motion, the superior court apparently examined the application of the PRA privacy statutes.¹⁶⁰ While the *Nissen* decision provided little additional clarity into the tension between personal privacy and the PRA, it does seem to support the ongoing vitality of *O'Neill* and the rationale of the majority in that case.¹⁶¹ Specifically, the *Nissen* court noted that in determining whether the requested text messages were public records, it was "immaterial" that government-business-related messages were contained in a personal cellular phone.¹⁶² While the court may be correct that it is "immaterial" that the messages were contained on a private device for determining whether the communications constitute "public records," the private nature of the device is certainly material to the applicability of statutory and constitutional privacy protections.¹⁶³ As Justice Alexander recognized in his dissent in *O'Neill*, a court-directed examination of a private hard drive, such as one contained in a smartphone, likely implicates its owner's privacy rights in the information contained on the device.¹⁶⁴ Thus, the *Nissen* court's determination that public records may be created and contained on a private cellphone¹⁶⁵ is consistent with the *O'Neill* Court's determination that public records may be contained on a private computer. However, neither case squarely addresses the constitutional privacy issues lurking in the background.¹⁶⁶

159. *Id.* at 598, 333 P.3d at 585–86.

160. *See id.* at 588 n.9, 333 P.3d at 581 n.9 (finding that RCW 42.56.050, the PRA exemption designed to protect against invasions of privacy, applies to the phone records at issue in the case).

161. *See id.* at 594, 333 P.3d at 583 ("Our Supreme Court has refused to exempt personal device communications from records subject to the PRA, stating '[i]f government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined.'" (quoting *O'Neill v. City of Shoreline*, 170 Wash. 2d 138, 150, 240 P.3d 1149, 1155 (2010))).

162. *Id.*

163. *See O'Neill*, 170 Wash. 2d at 155, 240 P.3d at 1157 (Alexander, J., dissenting) ("[T]he majority provides no authority of law for the proposition that a city employee's home computer is subject to such a search or inspection by the employing city.").

164. *See id.*

165. *Nissen*, 183 Wash. App. at 595–96, 333 P.3d at 584–85.

166. *See generally O'Neill*, 170 Wash. 2d at 155, 240 P.3d at 1157; *Nissen*, 183 Wash. App. at 596, 333 P.3d at 585.

B. *The PRA Does Not Provide Agencies with the Necessary “Authority of Law” to Inspect a Private Device Protected Under Article I, Section 7*

If in responding to a public records request, an agency determines that a public record exists only on an employee’s private device, can the agency constitutionally require inspection of that device and recover the record without the employee’s consent? If a court decides that electronic records stored on a personal device are “public records” for purposes of the PRA, can it compel a public employee or elected official to produce the device for inspection? The answers to these questions and many like them are not entirely clear, but the Washington State Supreme Court’s prior article I, section 7 decisions suggest that the “authority of law” required to disturb an individual’s private affairs cannot be grounded solely in the PRA.¹⁶⁷ Moreover, an additional wrinkle appears in the fact that a court’s power of judicial review applies only to the agency’s response to a record request.¹⁶⁸ In other words, a court’s power to enforce the PRA flows from its power to review agency actions; attorney fees and statutory penalties are only available to a party that has prevailed “against an agency.”¹⁶⁹ As such, the court’s power to compel the production of records and impose statutory penalties may be applied against the agency itself, but not necessarily against the individual employee or official in *physical* possession of the disputed records.¹⁷⁰

Washington’s courts have long recognized that once a matter is deemed “private” under article I, section 7, a search must only be conducted with “authority of law,” or “in other words, a [valid]

167. The PRA does not contain an authorizing statute and, like the housing at issue in *State v. Walker*, does not provide for criminal sanctions for violations. See 101 Wash. App. 1, 6, 999 P.2d 1296, 1299 (2000) (“[I]n the absence of a specific authorizing statute or court rule, a court may not constitutionally issue an administrative search warrant *even with* probable cause, at least where the reason for issuance is a non-criminal housing code violation.” (emphasis in original)).

