DEVELOPMENT AND IMPLEMENTATION OF A COMPREHENSIVE EMAIL ORGANIZATION AND RETENTION SYSTEM FOR WASHINGTON STATE PATROL EMPLOYEES

GRETCHEN DOLAN

WASHINGTON STATE PATROL

A Staff Study Submitted to the

Northwestern University Center for Public Safety

School of Police Staff & Command

Class # 422

Burien, Washington

November 6, 2017

DEVELOPMENT AND IMPLEMENTATION OF A COMPREHENSIVE EMAIL ORGANIZATION AND RETENTION SYSTEM FOR WASHINGTON STATE PATROL EMPLOYEES

Problem:

The Washington State Patrol (WSP) is a nationally accredited law enforcement agency with more than 1,600 employees (Annex A). The WSP consists of eight regions (Field Operations Districts), the Commercial Vehicle Enforcement Bureau, the State Fire Marshal/Fire Protection Bureau, the State Toxicology Lab, the State Crime Lab, and various other specialized services (Annex B). The WSP has one Information Technology Division, (ITD) located near WSP headquarters in Tumwater, Washington.

The WSP currently does not have any central archiving system for emails sent or received by agency employees. The WSP also has limited server resources and has placed volume limits on employee's server mailboxes. To allow employees to conduct work via email, employees create Outlook Data Files (PST files) which append to their Outlook screens, but are stored entirely on their desktop or laptop computers, not the servers (Annex C). This process allows employees to use their email to conduct business, but limits email volume retained on WSP servers.

The WSP receives more than 13,000 public records requests each year (Annex D page 24). Many of these requests involve WSP email, which is defined in the Public Records Act (PRA) and case law interpreting the PRA as a public record (Annex E). Since agency emails are held both on the server and on individual computer hard drives, there can be no single source search for emails responsive to records requests. ITD employees can conduct server searches, but employees must also individually search their PST files and computers.

Because there is no standardized or universal folder storage system for emails, and retention varies by email topic, employees are confused about how long to keep emails. This results in many staff either holding emails eternally, or deleting everything. Neither is a lawful option. The WSP is currently working on a records request for all emails sent by or received by the WSP in July 2017. Research has determined that the server emails alone number over 1.7 million (Annex F).

In order to set and communicate clear retention requirements for emails and properly and lawfully organize and maintain these records, the WSP must develop and consistently use an agency wide email organization and retention system.

Assumptions

- The Washington State Patrol will not receive any additional funding.
- The Washington State Patrol will not be able to change existing public records laws.
- Records requests for email will continue to occur and increase in the Washington State Patrol.
- The Washington State Patrol Records Section will not receive any additional staffing.
- Police accountability, transparency, and integrity will continue to be priorities for the department and the citizens we serve.
- It is the responsibility of Washington State Patrol leadership to ensure employees are trained and equipped to properly manage email.

Facts

- Email is a public record subject to disclosure under the PRA (Annex G).
- The Washington State Patrol is staffed by more than 600 sworn and 1,000 civilian personnel (Annex A).
- In the month of July 2017, the WSP Server contained 1,756,035 emails (Annex F).
- In 2016, the WSP received more than 13,000 records Requests (Annex D).
- WSP policy requires employees to manage their email (Annex H).

Discussion

Background

The management of email has been a long standing issue in the Washington State Patrol (WSP), with more work done via email than ever before and the legal retention requirements, public disclosure requests, agency litigation, and significant liability these present to the agency.

There are many regulatory requirements pertaining to email management. These include both state and federal law. State law, for instance, requires that public agencies must retain their records for a specific amount of time, depending on the type of record (RCW 40.14.050).

With improper email retention and management, not only are records and history, being lost, but many government lawsuits now turn on what is buried in old e-mail messages. Government policy simply has not kept up with the evolving technology (Perlman, 2017).

Deleting emails too quickly may violate federal, state, local and/or industry regulations that require certain types of information to be retained for a minimum period of time. Holding emails "forever" increases the WSP's exposure to legal examination (InfoSec, 2014).

The newer version of Microsoft Exchange offers tools and new features to help manage email. As the agency re-implements the storage limits for employee email, we recognized the need to re address this issue. (Jarmon Interview, 2017)

Server storage is a problem as far as capturing and holding emails long term. Challenges include public record requests for large amounts of agency records and the lack of continuity in retention from employee to employee. Records holds for tort claims or agency litigation can also be difficult to properly and legally complete when there are no agency wide methods for retention and storage of emails. The risk is high of missing important documents because they are not properly kept or catalogued. Retention rules are based on record content, not medium (email vs. paper), making managing them difficult to understand for many employees.

In a one month period this year (July 2017) the WSP counted over 1,750,000 emails held on WSP servers. This figure does not include emails kept and held on personal folders (PST) files which are specifically linked to individual PCs rather than the server. It is anticipated that personal folders may account for another 1,000,000 emails (Harwell interview, 2017).

The WSP has received a records request for all July 2017 emails from a disgruntled citizen. Assuming we can provide 300-500 emails per month (fitting this task in with all other job assignments) and only taking into account the known number of emails from the server, it is anticipated that this request alone would take 292 years to complete. This time frame would not only exceed the life of the employee and requestor, but also their children's, children's lives.

It is well established that providing employees with work they can complete is a key element to employee satisfaction. Additionally, an employee who knows that their work is being required only to satisfy the whim of a disgruntled citizen intent on harassing an agency can make an employee feel diminished. This is in conflict with the agency value to make sure every employee knows they are a critical member of a team committed to earning the trust and confidence of the public. It is also incongruent with our mandate to be good stewards of public funds to expend so many resources to one individual with a grudge. But it is our legal obligation. Managing the volume of emails remains our best tool to combat this problem.
This issue concerns all WSP employees and our stakeholders. Taxpayers also share concern as public funds are sometimes being spent on personal vendettas. There are potential significant budgetary impacts if server space continues to be improperly managed and purchase of larger servers becomes necessary. This would also necessarily impact WSP legislative priorities.
It is entirely within our span of control to affect this issue. External stakeholders are impacted by improper collection and storage of emails but they have no interest in or involvement in any specific solution. There is general agreement that the issue is significant given the influx of records requests for emails, the continually increasing amount of work done via email, the high volume of emails generated daily, and the complicated nature of email retention.

Comparative Analysis

The need to address email retention pertains to all public agencies and law enforcement agencies in the country. Some other state agencies (Attorney General's Office) and larger local police departments (Seattle Police Department) have created universal email folders identifying specific emails by retention period and implementing automatic deletion periods (Camus interview, 2017). Still others have purchased outside vendor services to manage electronic records according to a survey of SPSC #422 students. (Survey, 2017). Of the 30 students in class 422, I preempted responses from the 16 WSP employees. I received 6 responses. The results of the survey indicated that 100% of the respondents liked the method their department employed to archive emails. 50% of the departments made their employees at least partially responsible for proper retention of their own emails. The majority of the

respondents (66%) used a combination of Outlook and an external vendor (Barracuda) to manage their email.

Records Retention and Court System

Unmanaged email can trigger financial, productivity, and legal nightmares should the organization one day find itself embroiled in a workplace lawsuit. The cost and time required producing subpoenaed email, retaining legal counsel, securing expert witnesses, mounting a legal battle, and cover jury awards and settlements could put you out of business. Best practices call for a proactive approach to email management and combine written content, usage, and retention policies (Symantec 2011).

