



# CITY COUNCIL AGENDA

15728 Main Street, Mill Creek, WA 98012 (425) 745-1891

Pam Pruitt, Mayor • Brian Holtzclaw, Mayor Pro Tem • Sean Kelly • Donna Michelson •  
Vince Cavaleri • Mike Todd • Mark Bond

Regular meetings of the Mill Creek City Council shall be held on the first, second and fourth Tuesdays of each month commencing at 6:00 p.m. in the Mill Creek Council Chambers located at 15728 Main Street, Mill Creek, Washington. Your participation and interest in these meetings are encouraged and very much appreciated. We are trying to make our public meetings accessible to all members of the public. If you require special accommodations, please call the City Clerk at (425) 921-5732 three days prior to the meeting.

The City Council may consider and act on any matter called to its attention at such meetings, whether or not specified on the agenda for said meeting. Participation by members of the audience will be allowed as set forth on the meeting agenda or as determined by the Mayor or the City Council.

To comment on subjects listed on or not on the agenda, ask to be recognized during the Audience Communication portion of the agenda. Please stand at the podium and state your name and address for the official record. Please limit your comments to the specific item under discussion. Time limitations shall be at the discretion of the Mayor or City Council.

Study sessions of the Mill Creek City Council may be held as part of any regular or special meeting. Study sessions are informal, and are typically used by the City Council to receive reports and presentations, review and evaluate complex matters, and/or engage in preliminary analysis of City issues or City Council business.

Times listed on the agenda are approximate only. Discussions may sometimes cause remaining agenda items to be considered before or after their scheduled time. Citizens are welcome and encouraged to attend all sessions (except for Executive Sessions) of the meeting.

**Next Ordinance No.** 2015-798

**Next Resolution No.** 2015-536

**September 22, 2015  
City Council Meeting  
6:00 p.m.**

**CALL TO ORDER:**

**FLAG SALUTE:**

**ROLL CALL:**

**AUDIENCE COMMUNICATION:**

A. Public comment on items on or not on the agenda

**PRESENTATIONS:**

- A. Proclamation for Police Commander Ken Neaville  
*(Pam Pruitt, Mayor and Bob Crannell, Police Chief)*

**CONSENT AGENDA:**

- A. Approval of Checks #54239 through #54369 and ACH Wire Transfers in the Amount of \$490,101.49.  
*(Audit Committee: Councilmember Cavaleri and Councilmember Michelson)*
- B. Payroll and Benefit ACH Payments in the Amount of \$458,650.92.  
*(Audit Committee: Councilmember Cavaleri and Councilmember Michelson)*
- C. City Council Meeting Minutes of September 1, 2015
- D. City Council Meeting Minutes of September 8, 2015

**NEW BUSINESS:**

- A. Application of Public Records Act to Information on Personal Devices  
*(Rebecca Polizzotto, City Manager)*
- B. Interlocal Agreement Between the City of Mill Creek and Snohomish County for Emergency Services  
*(Rebecca Polizzotto, City Manager)*

**REPORTS:**

- A. Mayor/Council  
City Manager

**EXECUTIVE SESSION:**

- A. Discuss Potential Litigation per RCW 42.30.110 (1) (g)  
*(Approximately 20 minutes)*

**AUDIENCE COMMUNICATION:**

- A. Public comment on items on or not on the agenda

**ADJOURNMENT**



**CITY COUNCIL MINUTES**

September 1, 2015

15728 Main Street, Mill Creek, WA 98012 # 425-745-1891

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Pam Pruitt, Mayor  
Brian Holtzclaw, Mayor Pro Tem  
Sean Kelly  
Donna Michelson  
Vince Cavaleri  
Mike Todd  
Mark Bond

**September 1, 2015**  
**Regular City Council Meeting**  
**6:00 p.m.**

**CALL TO ORDER**

Mayor Pruitt called the meeting to order at 6:00 p.m.

**FLAG SALUTE**

Flag Salute was conducted.

**ROLL CALL**

Roll was called by the City Clerk with all Councilmembers present.

**AUDIENCE COMMUNICATION**

Bob Mollegaard  
17322 116<sup>th</sup> Street  
Snohomish, Washington

Mr. Mollegaard spoke to the Council about East Gateway. He believes the City has missed opportunities for development.

Geraldine Koch  
5712 142<sup>nd</sup> Place SE (Address not confirmed)

Ms. Koch spoke to the need for a senior center or community center in the City. She explained that 25% of the population is seniors.

Gary Bennett  
Westfield Homeowners Association

Mr. Bennett spoke to the multi-family development in the City. He stated that the Polygon development has increased traffic on 132<sup>nd</sup>. He doesn't want to see anymore apartments.

Herbie Martin  
14119 42nd Ave SE  
Mill Creek, Washington 98012

Mr. Martin spoke to the Council about the need for a Veterans Day ceremony or event in the City.

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Wil Nelson  
14925 25<sup>th</sup> Drive SE  
Mill Creek, Washington 98012

Mr. Nelson stated that he believes the Council has done a good job honoring the veterans.

Ed Dunn  
13514 Seattle Hill Road  
Mill Creek, Washington 98012

Mr. Dunn stated that the City does have a Veteran's Monument. However he doesn't think that veterans should have to pay to put their name on the monument.

**PUBLIC HEARING**

Development Agreement for Proposed Binding Site Plan in East Gateway Urban Village  
(*Rebecca Polizzotto, City Manager*)

The following agenda summary information was presented:

The City of Mill Creek has received a Binding Site Plan Application from Vintage at Mill Creek to subdivide 3.96 acres in the East Gateway Urban Village area (EGUV) for a mixed-use development consisting of two five-story buildings with ground floor commercial/retail and parking with affordable senior residential units above. A total of 216 residential units and 15,539 square feet of commercial/retail are proposed. In addition, three single story garage buildings are proposed on the southern portion of the site adjacent to the existing single-family homes. Landscaping and open spaces are proposed as well as a 50-foot wide vegetated roadway buffer with sidewalk to be provided adjacent to 132<sup>nd</sup> Street SE. Access to the proposed development will be from 132<sup>nd</sup> Street SE and road connections are proposed to the west and east via a future public road.

Development in the EGUV zone district requires approval of a detailed master development plan that includes:

1. A binding site plan;
2. An evaluation of the proposal relative to the adopted EGUV Design Guidelines; and
3. A Development Agreement between the developer and the City setting forth conditions for development.

The item before the Council at this time is the required Development Agreement. The Agreement must be approved by the City Council following a public hearing for the project to continue through the review process.

In accordance with RCW 36.70B.170, the Development Agreement must set forth the development standards and other provisions, such as mitigation, that shall apply and vest the development for the duration specified in the agreement. Such obligations are to be consistent with the City's codes and provide mutual benefit for both parties.

The City and Developer have been negotiating a draft Agreement and have agreed on the issues to be addressed in the document. The following issues are addressed in the document:

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- Identification of the applicable regulations to be applied to the development. These are defined as the “EGUV Regulations.” These EGUV Regulations include the applicable provisions within MCMC, as well as the EGUV Design Guidelines, the Reid Middleton EGUV Infrastructure Report, any SEPA documents issued under the State Environmental Policy Act, and the Mill Creek Comprehensive Plan;
- The binding nature and vesting of the Development Agreement;
- Occupancy of the building, specifically in relation to the requirement for commercial uses only on the ground floor;
- Transportation and traffic requirements;
- Parking requirements, including reciprocal parking for commercial parking space stalls with other commercial developed properties in the EGUV;
- Design of the public gathering areas along the spine road;
- Provision of public access along the roadway buffer and perimeter trails/sidewalks;
- Maintenance responsibilities within the public right-of-way; and
- Formation, operation, and roles and responsibilities of an owners association.

Commercial Uses on the Ground Floor

Section 9 of the Development Agreement states that the ground floor uses must be commercial in nature and cannot be exclusively accessory to the residential units above. That being said, the agreement does acknowledge that there may be commercial uses that that can fulfill the intent of the EGUV regulations while also serving as accessories to the residential aspect of the project. To address the specific uses that fit into this category, the Agreement calls for the City Manager and the Developer to execute a Commercial Use Agreement. The City and the Developer are still negotiating the specific terms to be included in this Commercial Use Agreement, which will be incorporated in Section 9. A place marker for these specific terms is in the Agreement.

Mayor Pruitt opened the public hearing at 6:13 p.m.

City Manager Polizzotto explained the terms of the Development Agreement. The City of Mill Creek has negotiated an agreement for the development of a Senior Center and Satellite Police Precinct. The developer, Vintage Housing, will build both facilities in conjunction with its 216-unit senior housing project in the East Gateway Urban Village (EGUV). Vintage Housing will build approximately 2,800 square feet of space to be operated and maintained as a senior center by the Northshore Senior Center. Vintage Housing has also agreed to build approximately 500 square feet of space to be used, maintained and operated by the City as a satellite police precinct.

Council and staff engaged in a discussion.

Mayor Pruitt opened the public hearing for comments from the public.

Dave Wood  
14904 21<sup>st</sup> Drive SE  
Mill Creek, Washington 98012

Mr. Wood spoke to the proposed senior center. He didn't think the proposal was adequate for the seniors.

Danette Klemens

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Executive Director  
Northshore Senior Center  
7810 87<sup>th</sup> Avenue  
Marysville, Washington

Ms. Klemens spoke in support of the new senior center. She believes this venture is a win-win.

Terry Schuler  
Program Manager  
Mill Creek Senior Center  
16017 96<sup>th</sup> Lane SE  
Kenmore, Washington

Ms. Schuler spoke to the need for this senior center. The current space for the senior center in the Annex Building is not adequate and doesn't meet all of the needs of the seniors.

Geradline Koch  
(spoke earlier)

Ms. Koch spoke to the proposed senior center. She is not in support of it and feels a bit blackmailed that its tied to the senior housing development.

Herbie Martin  
(spoke earlier)

Mr. Martin spoke to the traffic and parking concerns for the Vintage Housing development.

Karen Brandon  
15907 24<sup>th</sup> Court SE  
Mill Creek, Washington 98012

Ms. Brandon spoke in support of the proposed senior center. She believes this is a win-win situation. She emphasized that this center will be free and she supports it.

Gary Bennett  
(spoke earlier)

Mr. Bennett asked the developer a clarifying question about whether the development was rent restricted. The developer stated that it was affordable housing for low income seniors.

Jean DeWitt  
1509 148th Place Southeast  
Mill Creek., Washington 98012

Ms. DeWitt spoke to the fact that the development needs more parking. She also said the City needs to look at more housing for low income citizens.

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Mayor Pruitt relayed for the record that a letter was received from Trisha Cook and copies have been given to the Council. The letter will be entered into the record.

Council discussed the agreement in more detail.

Staff will bring back the agreement at a future meeting for further review with the Council.

The Council took a 5 minute break.

