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PERSONAL ELECTRONIC DEVICES: PRIVATE USE v. PUBLIC USE, AND PUBLIC DISCLOSURE

Various fire department clients have recently raised concerns over whether they should issue electronic devices in order to prevent a public records requestor from gaining access to an individual employee's (or elected official's) personal information on their personal electronic device (PED). This is an unfounded fear, and we would counsel against it, in the interest of saving administrative resources and taxpayer dollars. Truly private information need not be disclosed, regardless of where that information is contained, be it a personal or employer-issued device. That is what fire districts should always consider, regardless of the location of the information. Under RCW 42.56, the Washington Public Records Act, when the contents of a record, if disclosed, would result in an "unreasonable invasion of privacy" of an employee or elected official, those contents must be redacted from the record. *See* RCW 42.56.070 (1). But such private information must also be exempt to be redacted. And if the remaining portions of the record are deemed public and no exemption applies, those remaining portions must be disclosed (pursuant to a valid public records request). *See* RCW 42.56.210. However, if the information at issue is not a public record, it

need not be disclosed, and should be redacted. We must look to the Public Records Act to make that determination.

The definitions within the Public Records Act (the "PRA"), delineated at RCW 42.56.010, must be examined thoroughly to determine what and who is covered by the PRA. But the word "public" is not actually defined in the PRA. So we consult other sources. The word "public" is defined as "of or relating to business or community interests as opposed to private affairs." Merriam-Webster's Collegiate Dictionary (11th ed.2003). Many courts have weighed in on whether or not information on personal computers may be deemed a "public record", but some courts, including those in Washington, currently hold that such information may be public, depending on the content. *See Mechling v. City of Monroe,* 152 Wn.App. 830 (2009); *See Also Denver Post Corp. v. Ritter,* 255 P. 3d 1083 (Colo. 2011).

This begs the first question: May information within a PED be construed as a public record, subject to disclosure under the PRA? The answer, unfortunately, is yes and no. Remember, information may be deemed to be a public record if it is "owned, used, or retained" by an agency and "relates to the conduct of government…regardless of physical form or characteristics." *See* RCW 42.56.010 (3). Furthermore, the PRA defines a public record as "any writing containing information" that relates to the conduct of government. Additionally, email messages have been held to be "writings" under the PRA. *See O'Neill v. City of Shoreline,* 145 Wn.App. 913, 923 (2008), aff'd, *O'Neill v. City of Shoreline,* 170 Wn.2d 138, 150 (2010) (reasoning that "[I]f government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined."). Therefore, and hypothetically, the argument that information on a PED is not a public record would fail if the PED was used for agency communications or agency business. This means that the same communications—whether on a PED or employer-issued device—are subject to disclosure under the PRA, depending on the substance of those communications.

However, if the communications on that PED are private, those communications are not actually a public record. Arguing otherwise flies in the face of logic. But the PRA does not define the word "private", which is generally defined as "not known or intended to be known publicly." Merriam-Webster's Collegiate Dictionary 941 (11th ed.2003). Additionally, "[A] purely personal record having absolutely no relation to the conduct of government is not a 'public record.'" WAC 44-14-03001 (2). Recall that a public record essentially is (1) any writing (2) related to the conduct of government (3) which is owned, used or retained by a local (or state) agency.

However, let us pretend that all of the information within a PED is found to be a public record by the court (assuming the client gets sued). That does not end the analysis. Whether or not a record is a "public" one is an entirely different inquiry than whether the

record is exempt from disclosure. An exemption must also be applicable to the record at issue—i.e. the privacy "exemption" is not a stand-alone exemption.

Some exemptions within the PRA involve or incorporate privacy concerns. Under the PRA, a person's "privacy" is violated if disclosure would be highly offensive to a reasonable person and the information at issue is not of legitimate concern to the public. *See* RCW 42.56.050. Both prongs of this test must be met for a person's privacy to be violated. One might argue that most information on a PED is not intended to be known publicly, and therefore its disclosure would not only be highly offensive to a reasonable person but would also be of no legitimate concern to the public. However, remember that the "highly offensive" test is an objective one, characterized by reasonableness. That is because—as we shall see below—the **message, not the medium,** is the key to determining whether a record is exempt from disclosure. Remember, the PRA is construed broadly in favor of governmental transparency.

