



2018 WAPRO SPRING TRAINING WORKSHOP

Electronic Records

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Lynwood Convention Center

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The Distant Past



“Changing and Unpredictable...”

Recent decisions demonstrate the changing and unpredictable nature of “public records,” underscoring the importance of a trial court's broad discretion. When the PRA was enacted in 1972, we typically imagined public records as handwritten or typed, hard copy documents. Today, there is no doubt a record can be something other than a sheet of paper or a bound volume.

Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus., 185 Wn. 2d 270, 279, 372 P.3d 97 (2016).

Not Just Records, But Delivery

Advances in information technology, including advances in hardware, software, and business processes for implementing and managing these resources, offer new opportunities to improve the level of support provided to citizens and state agencies and to reduce the per-transaction cost of these services. These advances are one component in the process of reengineering how government delivers services to citizens.

RCW 43.105.007

PUBLIC RECORDS OF THE FUTURE

- Queries and responses through super computers
- Electronic communication
- Millions of terabytes stored and delivered
- Look into the operating system
- Is there anything on the talking “phone”?
- Custom data access
- Requests made by robots

METADATA

Metadata

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Metadata

- Metadata is electronically stored information associated with electronic files such as e-mail, Microsoft Word or Excel documents, or other electronic records.
- Can include information regarding the time or date a record is created, recipients of an e-mail, the author of an e-mail or other electronic document, and revisions made to a document.

Metadata

- [M]etadata, “ ‘data about data, or hidden statistical information about a document that is generated by a software program,’ ” can be a public record.

Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus., 185 Wn. 2d 270, 279, 372 P.3d 97 (2016).

- Metadata that must be disclosed and produced, if specifically requested in the PRA request.

O'Neill v. City of Shoreline, 170 Wn.2d 138, 151, 240 P.3d 1149 (2010).

Metadata

In his email..., Hood stated: “Note that all requests below include an explicit request for metadata (Fields for the ‘To’, ‘From’, and ‘cc’ are all recipients and are considered ‘metadata.’...)” The District provided metadata in the form of the “to,” “from,” and “cc” fields (basic header information).... Hood received an email... that also shows server routing information for the electronic communication in addition to the header information. Hood did not contest the District's assertions that this allegedly “missing” metadata does not supply any additional substantive content to the email communication. The Court finds that the server routing information Hood identifies as the metadata missing from the District's productions is immaterial to the actual substantive content of the records he requested.

Hood v. S. Whidbey Sch. Dist., 195 Wn. App. 1058 (2016) (emphasis added), *review denied*, 187 Wn. 2d 1020, 390 P.3d 349 (2017) (emphasis added).



CUSTOM ACCESS & TECHNICAL ASSISTANCE

Customized Access

[A]n agency may include a customized service charge. A customized service charge may only be imposed if the agency estimates that the request would require the use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other agency purposes.

RCW 42.56.120(3)(a)(i)(added in 2017)

Customized Access

A customized service charge is warranted if:

•

fulfilling the request requires extensive use of information technology resources to identify, locate, format, or translate a record, or provide electronic access services, or

the request requires specialized analytical, research, or supervisory assistance to identify, locate compile, or transfer the records.

State Government, Elections & Information Technology Committee Bill Analysis

Customized Access

Without parity in costs, it's easier for requesters to seek large numbers of documents electronically. Agency cost recovery is declining, straining our ability to respond to many requests. Most requests are for electronic records now.

An agency may enter into an agreement with a requester who provides an alternative fee arrangement to the authorized charges or in response to a voluminous or frequently occurring request.

Engrossed Senate Bill Report

Customized Access

42.56.120(3) authorizes agencies to assess a customized service charge if the agency estimates that the request would require use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other business purposes.

Most public records requests for electronic records can be fulfilled based on the "reasonably locatable" and "reasonably translatable" standards.