**MOTION: At 8:28 p.m., Councilmember Todd made a motion to extend the meeting to 9:00 p.m., Councilmember Bond seconded the motion. The motion passed unanimously.**

**NEW BUSINESS**

City Hall Staff Organization and Expansion Project  
(Rebecca Polizzotto, City Manager)

City Manager Polizzotto presented a PowerPoint presentation to the Council. She asked the Council to support the City Manager's staff reorganization plan, support the proposed City Hall expansion Plan and authorize the City Manager to proceed with preparation of design and bid documents for:

- Annex Building Roof
- Annex Building HVAC
- City Hall/Annex Building Remodel
- Public Works Facility

Finance Director Manuel gave a financial update to the Council.

**MOTION: At 9:00 p.m., Councilmember Michelson made a motion to extend to 9:30 p.m., Councilmember Todd seconded the motion. The motion passed unanimously.**

Council and staff engaged in a discussion. All of the Councilmembers spoke in support of the proposal by City Manager Polizzotto.

**MOTION: Councilmember Cavaleri made a motion to support the City Manager's staff reorganization plan, support the proposed City Hall expansion plan and authorize the City Manager to proceed with preparation of design and bid documents for Annex Building roof, Annex Building HVAC, City Hall/Annex Building remodel and the Public Works facility, Councilmember Todd seconded the motion. The motion passed unanimously.**

**CONSENT AGENDA**

Approval of Checks #54092 through #54238 and ACH Wire Transfers in the Amount of \$1,186,726.26.

(Audit Committee: Councilmember Cavaleri and Councilmember Michelson)

Payroll and Benefit ACH Payments in the Amount of \$561,106.92.

(Audit Committee: Councilmember Cavaleri and Councilmember Michelson)

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There were no exceptions by the audit committee on the vouchers.

Revised City Council Meeting Minutes of June 23, 2015

**MOTION: Councilmember Michelson made a motion to approve the consent agenda, Councilmember Cavaleri seconded the motion. The motion passed unanimously.**

**REPORTS**

Mayor Pruitt reminded the Council about the next Snohomish County Cities (SCC) dinner on September 17.

Councilmember Cavaleri thanked a few specific residents by name that helped in the last windstorm.

Councilmember Michelson will be attending the next Art and Beautification Board meeting. The Board will be giving out the Great Garden awards at the next Council meeting. She also reminded Council about the Shred-it event on September 12.

Mayor Pro Tem Holtzclaw thanked the maintenance crew for their hard work with the windstorm. He also brought up the need to finalize City and Council goals as soon as possible.

Councilmember Todd reported on the last SCC meeting. He also will be participating in the United Way Day of Caring on September 11.

City Manager Polizzotto also thanked the crew for their outstanding service during the windstorm. She also reported on the stone wall on Dumas Road. The Public Works crew is working on repairing the wall.

City Clerk Chelin reported that the City may be hosting the SCC dinner in November at the Country Club. More details to come.

**AUDIENCE COMMUNIATION**

There were no comments from the audience.

**ADJOURNMENT**

With no objection, Mayor Pruitt adjourned the meeting at 9:23 p.m.

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Pam Pruitt, Mayor

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Kelly M. Chelin, City Clerk





## **CITY COUNCIL MINUTES**

**September 8, 2015**

**15728 Main Street, Mill Creek, WA 98012 # 425-745-1891**

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Pam Pruitt, Mayor  
Brian Holtzclaw, Mayor Pro Tem  
Sean Kelly  
Donna Michelson  
Vince Cavaleri  
Mike Todd  
Mark Bond

**September 8, 2015**  
**Regular City Council Meeting**  
**6:00 p.m.**

### **CALL TO ORDER**

Mayor Pruitt called the meeting to order at 6:00 p.m.

### **FLAG SALUTE**

Flag Salute was conducted.

### **ROLL CALL**

Roll was called by the City Clerk with all Councilmembers present.

### **AUDIENCE COMMUNICATION**

There were no comments from the audience.

### **PRESENTATIONS**

#### Great Garden Awards

*(Donna Michelson, Councilmember and Art and Beautification Board Liaison)*

Councilmember Michelson and Art and Beautification Board Chair Zach Anders presented the Great Garden Awards.

#### Proclamation for Officer Mike Harris

*(Bob Crannell, Police Chief)*

Mayor Pruitt and Chief Crannell read the proclamation for Officer Harris.

#### Waste Management Update

*(Will Ibershof, Waste Management)*

Mr. Ibershof presented an update to the Council.

#### Fire District 7 Presentation

*(Gary Meek, Fire Chief)*

Fire Chief Meek presented a community update to the Council.

Council Meeting Minutes  
September 8, 2015  
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**CONSENT AGENDA**

Regular City Council Meeting Minutes of July 28, 2015

**MOTION: Councilmember Michelson made a motion to approve the consent agenda, Councilmember Cavaleri seconded the motion. The motion passed unanimously.**

**ACTION ITEMS**

Construction Contract Award for the 2015 Median and Drainage Repair Project  
(*Scott Smith, City Engineer*)

The following agenda summary information was presented:

On June 23, 2015, the City Council voted to reject the one submitted bid for the 2015 Asphalt Repair Project since the contract price was double the estimated cost. The Council also directed staff to include the higher priority median and drainage reconstruction work in another repair project later this year. The remaining asphalt repairs will be deferred to next spring and a more favorable bidding climate.

The 2015 Median and Drainage Repair Project includes the reconstruction of the Highlands Boulevard Median between 29<sup>th</sup> Drive SE and 30<sup>th</sup> Drive SE, three landscaped cul-de-sac medians in Parkside, curb replacement in Heron and Highlands parks, and drainage repairs in Red Cedar and Evergreen.

The project was advertised for bids for three weeks in the Daily Journal of Commerce, the Everett Herald and through the Municipal Research Service Center (MRSC) contractor roster. Seven bids were received and opened on September 1, 2015. Agostino Construction, Inc. submitted the lowest responsive and responsible bid in the total amount of \$233,421.00. The City's budgeted estimate for the project was \$275,790.00. This work is a subproject of the ongoing Pavement Preservation Program, CIP Project No. T-34, which has an approved budget amount of \$1.5 million for the biennium.

Agostino Construction is based out of Maple Valley, and is a relatively new firm. However, the key management staff is from the large, established firm of Tri-State Construction, who has done hundreds of public agency jobs over the years. Agostino has also recently worked on projects in the cities of Kirkland, Bellevue and Mercer Island. City staff verified the bid prices were correct, the Contractor understands the job conditions and time restrictions, and can meet the insurance and bonding requirements. The Contractor is ready to begin work as soon as possible, and the project is expected to take approximately four weeks, weather permitting.

Discussion.

Council and staff engaged in a discussion.

**MOTION: Councilmember Todd made a motion to approve Resolution #2015-535, to award the construction contract to Agostino Construction for the 2015 Median and Drainage Repair Project, Councilmember Michelson seconded the motion. The motion passed unanimously.**

Council Meeting Minutes  
September 8, 2015  
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Appoint Two Members to the Design Review Board with Terms Expiring August 31, 2018  
(Council Interview Committee)

**MOTION:** Mayor Pro Tem Holtzclaw made a motion to appoint Dave Gunter and Beverly Tiedje to the Design Review Board with terms expiring August 31, 2018, Councilmember Cavaleri seconded the motion. The motion passed unanimously.

**REPORTS**

Mayor Pruitt reminded the Council about the Snohomish County Cities (SCC) dinner on September 17.

Councilmember Kelly stated that he attended the last Parks and Recreation Board meeting.

Councilmember Cavaleri reported that he will be attending the WRIA8 meeting next week.

Councilmember Todd passed out a Community Transit update.

City Manager Polizzotto handed out a revised monthly financial report. She will be handing out a schedule of upcoming agenda items to the Council soon.

City Engineer Smith reported on the chip seal project and the Bonding Wearing Course (BWC) project. The chip seal was completed during the week of August 24<sup>th</sup> and the City received no citizen complaints or questions this year. The BWC overlay should be completed by the end of September. As a part of the discussion, the City Council requested a policy review of the previous speed bumps that were in the BWC overlay area. An update on this matter will be provided to the City Council in the near future.

Public Works Director Gathmann gave a report on the windstorm clean-up. The City may be receiving reimbursement funds from FEMA.

**AUDIENCE COMMUNATION**

Karen Brandon  
15907 24<sup>th</sup> Court SE  
Mill Creek, Washington 98012

Ms. Brandon spoke to the noise on Seattle Hill Road. She also spoke to her experience working at a City fire department. She asked the Council to look into whether we have the proper fire equipment to respond to a 5-story building at the Vintage Housing Development in case of an emergency response.

**ADJOURNMENT**

With no objection, Mayor Pruitt adjourned the meeting at 7:47 p.m.

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Pam Pruitt, Mayor

\_\_\_\_\_  
Kelly M. Chelin, City Clerk



Agenda Item # \_\_\_\_\_  
Meeting Date: September 22, 2015

**CITY COUNCIL AGENDA SUMMARY**  
City of Mill Creek, Washington

**AGENDA ITEM:    APPLICATION OF PUBLIC RECORDS ACT TO INFORMATION ON PERSONAL DEVICES**

**KEY FACTS AND INFORMATION SUMMARY:**

Department of Law Director Shane Moloney will summarize the impacts of the Washington State Supreme Court decision in *Nissen v. Pierce County*, which held that “text messages sent and received by a public employee in the employee’s official capacity are public records of the employer, even if the employee uses a private cell phone.”

Director Moloney will discuss the case and what the City is doing to limit potential City liability under the Public Records Act.

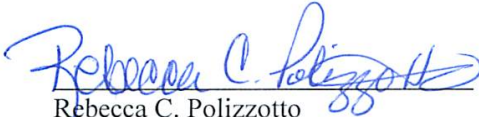
**CITY MANAGER RECOMMENDATION:**

No Council action is required at this time.

**ATTACHMENTS:**

*Nissen v. Pierce County*

Respectfully Submitted:

  
Rebecca C. Polizzotto  
City Manager

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**FILE**  
IN CLERKS OFFICE  
SUPREME COURT, STATE OF WASHINGTON  
DATE AUG 27 2015  
*Fairhurst*  
for **CHIEF JUSTICE**

This opinion was filed for record  
at 8:00am on Aug. 27, 2015

*[Signature]*  
Ronald R. Carpenter  
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GLEND A NISSEN, an individual )  
Respondent, )

No. 90875-3

v. )

En Banc

PIERCE COUNTY, a public agency, )  
PIERCE COUNTY PROSECUTING )  
ATTORNEY’S OFFICE, a public )  
agency, and PROSECUTOR MARK )  
LINDQUIST, )  
Petitioners. )

Filed AUG 27 2015

Yu, J.—Five years ago we concluded that the Public Records Act (PRA), chapter 42.56 RCW, applied to a record stored on a personal computer, recognizing that “[i]f government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined.” *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010). Today we

*Nissen v. Pierce County*, No. 90875-3

consider if the PRA similarly applies when a public employee uses a private cell phone to conduct government business. We hold that text messages sent and received by a public employee in the employee's official capacity are public records of the employer, even if the employee uses a private cell phone.

#### BACKGROUND

This case involves two requests for public records that Glenda Nissen, a sheriff's detective, sent to Pierce County (County). Both requests asked for records related to Pierce County Prosecutor Mark Lindquist. One request stated:

Please produce any and all of Mark Lindquist's cellular telephone records for number 253-861-[XXXX]<sup>1</sup> or any other cellular telephone he uses to conduct his business including text messages from August 2, 2011.

