

April 3, 2017

**VIA EMAIL**

Matthew Miller  
Staff Representative  
Washington State AFSCME, Council 2  
P.O. Box 750  
3305 Oakes Avenue  
Everett, Washington 98206

*Re: Your Letter of March 23, 2017 Concerning City of Mill Creek's Request for Employee Search of Personal Electronic Devices*

Dear Mr. Miller:

I serve as the Mill Creek City Attorney and was asked to respond to your March 23<sup>rd</sup> letter to Peter Altman at the Summit Law Group.<sup>1</sup> Before going into some of the details, let me assure you that the City asked its employees only for what it is entitled to seek from them in accordance with state law and *Nissen v. Pierce County*, 183 Wash. 2d 863, 357 P.3d 45 (2015).

Because you may not have full information about this situation, here are the pertinent facts: Mill Creek received a Public Records Act, RCW Ch. 42.56 ("PRA"), disclosure request dated November 29, 2016 ("Disclosure Request") asking for the following information:

**All e-mails, texts and all other communication dealing with city employment, employment conditions and employment environment between the Personnel Committee, Mark Bond, Donna Michelsen, and Mike Todd, and City Staff since June 1, 2016.** This request includes the above information on both city and personnel [sic] cell phones and computers and any deleted information as-well-as and any information that may have been attempted to be deleted.

[T]his request also includes **all e-mails, texts, and all communication dealing with city employment, employment conditions and employment environment between city employees and Mary Kay Voss, Kathy Nielsen and Lynn Sordel since June 1, 2016.**

Mill Creek March 17, 2017 letter to staff and others (bold text in original).<sup>2</sup>

The information requested in the first paragraph seeks information concerning the conduct of government as exchanged by and between the named individuals (all City Councilmembers)

<sup>1</sup> Mr. Altman is counsel to the City for collective bargaining matters. Pursuant to the request in your letter, he forwarded your letter to City Manager Rebecca Polizzotto who in turn asked me to address your concerns.

<sup>2</sup> I trust you have a copy of this letter, but if not please let me know and I will send one to you.

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and any "City staff" person (if any were to have done so). The information in the second paragraph concerns the same topics and exchanges (if any) between two former Councilmembers and one private individual.

If any City employee or official possesses such communications (regardless of format, and so including texts and emails) on their personal electronic device, such communications could pertain to (i) City business and conduct, thus comprising a "public record" under the PRA; (ii) strictly personal and/or private matters that do not concern City business or conduct; or (iii) both types of information mixed in any particular communication. Under the requirements of the PRA, the *Nissen* case, and the City's personnel policies, City employees have the obligation to comply with the City's request for copies of information falling within categories (i) and (iii). The City expects that such obligation can be fulfilled without having to "turn over" any personal devices, so long as employees recognize their legal obligations, cooperate with the City in performing an adequate search of their device, describe and verify the search steps taken and results obtained, and provide copies to the City of all qualifying information they locate. This is spelled out in the City's March 17<sup>th</sup> letter as follows:

You are being contacted in your capacity as a City employee or elected official to ensure that the City meets its legal requirements to check all potential sources of the requested information identified in **bold text above** ("Qualifying Information") and respond to the requester appropriately. *Please advise the undersigned in writing within 10 days of this letter as to whether you have or may have any Qualifying Information, and whether it is or may be located on your work or personal computers, phones, cellphones, or in hard copy.*

*The undersigned will work with you to properly identify and obtain copies of all Qualifying Information. If you need help in determining the existence of any Qualifying Information that may be in your possession or on your devices, the City will assist you in reviewing your work or personal devices and files to ensure you make a complete response to this request. If you have Qualifying Information in your possession, you may not delete, destroy or move such information, but must maintain such information and report its existence to the undersigned as requested above. After working with City staff as outlined above, the City may require a written response from you concerning the results of your response to this request.*

*Id.* (emphasis added).

In short, City employees are simply being asked to search their City work related and personal devices for information that fits within the scope of the Disclosure Request, and if they have such records, to provide copies to the City, along with an affidavit attesting to their search efforts. **The City is not asking employees to hand over their personal devices to the City.** However, if they need help in accessing their City-provided or personal devices to locate the requested information, the City will provide such assistance to ensure that an accurate and reliable search has been conducted.

As you know, the foregoing process is precisely what the *Nissen* case required and contemplated. After recognizing the comprehensive nature of a "public record"<sup>3</sup> and noting that public agencies, like the City, "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,'"<sup>4</sup> the Court held 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)."<sup>5</sup> The Court also noted that many agencies "have begun adopting policies about private cell phone use and advising employees of the agencies' obligation to preserve all public records," which Mill Creek has included in its personnel policies. The Court further noted that "an individual has no constitutional privacy interest in a *public* record,"<sup>6</sup> and described how to distinguish between public and non-public records:

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. 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 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>

*Nissen* also described the requirements for an employee's search of their personal device, and subsequent report thereof to the City, as follows:

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.

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

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<sup>3</sup> *Nissen* at 874.

<sup>4</sup> *Nissen* at 876.

<sup>5</sup> *Nissen* at 877.

<sup>6</sup> *Nissen* at 883 (emphasis in original).

<sup>7</sup> *Nissen* at 878-79 (citations omitted; emphasis in original).

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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 search for and disclose public records without unnecessarily treading on the constitutional rights of its employees.<sup>8</sup>

We trust that AFSCME, like Mill Creek, will abide the Supreme Court's requirements specified in *Nissen*. If any employee or official needs assistance in adequately searching, reviewing, identifying and copying public records on their work or personal devices that fall within the scope of the PRA request identified above, the City will assist that individual to ensure their compliance with the applicable legal requirements. The City will also prepare an affidavit template that employees may use to verify the steps they have taken and results obtained. That said, we urge employees to consult with the City to make sure their actions meet the requirements of law and do not place them in the position of noncompliance.

Finally, all qualifying public records found by any employee or official pursuant to their search must be delivered to the City for review and determination of privileged or redactable status. Employees are not authorized to make such determinations, as noted in the *Nissen* text accompanying footnote 8.

Thank you for your assistance in this matter. The City looks forward to timely responses from all of its employees and officials. In the meantime, please let me know if you have any questions.

Sincerely,  
SHORT CRESSMAN & BURGESS PLLC



Scott M. Missall, City Attorney

SMM:

cc via email: Rebecca Polizzotto, City Manager  
Peggy Lauerman, Finance Director  
Peter Altman, Summit Law

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<sup>8</sup> *Nissen* at 886-87 (citation omitted).