168. See generally WASH. REV. CODE. § 42.56.550 (2014) (describing the courts’ power of judicial review over agency actions).

169. *Id.* § 42.56.550(4) (“Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.”).

170. *Id.* § 42.56.550 (explaining that judicial review under the PRA is available for agency action). *But see* Memorandum Opinion on Violation of the Public Records Act, Paulson v. City of Bainbridge Island, No. 13-2-01839-1 (Kitsap Cnty. Super. Ct., Wash., May 29, 2014) (directing plaintiffs to petition the court for mandamus should the City fail to turn over councilmembers personal hard drives for inspection).

warrant.”¹⁷¹ Specifically, “authority of law” has historically meant a government disturbance or invasion conducted pursuant to a valid warrant or subpoena issued by a neutral magistrate or other authorized government entity.¹⁷² Local governments do not possess a common law right to issue a search warrant in Washington.¹⁷³ Instead, “Washington’s long-standing tradition of limiting search warrants to carefully circumscribed statutory categories provides powerful support for the proposition that Const. art. I, § 7 prohibits courts from issuing warrants without an authorizing statute or court rule.”¹⁷⁴ For example, an agency may not inspect a tenant’s apartment based on a warrant issued by a superior court if the court was not expressly authorized to issue such a warrant.¹⁷⁵ Rather, for a search based on less than probable cause, courts are granted authority to issue search warrants only if authorized by a specific statute or court rule.¹⁷⁶ Stated another way, an administrative search warrant must be supported by either: (1) an authorizing statute or court rule or (2) “by allegations of a *criminal* violation supported by probable cause.”¹⁷⁷ Moreover, the authority of a court to issue a warrant on less than probable cause is not to be implied from a statute, even one that grants inspectors a right of entry for enforcement purposes.¹⁷⁸ Rather, the legislature has crafted a number of statutes that explicitly authorize courts to issue administrative search warrants in support of the enforcement of specific laws.¹⁷⁹

The PRA does not contain a statutory provision explicitly authorizing the issuance of a warrant nor does it contain an administrative subpoena

171. *York v. Wahiakum Sch. Dist.* No. 200, 163 Wash. 2d 297, 306, 178 P.3d 995, 1001 (2008).

172. *Johnson & Beetham*, *supra* note 7, at 450 (citations omitted).

173. *City of Seattle v. McCready*, 123 Wash. 2d 260, 273–74, 868 P.2d 134, 141 (1994).

174. *Id.* at 274, 868 P.2d at 141.

175. *See id.* at 272–73, 868 P.2d at 140–41 (explaining that an absolutely essential element of a valid warrant is that it be issued by a magistrate with the legal authority to issue it).

176. *Id.* at 273, 868 P.2d at 141 (holding “that a superior court is not authorized either by the common law or by the state constitution to issue search warrants on less than probable cause in the absence of a statute or court rule”).

177. *City of Pasco v. Shaw*, 161 Wash. 2d 450, 459, 166 P.3d 1157, 1162 (2007) (emphasis in original).

178. *See McCready*, 123 Wash. 2d at 278, 868 P.2d at 143 (explaining that “a right of entry, and even an authorization to seek a warrant to implement a right of entry, is not equivalent to a legislative authorization for a court to issue a warrant on less than probable cause”).

179. *Id.* at 278–89, 868 P.2d at 143–44 (citing WASH. REV. CODE § 15.17.190 (horticultural grading laws); WASH. REV. CODE § 16.57.180 (livestock identification laws); WASH. REV. CODE § 17.24.021 (insects, pests, and plant diseases); WASH. REV. CODE § 19.94.260 (weights and measures laws); WASH. REV. CODE § 69.50.502 (pharmaceutical premises)).