Clerk's Papers (CP) at 15. The other stated:

The new public records request is for Mark Lindquist's cellular telephone records for number 253-861-[XXXX] for June 7, [2010].<sup>2</sup>

*Id.* at 17 (second alteration in original). The telephone number identified in these requests is connected to Lindquist's private cell phone. There is no dispute that Lindquist personally bought the phone, pays for its monthly service, and sometimes uses it in the course of his job.

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<sup>1</sup> Though redacted in the record before us, the requests contained the full 10-digit telephone number.

<sup>2</sup> The County has not challenged the breadth or specificity of these requests, and we pass no opinion.

*Nissen v. Pierce County*, No. 90875-3

In response to these requests, Lindquist obtained and provided the County with two types of records. The first, which the parties refer to as the “call log,” is similar to an itemized statement customers might receive from their service provider each month. It contains information about the dates and times of calls made and received, the length of those calls, and the telephone number of the incoming or outgoing call. Lindquist’s service provider, Verizon Wireless, generated the call log and provided it to Lindquist at his request. He voluntarily produced it to the County.

The second type of record reveals information about text messages Lindquist sent and received over two days (“text message log”). The text message log does not reveal the content of those messages. Instead, similar to the call log, it itemizes the date and time of each message and provides the telephone number of the corresponding party. Lindquist also obtained the text message log from Verizon after receiving Nissen’s PRA requests and produced it to the County.

The County reviewed the call and text message logs and disclosed partially redacted copies to Nissen. Accompanied by an exemption log, the redactions conceal line items for calls and text messages that Lindquist self-described as personal in nature. The remaining unredacted portions relate to calls and text messages that the County and Lindquist admit might be work related. *See* CP at 490 (Decl. of Mark Lindquist in Supp. of Mot. To Intervene & Join) (“I authorized the release of records of calls that were related to the conduct of government or the

*Nissen v. Pierce County*, No. 90875-3

performance of any governmental or proprietary function.”); Pierce County’s Pet. for Review at 3 (“[T]he Prosecutor authorized the release of records of calls that ‘may be work related.’”); Lindquist’s Pet. for Review at 10 (“[T]he Petitioner provided those communications that may be ‘work related.’”). Thus nearly half of the text messages Lindquist sent or received and many of his phone calls during the relevant period potentially related to his job as the elected prosecutor. The County did not produce the contents of any text message, however, though copies of them exist on Verizon’s servers.<sup>3</sup>

Dissatisfied with the County’s disclosures, Nissen sued the County in Thurston County Superior Court. She sought an in camera review of Lindquist’s text messages and the call and text message logs to determine if all of the information is a public record. Lindquist intervened and moved for a temporary restraining order and preliminary injunction to enjoin further disclosure of records related to his cell phone. He argued that compelling him to disclose his text messages would violate the state and federal constitutions and was prohibited by state and federal statutes. CP at 502-18. That same day the County moved to dismiss Nissen’s complaint under

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<sup>3</sup> The messages apparently no longer exist on Lindquist’s phone. In conjunction with her PRA requests, however, Nissen’s lawyer contacted Verizon and asked it to preserve all “communications and data [on Lindquist’s account] . . . pending the issuance of a subpoena or other legal process.” CP at 200. The propriety of that request is not before us.



*Nissen v. Pierce County*, No. 90875-3

CR 12(b)(6). It argued the records at issue could not be public records as a matter of law, because they related to a personal cell phone rather than a county-issued one.

The trial court consolidated the two motions for a hearing. After argument, the trial judge granted the County's CR 12(b)(6) motion, determining as a matter of law that records of private cell phone use can never be public records under the PRA. The Court of Appeals reversed. *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014). Applying the PRA's definition of "public record," the Court of Appeals held that Lindquist's text messages were public records because he "prepared" them in his official capacity. *Id.* at 593-94 (citing RCW 42.56.010(3)). The court further held that the factual record was not sufficiently developed on the issue of whether the call logs also qualify as "public record[s]," noting that the issue turned on whether Lindquist used or retained the logs in his capacity as prosecuting attorney. *Id.* at 595.

We granted the County's and Lindquist's petitions for review, *Nissen v. Pierce County*, 182 Wn.2d 1008, 343 P.3d 759 (2015), and now affirm in part and remand with further instructions.

#### STANDARD OF REVIEW

We review de novo a CR 12(b)(6) order dismissing a complaint. Dismissal is proper only if we conclude that "the plaintiff cannot prove 'any set of facts which would justify recovery.'" *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)

*Nissen v. Pierce County*, No. 90875-3

(quoting *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). Motions to dismiss are granted “only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE § 357, at 604 (1969)).

Our standard of review in PRA cases is also de novo. *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).

#### ANALYSIS

Before turning to the questions this case presents, it is helpful to clarify the questions it does not. This case does not involve a public employer seizing an employee’s private cell phone to search for public records. It does not involve a records request for every piece of data on a smartphone. And it does not involve a citizen suing a public employee for access to the employee’s phone. Instead, this is an action against an agency for two types of records that, while potentially related to the agency’s public business, are in the exclusive control of the agency’s employee. This case asks whether those records can nonetheless be “public records” the agency must disclose and, if so, whether there are limits to how the agency may search for and review those records.

*Nissen v. Pierce County*, No. 90875-3

With that in mind, we first interpret the PRA to determine if a record of government business conducted on a private cell phone is a “public record,” as the PRA defines the term. We then apply that definition to the specific records here—the call and text message logs and text messages. Finally, we address the mechanics of searching for and obtaining public records held by or in the control of public employees. As explained below, we hold that text messages sent or received by Lindquist in his official capacity can be public records of the County, regardless of the public or private nature of the device used to create them; and we order Lindquist to obtain, segregate, and produce those public records to the County.

I. THE PRA REACHES EMPLOYEE-OWNED CELL PHONES WHEN USED FOR AGENCY BUSINESS

Our analysis begins with the text of the PRA. By its plain language, the PRA applies “when an ‘agency’ is requested to disclose ‘public records.’” *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993). Because those are both defined terms, we must interpret the statutory definitions to decide if records of public business an employee conducts on his or her private cell phone are public records. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm’n*, 133 Wn.2d 229, 239, 943 P.2d 1358 (1997). The PRA defines “agency” very broadly as

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

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district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010(1). This definition in turn affects what information is a “public record” since it is incorporated into the statutory definition of that term. Under the PRA, a “public record” is

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.

RCW 42.56.010(3) (emphasis added).

The definitions of “agency” and “public record” are each comprehensive on their own and, when taken together, mean the PRA subjects “virtually any record related to the conduct of government” to public disclosure.<sup>4</sup> *O’Neill*, 170 Wn.2d at 147. This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government. *See LAWS OF 1973*, ch. 1, § 1(11). As we so often summarize, the PRA “is a strongly worded mandate for broad disclosure of public records.” *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 791, 246 P.3d 768 (2011) (quoting *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978))).

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<sup>4</sup> Disclosing that a public record exists in response to a request does not mean the record will ultimately be produced. Agencies must consider whether any applicable exemption precludes production of part or all of a record. *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010).

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A. Agency Employees Working within the Scope of Employment Create Public Records

Despite that mandate, the County argues public employees can avoid the PRA simply by using a private cell phone, even if they use it for public business and even if the same information would be a public record had they used a government-issued phone instead.<sup>5</sup> The County finds this large gap in the PRA by isolating the statute's definition of "agency," which does not expressly refer to individual employees as agencies. RCW 42.56.010(1). Since county employees like Lindquist are not literally a "county," the County argues its employees and the records they control are completely removed from the PRA's scope.

While that reasoning may have superficial appeal, it misses the central question here. We cannot interpret statutory terms oblivious to the context in which they are used. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002). As this case does not ask if a public employee is an "agency" with independent obligations separate from those the PRA imposes on the employer, interpreting "agency" in isolation is unhelpful. Nissen's request was directed at the County, not Lindquist.<sup>6</sup> Our task instead is to decide if *records* that a public

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<sup>5</sup> The County admits that this is the natural result of its interpretation of the PRA. Wash. Supreme Court oral argument, *Nissen v. Pierce County*, No. 90875-3 (June 11, 2015), at 3 min., 4 sec., and 6 min., 57 sec., *audio recording* by TVW, Washington State's Public Affairs Network, <http://www.tvw.org>.

<sup>6</sup> Whether an elected official is independently subject to the PRA is an unsettled question. *See Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 746, 218 P.3d 196 (2009). Here,

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employee generates while working for an agency are “public records” that the agency must disclose. Thus we must interpret the statutory definitions of “agency” and “public record” together, keeping in mind the purpose those definitions are intended to further. *See Hearst Corp.*, 90 Wn.2d at 128.

One characteristic of a public record is that it is “prepared, owned, used, or retained by any state or local agency.” RCW 42.56.010(3). The County is correct that every agency the PRA identifies is a political body arising under law (e.g., a county). But those bodies lack an innate ability to prepare, own, use, or retain any record. They instead act exclusively through their employees and other agents, and when an employee acts within the scope of his or her employment, the employee’s actions are tantamount to “the actions of the [body] itself.” *Houser v. City of Redmond*, 91 Wn.2d 36, 40, 586 P.2d 482 (1978) (as to cities); *Hailey v. King County*, 21 Wn.2d 53, 58, 149 P.2d 823 (1944) (as to counties). Integrating this basic common law concept into the PRA, a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record “prepared, owned, used, or retained by [a] state or local agency.” RCW 42.56.010(3).

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however, Nissen did not sue Lindquist, either in his individual or official capacity. She instead sued the County, alleging that Lindquist’s use of his cell phone resulted in public records of the County; Lindquist is a party only because he intervened to enjoin disclosure. The relevant question then is not whether Lindquist is individually subject to the PRA but, rather, whether records he handles in his capacity as the prosecutor are county public records.

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That interpretation is the only logical one considering how agencies conduct business and carry out their obligations under the PRA. *See Dawson*, 120 Wn.2d at 789 (public records were “prepared by the prosecutor’s office” because two employees created and compiled them). If the PRA did not capture records individual employees prepare, own, use, or retain in the course of their jobs, the public would be without information about much of the daily operation of government. Such a result would be an affront to the core policy underpinning the PRA—the public’s right to a transparent government. That policy, itself embodied in the statutory text, guides our interpretation of the PRA. RCW 42.56.030; LAWS OF 1973, ch. 1, § 1(11); *Hearst Corp.*, 90 Wn.2d at 128.

B. The PRA Captures Work Product on Employee Cell Phones

With that understanding, it is clear that an agency’s “public records” include the work product of its employees. And we find nothing in the text or purpose of the PRA supporting the County’s suggestion that only work product made using agency property can be a public record. To the contrary, the PRA is explicit that information qualifies as a public record “regardless of [its] physical form or characteristics.” RCW 42.56.010(3). In *O’Neill* we held that a city official stored a public record on a private computer in her home by using the computer for city business, 170 Wn.2d at 150, which is consistent with the idea that employees can use their own property and still be within the scope of their employment.