In addition, the courts appreciate consistency. If an agency can demonstrate that they have consistently applied clear email usage, content, and retention policies—and have supported written email policy, then the court is more likely to look favorably upon the organization should we one day find ourselves embroiled in a workplace lawsuit (Symantec 2011).

It has already been determined how long records (based on content) must be kept.

WSP Records Retention Schedule

The WSP records retention schedule was approved by the State Records Committee in accordance with RCW 40.14.050. Public records covered by the records series within this records retention schedule (regardless of format) must be retained for the minimum retention period as specified in this schedule (SGGRRS 2016). If a retention period is not known for a particular type of data, seven years (the minimum IRS recommendation) is often used as a safe common denominator.

Email is a vital part of agency work and this is not likely to change. Most communication is conducted via email as is a wide variety of other agency business. Addressing the complex issue of email retention will result in employees being able to discontinue stockpiling email to avoid improper deletion or deleting everything and losing key records. Both could severely impact agency liability. Email management will also decrease agency liability for public records requests by making searches less cumbersome and creating smaller and more concise volumes of responsive records. A comprehensive email organization system would also reduce the tremendous number of emails stored on the server.

The WSP has tools already at our disposal to design a manageable email archiving system (Harwell interview, 2017).

Possible Solutions

WSP has three options to consider regarding the proper and lawful organization, maintenance, and retention of email which are outlined below:

Option I

Continue to have each employee be responsible for their own archiving and retention of email.

Pros:

- Employees will not have to learn a new method for email archiving and discovery.
- Employees would be saved the time of learning a new system.
- No new policies would be required

Cons:

- When WSP becomes litigants in court we have to produce any electronic information considered relevant to the case. If we can't easily retrieve e-mails because we haven't established an efficient way to store and recover them, it will require a lot in staff time to retrieve and review a large volume.
- If we can't easily retrieve emails because we haven't established an efficient way to store and recover them, it will also be costly to retrieve and review a large volume.
- If employees have deleted crucial e-mails that are public record, that risks an unfavorable case outcome. (Perlman, 2008).

Costs:

- This approach would increase storage cost.
- And very often, the required email lies hidden among the millions of junk, spam, and irrelevant emails, making retention an arduous, stressful, and productivity busting activity (Nayab, 2011).

Option II

Create universal email folders for all employees with built-in retention.

Pros:

- It would pay to segment different types or uses of email into different retention periods to avoid subjecting the entire online email store to the maximum email retention period.
- Because email retention depends on content, it would be a simple matter to create some universal folders for each Outlook account based on common WSP uses for email.
- ITD indicates they can include automatic deletion when retention rules are met by email folder type.
- Segmentation by type of content would look something like this for example:
    - Financial – 7 years
    - General Correspondence – 1 year
    - Equipment – 6 years
    - Spam – not retained
    - Executive email – 2 years
    - Spam – not retained
    - Everything else (e.g., "default retention policy") – 1 year

Cons:

- An archiving system will require additional work for those employees who currently ignore retention, delete everything, or save everything. But once employees fully integrate email storage into their daily work flow, it will take next to no additional time.
- Policies will need to be reviewed and or created.

Costs:

- This option can be accomplished with currently available resources. As noted above, there will be an initial cost in employee time to become familiar with the new folder structures.

Option III

Purchase a system from an outside vendor such as Barracuda to manage WSP email storage.

Pros:

- This approach would remove additional workload for WSP staff to program the above folder structure.
- It would remove the archiving function from WSP employees to an outside vendor, saving WSP time.
- Several other local law enforcement agencies use these systems and report that they are very satisfied.

Cons:

- This would require a budgetary impact for WSP that we do not currently have funding for.
- It also would provide an outside vendor with access to potentially significant confidential information.

Costs:

- A system such as Barracuda would cost the WSP upwards of $225,000, with additional yearly costs (Annex I).

Conclusion

The Washington State Patrol (WSP) currently has no organized email management system. With ever increasing volumes of work being done via email, it is critical that the agency find a method of email management that will help us to comply with regulations and state and federal retention laws, while meeting our mission and providing the best resources to our employees. Option I, remain status quo is not the best option because the problem of improper email retention will persist and the agency will remain out of compliance with legal requirements. Option II, which is recommended, is implementing a comprehensive internal email folder system that will assist each WSP employee in proper email management. This option does not have a budgetary impact and after initial time invested in set up and training, this option will ultimately reduce staff time to retrieve archived records from email. Option III,

purchase an available system for email archiving and retrieval from an outside vendor is not a good option at this time as it would impact our operating budget and that money is currently unavailable.

Recommendation

The implementation of an in-house email folder structure with automatic retention/destruction built in for all employees will offer a more convenient way for employees to manage email, while also streamlining agency retention compliance with the least budgetary impact. It is recommended that the Department implement Option II, a comprehensive email management strategy to include Executive level support, updated policies on email management, and technology based solutions of universal email folders and automated retention/destruction to help enforce laws, rules, and regulations. A proposed implementation schedule is outlined in Annex J.

( ) Approved ( ) Denied;

Comments_____

_____ _____

Chief John R. Batiste Date

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Annex Table of Contents

Annex A

About Us · Agency Overview

The Washington State Patrol makes a difference every day,
enhancing the safety and security of our state by
providing the best in public safety services.

Welcome to the Web site of the Washington State Patrol (WSP), one of the premier law enforcement organizations in the nation. Our Web site will provide you with an opportunity to learn more about us and the many services we provide.

The WSP is a professional law enforcement agency made up of dedicated professionals who work hard to improve the quality of life of our citizens and prevent the unnecessary loss of life on a daily basis. We will continue to work aggressively to enforce laws around the state while protecting the people of Washington from injury and grief.