provision.¹⁸⁰ If the legislature intended to authorize the courts to judicially compel the disclosure of “private affairs” protected under article I, section 7, it seems reasonable that it would have provided at least some procedural mechanism in the statutory scheme.¹⁸¹ But there is none.¹⁸² Without such authorization, an attempt by a court to compel production of the “private affairs” of an individual, even for *in camera* review, would be of questionable legality under article I, section 7 precedent.¹⁸³ This was the view of the superior court judge in *Nissen*.¹⁸⁴ In setting forth the superior court’s reasoning for granting Pierce County’s CR 12(b)(6) motion to dismiss, the judge explained that the court had “no power to require a third-party provider [Verizon, where the text messages were stored], without a search warrant application with probable cause, to disclose records. [The court] *ha[s] no power to do so under the PRA.*”¹⁸⁵ The trial judge’s statement reflects the fact that the PRA lacks a provision that would expressly authorize a court to issue an administrative search warrant. Without express authorization, only allegations of a criminal violation supported by probable cause are sufficient to support an administrative search warrant.¹⁸⁶

The PRA, as it currently exists, does not provide the “authority of law” necessary to overcome the privacy interests of public employees in their personal devices.¹⁸⁷ No statute or court rule authorizes a magistrate to issue a search warrant based on a suspected violation of the PRA, nor is a violation of the Act a criminal offense.¹⁸⁸ As such, an agency does not have the necessary “authority of law” to inspect a public employee’s private device against the employee’s will.¹⁸⁹ The *O’Neill*¹⁹⁰ court

180. See generally WASH. REV. CODE ch. 42.56 (2014) (codifying the Public Records Act).

181. See WASH. REV. CODE § 10.79.015 (2014) (authorizing a magistrate to issue a search warrant upon reasonable cause that certain conditions provided for in the statute, such as unlawful gambling or counterfeiting, are present); *Shaw*, 161 Wash. 2d at 459, 166 P.3d at 1161–62.

182. See generally WASH. REV. CODE ch. 42.56 (codifying the Public Records Act).

183. See *McCready*, 123 Wash. 2d at 273–74, 868 P.2d at 140–41; *State v. Walker*, 101 Wash. App. 1, 6, 999 P.2d 1296, 1299 (2000).

184. *Nissen v. Pierce Cnty.*, 183 Wash. App. 581, 588 n.9, 333 P.3d 577, 581 n.9 (2014).

185. *Id.* (emphasis in original).

186. See *Shaw*, 161 Wash. 2d at 459, 166 P.3d at 1162.

187. See generally WASH. REV. CODE ch. 42.56 (codifying the Public Records Act).

188. See generally *id.*

189. See *Shaw*, 161 Wash. 2d at 459, 166 P.3d at 1161–62 (holding that an administrative search warrant must be supported by either (1) an authorizing statute or court rule or (2) allegations of a criminal violation which are supported by probable cause); *City of Seattle v. McCready*, 123 Wash. 2d 260, 278–79, 868 P.2d 134, 143 (1994) (explaining that statutory authority to issue a warrant must be express and not merely implied).

190. *O’Neill v. City of Shoreline*, 170 Wash. 2d 138, 240 P.3d 1149 (2010).

implicitly recognized this issue, specifically qualifying its holding to apply only to a situation where the Deputy Mayor voluntarily produced what was undisputedly a “public record” sent to her private home computer.¹⁹¹ Even if the agency applied for a warrant to authorize the search, a court would have no authority to issue a search warrant based solely on the PRA.¹⁹² Because of this constitutional limitation on the authority of government, it is unfair to hold an agency in violation of the PRA for failing to produce records that are contained on the private computer or device of an employee or public official or otherwise protected by article I, section 7 of the Washington State Constitution.