Resorting to customized access should not be the norm. An example of where "customized access" would be appropriate is if a state agency's old computer system stored data in a manner in which it was impossible to extract the data... but rather required a programmer to spend more than a nominal amount of time to write computer code specifically to extract it.

WAC 44-14-05004 (updated 2018)

Customized Access

An agency may not assess a customized service charge unless the agency has notified the requestor of the customized service charge to be applied to the request, including an explanation of why the customized service charge applies, a description of the specific expertise, and a reasonable estimate cost of the charge. The notice also must provide the requestor the opportunity to amend his or her request in order to avoid or reduce the cost of a customized service charge.

RCW 42.56.120(3)(b)

Customized Access Procedure

Before resorting to customized access, the agency should confer with the requestor to determine if a technical solution exists not requiring the specialized programming.

WAC 44-14-05004 (updated 2018)

The bill provides a framework for better communication between agencies and requesters, helping minimize costs and liability.

Engrossed Senate Bill Report

Customized Access: Examples



SOUTH CORRECTIONAL ENTITY

Serving the Cities of Auburn, Burien, Des Moines, Federal Way, Renton, SeaTac, and Tukwila

SCORE Fee Schedule

	Video Compilations	Customized service charge for SCORE personnel to compile and provide customized access to video footage.
	Video Redactions	Actual charge from an outside vendor to redact (blur) images from video compilations. The requestor would pay the actual amount invoiced to SCORE by the vendor.
	Custom Service Charge <i>(Due to request to prepare custom data compilations or perform customized electronic access services)</i>	Actual charge from an outside vendor to compile data or provide customized electronic access services. The requestor would pay the actual amount invoiced to SCORE by the vendor.

So who's paying for this again?

Funding to meet the costs of providing access, including the building of the necessary information systems, the digitizing of information, developing the ability to mask nondisclosable information, and maintenance and upgrade of information access systems should come primarily from state and local appropriations, federal dollars, grants, private funds, cooperative ventures among governments, nonexclusive licensing, and public/private partnerships.

State agencies and local governments are encouraged to pool resources and to form cooperative ventures to provide electronic access to government records and information.

RCW 43.105.355

Bot Requests:

“I’m sorry Dave, I can’t do that.”

An agency may deny a bot request that is one of multiple requests from the requestor to the agency within a twenty-four hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential functions of the agency. For purposes of this subsection, “bot request” means a request for public records that an agency reasonably believes was automatically generated by a computer program or script.

RCW 42.56.080(3) (added in 2017)

SOCIAL MEDIA AND TEXTS

Nissen: Personal Phones

- Text messages of Pierce County Prosecutor sent on personal device may be public records if they relate to the conduct of government.
- Call logs from personal cell phone may be public records if they relate to the conduct of government and are retained or used in the prosecutor's official capacity.
 - Logs are not public records if they play no role in County business and County never uses them.

Nissen v. Pierce Cnty., 183 Wn.2d 863, 357 P.3d 45 (2015).

Extending *Nissen*: *West v. Vermillion*

“[A]n agency's employees or agents must search their own ‘files, devices, and accounts,’ and produce any public records, including ‘e-mails,’... that are responsive to the PRA request...

[A]ffidavits by the agency employees, submitted in good faith, are sufficient to satisfy the agency's burden to show it conducted an adequate search for records.”

West v. Vermillion, 196 Wn. App. 627, 636–37, 384 P.3d 634, 638 (2016), *review denied*, 187 Wn.2d 1024, 390 P.3d 339 (2017), and *cert. denied*, 138 S. Ct. 202, 199 L. Ed. 2d 115 (2017).

2018 Case: *West v. City of Puyallup*

Two Key Points:

“[A] public official's posts on a personal Facebook page can constitute an agency's public records subject to disclosure under the PRA if the posts relate to the conduct of government and are prepared within a public official's scope of employment or official capacity.”