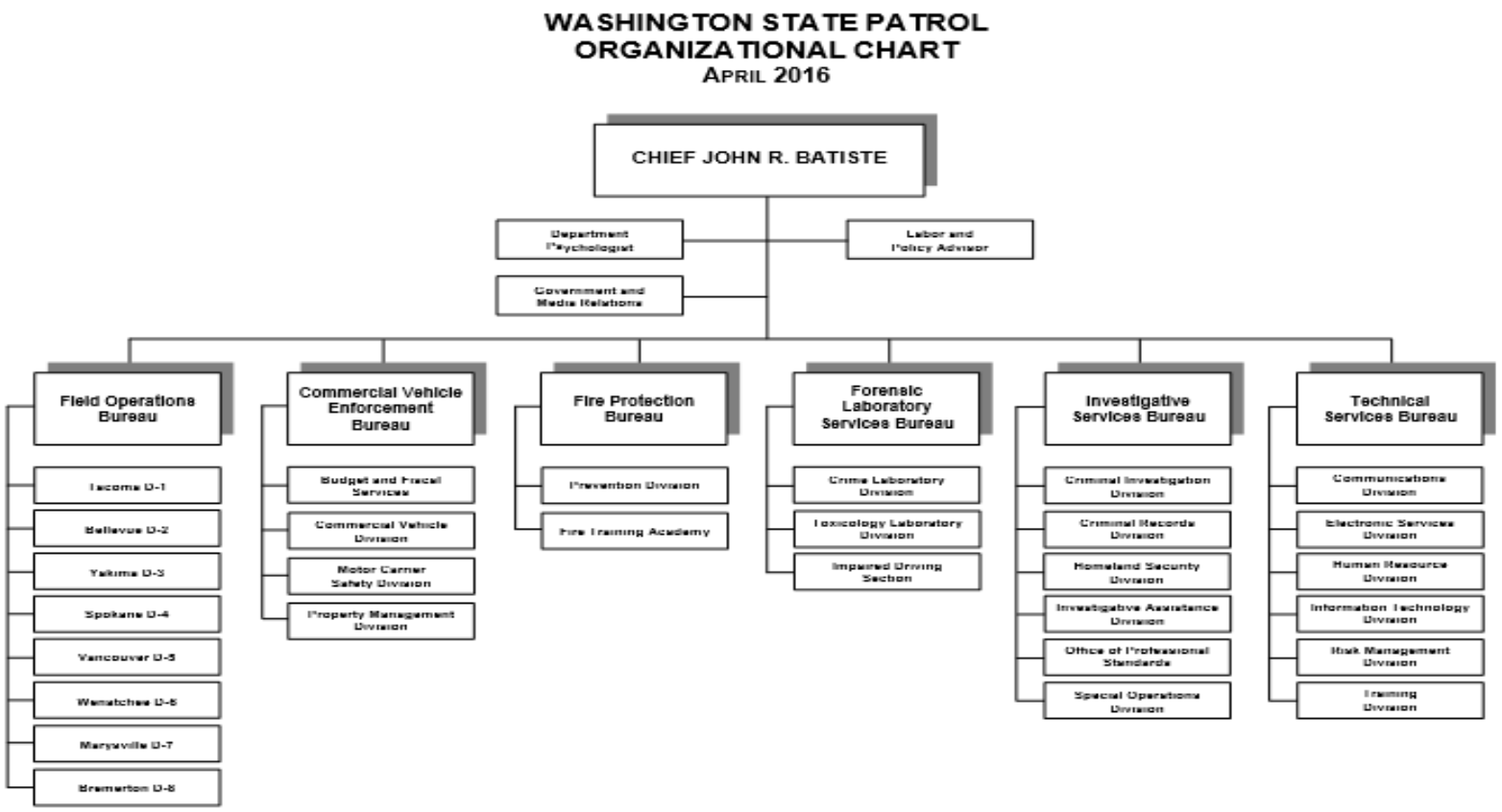
The 600 or so troopers patrolling the highways every day are the most visible part of this agency, but there are also over 1,000 civilian employees who are less visible and just as important. They include those who work for the State Fire Marshal to help prevent fires in your home or workplace; those who work as technicians and scientists in our crime labs processing DNA samples to help prosecute criminal cases; and they include investigative support staff who maintain our criminal records and databases so that sex offenders don't end up working with children.

Keeping our state safe is a huge job, even with our commissioned and civilian staff. That is why we routinely partner with other law enforcement, traffic safety, and criminal justice agencies to provide the highest quality of service to the citizens of this state.

The Internet gives us a unique opportunity to share information and ideas directly with those we serve, so I thank you and I hope you enjoy the time you spend visiting our Web site. If you have questions, be sure to let us know at questions@wsp.wa.gov.

Chief John R. Batiste

Annex B


WASHINGTON STATE PATROL
ORGANIZATIONAL CHART
APRIL 2016
CHIEF JOHN R. BATISTE
Department Psychologist
Labor and Policy Advisor
Government and Media Relations
Field Operations Bureau
Tacoma D-1
Bellevue D-2
Yakima D-3
Spokane D-4
Vancouver D-5
Wenatchee D-6
Marysville D-7
Bremerton D-8
Commercial Vehicle Enforcement Bureau
Budget and Fiscal Services
Commercial Vehicle Division
Motor Carrier Safety Division
Property Management Division
Fire Protection Bureau
Prevention Division
Fire Training Academy
Forensic Laboratory Services Bureau
Crime Laboratory Division
Toxicology Laboratory Division
Impaired Driving Section
Investigative Services Bureau
Criminal Investigation Division
Criminal Records Division
Homeland Security Division
Investigative Assistance Division
Office of Professional Standards
Special Operations Division
Technical Services Bureau
Communications Division
Electronic Services Division
Human Resource Division
Information Technology Division
Risk Management Division
Training Division

Annex C

Introduction to Outlook Data Files

Applies To: Outlook 2016 Outlook 2013

When you use Outlook 2013 or Outlook 2016, your email messages, calendar, tasks, and other items are saved on a mail server, on your computer, or both. Outlook items that are saved on your computer, are kept in Outlook Data Files (.pst and .ost).

Outlook Data File (.pst)

An Outlook Data File (.pst) contains your messages and other Outlook items and is saved on your computer. The most common type of email account — a POP3 account — uses Outlook Data Files (.pst). Your email messages for a POP3 account are downloaded from your mail server and then saved on your computer.

Outlook Data Files (.pst) can also be used for archiving items from any email account type.

Because these files are saved on your computer, they aren't subject to mailbox size limits on a mail server. By moving items to an Outlook Data File (.pst) on your computer, you can free up storage space in the mailbox on your mail server.

When messages or other Outlook items are saved in an Outlook Data File (.pst), the items are available only on the computer where the file is saved.

https://support.office.com/en-us/article/Introduction-to-Outlook-Data-Files-pst-and-ost-222eaf92-a995-45d9-bde2-f331f60e2790

Annex D

Washington State Patrol

2015 Annual Report

Table of Contents

Message from Chief John R. Batiste

Thank you for taking time to learn more about the Washington State Patrol (WSP) through our 2015 Annual Report. What you will learn through these pages is that the WSP is a fantastic organization full of men and women who are committed to excellence and have a passion for serving their community. Every day I feel proud to be a member of this great organization.

This year has been a challenging one for the WSP. The years of economic decline have caused Trooper salaries to lag behind many of their law enforcement counterparts. In 2015, 106 commissioned personnel left the agency and by December, we had 160 commissioned personnel vacancies, which is a vacancy rate of 14%. We are losing about nine troopers a month to either retirements or troopers seeking other employment opportunities outside the agency. These vacancy levels have impacted the way we do business.

Our data reflects this downward trend. In 2015, we have seen our Driving Under the Influence (DUI) injury collisions increase by 21%. Also, our DUI arrests have decreased by 10% since 2014. In addition, the length and complexity of the process for each arrest has increased. More DUI arrests involve obtaining and executing a search warrant for blood evidence. The bottom line is less impaired drivers are being taken off the roadways due to vacancies.

Hope is on the horizon. In 2016, State Legislators will take up the issue of more competitive compensation for our hardworking Troopers.

Our current Field Operations Bureau (FOB) Troopers are working diligently to protect the roadways with the resources available to them. During 2015, Troopers made 1,063,845 contacts with individuals in Washington State and responded to 202,594 calls for service. We are continuing to march forward in our efforts to reach zero fatal crashes by 2030 as part of our Target Zero program. In 2015, the five Target Zero Team (TZT) teams removed 2,469 impaired drivers from our roadways. They also made 26,744 violator contacts.

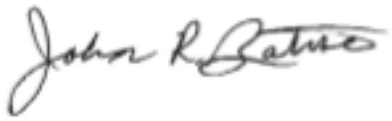
More great work is being done by our agency. Our Missing and Exploited Children Task Force (MECTF) worked to protect our most vulnerable population, children. In 2015, detectives executed several successful operations that identified, arrested and convicted individuals who exploit children. Last year, MECTF received 80 new cases and completed 50 case investigations resulting in 59 arrests. Nineteen suspects were arrested in our first two "Net-Nanny" Operations of 2015 and several children were removed from the influence of these suspects.

Children were once again the focus of our Commercial Vehicle Enforcement Bureau. Every year, more than 402,000 students are transported on school buses every day. To protect the children, WSP employees inspected 100% of school buses throughout the state. In the summer of 2015, The Motor Carrier Safety Division (MCSD) inspected 9,817 public school buses with an out of service rate of 2.98% compared to 3.7% in 2014.

