

When Private is Public

By Debbi Sellers

Is there an individual privacy interest afforded for communications contained in a city council member's private email account that relates to matters of city governance? According to the Washington State Court of Appeals, the answer is no.

In November 2016, the Washington State Court of Appeals heard *West v. Vermillion*, which stemmed from a public records request for "communications received or posted" through a personal website and associated email account run by a city council member. The council member refused to provide records that were in his home, on his personal computer, or in the email account associated with his website, citing privacy provisions of the Washington and United States Constitutions. The City supported the council member's position. A lawsuit ensued.

The Washington Court of Appeals held that the *Nissen v. Pierce County* case controlled. In *Nissen*, a sheriff's detective sent requests to Pierce County for records related to the County Prosecutor. One request was for cellular telephone records for the Prosecutor's personal phone. There was no dispute that the Prosecutor personally bought the phone, paid for its monthly service, and sometimes used it in the course of his job. The Court's unanimous decision required the Prosecutor to obtain a transcript of the content of all the text messages at issue, review them, and produce any that were public records to the County. The Court stated that "The County must then review those messages just as it would any other public record-and apply any applicable exemptions, redact information if necessary, and produce the records and any exemption log."

Based on *Nissen*, the court ruled that council member Vermillion had no constitutionally protected privacy interest in public records contained in his personal email account. The court further explained that whether a record is subject to disclosure, "hinges on if the record was prepared, owned, used or retained within the scope of employment."

Council members who use their private email accounts or personal electronic devices to conduct Member business, could be required to temporarily relinquish these devices to be searched, as a result of a public record request. To avoid this, WCIA strongly recommends all Members have, as part of their public records management procedures, a written policy requiring employees, appointed and elected officials to use only electronic devices and accounts that have been issued by the Member to conduct agency business. This would include devices such as computers, tablets and telephones, website accounts, telephone service for calls and text messaging as well as social media sites. Members should also ensure all staff, appointed officials and elected officials receive training on this policy.