



Public Records 3000

WAPRO
2024 Fall Conference
October 17, 2024
Greater Tacoma
Convention Center

Judge Matthew J. Segal
(ret.)
Pacifica Law Group

1972

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)

You've Got [e]Mail[s]!

Ms. Tiberino does not dispute that the e-mail records are writings and that they are prepared, owned, used or retained by a state agency. She contends that the e-mails are not “public records” because the second element of the definition of public record is not met. She argues that the e-mails do not contain any information relating to the conduct of governmental or proprietary function.

Ms. Tiberino's excessive personal use of e-mail was a reason for her discharge. The County printed the e-mails in preparation for litigation over her termination, a proprietary function. Consequently, they contain information relating to the conduct of a governmental or proprietary function. The second element is met and the e-mails are “public records” within the scope of the public records act.

***Tiberino v. Spokane Cnty.*, 103 Wn. App. 680, 687-88, 13 P.3d 1104 (2000)**

Text Messages

- 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.

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

The Social Network(s)

[P]osts on social media sites like Facebook potentially can constitute public records, just like any other written communication.

We hold that as a matter of law, the City cannot be deemed to have prepared the Facebook posts at issue here because Door did not prepare the posts within the scope of her employment or official capacity as a City Council member. In making the posts, Door was not acting in her official capacity, conducting public business, or otherwise furthering the City's interests. Therefore, we hold that the Facebook posts here were not public records under the PRA.

***West v. Puyallup*, 2 Wn. App. 2d 586, 593, 599–600, 410 P.3d 1197 (2018)**

The Social Network(s)

Was the post owned, used, prepared or retained by the City?

“Prepared” was the only issue in this case.

To determine whether [the public official] was acting within the scope of their employment or official capacity... when posting on Facebook, the Court considered the following:

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

West, 2 Wn. App. 2d at 594-99

(citing *Nissen*, 183 Wn.2d at 878).

Metadata

In the words of a frequently quoted article, “if a party wants metadata, it should ‘Ask for it. Up front.’ ”

Additionally, courts have required the requesting party to show “a particularized need for the metadata,” not simply a generalized view as to its importance.

This principle was a response, as a case cited by Plaintiffs notes, to metadata's status as “ ‘the new black,’ with parties increasingly seeking its production in every case, regardless of size or complexity,” a trend well-represented by oft-made requests that “all metadata for all electronic documents ... be produced, both because the metadata is relevant to ... [parties'] claims and because it will enable them to search and sort the documents more efficiently.”

This fact may even explain why a *weak* presumption against the production of metadata has taken hold....

U.S. ex rel. Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 246 (S.D. Cal. 2015)

Metadata

The trial court properly determined that the District complied with Hood's requests for e-mail metadata. The District provided the type of metadata that Hood specifically requested. Further, Miller expressly testified in his deposition that the e-mails he printed out in response to Hood's requests all had metadata. He identified metadata as “[t]he header at the top, printed by, title, date, time, [and page number.]” Miller also testified that he did not know if it was possible to retrieve the additional metadata Hood now asserts should have been provided.

Hood v. S. Whidbey Sch. Dist., 195 Wn. App. 1058 (2016)

Ten Years of *Nissen*

Robert Conrad d/b/a thisisreno.com regularly submits public records requests under the Nevada Public Records Act (NPRA) to government entities. The City of Reno denied several of Conrad's requests, and he sought a writ of mandamus directing the City to make those records available.... The district court denied Conrad's petition to order the City to provide Reno City Council Member Devon Reese's social media communications with constituents because the City did not have custody or control over Reese's private devices and social media accounts.

Conrad v. City of Reno, No. 86340, 2024 WL 3664212, at *1 (Nev. Aug. 5, 2024) (citing *Nissen*)

The Legacy of the Pandemic

The University of Wisconsin published helpful guidance in which it reminded its employees that all communications and documents that relate to university business are subject to Wisconsin's public records law, regardless of where employees are working. Specifically, the University instructed its staff that records “created in [Microsoft] Teams such as chats, video and audio recordings, call histories, and transcriptions of voicemails,” as well as “[c]ommunications and documents created on other non-university platforms” like “Slack, WhatsApp, Snapchat, Facebook Messenger, Gmail, and text messaging on your personal device” are subject to Wisconsin's public records law.