2015 was the most devastating fire season on record. The WSP Fire Mobilization Program provides additional fire resources when local and regional mutual aid has been exhausted. Use of the Fire Mobilization Plan was authorized a record 30 times in 2015, for fires in 15 different counties; a total of 867,429 acres burned. The largest fire was in Okanogan County, known as the North Star fire, which consumed 218,138 acres. These fires were also costly. The final cost for Fire Mobilization to support the overall fire suppression effort was a record $35 million dollars, three times the 2014 costs.

As you review this report, I'm sure you'll find much more information that you will find both interesting and valuable. Please know that the men and women of the Washington State Patrol stand ready to deliver Service with Humility 24 hours a day, seven days a week. I'm incredibly grateful for their service.

Sincerely,

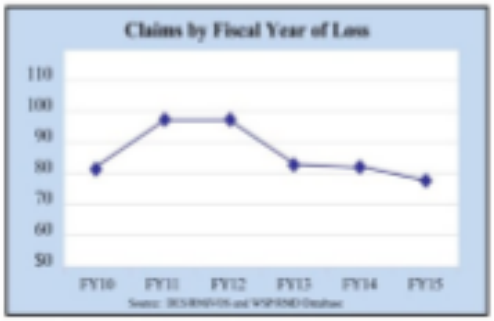


Chief John R. Batiste Washington State Patrol

Service With Humility

Risk Management Division

Incurred Self Insured Liability Account expenses in FY15 included a significant settlement shared with the Washington State Department of Transportation. Removing this one incident puts our liability payout on par with the prior year. Claims filed continued their downward trend.



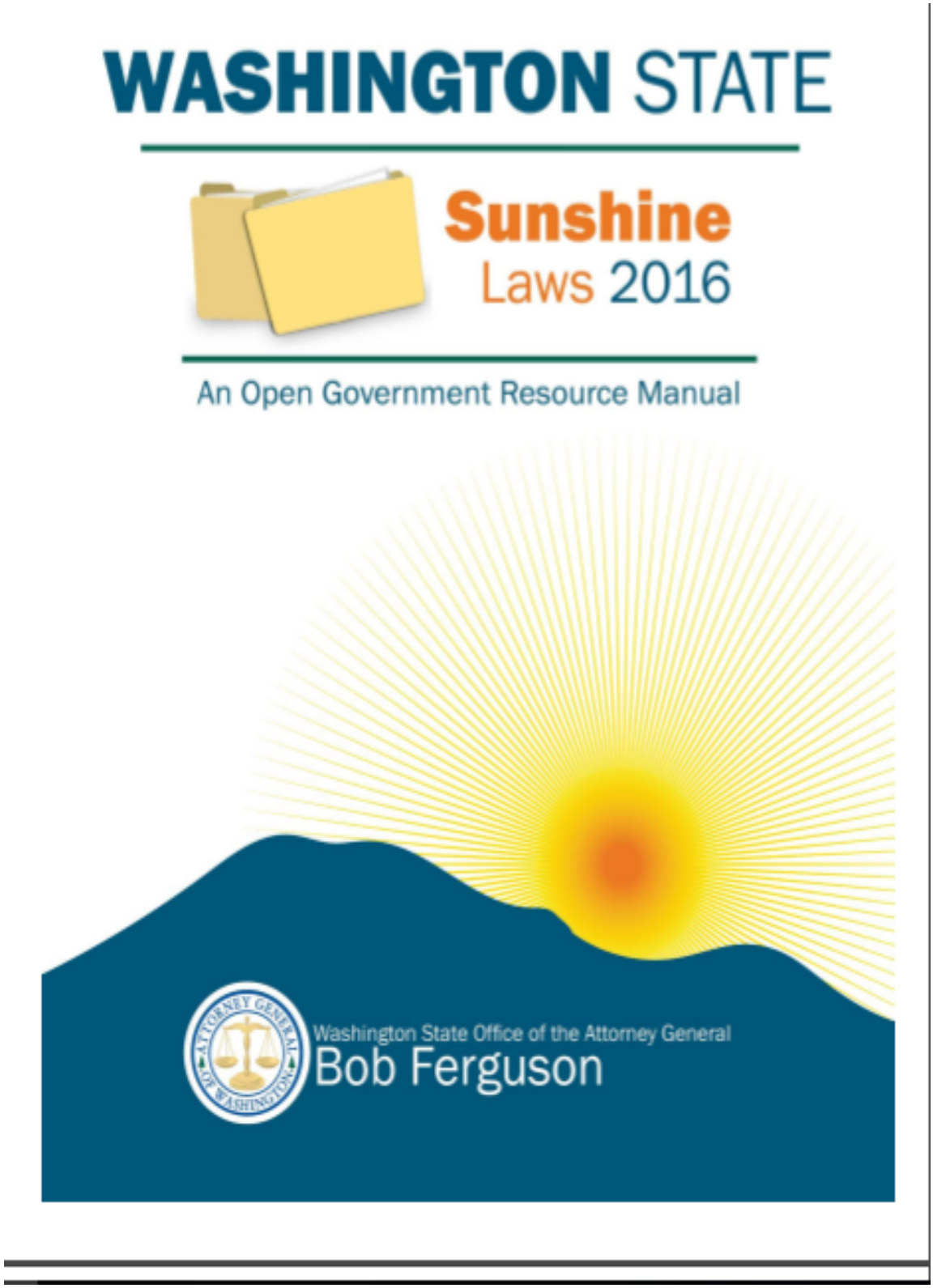
The Audit Section conducted 34 evidence and 7 financial audits and inspections mandated by the Commission on Accreditation for Law Enforcement Agencies (CALEA).

Additionally, it created new procedures to handle firearms return notifications to family members under the Sheena Henderson Act which was passed into law in July. The number of audit exceptions remained unchanged although audit findings decreased from four to three.

The Strategic Planning and Accountability Section successfully facilitated the agency's ninth re-accreditation with CALEA. To complement its compliance with CALEA's body of internationally accepted standards and to enhance organizational performance, the agency is also innovatively
applying Lean principles and concepts to daily work to bring better value to our citizens.

The Public Disclosure Section coordinates public records requests, subpoenas for records, and discovery demands for the agency. The WSP processed more than 13,000 records requests and released more than 1.78 million documents in 2015, with an average cycle time of 9.37 days. It is anticipated that total records released in 2016 will continue the established, annual trend of increasing significantly.

Annex E


WASHINGTON STATE
Sunshine
Laws 2016
An Open Government Resource Manual
Washington State Office of the Attorney General
Bob Ferguson

A Message from Attorney General Bob Ferguson

Welcome to the Washington State Attorney General's Office 2016 Open Government Resource Manual.

This manual provides you information about our state's Sunshine Laws. I am committed to enhancing transparency in government. Open government is vital to a free and informed society, and this updated guide will help both public officials and the people they serve understand our state's open government laws.

This 2016 edition modernizes the prior manual interpreting those laws. The manual includes summaries of and links to relevant statutes, court decisions, formal Attorney General Opinions, and Public Records Act Model Rules.

My office produced this manual with the assistance of attorneys representing media and requesters, and local and state government organizations. If you have questions or comments about the contents of this manual, please contact Nancy Krier, the Assistant Attorney General for Open Government at nancyk1@atg.wa.gov.