III. ADDRESSING THE DILEMMA: SUGGESTIONS FOR THE FUTURE

A. *Agencies Should Not Face Statutory Penalties for Records They Do Not Possess and Cannot Obtain*

One immediate question that *O’Neill* raised but left unresolved is what would have happened had Fimia, Shoreline’s deputy mayor, refused to turn over her personal hard drive for inspection? The Court dodged this issue,¹⁹³ and in so doing left government agencies without guidance on how to handle such a situation. In *Concerned Ratepayers*, the Court appeared to imply that the PUD could be held liable for failing to produce documents that were not in its physical possession.¹⁹⁴ While fifteen years later it is difficult to know the precise factual context of that case, including the PUD’s ability at the time to obtain the turbine’s technical specifications from Cogentrix and GE, it nonetheless continues to appear that agencies have a duty to produce public records even when

191. *Id.* at 150 n.4, 240 P.3d at 1155 n.4; *see also id.* at 155, 240 P.3d at 1157 (Alexander, J., dissenting) (“[T]he majority provides no authority of law for the proposition that a city employee’s home computer is subject to such a search or inspection by the employing city. In my opinion, the home computer hard drive is not subject to search or inspection by the City without permission of the employee.”).

192. *See McCready*, 123 Wash. 2d at 280–81, 868 P.2d at 144–45 (holding that warrants issued by superior court not authorized to do so by a statute or court rule were invalid and must be quashed).

193. *O’Neill*, 170 Wash. 2d at 150 n.4, 240 P.3d at 1155 n.4 (explaining that the Court only addresses whether the City may inspect Fimia’s computer *with* consent, thus avoiding issues that might arise should she challenge such an inspection).

194. *Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1 of Clark Cnty., Wash.*, 138 Wash. 2d 950, 964, 983 P.2d 635, 642 (1999) (declining to award statutory penalties and attorney’s fees because further fact finding by the trial court was necessary to determine if a statutory exemption applied).

they do not possess them.¹⁹⁵

This interpretation of the PRA creates a substantial dilemma for agencies that must respond to requests for records they do not possess. For example, consider the following hypothetical: a city receives a public records request for “all communications (including associated metadata) relating to the zoning variance for building X.” In the course of searching for responsive records, the city discovers that an employee in the planning department sent email messages relating to that project’s approval from the employee’s private smartphone. The employee refuses to turn over the phone or provide the messages. As discussed in Part II.B, the agency does not have authority to inspect the employee’s private device, nor will it likely be able to seek a warrant compelling a search of the phone.¹⁹⁶ In this circumstance, an agency would be forced to confront the same dilemma as the PUD in *Concerned Ratepayers*.¹⁹⁷ The messages and associated metadata would be disclosable under the PRA because they relate to the conduct of government and were “prepared” by an employee of the agency,¹⁹⁸ but they would be practically impossible to disclose. Even if the city makes best efforts, under the current statutory scheme there is no mechanism that would allow the city to obtain the requested records.¹⁹⁹ In this circumstance, it matters very little that the communications are technically “public records” because, practically, they are entombed within a private device protected by article I, section 7 of the Washington State Constitution. Yet, the record is “disclosable” because it is both (1) a public record, and (2) not exempt from disclosure.²⁰⁰ Thus, presumably, despite the practical impossibility of disclosure, the agency could be liable for

195. *Id.* at 954 n.6, 983 P.2d at 638 n.6. (noting in a footnote that the Concerned Ratepayer’s Association (CRA) had been put in touch with GE regarding the requested record but had “neither responded to the opportunity to meet with General Electric nor sought the District’s assistance in directly communicating with General Electric”). Thus, regardless of whether the technical specifications were exempted under the PRA, physical disclosure of the document apparently depended on GE’s consent. As such, if GE refused to provide the document, the PUD would be unable to disclose a document it had a duty to disclose and would presumably be liable for penalties and attorney fees under the PRA. *Id.* at 963–64, 983 P.2d at 643 (explaining that in order to prevail against an agency (and thus be entitled to attorney fees and penalties), a party must demonstrate that the requested document was disclosable); *see also* WASH. REV. CODE § 42.56.550 (2014).

196. *See supra* Part II.B.

197. *Concerned Ratepayers*, 138 Wash. 2d at 954 n.6, 983 P.2d at 638 n.6 (suggesting that the PUD’s ability to obtain the requested documents depended on the consent of GE and Cogentrix).

198. *See* WASH. REV. CODE § 42.56.070(1) (requiring agencies to make public records available for inspection and copying); WASH. REV. CODE § 42.56.010(2) (defining “public” record).