In those cases that have come before Washington courts involving personal electronic communications, an oft-cited exemption to prevent disclosure is RCW 42.56.230 (3). This exemption prevents disclosure of "[P]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." The courts have construed "personal information"—in the context of this exemption—to mean facts that would "not normally be shared with strangers" *Dawson v. Daly*, 120 Wn.2d 782 (1993). The *Dawson* court further held that the two-pronged privacy test must also be satisfied for RCW 42.56.230 (3) to prevent disclosure.

In a somewhat recent case, Division One of the Washington Court of Appeals reiterated that emails on personal computers used by elected officials were not exempt from disclosure under RCW 42.56.230 (3). *Mechling v. City of Monroe*, 152 Wn.App. 830 (2009); *See Also Tiberino v. City of Spokane*, 103 Wn.App. 680, 688 (2000) (holding that email messages of public officials or employees are subject to a public records request if those emails contain information related to the conduct of government). The *Mechling* court also held that personal email addresses contained within those emails were subject to disclosure, but here we address the substance of the emails themselves, and the request for those emails.

In *Mechling*, a requestor sought records of "[E]mails to and from any Monroe City Councilmembers *in which city business is the subject matter*, including emails originating from the home or business computers of council members." *See Monroe* at 837. After the City of Monroe sought clarification, the requestor insisted that she was "not limiting the emails to those contained on the City's computer system." *Id.* She further indicated that she was "*not* interested in information of a personal nature, and [understood] that this

may require redaction." *Id*. First, the court held that the emails (and personal email addresses within the emails) relating to the conduct of government were public records. Then the court found that the emails were not exempt from disclosure under former RCW 42.17.310 (1)(u), now located at RCW 42.56.230 (3), otherwise known as the "personal information" exemption. The court reasoned that RCW 42.56.230 (3) covers information *within* personnel files, not personal or business-owned computers. *Mechling* at 846.

So what may be taken away from *Mechling*? This case stands for the "message-not-the-medium" concept: Of importance is the content of the message, not where the message is contained. In other words, when non-exempt agency communications, relating to the conduct of government, are made from a home computer via email or social media, these communications may be subject to disclosure as if they were discussed using employer-issued media. That same rationale would apply to the use of a PED, because the same communications may be made from that PED.

With that in mind, let us consider a hypothetical: An elected official primarily talks about pending investigations of employee misconduct or ongoing legal matters, involving her agency, on her work email. However, when this official leaves work, she sends emails from her personal IPad—and from her personal email address—to the work emails of fellow officials or employees. Within these emails, she talks about the same pending investigations. She talks about the same legal matters. But this official also exchanges emails with her son about which colleges he should apply to, and she also sends a variety of other emails to friends about going to a concert. Then her agency receives a public records request, similar to the request made in *Mechling*, seeking emails to-and-from the agency relating to "pending investigations"; and this request is "not limited to those emails sent from the agency's web server."

The agency, after consent by the elected official, produces many of the emails sent from her IPad. But all of the emails to friends and family (any emails not sent to agency officials or employees) are withheld on the grounds that those redacted portions are "not responsive" to the records request because those portions are "not public records as defined in RCW 42.56.010 (3)." Next, the public records requestor files a motion in superior court for the agency to demonstrate why those emails were not produced. The court orders that those emails be reviewed "*in camera*" to determine if they should have been produced. The agency insists that those unproduced emails were not public records.

When there is a dispute as to whether portions of a requested record are exempt, or whether those portions are even public records, the court may engage in an *in camera* inspection. *In camera* is defined as "in the judge's private chambers," or an action "taken when court is not in session." BLACK'S LAW

DICTIONARY, Second Pocket Edition, West Group Publishing (2001). It stands to reason that if an action is taken in private chambers, then the action is "not known or intended to be known publicly." We believe that the *in camera* inspection procedure would properly balance and reconcile the competing interests (both legitimate) of the public, which has a right to know about the business of public agencies, and the public employee or official, who has a right to privacy of his or her truly personal information. This balanced approach, although it may not entirely satisfy open government advocates *or* public employees and elected officials, is more in line with the position espoused by the Attorney General. It is also consistent, we believe, with the majority of court decisions.