My office is a resource for you regarding the state's Public Records Act and the Open Public Meetings Act. Please explore our website for training and other open government information at http://www.atg.wa.gov/open-government.

Thank you for your interest in open, transparent government.

Bob Ferguson
Washington State Attorney General

Open Government Resource Manual

Last revised: October 31, 2016

The Attorney General's Open Government Resource Manual describes Washington's open government laws as of the last update in 2016. The manual was previously updated in 2015. Readers should be aware that court decisions issued or statutes enacted after the last revised date of the manual or a particular chapter may impact the law as summarized here.

The manual has a table of contents, introduction, and three chapters:

The manual provides links to cited statutes, cases, Attorney General's Opinions and rules. More information on open government is available at the Attorney General's Office Open Government Web page, the Washington Coalition for Open Government, the Municipal Research and Services Center, and other sources.

The current manual was written and edited by:

Nancy Krier, Assistant Attorney General for Open Government (Ombuds).

Flannary Collins and **Bob Meinig (ret.)**, Legal Consultants with the Municipal Research and Services Center, which provides legal consultation and other services to Washington local governments.

Kristal Wiitala, Information Governance Manager for the Department of Revenue. Ms. Wiitala was previously the Public Records Officer for the Department of Social and Health Services.

Katherine George, Attorney at the Harrison-Benis law firm. Ms. George is a former reporter who works with and represents requesters and others on open government cases and issues.

If you have any questions or comments about the content of this manual, please contact the Attorney General's Office Assistant Attorney General for Open Government.

Chapter 1
PUBLIC RECORDS ACT – GENERAL AND PROCEDURAL PROVISIONS

Chapter last revised: October 28, 2016

1.1 The Public Records Act (PRA) is Interpreted in Favor of Disclosure

The PRA was enacted by initiative to provide the people with broad rights of access to public records. The PRA declares that it must be "liberally construed" to promote the public policy of open government:

> **The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed to promote this public policy and to assure that the public interest will be fully protected. In the event of a conflict between [the PRA] and any other act, the provisions of [the PRA] shall govern. RCW 42.56.030.**
>
> **Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. RCW 42.56.550(3).**

Courts interpret the PRA liberally to promote the purpose of informing people about governmental decisions and promote government accountability. WAC 44-14-01003 (summarizing how PRA is interpreted by courts).

1.2 "Public Record" Is Defined Broadly

The definition of a public record (other than a record of the Legislature) contains three elements. RCW 42.56.010(3) and (4); WAC 44-14-03001. First, the record must be a "writing," which is broadly defined in RCW 42.56.010(4) to include any recording of any communication, image or sound. A writing includes not only conventional documents, but also videos, photos, and electronic records including emails and computer data.

Second, the writing must relate to the conduct of government or the performance of any governmental or proprietary function. Virtually every document a government agency has relates in some way to the conduct of government business or functions. "Proprietary" refers to where an agency function is similar to a private business function or venture.

Third, the writing must be prepared, owned, used or retained by the agency. *West v. Thurston County*. (2012); *Nissen v. Pierce County* (2015). A writing may include data compiled for the issuance of a report (as well as the report itself), even though the agency had not intended to make the

underlying data public. Yacobellis v. City of Bellingham (1989); see also O'Neill v. City of Shoreline (2010) (agency must produce non-exempt metadata when it is requested). An agency need not possess a record for it to be a "public record." Concerned Ratepayers v. Pub. Util. Dist. No. 1 (1999) (records held by out-of-state private vendor were "public records" because they were "used" by agency); see also Forbes v. City of Gold Bar (2012); O'Neill v. City of Shoreline (2010) (agency records on city officials' personal computers subject to PRA); Nissen v. Pierce County (2015) (agency records on personal cell phones). Although this element is broad, it is not limitless. *Compare* 1983 Att'y Gen. Op. No. 9 (list of customers of public utility district is a public record) *with* 1989 Att'y Gen. Op. No. 11 (registry of municipal bondholders is not public record because it was compiled by trust company and never prepared, possessed or used by county).

The PRA applies only to "public records." Oliver v. Harborview Med. Ctr. (1980); Nissen v. Pierce County (2015). The definition of "public record" is to be liberally construed to promote full access to public records. *Id.*

Case Example: *A public agency hires a consultant to help resolve a specific problem. The consultant prepares a report and transmits the report to the agency. After reviewing the report and before receiving a public records request for the report, the agency returns all copies to the consultant. Is the report a public record?*

Resolution: *Yes, because the agency "used" the report. A record outside the possession of the agency can be a "public record." The agency should require the consultant to return the report to the agency for public records processing (reviewing for exempt information, redacting, copying, etc.).* See Concerned Ratepayers v. PUD No. 1. (1999).

1.3 The PRA Applies to State and Local Agencies

As noted above, only the records of an "agency" are covered by the PRA. The PRA's definition of "agency" is broad and covers all state agencies and all local agencies. RCW 42.56.010(1); WAC 44-14-01001. Courts have interpreted that definition to include a city's design and development department (Overlake Fund v. City of Bellevue (1991)); a county prosecutor's office (Dawson v. Daly (1993)); a city's parks department (Yacobellis v. City of Bellingham (1989)); and a public hospital district (Cornu-Labat v. Hospital Dist. No. 2 of Grant County (2013)). Some non-government agencies (such as an association of counties) that perform governmental or quasi-governmental functions can be considered the functional equivalent of an "agency" if they meet certain criteria. 2002 Att'y Gen. Op. No. 2; Telford v. Thurston County Board of Commissioners (1999); Clarke v. Tri-Cities Animal Care Control Shelter (1999). If the non-governmental entity does not satisfy the criteria demonstrating it is the functional equivalent of a public agency, the entity is not subject to the PRA. Woodland Park Zoo v. Fortgang (2016). Under the exceptional circumstances of one case, certain records of a contractor acting as the functional equivalent of a public employee were subject to a PRA request. Cedar Grove Composting Incorporated v. City of Marysville (2015). Whether a group of public agencies operating together by agreement can be sued as separate legal entity under the PRA can be a mixed question of law and fact. Worthington v. WestNet (2014).

Annex F

From: Harwell, Bill (WSP)
Sent: Wednesday, August 02, 2017 9:56 AM
To: Dolan, Gretchen (WSP)
Cc: Jarmon, Scott (WSP); Sorenson, Don (WSP); Brunke, Volker (WSP); Amendala, Andy (WSP)
Subject: FW: Assignment Notification: Ticket# 00128753 has been assigned.

Initial Estimate

Size:..... 254.34 GB

Items: 1,756,035

Bill Harwell

Exchange Administrator

Washington State Patrol

360-596-4936 Office

12-13936 Micro

From: itdhelp@wsp.wa.gov [mailto:itdhelp@wsp.wa.gov]
Sent: Wednesday, August 02, 2017 7:38 AM
To: Harwell, Bill (WSP)
Cc: U-D-HEAT Integrated Systems Server Support
Subject: Assignment Notification: Ticket# 00128753 has been assigned.

You have an assignment. Please do not reply to this message.

==========

Ticket #: 00128753

Customer: Gretchen Dolan

Email Contact: Gretchen.Dolan@wsp.wa.gov

Phone Number: 360-596-4137

Department: TSB - Risk Management Division - Public Disclosure

Original Work Order Description:

Good Morning Bill – we have received another huge request regarding email. The requestor (who was rejected as a trooper applicant) wants "every single email sent or received by any employee of the Washington State Patrol in the month of July 2017". I have told him I will respond to him with a down payment estimate within the required 5 business days (this came in late yesterday). So my question for you is – do you have any simple way to give me an estimate of the volume of emails for a given time frame? If possible, it would help me to know the approximate size and number of emails. This does not have to be exact, just a reasonable estimate.