199. *See supra* notes 142–155 and accompanying text.

200. *See Concerned Ratepayers*, 138 Wash. 2d at 963–64, 983 P.2d at 643.

failing to produce the requested communications and metadata.

Agencies should not be assessed statutory penalties for failing to disclose records they cannot obtain. Imposing statutory liability in this case does not promote open access to government records because the “agency,” as opposed to the individual in possession of the records, never had power to correct the situation. Rather, penalties in this case would merely burden taxpayers and detract from the agency’s ability to do its job. Further, an agency should not be punished for failing to violate an employee’s constitutional right to privacy.

B. The Dilemma Will Persist Until the Legislature Acts

A long-term solution to the dilemma is needed that both ensures public employees retain their constitutional privacy protections and preserves open access to government records. As the PRA’s proponents suggest, allowing public officers to systematically avoid disclosure by conducting public business on a private device would undermine the purpose of the Act.²⁰¹ This Comment argues that the legislature should resolve the dilemma by amending the PRA to (1) ensure that emails concerning government business are always possessed by the associated agency, and (2) include an express administrative subpoena provision.

First, ensuring that agencies have access to all electronic messages concerning public business could be accomplished by requiring public employees to carbon-copy (“CC”) an agency account when sending an email or other electronic message that concerns public business from a private account. Such a mechanism was proposed by the Federal Records Accountability Act of 2014, a bill that passed the U.S. House of Representatives in September 2014.²⁰² The bill would require that federal employees or officers who send an electronic message related to official business from a non-work messaging account (1) include their official agency account as a recipient of the message and identify all recipients in the message, or (2) forward a complete copy of the message, including a complete list of recipients to an appropriate agency account within fifteen days.²⁰³ Failure by an employee to comply with

201. Brian Sonntag & Rob McKenna, *Guest: Public Officials Give up Some Privacy on Personal Cellphones*, SEATTLE TIMES (Sep. 30, 2014, 4:25 PM), http://seattletimes.com/html/opinion/2024665428_briansonntagrobmckennaopedpublicrecordsxxxml.html.

202. See Federal Records Accountability Act of 2014, H.R. 5170, 113th Cong. (2014); Social Security Legislative Bulletin, *House Passes H.R. 5170, the Federal Records Accountability Act of 2014*, SOC. SEC. ADMIN. (Sep. 24, 2014), available at http://www.ssa.gov/legislation/legis_bulletin_092414c.html.

203. Federal Records Accountability Act of 2014, H.R. 5170, 113th Cong. § 2911(a)(1)–(2)

the requirements could result in suspension or termination.²⁰⁴ The stated purpose of the bill is to improve federal employee compliance with federal and presidential recordkeeping requirements.²⁰⁵ In addition to the forwarding requirement, the Bill would put in a place a process for suspending or removing a federal employee who willfully and unlawfully destroys, conceals, removes, mutilates, obliterates, or falsifies a record in the employee's custody.²⁰⁶

Several jurisdictions have implemented laws with requirements that resemble those of the Federal Records Accountability Act of 2014. Missouri, for example, adopted a forwarding requirement into its sunshine law in 2004.²⁰⁷ Missouri's statute requires a member of a governmental body "who transmits any message relating to public business by electronic means" to "concurrently transmit that message to either the member's public office computer or the custodian of records in the same format."²⁰⁸ However, this seemingly broad mandate applies only to messages sent to "two or more members" of that governmental body such that, when counting the sender "a majority of the body's members are copied."²⁰⁹ The District of Columbia Council also adopted a forwarding requirement into its Rules of Organization and Procedure.²¹⁰ The Rule requires Council employees to use their government-provided email address to transact public business "unless the employee takes steps to ensure that any emails transmitted or received on an account other than the account provided by the

(2014). Alternatively, the Bill also proposes that employees be allowed to print a covered message, including its recipients, and submit the printed copy for archival storage within fifteen days of the original's transmission. *Id.* § 2911(a)(3).

204. *Id.* § 2911(b).

205. *Id.*

206. *Id.* § 7522.