Adam A. Marshall & Gunita Singh, Access to Public Records and the Role of the News Media in Providing Information About Covid-19, 11 J. Nat'l Security L. & Pol'y 199, 205 (2020)

Zoom

FHWA represents that Plaintiff made several separate requests for correspondence production. The first was September 5, 2023, in which Plaintiff submitted a FOIA request to FHWA employee Christopher Richardson seeking “[a]ll emails, texts, Teams, or Zoom messages and any and all other written communications between [Mr. Richardson] and ...

***Sharpe v. United States Fed. Highway Admin.*, No. 2:24-CV-0045-TOR, 2024 WL 2064051, at *1 (E.D. Wash. May 8, 2024), *reconsideration denied*, No. 2:24-CV-0045-TOR, 2024 WL 2870847 (E.D. Wash. May 22, 2024)**

Zoom

As for Zoom chats, EPA notes that Zoom has a function allowing in-meeting chats and alleges that Interior used “Zoom prolifically during COVID to host meetings.”

In response, Interior argues that Zoom chats are not “agency records”—and thus not covered by FOIA—and, in any event, the dearth of other communications and meetings between Klein and Hayes suggests there would be no responsive Zoom records.

***Energy Pol'y Advocs. v. U.S. Dep't of the Interior*, No. CV 21-1411 (JDB), 2023 WL 2585761, at *3 (D.D.C. Mar. 21, 2023)**

“[A] storm of controversy... swept across the blogosphere...”

“During January 2007, a storm of controversy over Wikipedia use swept across the blogosphere. From a history department banning citations to Wikipedia in student papers, to companies paying for updates to its collaboratively written articles, to the citation of those articles in federal court opinions, Wikipedia was being discussed everywhere.

Appellate courts and appellate judges in the state of Washington are no exception, because while Wikipedia citations have only recently appeared in Washington court opinions, citations to Internet sources have been around for several years.”

Tina S. Ching, *The Next Generation of Legal Citations: A Survey of Internet Citations in the Opinions of the Washington Supreme Court and Washington Appellate Courts, 1999-2005*, 9 J. App. Prac. & Process 387, 387–89 (2007)

“Modern Attachments”



NOVEMBER 10, 2023

DOUG AUSTIN

The Primary Argument for Hyperlinked Files as Modern Attachments: eDiscovery Issues

The modern attachments issue is still being debated and there is one primary argument for treating hyperlinked files as modern attachments.

Links & Attachments

To accept the argument that a hyperlinked survey instead of an attached survey removes the document from the universe of public records requires us to read the statutory language much too narrowly. Such a reading would defeat the purpose of the statute, creating a clear path to hide huge swaths of governmental work from public scrutiny. Instead, we note that the statute includes broad language including “all documents ... electronic data-processing records ... *regardless of physical form or characteristics.*” Further, the Public Records Act has been repeatedly interpreted to provide liberal access to public records. Therefore, we decline to adopt the City's narrow interpretation that a hyperlink to EY webspace does not constitute a “document or electronic data processing record.”

Gray Media Grp., Inc. v. City of Charlotte through City Council, 290 N.C. App. 384, 395, 892 S.E.2d 629, 638–39 (2023) (internal citations omitted)(emphasis original)

GPS & Location Data

RCW [42.56.240](#)

Investigative, law enforcement, and crime victims. (*Effective until January 1, 2025.*)

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(13) The global positioning system data that would indicate the location of the residence of an employee or worker of a criminal justice agency as defined in RCW [10.97.030](#)....

Surveillance Video

Nothing in the DOE's Letter... exempts production here. Like the facts in the letter, the videos C.S.A. requested amount to his education records. And, while the November 19 videos also amount to A.S.'s education record, the District concedes that redaction of A.S.'s personal information from that record destroyed its meaning. So, C.S.A. has the right under FERPA to inspect and review information in the videos, even though they also contained personally identifiable information from A.S.'s education record. Because FERPA did not exempt production of the videos to C.S.A., the District fails to show that it amounts to an "other statute" justifying its decision to withhold them under the PRA.