Thank you,

ITD Customer Services

360.705.5999

Annex G

ARTHUR WEST, *Respondent*, v. STEVE VERMILLION ET AL., *Appellants*.

No. 48601-6-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

196 Wn. App. 627; 384 P.3d 634; 2016 Wash. App. LEXIS 2701

May 17, 2016, Oral Argument
November 8, 2016, Filed

SUBSEQUENT HISTORY: Review denied by **West v. Vermillion,** 187 Wn.2d 1024, 390 P.3d 339, 2017 Wash. LEXIS 235 (Mar. 8, 2017)
US Supreme Court certiorari denied by Vermillion v. W., 2017 U.S. LEXIS 5856 (U.S., Oct. 2, 2017)

PRIOR-HISTORY: Appeal from Pierce County Superior Court. Docket No: 14-2-05483-7. Judge signing: Honorable Stanley J Rumbaugh. Judgment or order under review. Date filed: 09/19/2014.
West v. Vermillion, 2016 Wash. LEXIS 1 (Wash., Jan. 6, 2016)

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: A citizen sought to enforce a request under the Public Records Act for the production of city related "communications received or posted" through a personal website and associated e-mail account run by a city council member. The city council member refused to produce the records on the grounds of constitutional privacy rights.

Superior Court: The Superior Court for Pierce County, No. 14-2-05483-7, Stanley J. Rumbaugh, J., on September 19, 2014, entered a partial summary judgment in favor of the plaintiff and certified the case for immediate review.

Court of Appeals: Holding that the superior court could require the city council member to provide the city with the e-mails in his personal e-mail account that met the statutory definition of "public record" and to submit an affidavit attesting to the adequacy of his search for the requested records, that the city council member could not avoid production of the e-mails in his personal e-mail account that met the

statutory definition of "public record" because the First and Fourth Amendments to the United States Constitution and Wash. Const. art. I, § 7 did not afford the city council member an individual privacy interest in such records, and that the city council member could be required to produce the e-mails because the Public Records Act applies to local elected legislative officials, the court *generally affirms* the judgment but *remands* the case for the superior court to amend its order to conform to the language and procedure set forth in *Nissen v. Pierce County*, 183 Wn.2d 863 (2015).

COUNSEL: *Arthur West*, pro se.

Kathleen J. Haggard (of *Porter Foster Rorick LLP*); Joseph N. Beck, *City Attorney for the City of Puyallup*, and Ramsey E. Ramerman, *Assistant City Attorney for the City of Everett*, for appellants.

Judith A. Endejan on behalf of Washington Coalition for Open Government, amicus curiae.

JUDGES: Authored by Linda Cj Lee. Concurring: Jill M Johanson, Lisa Sutton.

OPINION BY: Linda Cj Lee

OPINION

¶1 LEE, J. — Arthur West submitted a public records request under the Public Records Act[1] (PRA) to the city of Puyallup (City) for the "communications received or posted" through a personal website and associated e-mail account run by city council member Steve Vermillion. Clerk's Papers (CP) at 41. Vermillion refused to provide records that were in his home, on his personal computer, or in the e-mail account associated with his website, citing privacy provisions of the Washington and United States Constitutions. The City supported Vermillion's position. West sued. The superior court granted West's motion for summary judgment requiring Vermillion to search for and produce the requested records. Vermillion and the City appeal, arguing that the superior court erred because article I, section 7 of the Washington Constitution and the First and Fourth Amendments to the United States Constitution protect the requested documents.

FOOTNOTES

1 Ch. 42.56 RCW.

¶2 We hold that it was proper for the superior court to require Vermillion to produce to the City e-mails in his personal e-mail account that met the definition of a public record under RCW 42.56.010(3) and to submit an affidavit in good faith attesting to the adequacy of his search for the

requested records. We further hold that the First and Fourth Amendments to the United States Constitution and article I, section 7 of the Washington Constitution do not afford an individual privacy interest in public records contained in Vermillion's personal e-mail account. Therefore, we affirm, but we remand for the superior court to amend its order in light of *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

FACTS

¶3 In 2009, Vermillion created a website and an e-mail account associated with the website to aid in his state congressional campaign. Vermillion continued to use the website and e-mail after the campaign ended for various civic groups with which he was involved.

¶4 In 2011, Vermillion began using the website and e-mail to campaign for a position on the Puyallup City Council. Vermillion was elected to the Puyallup City Council effective January 1, 2012. After being elected, Vermillion occasionally received e-mails from constituents, as well as people from the City, through his website and personal e-mail account. Vermillion also used his website and e-mail to coordinate with other city council candidates.

¶5 When Vermillion received an e-mail that required an official response or action, he would forward the e-mail to the appropriate person at the City and then delete it from his e-mail. Vermillion said he used his City e-mail account when conducting City business, and he considered his website and the associated e-mail account to be "personal papers." CP at 70.

¶6 West submitted a public records request to the City for the communications received or posted through city council member Steve Vermillion's website that "concern[ed] the City of Puyallup, City business, or any matters related to City governance[,] the City Council and mayor, or his membership on the City Council." CP at 40. Vermillion refused to provide records that were at his home, on his personal computer, or in his non-City e-mail account. The City informed West that the records he sought were not within the City's possession or control. West filed a public records request action against the City and Vermillion.

¶7 West, the City, and Vermillion filed cross-motions for summary judgment. The superior court denied the City's motion, but granted West's motion in part, ruling that (1) the Fourth Amendment's protections against search and seizure were not implicated because Vermillion had no reasonable expectation of privacy in communications "related to the public's business"; (2) the privacy protections under article I, section 7 did not apply because West was not seeking private information; (3) the First Amendment was not implicated because West was not asking for political activity records; (4) Vermillion was not subject to the City's policy prohibiting City employees and volunteers from performing city business on personal or third-party "technology resource[s]," which include electronic or digital communications and commingling of City and non-City data files; and (5) the public has a right to inspect public records located on a personal computer unless the records are "highly offensive to a reasonable person and are not of legitimate public concern." CP at 183-85. The

superior court then ordered Vermillion "under penalty of perjury [to] produce records that are within the scope of [p]laintiff's records request." CP at 185. The superior court also granted a CR 54(b) certification.

¶8 Vermillion and the City appealed directly to the Washington Supreme Court. The Supreme Court transferred the appeal to this court for review.

ANALYSIS

¶9 Our Supreme Court's decision in *Nissen*, 183 Wn.2d 863, controls. Accordingly, we conclude that the arguments raised by Vermillion and the City fail, but we remand for the superior court to amend its order to conform to the language and procedure set forth in *Nissen*.

A. STANDARD OF REVIEW

¶10 We review PRA requests and summary judgment orders de novo. RCW 42.56.550(3); *Nissen*, 183 Wn.2d at 872; *West v. Thurston County*, 169 Wn. App. 862, 865, 282 P.3d 1150 (2012). We also review "the application of a claimed statutory exemption without regard to any exercise of discretion by the agency." *Newman v. King County*, 133 Wn.2d 565, 571, 947 P.2d 712 (1997).

¶11 The PRA "'is a strongly worded mandate for broad disclosure of public records.'" *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (plurality opinion) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). We are required to construe the PRA's disclosure provisions liberally and its exemptions narrowly. *Progressive Animal Welfare*, 125 Wn.2d at 251.