207. *See* MO. ANN. STAT. § 610.025 (West 2006) ("Any member of a public governmental body who transmits any message relating to public business by electronic means shall also concurrently transmit that message to either the member's public office computer or the custodian of records in the same format. The provisions of this section shall only apply to messages sent to two or more members of that body so that, when counting the sender, a majority of the body's members are copied. Any such message received by the custodian or at the member's office computer shall be a public record subject to the exceptions of section 610.021.").

208. *Id.*

209. *Id.*

210. *See* Rules of Organization and Procedure for the Council of the District of Columbia, COUNCIL OF THE D.C. § 811(g) (Feb. 25, 2013), available at <http://dcclims1.dccouncil.us/images/00001/20130315144923.pdf>; Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?*, 19 COMM. L. & POL'Y 293, 324 (2014).

government are otherwise incorporated into the Council's records."²¹¹ In effect, both jurisdictions implemented forwarding requirements that allow covered agencies to possess and retain public records that were originally produced on a private device or account.²¹²

The Washington legislature might amend the PRA in a way similar to the Federal Records Accountability Act of 2014,²¹³ thus ensuring that agencies possess public records that might otherwise only be contained in a private device or personal email account. Such an amendment could go a long way toward insulating agencies from the dilemma created by *Concerned Ratepayers*²¹⁴ by ensuring that agencies possess the necessary records to provide a complete and responsive disclosure to a requestor. Amending the PRA to include a forwarding requirement would largely allow agencies to fulfill their statutory obligations²¹⁵ while avoiding government intrusion into private devices. At least one commentator has proposed that states should consider adopting a similar forwarding requirement.²¹⁶

However, situations may still arise where certain records sought by requestors, such as telephone bill records or certain metadata, are not physically possessed by the agency.²¹⁷ To address these situations the legislature should also include in the PRA a statutory provision that expressly authorizes the issuance of an administrative search warrant under certain specified conditions. While exploring the difficulties in designing such a provision, such as the need to protect associational privacy,²¹⁸ is beyond the scope of this Comment, an administrative

211. See Senat, *supra* note 210, at 324.

212. *Id.*

213. Federal Records Accountability Act of 2014, H.R. 5170, 113th Cong. (2014)

214. *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1 of Clark Cnty.*, Wash., 138 Wash. 2d 950, 983 P.2d 635 (1999).

215. See WASH. REV. CODE § 42.56.070(1) (2014) ("Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.").

216. See Senat, *supra* note 210, at 324 (suggesting that governments require employees to forward public-business-related emails and other records from their private accounts to work accounts within a specified period of time).

217. An amendment to the PRA similar to the Federal Records Accountability Act of 2014 would not, for example, ensure that an agency possesses private employee call logs or certain metadata because neither is an "electronic message." Metadata associated with an email is a public record in Washington. See *O'Neill v. City of Shoreline*, 170 Wash. 2d 138, 148, 240 P.3d 1149, 1154 (2010) (holding that metadata embedded in an email was a public record under the PRA).

218. See U.S. CONST. amend. I; WASH. CONST. art. I, § 5; *Snedigar v. Hoddersen*, 114 Wash. 2d 153, 158, 786 P.2d 781, 783 (1990) (adopting additional protections beyond the warrant requirement to protect associational materials protected by the First Amendment).

warrant provision would presumably provide the necessary “authority of law” to render inspection of an employee’s private device constitutional.²¹⁹ Thus, it could serve as an important gap filler to provide access to public records not possessed by an agency, including any that might be created in violation of an agency policy or the proposed PRA amendments.