Admittedly, having information on one's PED examined by a judge is an intrusion in-and-of-itself. However, should a fire district employee or elected official be subject to relinquishing his or her personal device, or information within that device, to the courts, the personal information—which does not relate to the conduct of government—contained within that device, although subject to an *in camera* inspection, would be viewed in the judge's private chambers. Regardless of where private or public information is contained, those aspects of life that are "not known or intended to be known publicly" may not be drawn from that container. But according to current judicial opinions, public information may be drawn from a public or private container (a PED). Therefore, the fear that a fire-district-issued device is necessary to prevent the public from accessing all of the information on an employee's PED is unfounded. That information relating to the conduct of government may be disclosed, from wherever it came. But not everything relates to the conduct of government; therefore, not everything is a public record.

However, if members of a public agency do not wish to relinquish their PED for *in camera* inspection, these members should not discuss information related to the conduct of government on their PED. In the end, an agency should not waste administrative resources on issuing PEDs such as tablets to their employees or elected officials, because the message, not the medium, controls whether or not certain communications are subject to disclosure.

One final note: Some of our clients have raised issues about the rules governing pretrial discovery and how they may be compared to obtaining material via public records request. That is an entirely different inquiry, and generally does not arise until the client is sued for anything other than a PRA violation (such as a personal injury action or a claim for breach of contract) and a discovery request, seeking such material, is served on the client. Consequently, do not concern yourself with those rules, as they are distinct from the PRA.

A NOTE ON FIRE PROTECTION AND INDIAN COUNTRY

Recently, the Washington Legislature enacted RCW 52.30.080. This statute may have

implications for fire protection districts currently providing fire protection to Native American tribes (the "Tribes"). The statute reads as follows:

> [W]hen exempt tribal property is located within the boundaries of a fire protection district or a regional fire protection service authority, the fire protection district or authority is **authorized** to contract with the tribe for compensation for providing fire protection services in an amount and under such terms as are mutually agreed upon by the fire protection district or authority and the tribe

RCW 52.30.080 (1) (emphasis added).

This statute does not imply that a fire protection district is obligated to provide free fire protection to Tribes located within the district. Such a district (according to current law) must provide free service to agencies of the federal government, such as the United States Postal Service or the Veterans Affairs Administration hospitals that are located within its boundaries. *See* RCW 52.30.020; *See Also* Government Accountability Office Decision B-243004 (1991).

Instead, RCW 52.30.080 only provides that a fire protection district *may* contract with an Indian tribe. So that begs the question: What duties are owed by fire protection districts to federally recognized tribes?

The Tribes are sovereign nations, dependent on the federal government. *See State v. Schmuck*, 121 Wn.2d 373 (1993). They remain "under federal superintendence", but are not arms of the federal, or state, government. *See Alaska v. Native Village of Venetie*, 522 U.S. 520, 533 (1998). Most importantly, the federal government respects the Tribes as dependent sovereigns: "[A]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto." 25 U.S.C. § 476 (a).

Furthermore, Washington state recognizes the relationship between the federal government and the Tribes: "[A]lthough the federal government has plenary power over the Indians this power requires an express enactment, and where Congress has remained silent the power remains with the states." *See State v. Superior Court of Okanogan County*, 57 Wn.2d 181, 183 (1960). Additionally, under federal law, "[T]he establishment of master plans for fire prevention and control are the responsibility of the States and the political subdivisions thereof." 15 U.S.C. § 2209. What this means is that if there is no federal law that requires that local fire protection districts provide services to the Tribes, and there is no state statute which mandates that such services be provided, then those local districts have no obligation to serve the Tribes, but instead retain the discretion to do so. But RCW 52.30.080 seems to demonstrate that the legislature has presumably found, for reasons of promoting social equity, that fire protection districts may contract with the Tribes. Neither Congress, nor the Washington Legislature, however, has

enacted any law that imposes a duty upon a fire protection district to provide services to the Tribes.