¶12 "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550(1). Unless the requested record falls within a specific exemption of the PRA, or other statute that exempts or prohibits disclosure of specific information or records, the agency must produce the record. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 730, 174 P.3d 60 (2007) (plurality opinion); RCW 42.56.070(1).

B. *NISSEN V. PIERCE COUNTY*

¶13 Subsequent to West's request, the superior court's decision, and the parties' submission of appellate briefs, our Supreme Court decided *Nissen*, 183 Wn.2d 863. The parties then filed supplemental briefing addressing *Nissen*. The *Nissen* opinion is dispositive of the issues raised on appeal in this case.

¶14 In *Nissen*, the court considered whether an elected county prosecutor's text messages on work-related matters sent and received from a private cell phone may be public records. 183 Wn.2d at

873. The records request asked for production of "'any and all of [elected county prosecutor's] cellular telephone records for [private telephone number] or any other cellular telephone he uses to conduct his business including text messages from August 2, 2011,'" and for "'[elected county prosecutor's] cellular telephone records for [private telephone number] for June 7, 2010.'" *Nissen*, 183 Wn.2d at 869-70. *Nissen* first considered whether records of government business conducted on a private phone were "public record[s]" as defined in the PRA; then whether the specific records requested were "public record[s]"; and finally, how "public records" in the exclusive control of public employees could be sought and obtained. 183 Wn.2d at 873.

¶15 First, *Nissen* 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)."[2] 183 Wn.2d at 877. In reaching this conclusion, the court noted that a public record is "'prepared, owned, used, or retained by [a] state or local agency'" but that state and local agencies "lack an innate ability to prepare, own, use, or retain any record" independently, and "instead act exclusively through their employees and other agents." *Nissen*, 183 Wn.2d at 876 (quoting RCW 42.56.010(3)). Thus, when the employee or other agent "acts within the scope of his or her employment, the employee's actions are tantamount to 'the actions of the [body] itself.'" *Nissen*, 183 Wn.2d at 876 (alteration in original) (quoting *Houser v. City of Redmond*, 91 Wn.2d 36, 40, 586 P.2d 482 (1978)). "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." *Nissen*, 183 Wn.2d at 878 (quoting *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958)).

FOOTNOTES

[2] RCW 42.56.010 states:

> The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.
>
> (1) "Agency" includes 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 district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

(2) “Person in interest” means the person who is the subject of a record or any representative designated by that person, except that if that person is under a legal disability, “person in interest” means and includes the parent or duly appointed legal representative.

(3) “Public record” includes 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. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

(4) “Writing” means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other

documents including existing data compilations from which information may be obtained or translated.

¶16 Second, the *Nissen* court considered whether the specific records requested were public records. The court noted that the text messages were a writing, and considered whether the requested records "'relat[e] to the conduct of government or the performance of any governmental or proprietary function'" and were "'prepared, owned, used, or retained' by an agency." *Nissen*, 183 Wn.2d at 880-81 (alteration in original) (quoting RCW 42.56.010(3)). The court held that the content of the text messages requested were potentially public records subject to disclosure because the requester sufficiently alleged that the elected prosecutor put "'work related'" outgoing text messages "'into written form'" and "'used'" incoming text messages "while within the scope of employment," thereby satisfying the three elements of a public record in RCW 42.56.010(3). *Nissen*, 183 Wn.2d at 882-83.

¶17 Third, the court considered "the mechanics of searching for and obtaining public records stored by or in the control of an employee." *Nissen*, 183 Wn.2d at 883. The court rejected the county's and prosecutor's arguments that various constitutional provisions, including the Fourth Amendment and article I, section 7, protected the records on a private phone from disclosure. *Nissen*, 183 Wn.2d at 883. The court reasoned that "an individual has no constitutional privacy interest in a *public* record." *Nissen*, 183 Wn.2d at 883. Instead, the court held that the agency employees and agents are required to search their own "files, devices, and accounts for records responsive to a relevant PRA request," and must then "produce any public records (e-mails, text messages, and any other type of data)" to the agency for the agency to then review for disclosure. *Nissen*, 183 Wn.2d at 886. The employee or agent may submit "'reasonably detailed, nonconclusory affidavits' attesting to the nature and extent of their search," to show the agency conducted an adequate search. *Nissen*, 183 Wn.2d at 885 (quoting *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011)). But the court held:

> 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.

Nissen, 183 Wn.2d at 886.

C. PUBLIC RECORDS ON PERSONAL ACCOUNTS

1. Personal E-mail Accounts are Subject to the PRA

¶18 Appellants argue that the superior court erred in ordering Vermillion "to produce e[-]mails from his personal e[-]mail account and swear under [penalty of] perjury that he had complied." Br. of Appellant (Vermillion) at 3. Specifically, Vermillion argues that the PRA does not "authorize an agency to require an elected official to search a personal e[-]mail account." Br. of Appellant (Vermillion) at 4. We reject Vermillion's argument.

¶19 *Nissen* squarely addressed this argument and held that an agency's employees or agents must search their own "files, devices, and accounts," and produce any public records, including "e-mails," to the employer agency that are responsive to the PRA request. 183 Wn.2d at 886. The *Nissen* court also held that affidavits by the agency employees, submitted in good faith, are sufficient to satisfy the agency's burden to show it conducted an adequate search for records. 183 Wn.2d at 885. Thus, we hold that it was proper for the superior court to require Vermillion to produce[3] to the City e-mails in his personal e-mail account that meet the definition of a public record under RCW 42.56.010(3) and to submit an affidavit in good faith attesting to the adequacy of his search for the requested records.

FOOTNOTES

3 We are mindful of the distinction between the terms "produce" and "disclose," along with the variations of each word, as discussed in *White v. City of Lakewood*, 194 Wn. App. 778, 374 P.3d 286 (2016). Here, "produce" is used because "produce" is the term that the Supreme Court uses in *Nissen* and the term "produce" only contemplates production to the City, which then reviews the entire set of responsive records before deciding what will be disclosed to the requester. 183 Wn.2d at 873 (ordering the prosecutor "to obtain, segregate, and produce those public records to the County").

2. No Individual Constitutional Privacy Interests in Public Records

¶20 Appellants argue that the superior court "erred in ruling that a search would not violate Vermillion's privacy rights," and that the PRA does not provide sufficient guidance to distinguish between what e-mails should be produced to the City and what should be protected by Vermillion's constitutional privacy rights. Br. of Appellant (Vermillion) at 3. In support, Vermillion relies on article I, section 7 and the Fourth Amendment to argue that the entirety of his personal e-mail account is protected from a compelled search. Vermillion also relies on the First Amendment to argue that the content of his e-mails is protected by his right to associate privately. We disagree.

a. Fourth Amendment and Article I, Section 7

¶21 In *Nissen*, the court held that "an individual has no constitutional privacy interest in a *public* record." 183 Wn.2d at 883. Like the appellants, the elected prosecutor and Pierce County in *Nissen* "primarily cite[d] to the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution" in asserting constitutional rights to privacy in the place potentially containing public records. 183 Wn.2d at 883 n.9. Vermillion's argument differs only in that the place potentially containing public records is his personal e-mail account rather than a personal cell phone. Vermillion does not argue that this factual distinction changes the constitutional analysis, and we hold that it does not. Because our Supreme Court considered and rejected the argument that the Fourth Amendment and article I, section 7 afford an individual privacy interest in public records held on a personal cell phone, we also reject the argument that the Fourth Amendment and article I, section 7 afford an individual privacy interest in public records contained in a personal e-mail account.

b. First Amendment Right To Associate

¶22 Vermillion and the City submitted supplemental briefs addressing what they believed the effect *Nissen* has on the case here. Appellants argue that the *Nissen* court did not address the "privacy of associational communications" afforded by the First Amendment. Suppl. Br. of Appellants at 9. We hold that (1) the language of the *Nissen* holding is not limited to the constitutional principles explicitly

expressed by the *Nissen* court, (2) the *Nissen* opinion shows the court was mindful of the First Amendment's associational privacy rights, and (3) even if individual constitutional protections could prevent disclosure of public records, the absence of specificity as to the particular records claimed to be protected here would render any opinion as to those records similarly vague and wholly advisory.