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*Dickinson v. Edwards*, 105 Wn.2d 457, 467-68, 716 P.2d 814 (1986). There is no reason to treat cell phones differently. We hold that records an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be a public record if they also meet the other requirements of RCW 42.56.010(3).

Applying the PRA to employee cell phone use is not new. Though an issue of first impression in this court, many state and local agencies implementing the PRA already conclude that using a private cell phone to conduct public business can create a public record. Over the last several years, agencies have begun adopting policies about private cell phone use and advising employees of the agencies' obligation to preserve all public records. Just as examples:

- “Employees utilizing cell phones for City business must not utilize written cell phone capabilities such as text messaging or email for City business unless such phone is synchronized with the City’s computer system so that such electronic records can be maintained according to the State records retention requirements.” CITY OF PROSSER, PERSONNEL POLICY MANUAL 32 (2009) (Policy 403: Cell Phone Allowance).
- “All county business generated on personal mobile devices are subject to the Public Records Act. . . . Text messages sent and received on a personal mobile device are not stored in any other form. Employees shall not use texting for any County business.” THURSTON COUNTY ADMINISTRATIVE MANUAL (2012) § 10 (Personal Mobile Device Policy).
- “Employees should be aware that work-related texts and voice messages on cell phones are public records subject to the Public Records Act. Employees have a duty to maintain such records in



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accordance with the Washington Local Government Record Retention Schedules.” CITY OF GRANDVIEW, PERSONNEL POLICY MANUAL 88 (2013) (use of personal cellular telephones to conduct city business), <http://www.grandview.wa.us/wp-content/uploads/2013/03/Personnel-Policy-Manual1.pdf>.

These policies are comparable to many others around the state and are consistent with the attorney general’s understanding of the PRA. *See* WAC 44-14-03001(3). While these interpretations do not bind us, *O’Neill*, 170 Wn.2d at 149, they discredit the County’s assertion that private cell phone use has always been treated as outside the PRA.

Similarly unpersuasive is the County’s warning that every “work-related” personal communication is now a public record subject to disclosure. Traditional notions of principal-agency law alleviate this concern. For information to be a public record, an employee must prepare, own, use, or retain it *within the scope of employment*. An employee’s communication is “within the scope of employment” only when the job requires it, the employer directs it, or it furthers the employer’s interests. *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958) (citing *Lunz v. Dep’t of Labor & Indus.*, 50 Wn.2d 273, 310 P.2d 880 (1957); *Roletto v. Dep’t Stores Garage Co.*, 30 Wn.2d 439, 191 P.2d 875 (1948)). This limits the reach of the PRA to records related to the employee’s public responsibilities. For instance, employees do not generally act within the scope of employment when they text their spouse about working late or discuss their job on

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social media. Nor do they typically act within the scope of employment by creating or keeping records purely for private use, like a diary. None of these examples would result in a public record “prepared, owned, used, or retained” by the employer agency in the usual case.<sup>7</sup>

Agencies can act only through their employee-agents. With respect to an agency’s obligations under the PRA, the acts of an employee in the scope of employment are necessarily acts of the “state and local agenc[ies]” under RCW 42.56.010(3). We therefore reject the County’s argument that records related to an employee’s private cell phone can never be public records as a matter of law. Instead, records an employee prepares, owns, uses, or retains within the scope of employment are public records if they meet all the requirements of RCW 42.56.010(3). This inquiry is always case- and record-specific. *Cf. Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015).

## II. APPLYING THE PRA TO THE CALL AND TEXT MESSAGE LOGS AND TEXT MESSAGES

We next apply RCW 42.56.010(3) to the records at issue here—the call and text message logs and text messages. To be a public record under RCW 42.56.010(3), information must be (1) a writing (2) related to the conduct of

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<sup>7</sup> We offer these generic illustrations in response to hypotheticals raised by the County and some amici. Of course, the facts of every case vary. We do not intend these illustrations to have precedential effect.

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government or the performance of government functions that is (3) prepared, owned, used, or retained by a state or local agency. *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746, 958 P.2d 260 (1998). The first element is not in dispute—the parties agree that the call and text message logs and text messages are “writings” under the PRA. *See* RCW 42.56.010(4). The remaining two elements are discussed in turn.

A. Records Relating to the Conduct of Government

Public records must “relat[e] to the conduct of government or the performance of any governmental or proprietary function.” RCW 42.56.010(3). This language casts a wide net. In *Confederated Tribes*, for example, we held that records of money paid by Indian tribes into a common fund related to the conduct of the government even though the records related primarily to tribal gaming operations. 135 Wn.2d at 739-43. Since the state received money from the common fund, we determined tribal contributions impacted state government and therefore records of those contributions were public records. *Id.* at 748.

We adopted a similarly broad interpretation in *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 618 P.2d 76 (1980), which involved medical records of patients hospitalized at a state-owned facility. The records there unquestionably related to individual patients and did not explicitly discuss government operations, but we still held that the records “relat[ed] to the conduct of government” under RCW

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42.56.010(3). From them the public could learn about the “administration of health care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs, all of which are carried out or relate to the performance of a governmental or proprietary function.” *Oliver*, 94 Wn.2d at 566.

Together these cases suggest records can qualify as public records if they contain any information that refers to or impacts the actions, processes, and functions of government.<sup>8</sup>

**B. Records Prepared, Owned, Used, or Retained by an Agency**

As explained previously, a public record must also be “prepared, owned, used, or retained” by an agency, which includes an agency employee acting within the scope of employment. But the parties still quarrel over the meaning of these verbs, which requires that we further interpret RCW 42.56.010(3). Statutory interpretation starts with the plain meaning of the language; the plain meaning controls if it is unambiguous. *Campbell*, 146 Wn.2d at 11-12. We may use a dictionary to discern the plain meaning of an undefined statutory term. *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citing *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1996)).

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<sup>8</sup> It is worth repeating that records an employee maintains in a personal capacity will not qualify as public records, even if they refer to, comment on, or mention the employee’s public duties.

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“*Prepared.*” “Prepare” is defined as “to put together”; to “MAKE, PRODUCE”; “to put into written form.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1790 (2002). This interpretation is consistent with previous cases that treat “preparing” a record as creating it. *See Dawson*, 120 Wn.2d at 787 (agency prepared record by “creat[ing] one of the files”); *Oliver*, 94 Wn.2d at 566 (records of patient’s hospitalization prepared by the hospital).

“*Owned.*” To “own” a record means “to have or hold [it] as property.” WEBSTER’S, *supra*, at 1612; *see also O’Neill v. City of Shoreline*, 145 Wn. App. 913, 925, 187 P.3d 822 (2008).

“*Used.*” We previously addressed what it means for an agency to “use” a record. We broadly interpreted the term in *Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1 of Clark County*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999), holding that the “critical inquiry is whether the requested information bears a nexus with the agency’s decision-making process.” A record that is prepared and held by a third party, without more, is not a public record. But if an agency “evaluat[es], review[s], or refer[s]” to a record in the course of its business, the agency “uses” the record within the meaning of the PRA. *Id.* at 962.

“*Retained.*” To “retain” a record means “to hold or continue to hold [it] in possession or use.” WEBSTER’S, *supra*, at 1938.

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**C. The Text Messages Are Potentially Public Records; the Call and Text Message Logs Are Not**

We now apply those definitions to decide if the complaint sufficiently alleges that the call logs and text messages are “public records.” Absent an allegation that the County used the call and text message logs, the logs in this case are not public records. The call and text message logs were prepared and retained by Verizon, and Nissen does not contend that the County evaluated, reviewed, or took any other action with the logs necessary to “use” them. *Concerned Ratepayers*, 138 Wn.2d at 962. Though they evidence the acts of a public employee, the call and text message logs played no role in County business as records themselves. We hold that the complaint fails to allege the call and text message logs are “public records” of the County within the meaning of RCW 42.56.010(3) because the County did nothing with them.

We reach a different conclusion as to text messages. Nissen sufficiently alleges that Lindquist sent and received text messages in his official capacity “to take actions retaliating against her and other official misconduct.” CP at 14. When acting within the scope of his employment, Lindquist prepares outgoing text messages by “putting them into written form” and sending them. Similarly, he “used” incoming text messages when he reviewed and replied to them while within the scope of employment. Since the County and Lindquist admit that some text

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messages might be “work related,” the complaint sufficiently alleges that those messages meet all three elements of a “public record” under RCW 42.56.010(3).

Transcripts of the content of those text messages are thus potentially public records subject to disclosure, consistent with the procedure discussed below.

### III. SEARCHING FOR PUBLIC RECORDS WITHIN AN EMPLOYEE’S CONTROL

We finally turn to the mechanics of searching for and obtaining public records stored by or in the control of an employee. The County and Lindquist suggest that various provisions of the state and federal constitutions categorically prohibit a public employer from obtaining public records related to private cell phone use without consent.<sup>9</sup> Because an individual has no constitutional privacy interest in a *public* record,<sup>10</sup> Lindquist’s challenge is necessarily grounded in the constitutional rights he has in personal information comingled with those public records. We are mindful that today’s mobile devices often contain “a ‘wealth of detail about [a person’s] familial, political, professional, religious, and sexual associations.’” *State v. Hinton*, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (alteration in original) (quoting *United States v. Jones*, 565 U.S. \_\_\_, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring)). As nearly two-thirds of Americans can

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<sup>9</sup> They primarily cite to the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution.

<sup>10</sup> See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (noting public officials have “constitutionally protected privacy rights in matters of personal life *unrelated to any acts done by them in their public capacity*” (emphasis added)).

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now communicate, access the Internet, store documents, and manage appointments on their smartphone, cell phones are fast becoming an indispensable fixture in people's private and professional lives. Text messaging is the most widely used smartphone feature; e-mail is not far behind. Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CTR. (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015>.

Yet the ability of public employees to use cell phones to conduct public business by creating and exchanging public records—text messages, e-mails, or anything else—is why the PRA must offer the public a way to obtain those records. Without one, the PRA cannot fulfill the people's mandate to have “full access to information concerning the conduct of government on every level.” LAWS OF 1973, ch. 1, § 1(11). As noted earlier, many counties, cities, and agencies around the state recognize the need to capture and retain public records created on personal devices. Some of those entities provide employees with a way to preserve public records and avoid any inquiry into their private affairs by, for example, syncing work-related documents, e-mails, and text messages to an agency server or other place accessible to the employer. The County apparently has no such policy.

While a policy easing the burden on employees of preserving public records is certainly helpful, it cannot be a precondition to the public's right to access those records. If it were, the effectiveness of the PRA would hinge on “the whim of the



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public officials whose activities it is designed to regulate.” *Mead Sch. Dist. No. 354 v. Mead Educ. Ass’n*, 85 Wn.2d 140, 145, 530 P.2d 302 (1975). The legislature tasks us with interpreting the PRA liberally and in light of the people’s insistence that they have information about the workings of the government they created. RCW 42.56.030. Of course, the public’s statutory right to public records does not extinguish an individual’s constitutional rights in private information. But we do not read the PRA as a zero-sum choice between personal liberty and government accountability. Instead, we turn to well-settled principles of public disclosure law and hold that an employee’s good-faith search for public records on his or her personal device can satisfy an agency’s obligations under the PRA.