The bottom line: Ceasing to serve the Tribes would be a political question. By statute, fire protection districts are now afforded the ability to contract with the Tribes for fire protection services, and may set mutually agreeable terms for compensation to the fire district. Implicitly, our legislature has given fire districts the opportunity to improve relationships with the Tribes.

REMINDER: For those clients of ours who have raised concerns over whether their proposed tax levies would be pro-rationed if, under RCW 84.52.043, the combined dollar amount of all property-tax levies (counties, cities, roads, libraries, public hospital districts, fire protection districts and parks etc…) exceeds $5.90 per $1,000 of assessed value, our legislature has enacted a statute, RCW 84.52.125, which allows a fire protection district to withhold a 25-cent amount from potential pro-rationing:

> A fire protection district may protect the district's tax levy from prorationing under *RCW 84.52.010(2) by imposing up to a total of twenty-five cents per thousand dollars of assessed value of the tax levies authorized under RCW 52.16.140 and 52.16.160 outside of the five dollars and ninety cents per thousand dollars of assessed valuation limitation established under RCW 84.52.043(2), if those taxes otherwise would be prorated under *RCW 84.52.010(2)(e).[1]

For those districts that would be interested in formalizing language that would implement this set-aside, our office has a draft resolution to that effect, which is available upon request.

CASE NOTE: In our practice, we deal regularly with fire department consolidations accomplished under RCW 39.34, the Interlocal Cooperation Act. Often there are questions regarding the scope of delegation of powers by the governing body to a joint board. The Washington Court of Appeals recently addressed some of these questions in an interesting case, *Public Hospital District No. 1 of King County v. University of Washington and U.W. Medicine*, No. 70663-1-1 (2014). This case involved a cooperative agreement between a public hospital district and U.W. Medicine for the provision of medical services. The Court of Appeals, Division 1, in *U.W. Medicine* sought to determine the extent to which such agreements are expressly authorized between two entities providing the same type of service: medical care. Central to the court's holding was a common thread in matters involving fire protection districts: statutory interpretation.

Public hospital districts have been granted authority to enter into contracts with other public hospital districts or legal entities. *See*

[1] This particular statutory section was amended in 2011 and moved to section 3 (b) of RCW 84.52.010

RCW 70.44.240. In *U.W. Medicine,* the plaintiff public hospital district argued that a Strategic Alliance Agreement (the Agreement) entered into by the parties divested its former board of, among other things, the ability to establish a budget and the power to levy taxes. The hospital district alleged the Agreement was therefore an ultra vires action of the prior district board, and therefore void as being beyond their powers. This Agreement was entered into (after resolution by the public hospital district's board) to "establish joint or cooperative action pursuant to RCW 39.34.030." The court read RCWs 70.44 and 39.34 together to determine that this Agreement was enforceable.

The public hospital district retained some of its powers under the Agreement, which stated that the power to incur indebtedness could not be exercised "unless first approved by the District's Board of Commissioners." Acknowledging the general rule that a legislative body (a board of commissioners) may not impermissibly delegate its powers, the court applied a prominent exception: This rule does not apply when the legislature has expressly authorized such bodies to do just that. It should also be noted that the statute that authorized such joint contracts provided that new joint boards must include representatives of the public hospital district, but stated the board may include members of the district's former board of commissioners. *See* RCW 70.44.240. The court gave this great weight, and found that although the commissioners of the district did not represent a majority, those commissioners (five of them) were able to give "significant input" into the actions to be taken by the new board.

What are the implications of this case for Washington fire protection districts and regional fire authorities? Under Washington law, "[W]henever two or more fire protection districts merge, the board of fire commissioners of the merged fire protection district shall consist of all of the fire commissioners of the districts that are merging." RCW 52.06.085. This law differs from the statutory scheme at issue in *U.W. Medicine*. The statute at issue in that case permitted a prospective board to include, or not include, members of the "merging" public hospital district. But what if the alliance was a contractual consolidation under RCW 39.34 and not a statutory merger? RCW 52.12 grants broad authority: Fire protection districts have "full authority…to enter into and to perform any and all necessary contracts." RCW 52.12.021. Reading this statute together with RCW 39.34, such consolidations are no less immune from a claim of ultra vires action than the "merger" at issue in *U.W. Medicine*.

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