“However,... [the] particular Facebook posts at issue in this case were not public records as a matter of law because [the Council member] did not prepare them within the scope of her official capacity....”

West v. Puyallup, 410 P.3d 1197, 1199 (Wash. Ct. App. Feb. 21, 2018).

West Employs *Nissen* Test

To determine whether [the Council Member] was acting within the scope of her employment or official capacity... when she prepared the Facebook posts, the Court looked at whether:

- (1) her position required the posts,
- (2) the City directed the posts, or
- (3) the posts furthered the City's interests

West, 410 P.3d at 1202-03.

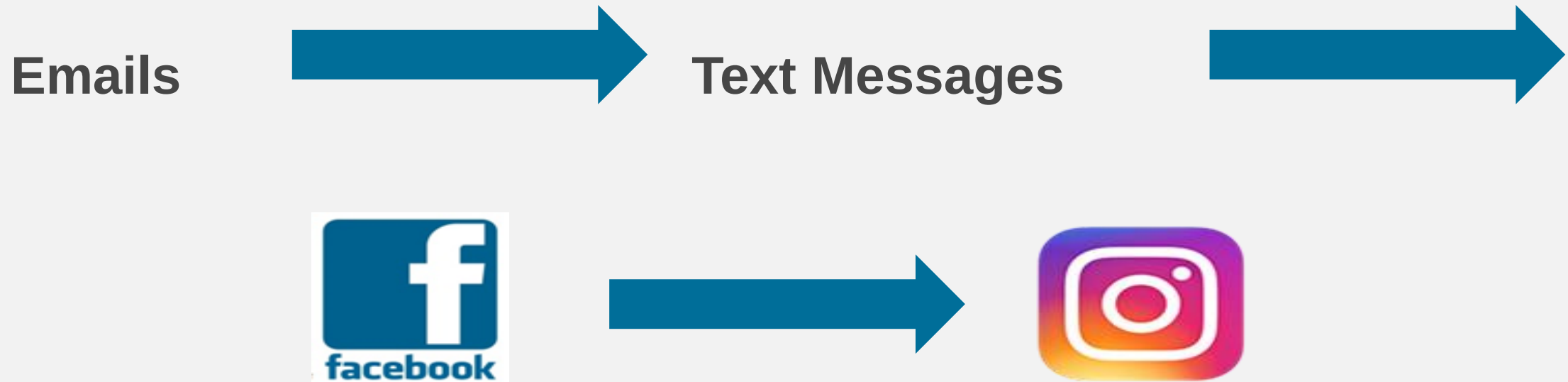


The *West* Court's Conclusions

- Door's position as a City Council member clearly did not require that she post on Facebook.
- The Facebook page was not associated with the City and was not characterized as an official City Council member page. It was characterized as the 'Friends of Julie Door.'
- Door was not 'conducting public business' on the Facebook page.
 - Any “tangential benefit” to the City was insufficient to establish that Door was acting within the scope of employment or her official capacity.

West, 410 P.3d at 1202-04 (emphasis added).

The Expansion of *Nissen*



Recovery Mission?

[F]ederal case law addressing subpoenas for digital communications held by third parties reaches the opposite conclusion.... [T]he Sixth Circuit held that provisions in the **Stored Communications Act**... authorizing government agents to obtain e-mail communications from a third party through an administrative or grand jury subpoena, violate Fourth Amendment protections....

The court reasoned that “a subscriber enjoys a reasonable expectation of privacy in the contents of e[-]mails” stored with a commercial internet service provider and that the government may not, therefore, use a subpoena to circumvent the Fourth Amendment's probable cause requirement.

State v. Reeder, 184 Wn. 2d 805, 840, 365 P.3d 1243 (2015) (Gordon-McCloud, J., dissenting).