Though technology evolves, segregating public records from nonpublic ones is nothing new for agencies responding to a PRA request. Whether stored in a file cabinet or a cell phone, the PRA has never authorized “unbridled searches” of every piece of information held by an agency or its employees to find records the citizen believes are responsive to a request. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004). The onus is instead on the agency—necessarily through its employees—to perform “an adequate search” for the records requested. *Neigh. All.*, 172 Wn.2d at 720-21. To satisfy the agency’s burden to show it conducted an adequate search for records, we permit employees in good faith to submit “reasonably detailed, nonconclusory affidavits” attesting to the nature and extent of

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their search. *Id.* at 721. The PRA allows a trial court to resolve disputes about the nature of a record “based solely on affidavits,” RCW 42.56.550(3), without an in camera review, without searching for records itself, and without infringing on an individual’s constitutional privacy interest in private information he or she keeps at work.

Federal courts implementing the Freedom of Information Act (FOIA), Pub. L. No. 89-487, 80 Stat. 250, allow individual employees to use the same method to self-segregate private and public records. *See, e.g., Media Research Ctr. v. U.S. Dep’t of Justice*, 818 F. Supp. 2d 131, 139-40 (D.D.C. 2011) (declarations sufficient to determine e-mails were not sent in employee’s official capacity); *Consumer Fed’n of Am. v. Dep’t of Agric.*, 455 F.3d 283, 288-89 (D.C. Cir. 2006) (affidavits from employees about character of electronic calendars); *Bloomberg, LP v. U.S. Sec. & Exch. Comm’n*, 357 F. Supp. 2d 156, 163 (D.D.C. 2004) (affidavits about “telephone logs” and message slips); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11-12 (D.D.C. 1995); *Gallant v. Nat’l Labor Relations Bd.*, 26 F.3d 168, 171 (D.C. Cir. 1994). While “[a]n agency cannot require an employee to produce and submit for review a purely personal document when responding to a FOIA request[,] . . . it does control the employee to the extent that the employee works for the agency on agency matters.” *Ethyl Corp. v. U.S. Emt’l Prot. Agency*, 25 F.3d 1241, 1247 (4th Cir. 1994). Thus, where a federal employee asserts a potentially responsive record is

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personal, he or she must provide the employer and “the courts with the opportunity to evaluate the facts and reach their own conclusions” about whether the record is subject to FOIA. *Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 480-81 (2d Cir. 1999). We already incorporate FOIA’s standard for adequate searches into the PRA, *Neigh. All.*, 172 Wn.2d at 720, and we similarly adopt FOIA’s affidavit procedure for an employee’s personally held public records.

Therefore, we hold agency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant PRA request. Employees must produce any public records (e-mails, text messages, and any other type of data) to the employer agency. The agency then proceeds just as it would when responding to a request for public records in the agency’s possession by reviewing each record, determining if some or all of the record is exempted from production, and disclosing the record to the requester. *See generally Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 436-37, 327 P.3d 600 (2013).

Where an employee withholds personal records from the employer, he or she must submit an affidavit with facts sufficient to show the information is not a “public record” under the PRA. So long as the affidavits give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive, the agency has performed an adequate search under the PRA. When done in good faith, this procedure allows an agency to fulfill its responsibility to

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search for and disclose public records without unnecessarily treading on the constitutional rights of its employees.

We recognize this procedure might be criticized as too easily abused or too deferential to employees' judgment. Certainly the same can be said of any search for public records, not just for records related to employee cell phone use. But we offer two specific responses. First, an employee's judgment would often be required to help identify public records on a cell phone, even in an in camera review. Text messages, for example, are short communications whose meaning may not be self-apparent. Unlike a chain of e-mails where the preceding messages are often replicated in the body of each new reply, text messages may contain only a few words. The employee then might be needed to put that message into context to determine if it meets the statutory definition of a "public record."

Second, those criticisms spotlight why agencies should develop ways to capture public records related to employee cell phone use. The people enacted the PRA "mindful of the right of individuals to privacy," LAWS OF 1973, ch. 1, § 1(11), and individuals do not sacrifice all constitutional protection by accepting public employment. *City of Ontario v. Quon*, 560 U.S. 746, 756, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010). Agencies are in the best position to implement policies that fulfill their obligations under the PRA yet also preserve the privacy rights of their employees. E-mails can be routed through agency servers, documents can be cached

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to agency-controlled cloud services, and instant messaging apps can store conversations. Agencies could provide employees with an agency-issued device that the agency retains a right to access, or they could prohibit the use of personal devices altogether. That these may be more effective ways to address employee cell phone use, however, does not diminish the PRA's directive that we liberally construe it here to promote access to all public records. RCW 42.56.010(3).

#### CONCLUSION

We affirm the Court of Appeals in part. Records that an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be "public records" of the agency under RCW 42.56.010(3). Nissen's complaint thus sufficiently alleges that at least some of the text messages at issue may be public records subject to disclosure. Because it is impossible at this stage to determine if any messages are in fact public records, on remand the parties are directed as follows. Lindquist must obtain a transcript of the content of all the text messages at issue, review them, and produce to the County any that are public records consistent with our opinion. 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 to Nissen. As to text messages that Lindquist in good faith determines are not public

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records, he must submit an affidavit to the County attesting to the personal character of those messages. The County must also produce that affidavit to Nissen.

We note that the County responded to Nissen's records requests and produced records in a timely manner based on what we presume was its good-faith interpretation of the PRA. Though we now hold that interpretation is incorrect, penalties are not warranted at this early stage before the County has had the opportunity to comply with our opinion and supplement its response to Nissen's requests accordingly. We reserve for the trial court the issue of penalties going forward.

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Law, J.

WE CONCUR:

Madsen, C. J.

Stephens, J.

Johnson

Wegman, J.

Quinn, J.

Conzales, J.

Fairhurst, J.

Geetz McLeod, J.



Agenda Item # \_\_\_\_\_

Meeting Date: September 22, 2015

## **CITY COUNCIL AGENDA SUMMARY**

City of Mill Creek, Washington

**AGENDA ITEM: INTERLOCAL AGREEMENT BETWEEN THE CITY OF MILL CREEK AND SNOHOMISH COUNTY FOR EMERGENCY SERVICES**

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**KEY FACTS AND INFORMATION SUMMARY:** The proposed Interlocal Agreement (ILA) defines the terms and conditions for the Snohomish County Department of Emergency Management (SCDEM) to provide emergency support services to the City of Mill Creek. These services will replace those provided by the Emergency Services Coordinating Agency (ESCA) which will dissolve on December 31, 2015. The seven current ESCA cities within Snohomish County are all adopting the same ILA, and on January 1, 2016, all the cities within the County will be members of SCDEM except Everett, which has an emergency management division within its Fire Department. The initial term of the ILA is three years, from January 1, 2016 to December 31, 2018.

The purpose of the ILA is to use the emergency management service resources and capability of a much larger agency in the event the City must deal with a significant disaster or emergency. The services available in the interim period while ESCA is winding down operations (through December 31, 2015) are outlined in Schedule A1 of the ILA. The long term services are defined in Schedule A2, and include the following:

- Provide a SCDEM liaison to the City to directly assist with incident management leadership, technical support and/or mobile assets when necessary.
- Request additional assistance on behalf of the City to the State and FEMA.
- Make available the County's emergency resources not required elsewhere during an emergency.
- Coordinate post-disaster preliminary damage assessment and provide technical assistance to support the City's disaster recovery efforts.
- Provide technical assistance to maintain a compliant comprehensive emergency management plan (CEMP).
- Provide technical assistance to develop and update functional emergency management plans and procedures.
- Provide one county-wide annual training exercise and at least two training sessions and at least two exercise opportunities.
- Provide training and technical assistance to ensure communications interoperability during a crisis.
- Provide training and access to incident management sites and software.
- Help develop volunteer capabilities to augment disaster response efforts.
- Maintain a central database of volunteers and facilitate their registration as emergency workers in accordance with State regulations.



- Provide training and coordination of volunteers for various specific programs with the overarching goal of strengthening the capability of the City to respond to emergencies.
- Provide at least four presentations a year to promote public preparedness for emergencies.
- Provide one seat on the SCDEM advisory board, which shall meet quarterly.

The ILA also includes, in Schedule B, the expectations for the City regarding emergency management. These include the following:

- Maintain an incident management structure and disaster procedures per the principles of the National Incident Command System (NIMS).
- Actively work with SCDEM on updating and/or developing appropriate emergency management plans.
- Participate with SCDEM on developing appropriate training and exercises.
- Participate with SCDEM on emergency communications protocols and processes.
- Work in collaboration with SCDEM to develop a robust emergency volunteer program.
- Work in conjunction with SCDEM to provide public education to the community to improve community resilience to disaster.

The cost is outlined in Schedule D of the ILA:

- For 2016 it is \$1.15 per capita per year for all cities. Per section 7.2 of the ILA, each year thereafter the rate will vary with the local CPI. This compares to a cost of \$2.37 per capita in 2015 for ESCA, resulting in a savings of over \$24,000 in 2016 from what is currently budgeted. There will probably also be a small refund to the City from ESCA late in 2015, but that amount will not be known until all ESCA finances are closed out and audited.

**CITY MANAGER RECOMMENDATION:**

- Authorize the City Manager to execute the Interlocal Agreement between the City of Mill Creek and Snohomish County for emergency management services to become effective upon full execution through December 31, 2018.

**ATTACHMENTS:**

- Interlocal Agreement transmittal letter from Snohomish County Department of Emergency Management
- Interlocal Agreement between the City of Mill Creek and Snohomish County for emergency management services.

Respectfully Submitted:



Rebecca C. Polizzotto  
City Manager

G:\EXECUTIVE\WP\COUNCIL\SUMMARY\2015\SNOCO EMERGENCY MANAGEMENT SERVICES ILA.DOCX



**Snohomish County  
Emergency Management**

**John Lovick**  
County Executive

(425) 388-5060  
FAX (425) 423-9152

720 80th Street, SW  
Building A  
Everett, WA 98203

September 1, 2015

**INTERLOCAL AGREEMENT FOR EMERGENCY MANAGEMENT SERVICES**

Enclosed for your review is the interlocal agreement (ILA) for emergency management services with the Snohomish County Department of Emergency Management. This updated ILA is the result of input from the members of a multijurisdictional workgroup and covers the three year period from January 1, 2016 through December 31, 2018. Some key highlights of this ILA are:

- It enumerates specific numbers of training and exercises, and preparedness opportunities
- It clarifies DEM's role in volunteer management
- It contains a section that lists basic expectations of the participating jurisdictions
- It utilizes the same per capita formula

This ILA also includes in its recitals verbiage that clarifies that these services augment the jurisdictions emergency management efforts and that over the course of this three year period we will explore the potential for DEM to assume responsibility for all emergency management services, if so desired. The latter was requested by several representatives in the workgroup.

I will need both copies signed and returned. Once I receive them, they will go before the County's Executive for signature and to the County Council for adoption by motion. Once that process is complete, I will return a fully signed copy to you. If you have any questions or need assistance, feel free to contact me at 425.388.5068 or [jason.biermann@snoco.org](mailto:jason.biermann@snoco.org).