C.s.a, Et Al., Appellant V. Bellevue School District No 405, Respondent
(Wash. Ct. App. Oct. 14, 2024)

New Records, New Tech

Without the capability to capture and record WhatsApp chats of the officials and employees, the national, state, and local government offices are at grave risk of losing public trust in case they fail to provide those records under FOIA request.



With TeleMessage, public agencies can easily comply with the Public Records, FOIA, and Sunshine Laws requirements on archiving text messages.

Smash & Slack



Capture: Smash directly captures Slack content from the source through an API integration. This includes point-in-time snapshots of joins, leaves, edits, deletes, comments, replies, attachments and other events, which is especially important for collaborative conversations. No matter what type of communications data is produced in Slack, and regardless of a user's device, location or network, Smash preserves its chain of custody, context and original format.



Archive: Slack communications can be sent seamlessly to the Smash Professional Archive—an immutable and context-aware data store. You can perform advanced search for Slack-specific records, and data is produced quickly and easily, which makes the process faster and more accurate. Slack

Database Searches

Nicholas Clapham, an attorney, believes he is the subject of surveillance and harassment at the hands of policing agencies working in concert. In an attempt to investigate his suspicions, Clapham submitted a Public Records Act (PRA) request to the Washington State Patrol (Patrol).

[T]he Patrol's public records officer... searched four different databases after receiving Clapham's request. The databases included the Crime Investigation and Tracking Evidence database (CITE), Computer Aided Dispatch (CAD), Statewide Electronic Collision & Ticket Online Records (SECTOR), and Judicial Information System (JIS).

***Clapham v. Washington State Patrol*, 4 Wn. App. 2d 1025 (2018)**

Artificial Intelligence(?)

A Magistrate Judge reviewed the discovery motion and issued a Memorandum Opinion and Order granting MSA's motion and entering the requested protective order. Plaintiff noted timely objections to the decision, arguing the protective order should be vacated because it was contrary to law. According to the District Court, “[s]hockingly, [Plaintiff’s] objections rely, in part, on citations to sources and quotations that appear not to exist. MSA highlighted those mysterious citations in its brief opposing [Plaintiff’s] objections.”

National Law Journal, **Has Generative AI ‘Run Amok’ in Discovery Disputes?**

by: Kathryn C. Cole of Greenberg Traurig, LLP - *eDiscovery Watch*

Tuesday, August 20, 2024 (Emphasis Added)

What Can You Do?

Issue

Tool

Question as to Form, Type of Records

Clarification & Communication

New Types of Records

Technology, analogy, legal

Scope of Search

Feasibility, Documentation

Non-custodial records

Request. subpoena? Document!

Vanishing Records

Document hold. Reset retention.

Death Star Orbiting Planet

Obtain Plans. *Upload*. Use the Force.

Judicial Considerations of “Future” Records

What is Feasible?

What is the Functionality

What is the Cost?

What Effort was Made?

Is there a Clear Explanation?

Who Bears Responsibility?

Why are we here?

Judicial Considerations of “Future” Records

“Undergirding the discussion of text messages and other relatively informal electronic communications as public records is the suspicion, in some cases, that these communication formats are not used accidentally, but in fact in a purposeful effort to avoid state open-records laws.”

Helen Vera, “REGARDLESS OF PHYSICAL FORM”: LEGAL AND PRACTICAL CONSIDERATIONS REGARDING THE APPLICATION OF STATE OPEN-RECORDS LAWS TO PUBLIC BUSINESS CONDUCTED BY TEXT MESSAGE, 32-SPR Comm. Law. 24 (2017).

FINAL THOUGHTS, Part I

“We need to talk in a separate Zoom chat or somewhere that is *not a public record.*” (emphasis added)

M.G. Petitioner/Appellant, v. BAINBRIDGE ISLAND SCHOOL DISTRICT, Bainbridge Island School Board Members: Christina Hulet, Robert Cromwell, Mark Emerson, Sanjay Pal and the Washington Office of Superintendent of Public Instruction Respondents/Appellees., 2023 WL 7998315, at *23





Public Records 3000 QUESTIONS?

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