TECH, TOOLS AND TACTICS

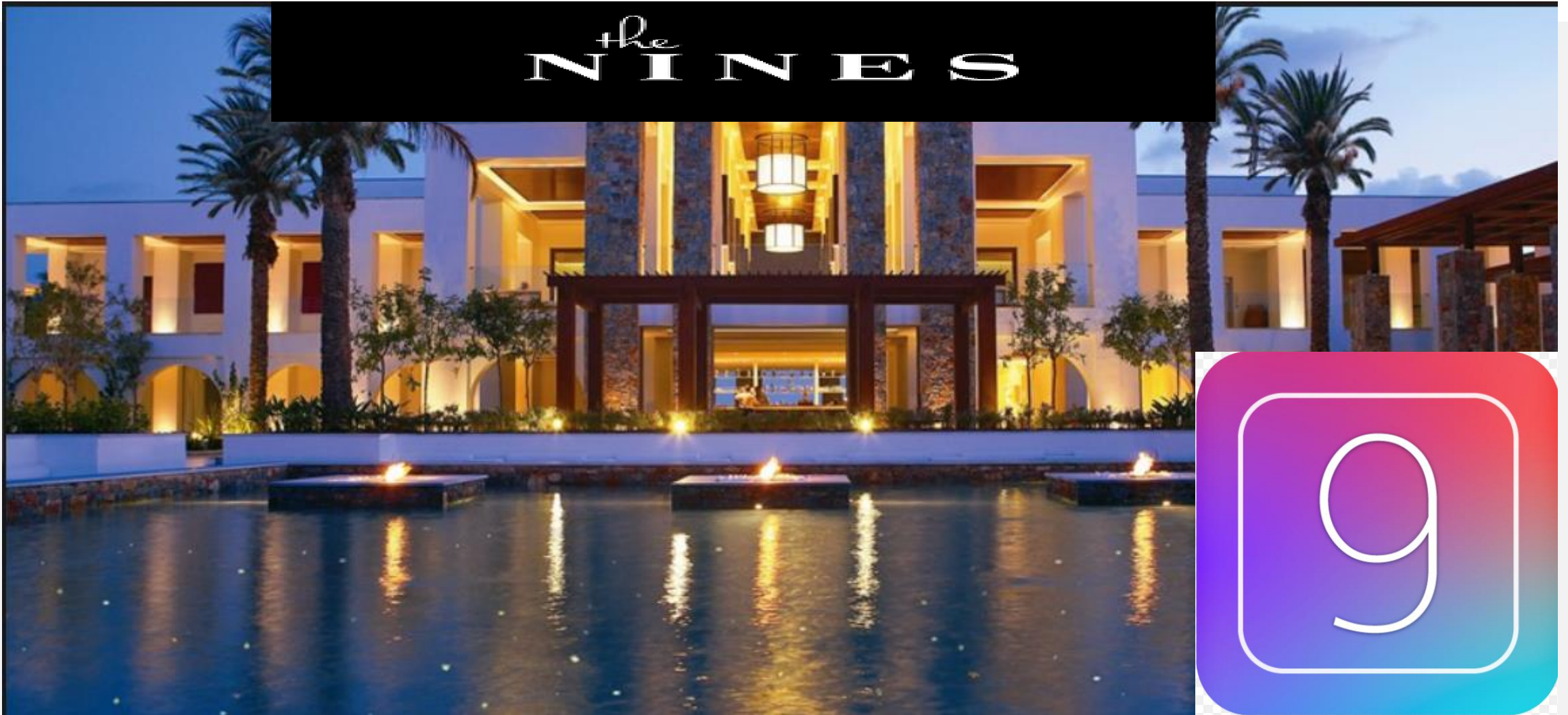
What's App?



What's App?



What's App?



What's App?





1. Know where your records are
2. Communicate with the requester; negotiate or reach agreements if possible
3. Communicate internally
4. Issue hold notices
5. Seek help early (legal or technical)
6. Consider custom access
7. Be reasonable about the timing
8. Understand the *Nissen* affidavit process
9. Be proactive



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