Best regards,

Jason Biermann, Deputy Director  
Snohomish County Department of Emergency Management

dem@snoco.org  
www.snoco.org

**INTERLOCAL AGREEMENT FOR  
EMERGENCY MANAGEMENT SERVICES**

THIS INTERLOCAL AGREEMENT FOR EMERGENCY MANAGEMENT SERVICES (the "Agreement") is made and entered into this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between SNOHOMISH COUNTY, a political subdivision of the State of Washington (the "County"), and the CITY OF \_\_\_\_\_, a municipal corporation of the State of Washington (the "City") (individually "Party", and collectively "Parties") pursuant to the Interlocal Cooperation Act, Chapter 39.34 RCW.

**RECITALS**

**A.** The County has established the Snohomish County Department of Emergency Management (hereinafter "SCDEM") as an emergency management agency within County government pursuant to Chapter 2.36 SCC.

**B.** The County, acting through SCDEM, operates as a local organization for emergency management in accordance with relevant comprehensive emergency management plans and programs pursuant to Chapter 38.52 RCW.

**C.** The City previously contracted for coordinated emergency management services through the Emergency Services Coordinating Agency.

**D.** The City now desires to contract with the County for emergency management services, and the County is agreeable to providing the City with emergency management services subject to the terms and conditions detailed below.

**E.** The coordinated emergency management services that SCDEM provides augment, but do not supplant, the City's responsibilities and obligations under Chapter 38.52 RCW. SCDEM and the City agree that over the course of this Agreement, the Parties will explore the possibility of SCDEM assuming all emergency management services for the City in future agreements.

**F.** The County and City believe that it is in the public interest to provide and coordinate emergency management services as provided herein.

**AGREEMENT**

NOW, THEREFORE, in consideration of the respective agreements set forth below and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the County and the City agree as follows:

**1. Purpose of Agreement.**

This Agreement is authorized by and entered into pursuant to Chapter 39.34 RCW. The purpose and intent of this Agreement is to provide an economical mechanism for administration

and coordination of County and City emergency management programs, generally to protect the public peace, health, and safety and to preserve the lives and property of the people of the County and City.

**2. Effective Date and Duration.**

This Agreement shall not take effect unless and until it has been duly executed by both Parties and either filed with the County Auditor or posted on the County’s Interlocal Agreements website. This Agreement shall remain in effect through midnight December 31, 2018, unless earlier terminated pursuant to the provisions of Section 12 below, and the term of this Agreement may be extended or renewed for up to one (1) additional two (2) year term, upon City providing County written notice on or before June 15, 2018. County shall in writing approve or reject the extension or renewal within thirty (30) days of receiving notice of intent to extend or renew; PROVIDED FURTHER, that each Party’s obligations after December 31, 2015, are contingent upon local legislative appropriation of necessary funds for this specific purpose in accordance with applicable law. In the event that funds are not appropriated for this Agreement, then this Agreement shall terminate as of the last fiscal year for which funds are appropriated. The Party shall notify the other Party in writing of any non-allocation of funds at the earliest possible date.

**3. Administrators.**

Each Party to this Agreement shall designate an individual (an “Administrator”), who may be designated by title or position, to oversee and administer such Party’s participation in this Agreement. The Parties’ initial Administrators shall be the following individuals:

<u>County’s Initial Administrator:</u>	<u>City’s Initial Administrator:</u>
John Pennington, Director Snohomish County Department of Emergency Management 720 80 <sup>th</sup> Street SW, Building A Everett, Washington 98203	Tom Gathmann, Public Works Director City of Mill Creek 15728 Main Street Mill Creek, WA 98012

Either Party may change its Administrator at any time by delivering written notice of such Party’s new Administrator to the other Party.

**4. Emergency Management Services.**

The County shall provide emergency management services, as described herein, to the City during the term of this Agreement in accordance with Chapter 38.52 RCW (the “Services”). The County will endeavor to provide the Services as described in its comprehensive emergency management plan and: (1) During the period from the Effective Date to midnight December 31, 2015, those Services as further described in Schedule A1, and (2) During the period from midnight December 31, 2015, to midnight December 31, 2018, those Services as further described in Schedule A2; PROVIDED, HOWEVER, that such Services shall be provided without warranty of any kind, including but not limited to the sufficiency or adequacy of the

actions of the Parties in response to an emergency or disaster or for support of search and rescue operations with regard to any person or property in distress. The City shall remain responsible the provision of all those services identified in Schedule B, attached hereto, as well as any other services the City is otherwise required by law to perform.

**5. Advisory Board.**

The City shall be entitled during the term of this Agreement to representation on the SCDEM Advisory Board established by SCC 2.36.100. The duties of the Advisory Board are set forth in SCC 2.36.130, a copy of which is attached hereto and incorporated herein as Schedule C, as it now exists or is hereafter amended.

**6. Independent Contractor.**

The County will perform all Services under this Agreement as an independent contractor and not as an agent, employee, or servant of the City. The County shall be solely responsible for control, supervision, direction and discipline of its personnel, who shall be employees and agents of the County and not the City. The County has the express right to direct and control the County's activities in providing the Services in accordance with the specifications set out in this Agreement. The City shall only have the right to ensure performance.

**7. Compensation.**

7.1 Annual Service Charge. Beginning January 1, 2016, the City shall pay an Annual Service Charge to the County calculated at a rate of \$1.15 per capita based on the City's population number from the Office of Financial Management (OFM) *April 1, 2015 estimate for Population of Cities, Towns and Counties Used for Allocation of Selected State Revenues State of Washington*, as set forth in Schedule C. The Annual Service Charge includes the services described in this Agreement's Schedules, and reasonable operation and maintenance costs for which there will be no separate billing. The County shall invoice the City or its designee for the Annual Service Charge for all services performed by the County. The City shall be responsible for complete and timely payment of all amounts invoiced regardless of whether the City opts to participate in the invoiced services. Invoices will be sent quarterly or on any other schedule that is mutually convenient to the Parties. Payment of the Annual Service Charge is due and payable in quarterly installments on January 31, April 30, July 31, and October 31.

7.2 Adjustments to Annual Service Charge. The Annual Service Charge shall be adjusted on January 1 of the subsequent years as follows: (1) the new year's per capita rate shall be the previous year's per capita rate adjusted by the amount of the change in the Bureau of Labor Statistics Consumer Price Index – Urban Wage Earner (CPI-W) for the Seattle-Tacoma-Bremerton area for the period from April to April; and (2) the City's population number from the Office of Financial Management (OFM) based on the *April 1 population estimate for Population of Cities, Towns and Counties Used for Allocation of Selected State Revenues State of Washington*. By July 10 of each year, the County shall issue a revision to Schedule D to reflect the City's population number from the Office of Financial Management (OFM) *April 1 estimate*

*for Population of Cities, Towns and Counties Used for Allocation of Selected State Revenues State of Washington and the resulting Annual Service Charge for the subsequent year.*

7.3 **Emergency Management Performance Grant.** The City agrees that by entering into this Agreement, effective January 1, 2016, it will forgo applying for future Emergency Management Performance Grant (EMPG) monies. The City further agrees that to the extent it receives future EMPG monies after January 1, 2016; such funds will be transferred by the City to SCDEM within thirty (30) days of receipt.

**8. Hold Harmless and Indemnification.**

Except in those situations where the Parties have statutory or common law immunity for their actions and/or inactions and to the extent permitted by state law, and for the limited purposes set forth in this Agreement, each Party shall protect, defend, hold harmless and indemnify the other Party, its officers, elected officials, agents and employees, while acting within the scope of their employment as such, from and against any and all claims (including demands, suits, penalties, liabilities, damages, costs, expenses, or losses of any kind or nature whatsoever including attorney's fees) arising out of or in any way resulting from such Party's own negligent acts, errors, or omissions or willful misconduct related to such Party's participation and obligations under this Agreement. Each Party agrees that its obligations under this subsection extend to any claim, demand, and/or cause of action brought by or on behalf of any of its employees or agents. For this purpose, each Party, by mutual negotiation, hereby waives, with respect to the other Party only, any immunity that would otherwise be available against such claims under the industrial insurance act provisions of Title 51 RCW.

**9. Privileges and Immunities.**

Whenever the employees of the County or the City are rendering outside aid pursuant to the authority contained in RCW 38.52.070 and 38.52.080(1), such employees shall have the same powers, duties, privileges, and immunities as if they were performing their duties in the County or the City in which they are normally employed. Nothing in this Agreement shall affect any other power, duty, right, privilege, or immunity afforded the County or the City in Chapter 38.52 RCW.

**10. Liability Related to City Ordinances, Policies, Rules and Regulations.**

In executing this Agreement, the County does not assume liability or responsibility for or in any way release the City from any liability or responsibility which arises in whole or in part from the existence or effect of City ordinances, policies, rules or regulations. If any cause, claim, suit, action or administrative proceeding is commenced in which the enforceability and/or validity of any such City ordinance, policy, rule or regulation is at issue, the City shall defend the same at its sole expense and, if judgment is entered or damages are awarded against the City, the County, or both, the City shall satisfy the same, including all chargeable costs and reasonable attorney's fees.

**11. Compliance with Laws.**



In the performance of its obligations under this Agreement, each Party shall comply with all applicable federal, state, and local laws, rules and regulations.

**12. Early Termination.**

Either Party may terminate this Agreement, with or without cause, upon written notice to the other Party by no later than June 15 of the year of termination. Termination pursuant to this Section will become effective on December 31 of the calendar year in which the termination notice is given.

**13. Notices.**

All notices required to be given by any Party to the other Party under this Agreement shall be in writing and shall be delivered either in person, by United States mail, or by electronic mail (email) to the applicable Administrator or the Administrator's designee. Notice delivered in person shall be deemed given when accepted by the recipient. Notice by United States mail shall be deemed given as of the date the same is deposited in the United States mail, postage prepaid, and addressed to the Administrator, or their designee, at the addresses set forth in Section 3 of this Agreement. Notice delivered by email shall be deemed given as of the date and time received by the recipient.

**14. Performance.**

Time is of the essence of the Agreement in each and all of the provisions and scope of services in which performance is a factor.

**15. Entire Agreement; Amendment.**

This Agreement constitutes the entire agreement between the Parties regarding the subject matter hereof, and supersedes any and all prior oral or written agreements between the Parties regarding the subject matter contained herein. This Agreement may not be modified or amended in any manner except by a written document executed with the same formalities as required for this Agreement and signed by the Party against whom such modification is sought to be enforced.

**16. Conflicts between Attachments and Text.**

Should any conflicts exist between any attached exhibit or schedule and the text or main body of this Agreement, the text or main body of this Agreement shall prevail.

**17. Governing Law and Venue.**

This Agreement shall be governed by and enforced in accordance with the laws of the State of Washington. The venue of any action arising out of this Agreement shall be in the Superior Court of the State of Washington, in and for Snohomish County. In the event that a

lawsuit is instituted to enforce any provision of this Agreement, the prevailing Party shall be entitled to recover all costs of such a lawsuit, including reasonable attorney's fees.