Regardless, until the legislature acts, agencies will likely continue to encounter situations where they cannot access records protected by article I, section 7. Internal agency policies might help address the problem, but there are serious questions about whether an agency could require employees to grant access to private devices as a condition of employment.²²⁰ In some situations, at least where the employee consents, an agency might use a private consultant to access public records stored on a private device. This technique was employed by the City of Goldbar as it attempted to respond to voluminous public records requests that had been directed toward its mayor and city council.²²¹ Because Goldbar’s part-time city council conducted much of the city’s business from private computers or through private email accounts,²²² the city itself was likely not in possession of many of the requested records. It appears that the public officials involved in that case consented to the consultant’s inspection of their email accounts.²²³ However, employing such a tactic with non-consenting employees would be problematic and potentially unconstitutional.²²⁴ Thus, while internal agency policies and third-party inspectors may be helpful to agencies in mitigating the dilemma, they probably cannot remedy it. That task, it seems, must lie with the legislature.

As agencies begin to address the implications of the PRA in the information age, courts should recognize the importance of the privacy

219. See *City of Pasco v. Shaw*, 161 Wash. 2d 450, 459, 166 P.3d 1157, 1161–62 (2007).

220. See *Robinson v. City of Seattle*, 102 Wash. App. 795, 821–23, 10 P.3d 452, 466–67 (2000) (holding that applicants for public employment do not waive their privacy rights).

221. See *Forbes v. City of Goldbar*, 171 Wash. App. 857, 859, 288 P.3d 384, 385 (2012).

222. See *id.* at 864, 288 P.3d at 337 (“[C]ity officials used their private e-mail accounts to conduct city business.”).

223. There is no mention in the court’s opinion that any of the city council members or then Mayor Hill opposed the use of the consultant. See *generally id.* However, the court notes that “[c]ity officials thought that Meyers was downloading just those files which concerned city business. However, Meyers downloaded their entire e-mail accounts for every city council member and then-Mayor Hill.” *Id.* at 864, 288 P.3d at 387.

224. No Washington case has yet addressed this particular issue but it is probably unlawful to require government employees to waive their privacy rights as a condition of employment. See *Robinson*, 102 Wash. App. at 821–22, 10 P.3d at 466–67 (holding that applicants for public employment do not waive their privacy rights).

interests at stake and avoid imposing statutory penalties where agencies fail to produce records they cannot constitutionally access or disclose. Under current law, agencies do not have the power to compel inspection of an employee's private device²²⁵ and the PRA should not be interpreted to require such a search. Ultimately, the task of adapting the PRA to the intricacies of privacy in the information age and ensuring continued open access to government records lies with the legislature. The Federal Records Accountability Act of 2014²²⁶ provides a good example of the kind of sensible amendment that could significantly reduce the tension between article I, section 7 privacy rights and the PRA.

CONCLUSION: GOING FORWARD

As Washington's courts grapple with applying the PRA in the information age, they should recognize the need to balance the PRA's mandate for disclosure against Washington's constitutional right to individual privacy. The PRA cannot serve as the foundation for the forced production of a private device because, as currently constituted, it cannot support the issuance of a warrant.²²⁷ Without the necessary "authority of law," an agency is powerless to inspect an employee's or elected official's personal device for records. If the agency cannot inspect, it cannot disclose. In this situation, taxpayers should not be punished for the agency's failure to produce records. Assessing penalties, ultimately to be borne by taxpayers, does not achieve the goals of the PRA and is a nonsensical response to the dilemma.

Under current law, where a public employee or elected official properly invokes the privacy protection of article I, section 7 of the Washington State Constitution to resist disclosure of a private electronic device, the public records inquiry should be at an end. The PRA "must give way to constitutional mandates."²²⁸ In this circumstance, a requestor must find recourse outside of Washington's public record laws, relying on public opinion, the electoral process, or a lawsuit where discovery of relevant information will be sanctioned. As agencies begin to modernize their policies on private devices, the frequency with which this dilemma arises should be reduced. Ultimately, however, the dilemma will likely persist until the legislature acts to amend the PRA

225. *See supra* Part II.B.

226. Federal Records Accountability Act of 2014, H.R. 5170, 113th Cong. (2014).

227. *See supra* notes 167–185 and accompanying text.

228. *Freedom Found. v. Gregoire*, 178 Wash. 2d 686, 695, 310 P.3d 1252, 1258 (2013).

and address the tension between article I, section 7 and the important public policy of open access to government records.