**18. Interpretation.**

This Agreement and each of the terms and provisions of it are deemed to have been explicitly negotiated by the Parties, and the language in all parts of this Agreement shall, in all cases, be construed according to its fair meaning and not strictly for or against either of the Parties hereto. The captions and headings in this Agreement are used only for convenience and are not intended to affect the interpretation of the provisions of this Agreement. This Agreement shall be construed so that wherever applicable the use of the singular number shall include the plural number, and vice versa, and the use of any gender shall be applicable to all genders.

**19. Severability.**

If any provision of this Agreement or the application thereof to any person or circumstance shall, for any reason and to any extent, be found invalid or unenforceable, the remainder of this Agreement and the application of that provision to other persons or circumstances shall not be affected thereby, but shall instead continue in full force and effect, to the extent permitted by law.

**20. No Waiver.**

Failure by either Party at any time to require performance by the other Party under this Agreement or to claim a breach of any provision of this Agreement shall not be construed as affecting any subsequent breach hereof or the right to require performance or affect the ability to claim a breach with respect hereto.

**21. No Assignment.**

This Agreement shall not be assigned, either in whole or in part, by either Party without the express written consent of the other Party, which may be granted or withheld in such Party's sole discretion. Any attempt to assign this Agreement in violation of the preceding sentence shall be null and void and shall constitute a default under this Agreement.

**22. Warranty of Authority.**

Each of the signatories hereto warrants and represents that he or she is competent and authorized to enter into this Agreement on behalf of the Party for whom he or she purports to sign this Agreement.

**23. No Joint Venture.**

Nothing contained in this Agreement shall be construed as creating any type or manner of partnership, joint venture or other joint enterprise between the Parties.



**24. No Separate Entity Necessary.**

The Parties agree that no separate legal or administrative entities are necessary to carry out this Agreement.

**25. Ownership of Property.**

Except as expressly provided to the contrary in this Agreement, any real or personal property used or acquired by either Party in connection with its performance under this Agreement will remain the sole property of such Party, and the other Party shall have no interest therein.

**26. No Third Party Beneficiaries.**

This Agreement and each and every provision hereof is for the sole benefit of the City and the County. No other persons or Parties shall be deemed to have any rights in, under or to this Agreement.

**27. Execution in Counterparts.**

This Agreement may be executed in two or more counterparts, each of which shall constitute an original and all of which shall constitute one and the same agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.

**COUNTY:**

Snohomish County, a political subdivision of the State of Washington

**CITY:**

City of \_\_\_\_\_, a Washington municipal corporation

By \_\_\_\_\_  
Name:  
Title:

By \_\_\_\_\_  
Name:  
Title:

**Approved as to insurance and indemnification provisions:**

\_\_\_\_\_  
Risk Management

**Approved as to Form:**

\_\_\_\_\_  
City Attorney

**Approved as to Form:**

\_\_\_\_\_  
Deputy Prosecuting Attorney

**Schedule A1**

**Description of Emergency Management Services**

The County provides Emergency Management Services (“Services”) through its Department of Emergency Management (“SCDEM”) to Cities, Towns, and Tribes (individually “Participating Jurisdiction”, and collectively “Participating Jurisdictions”). These Services shall include the following:

**1. Response Coordination:** SCDEM will coordinate emergency management activities in order to endeavor to minimize death, injury, and damages to property, the economy, and the environment during natural or man-made disasters as follows:

**a.** Maintain an emergency management organization compliant with state and federal guidelines, adhering to the commonly practiced principles of emergency management, and utilizing the National Incident Management System (NIMS) and the Incident Command System (ICS).

**b.** Provide a 24 hour per day Duty Officer for emergency management issues. The SCDEM Duty Officer is available via SNOFAC.

**c.** During disasters, as defined by RCW 38.52.010(6), activate the Snohomish County Emergency Operations Center (SCEOC) to support the Participating Jurisdiction.

Requests to activate the SCEOC will be made to the Duty Officer via SNOFAC. The level of SCEOC activation will depend on the situation and the need for coordination and support. The decision to activate the SCEOC, and at what level, is made by the SCDEM Director, Deputy Director, or the appropriate designee in the SCDEM line of succession.

**d.** Make available the County’s emergency resources not required for use elsewhere during emergencies. Use shall be determined and prioritized by the SCDEM. The Participating Jurisdictions agree that the County shall remain harmless in the event of non-availability or non-performance of the equipment. As needed, SCDEM will request additional assistance on behalf of the jurisdictions through established emergency management protocols— from the County to State, State to Region, and Region to National levels.

**e.** Under the provisions of SCC Chapter 2.36, initiate through the County Executive a Declaration of Emergency when SCDEM determines that a public disorder, disaster, energy emergency, or riot exists which affects the life, health, property or public peace.

**f.** When requested, and at the discretion of the SCDEM Director, Deputy Director, or the appropriate designee in the SCDEM line of succession, SCDEM will deploy a liaison(s) to the Participating Jurisdiction to directly assist with incident management leadership, technical support and assistance, and/or use of mobile assets. During activation of its EOC, SCDEM may request that jurisdictions deploy liaisons to the Snohomish County EOC to, among other things, enhance communication between the EOC and the incident site(s).

**2. Emergency Communications:** SCDEM and the Participating Jurisdiction will utilize communication protocols and guidance established in the Snohomish County Comprehensive Emergency Management Plan (CEMP). SCDEM will provide the Participating Jurisdiction with training and information or technical assistance to endeavor to ensure communications compatibility and effectiveness during a crisis. SCDEM will utilize multiple means of communication to notify, warn and provide information and instruction to the general public regarding impending or occurring disasters.

**3. Volunteer / Emergency Worker Management:** SCDEM will work in conjunction with the Participating Jurisdiction to maintain the viability of their Community Emergency Response Team (CERT) and/or Radio Amateur Civil Emergency Service (RACES) radio operators, as applicable.

**a.** SCDEM will create an AlertSense notification database and act as a resourcing center for CERT and RACES team assistance.

**b.** SCDEM will facilitate temporary Emergency Worker registration for CERT and RACES team members during activations.

**Schedule A2**

**Description of Emergency Management Services**

The County shall provide Emergency Management Services (the “Services”) through its Department of Emergency Management (“SCDEM”) to Cities, Towns, and Tribes (individually “Participating Jurisdiction”, and collectively “Participating Jurisdictions”). These Services shall include the following:

**1. Disaster Response and Recovery Coordination:** SCDEM will coordinate emergency management activities in order to endeavor to minimize death, injury, and damages to property, the economy, and the environment during natural or man-made disasters as follows:

a. Maintain an emergency management organization compliant with state and federal guidelines, adhering to the commonly practiced principles of emergency management and utilizing the tenets of the National Incident Management System (NIMS).

b. Provide a 24 hour per day Duty Officer for emergency management issues. The Duty Officer is available via SNOPAC.

c. During disasters as defined by RCW 38.52.010(6), activate the Snohomish County Emergency Operations Center (SCEOC) to support Participating Jurisdictions.

Requests to activate the SCEOC will be made to the Duty Officer via SNOPAC. The level of SCEOC activation will depend on the situation and the need for coordination and support. The decision to activate the SCEOC, and at what level, is made by the SCDEM Director, Deputy Director, or the appropriate designee in the SCDEM line of succession.

When requested, and at the discretion of the SCDEM Director, Deputy Director, or the appropriate designee in the SCDEM line of succession, SCDEM will deploy a liaison(s) to the Participating Jurisdiction to directly assist with incident management leadership, technical support and assistance, and/or use of mobile assets. During activation of the SCEOC, SCDEM may request that jurisdictions deploy liaisons to the Snohomish County SCEOC to, among other things, enhance communication between the EOC and the incident site(s).

d. During disasters, as defined by RCW 38.52.010(6), activate the Snohomish County Comprehensive Emergency Management Plan (SCCEMP) and Emergency Operations Plan (SCEOP). These plans articulate the roles and responsibilities of the County and its jurisdictions, and the SCEOC’s procedures, respectively. Participating Jurisdictions will, with the support of SCDEM as outlined in Section 2 of this schedule, develop and maintain plans and procedures that support the SCCEMP and SCEOP.

e. Make available the County’s emergency resources not required for use elsewhere during emergencies. Use shall be determined and prioritized by SCDEM. The County shall remain harmless in the event of non-availability or non-performance of the equipment.

f. As needed, SCDEM will request additional assistance on behalf of the Participating Jurisdictions through established emergency management protocols—from the County to State, State to Region, and Region to National levels.

g. Under the provisions of SCC Chapter 2.36, initiate, through the County Executive a Proclamation of Emergency when SCDEM determines that a public disorder, disaster, energy emergency, or riot exists which affects the life, health, property or public peace.

h. SCDEM, in conjunction with the Participating Jurisdiction and the State's Emergency Management Division (EMD), will coordinate FEMA's post-disaster preliminary damage assessment (PDA) process. The Participating Jurisdiction will be responsible for tracking and reporting activities potentially reimbursable by federal and/or state disaster assistance programs. Each Participating Jurisdiction remains responsible for the costs it incurs.

i. When requested and practicable, SCDEM will provide technical assistance to support Participating Jurisdictions' disaster recovery efforts.

**2. Planning, Training, and Exercises:** SCDEM will maintain emergency management plans in accordance with applicable state and federal laws, regulations, and guidance. It will also maintain training and exercise programs that adhere to state and federal guidance including the National Incident Management System (NIMS), Homeland Security Exercise and Evaluation Program (HSEEP), and Emergency Management Performance Grant (EMPG).

a. SCDEM will provide technical assistance (templates, meeting facilitation, and plan review) to Participating Jurisdictions in order for them to maintain a comprehensive emergency management plan (CEMP) that meets the requirements set forth in RCW 38.52.030 and WAC 118-30-060.

b. SCDEM will maintain a multi-jurisdictional hazard mitigation plan (HMP) that complies with the Disaster Mitigation Act of 2000 (DMA2K) and 44 CFR §201.6 and, when requested, provide technical assistance in order for its Participating Jurisdictions to meet the requirements for participation in the HMP.

c. When requested, and at the discretion of the SCDEM Director or Deputy Director, SCDEM will provide technical assistance and/or templates to Participating Jurisdictions in order to develop functional emergency management plans and procedures. Examples of such plans include mass fatality plans, disaster debris management plans, emergency operations plans, and emergency operations center procedures.

d. SCDEM will conduct an annual training and exercise planning workshop (TEPW) in order to develop a coordinated training and exercise calendar. Participating Jurisdictions desiring training and exercise support from SCDEM must be represented at the TEPW. SCDEM will coordinate one county-level functional exercise annually and provide additional training and exercise opportunities based upon the population or type of the jurisdiction as described below.

i. Jurisdictions with a population greater than 10,000 and Tribal Nations: SCDEM will provide, at a minimum, the delivery of two training and two exercise opportunities annually.

ii. Jurisdictions with a population of 10,000 or less: SCDEM will provide, at a minimum, the delivery of one training and one exercise opportunity annually.

**3. Warning, Notification, and Emergency Communications:** SCDEM and the Participating Jurisdiction will utilize protocols and guidance established in the Snohomish County Comprehensive Emergency Management Plan (CEMP) and SCDEM Emergency Operations Plan (EOP).

a. As resources allow, SCDEM will utilize multiple means of communication to notify, warn, and/or provide information and instruction to the general public regarding impending or occurring disasters.

b. SCDEM will provide the Participating Jurisdiction with training, information, and/or technical assistance to endeavor to ensure communications interoperability during a crisis.

c. SCDEM will facilitate access to, and training on, applicable incident management sites and software.

**4. Volunteer / Emergency Worker Management:** SCDEM will work in collaboration with Participating Jurisdictions to develop volunteer capabilities that augment Participating Jurisdictions' local disaster response efforts; specifically, the Snohomish Emergency Response Volunteers (SERV), Community Emergency Response Team (CERT) and/or an emergency communications volunteer group, e.g. the Snohomish County Auxiliary Communications Service (ACS).

a. SCDEM will maintain a central database of these volunteers and facilitate their registration as emergency workers in accordance with the Washington State Emergency Workers' Program. Annually, SCDEM will provide to the Participating Jurisdictions a list of the volunteers living within each jurisdiction's respective boundaries.

b. SCDEM will create AlertSense notification lists for these groups.

c. SCDEM will develop, maintain, and centrally manage the Snohomish Emergency Response Volunteer (SERV) group. This group's purpose is to provide volunteers able to augment jurisdictional emergency operation centers (EOCs), manage community points of distribution (CPODs), and manage volunteer reception centers (VRCs).

d. SCDEM will provide oversight for a countywide CERT capability based on self-organized and governed CERT teams in a regional construct. In this construct, SCDEM will provide initial CERT training and support volunteer Regional Coordinators that will be

responsible for coordinating with the SCDEM Volunteer Coordinator for ongoing training, recruiting, and meeting place logistics.

i. SCDEM will provide, at a minimum, annual initial training for CERT volunteers. Initial training will consist of the CERT program as outlined by FEMA's Emergency Management Institute (EMI) and damage assessment (i.e. windshield survey) training.

ii. SCDEM's Volunteer Coordinator will meet with the Regional Coordinators annually to establish a yearly training calendar for the regional teams, and then quarterly throughout the year.

iii. Semiannually, SCDEM will host a countywide CERT meeting. Each team's Regional Coordinator, with the support of SCDEM, will be responsible for additional meetings and trainings.

iv. SCDEM, in collaboration with the Regional Coordinators, will develop and maintain countywide CERT policies that ensure consistency and are applicable to all of the regional teams.

e. SCDEM will provide oversight to the Snohomish County Auxiliary Communications Service (ACS) function, which provides emergency communications services to SCDEM, its Participating Jurisdictions, as well as hospitals and the Snohomish County Regional Chapter of the American Red Cross.

f. Using volunteers (as groups or individuals) for activities outside of the scope of their intended purpose and/or training places them outside of the scope of RCW 38.52.180, WAC 118-04, and this Agreement. These volunteers cannot be afforded protection under the Washington State Emergency Workers Program; therefore the requesting jurisdiction is required to provide coverage in accordance with L&I Industrial Insurance regulations.

**5. Outreach and Preparedness:** SCDEM will work in conjunction with Participating Jurisdictions to provide disaster-related preparedness and education in order to improve overall community resilience.

a. SCDEM leadership will meet semi-annually with Participating Jurisdictions' leadership to discuss community-specific concerns and needs.

b. SCDEM will convene meetings of its Advisory Board (see Schedule C) quarterly.

c. SCDEM will provide preparedness presentations based upon the population or type of the jurisdiction as described below. Requests for presentations will be made at least 60 days prior to the date of the presentation.



- i. Jurisdictions with a population greater than 10,000 and Tribal Nations: Four presentations per year.
- ii. Jurisdictions with a population of 10,000 or less: Two presentations per year.

**Schedule B**  
**Expectations of Participating Jurisdiction**

As stated in Section 4 of the Agreement, the services provided by SCDEM augment the Participating Jurisdictions. This schedule outlines some, but not all, of the areas for which the Participating Jurisdictions retain responsibility.

**1. Disaster Response and Recovery Coordination:** Participating Jurisdictions will coordinate their emergency management activities with SCDEM in order to endeavor to minimize death, injury, and damages to property, the economy, and the environment during natural or man-made disasters as follows:

**a.** Maintain a jurisdiction-level incident management structure that utilizes the principles of the National Incident Management System (NIMS).

**b.** During disasters, as defined by RCW 38.52.010(6), activate their incident management structure and notify SCDEM as soon as practicable.

**c.** When requested and practicable, deploy a liaison to the Snohomish County EOC to enhance coordination between the SCEOC and the jurisdiction.

**d.** During disasters, as defined by RCW 38.52.010(6), activate the jurisdiction's Comprehensive Emergency Management Plan (CEMP).

**e.** Under the provisions of applicable code, initiate through the jurisdiction's appropriate authority, a Proclamation of Emergency when the jurisdiction determines that a public disorder, disaster, energy emergency, or riot exists which affects the life, health, property or public peace. Notify SCDEM as soon as practicable of the intent to proclaim a disaster and provide SCDEM with a copy of the proclamation as soon as practicable.

**f.** Work in conjunction with SCDEM during FEMA's post-disaster preliminary damage assessment (PDA) process. Track and report activities potentially reimbursable by federal and/or state disaster assistance programs.

**2. Planning, Training, and Exercises:** Participating Jurisdictions, with SCDEM assistance, will develop and maintain emergency management plans; train staff necessary to implement those plan; and exercise those staff and plans accordingly. In order to achieve this, Participating Jurisdictions should:

**a.** Provide a point of contact to SCDEM.

**b.** Convene work groups and provide meeting space as necessary to facilitate the development of plans including the jurisdiction's comprehensive emergency management plan, hazard mitigation plan, functional emergency management plans, etc., as applicable.

c. Send a representative to participate in SCDEM's annual training and exercise planning workshop (TEPW) per Section 2 of Schedule A2.

**3. Warning, Notification, and Emergency Communications:** Utilize established protocols and guidance to warn, notify, and communicate before, during, and after disasters.

a. Identify pre-designated areas and messages that can be loaded into the AlertSense notification system.

b. Participate in monthly communications checks with SCDEM.

c. Identify incident management staff to receive access to, and training on, applicable incident management sites and software.

**4. Volunteer / Emergency Worker Management:** Work in collaboration with SCDEM to develop capabilities that augment local disaster response efforts; specifically, the Snohomish Emergency Response Volunteers (SERV), Community Emergency Response Team (CERT) and/or an emergency communications volunteer group, e.g. the Snohomish County Auxiliary Communications Service (ACS).

a. Identify potential volunteers for membership in SERV, CERT, and/or ACS.

b. When practicable, support volunteer activities in their region by providing meeting space.

c. When practicable, integrate volunteers into the jurisdiction's plans, training, and exercising.

d. If desiring to utilize volunteers for duties outside of the scope of their intended purpose and/or training, provide said additional training. Using these volunteers (as groups or individuals) for activities outside of the scope of their intended purpose and/or training places them outside of the scope of RCW 38.52.180 and WAC 118-04. These volunteers cannot be afforded protection under the Washington State Emergency Workers Program; therefore the requesting jurisdiction is required to provide coverage in accordance with L&I Industrial Insurance regulations.

**5. Outreach and Preparedness:** Work in conjunction with SCDEM to provide disaster-related preparedness and education in order to improve overall community resilience.

a. Meet semi-annually with SCDEM's leadership to discuss community-specific concerns and needs.

b. Assign a representative to attend the quarterly Advisory Board meeting.

- c. Submit requests for presentations at least 60 days prior to the date of the presentation.

**Schedule C**  
**SCC 2.36.130 Duties of the advisory board.**

- (1) The board shall serve in an advisory capacity and have the power to make recommendations to the county.
- (2) The board shall advise the director of emergency management in recommending to the executive, actions on the following:
  - (a) Emergency management plans;
  - (b) The department's budget;
  - (c) Rate schedules for emergency management service charges paid by contracting agencies;
  - (d) Grant applications and utilization of awarded grant funds; and
  - (e) Other matters as requested by the county executive or the director

**Schedule D  
Service Fees by Jurisdiction**

<b>2016 Service Fees</b>			
<b>Jurisdiction</b>	<b>April 1, 2015 Population Est.<sup>1</sup></b>	<b>2016 Per Capita Rate<sup>2</sup></b>	<b>2016 Fees<sup>3</sup></b>
Arlington	18,490	\$1.15	21,295
Brier	6,500	\$1.15	7,486
Darrington	1,350	\$1.15	1,555
Edmonds	40,490	\$1.15	46,633
Gold Bar	2,115	\$1.15	2,436
Granite Falls	3,390	\$1.15	3,904
Index	160	\$1.15	184
Lake Stevens	29,900	\$1.15	34,437
Lynnwood	36,420	\$1.15	41,946
Marysville	64,140	\$1.15	73,872
Mill Creek	19,760	\$1.15	22,758
Monroe	17,620	\$1.15	20,293
Mountlake Terrace	21,090	\$1.15	24,290
Mukilteo	20,900	\$1.15	24,071
Snohomish	9,385	\$1.15	10,809
Stanwood	6,585	\$1.15	7,584
Sultan	4,680	\$1.15	5,390
Woodway	1,335	\$1.15	1,538
Tulalip Tribes <sup>4</sup>	4,517	\$1.15	5,202
Stillaguamish Tribe <sup>5</sup>	280	\$1.15	322
<b>TOTALS</b>	<b>309,107</b>	<b>\$1.15</b>	<b>356,007</b>

<sup>1</sup>Source: State of Washington, Office of Financial Management, April 1, 2015 Estimates;  
<http://www.ofm.wa.gov/pop/april1/default.asp>

<sup>2</sup>The 2016 Per Capita Rate is the 2015 Per Capita Rate (\$1.1543) adjusted by the change in CPI-W from April 2014 to April 2015, -0.22%.

<sup>3</sup>The 2016 fees are based on the April 1, 2015 population estimate and the 2016 per capita rate (\$1.1517).

<sup>4</sup>The Tulalip Tribes population numbers will be obtained from the Tulalip Tribes Enrollment Department once every year.

<sup>5</sup>The Stillaguamish Tribe population numbers will be obtained from the Stillaguamish Tribe Enrollment Officer once every year.

**TENTATIVE Council Agenda  
Planning Schedule**

**OCTOBER**

Sun	Mon	Tue	Wed	Thu	Fri	Sat
				1	2	3
4	5	6 Council	7	8	9	10
11	12	13 Council	14	15	16	17
18	19	20	21	22	23	24
25	26	27 Council	28	29	30	31

**October 6:**

Street Tree Pilot Program  
RFP on East Gateway Consultant and selection  
Critical Area Regulations  
Vintage Development Agreement  
Surplus equipment in PD

**October 13:**

Community-Oriented Policing stats by Sergeants  
WRIA 8 ILA  
Park Mitigation Fees  
EDC presentation by Tom Rogers  
Community Transit Presentation

**October 27:**

Records Committee Presentation

**NOVEMBER**

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2	3 Council	4	5	6	7
8	9	10 Council	11	12	13	14
15	16	17	18	19	20	21
22	23	24 Council	25	26 Holiday	27 Holiday	28
29	30					

**November 10:**

Veteran recognition  
Everett School District stormwater contract