¶23 As stated above, "an individual has no constitutional privacy interest in a *public* record." *Nissen*, 183 Wn.2d at 883. The language of this holding does not limit it to only certain constitutional privacy interests nor to only those privacy interests enumerated under certain constitutional provisions. Instead, *Nissen* was clear that an individual does not have a constitutional privacy interest in public records. *Nissen*'s holding was mindful of the associational privacy rights the First Amendment affords elected officials, as evidenced by the court's citation to *Nixon v. Administrator of General Services*, 433 U.S. 425, 426, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (considering First Amendment associational privacy rights of President Nixon as they related to the Presidential Recordings and Materials Preservation Act of 1974 (Act)[4]) immediately following its holding. 183 Wn.2d at 883 n.10. We, therefore, reject appellants' argument that the First Amendment's right to association protects public records in Vermillion's personal e-mail account from disclosure because associational privacy rights under the First Amendment are constitutional privacy rights, and "an individual has no constitutional privacy interest in a *public* record." *Nissen*, 183 Wn.2d at 883.

FOOTNOTES

[4] Specifically, Title I of Pub. L. No. 93-526, 88 Stat. 1695, note following 44 U.S.C. § 2107 (Supp. V 1976).

¶24 *Nissen* also concluded that "it [wa]s impossible at th[at] stage to determine if any messages are in fact public records," and directed the elected prosecutor to "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 [the *Nissen*] opinion." 183 Wn.2d at 888. This would then allow the County to conduct its review

just as it would any other public records request. *Nissen*, 183 Wn.2d at 888.

¶25 Similarly here, the record before us does not contain information upon which we can determine whether e-mails contained in Vermillion's personal e-mail account could be subject to First Amendment protections, let alone if they are public records. The closest thing to the actual e-mails in dispute that is in our record is a "fictitious e[-]mail … based on an actual e[-]mail at issue in a case that involves this exact issue currently being litigated in Skamania Superior Court." Reply Br. of Appellant (Vermillion) at 19 n.40; *see also* Suppl. Br. of Appellants at 17 n.35 (reproducing the same "fictitious e-mail"). A fictitious e-mail that is similar in an unexplained way to an e-mail in an unrelated case cannot be the basis for us to issue an opinion as to the character of a real e-mail in this case. Were we to issue such an opinion, it would be, at best, advisory. *See* *Walker v. Munro*, 124 Wn.2d 402, 418, 879 P.2d 920 (1994) ("We choose instead to adhere to the longstanding rule that this court is not authorized under the declaratory judgments act to render advisory opinions or pronouncements upon abstract or speculative questions."). Therefore, we hold that even if individual constitutional protections under the First Amendment could allow Vermillion to not disclose public records in his personal e-mail account, it is impossible for us to determine if any of the e-mails are subject to First Amendment protections or are even public records.

3. Amicus Briefing

¶26 The Washington Coalition for Open Government (WCOG) filed an amicus curiae brief. Appellants responded jointly to the Amicus brief.

a. Elected Officials—Legislative vs. Executive

¶27 WCOG argues that the PRA applies to elected officials. As explained above, the *Nissen* court held that the PRA applied to elected officials when it ruled that Pierce County's elected prosecutor was subject to the PRA. 183 Wn.2d at 879.

¶28 In reply, appellants argue, for the first time, that the result must be different as applied to them because Vermillion was an elected *legislative* official, rather than an elected *executive* official. Appellants contend that this distinction is important because "unlike an elected executive official such

as a county prosecutor, an elected legislative official has no legal authority to act on behalf of the city through e[-]mail, or to take any unilateral action on behalf of the City at all." Joint Response to Amicus Br. at 2. We disagree.

¶29 A record subject to disclosure under the PRA is not contingent on its possessor's ability to take unilateral action on behalf of the agency. Instead, a record is subject to disclosure under the PRA if it is "a record that an agency employee prepares, owns, uses, or retains in the scope of employment." *Nissen*, 183 Wn.2d at 876. And the record is "'within the scope of employment' only when the job requires it, the employer directs it, or it furthers the employer's interests." *Nissen*, 183 Wn.2d at 878 (quoting *Greene*, 51 Wn.2d at 573). Thus, whether a record is subject to disclosure hinges on if the record was prepared, owned, used, or retained "within the scope of employment," not if the record was prepared, owned, used, or retained within the scope of employment by the executive branch of the government. *Nissen*, 183 Wn.2d at 879. Appellants' attempt to distinguish *Nissen* on the basis that Vermillion was an elected legislative official rather than an elected executive official fails.

b. First Amendment

¶30 WCOG argues that the First Amendment does not bar the e-mails that are public records from disclosure. WCOG relies on the holding in *Nissen* that "an individual has no constitutional privacy interest in a *public* record." 183 Wn.2d at 883.

¶31 Instead of addressing *Nissen*, appellants rely entirely on *Nixon* to support the proposition that "Vermillion's correspondence with constituents qualifies as political association, which would be 'seriously infringed' if subjected to disclosure under the PRA." Joint Response to Amicus Br. at 4 (citing *Nixon*, 433 U.S. at 467). Appellants seize on the *Nixon* Court's recognition "that involvement in partisan politics is closely protected by the First Amendment." 433 U.S. at 467. The *Nixon* Court was considering whether a subpart of the Act that provided the "scheme for custody and archival screening of the materials" disclosed under the Act "'necessarily inhibits [the] freedom of political activity [of future Presidents] and thereby reduces the quantity and diversity of the political speech and association that the Nation will be receiving from its leaders.'" 433 U.S. at 468 (alterations in original) (internal quotation marks omitted) (quoting "Brief for Appellant 168"). The *Nixon* Court held that the Act did not inhibit the freedom of political activity and did not reduce the quantity and diversity of political speech and

association. 433 U.S. at 468.

¶32 Appellants' reliance on *Nixon* rather than *Nissen* is not persuasive. Appellants do not argue that *Nixon* and *Nissen* are in conflict with one another. Nor do appellants analyze the significant factual dissimilarities between *Nixon* and the case at bar. *Nissen* interpreted the same statute at issue here, under similar facts, and citing to *Nixon*, held that under Washington's PRA, "an individual has no constitutional privacy interest in a *public* record." 183 Wn.2d at 883. We follow *Nissen* and hold Vermillion has no constitutional privacy interest in public records that are contained in his personal e-mail account.

CONCLUSION

¶33 Under *Nissen*, appellants' arguments fail. However, because the superior court issued its order before our Supreme Court decided *Nissen*, we remand this case for the superior court to amend its order to conform to the language and procedure set forth in *Nissen*. This will include requiring Vermillion to conduct "'an adequate search'" of the undisclosed e-mails. *Nissen*, 183 Wn.2d at 885 (quoting *Neigh. All.*, 172 Wn.2d at 721). In doing so Vermillion must "in good faith … submit 'reasonably detailed, nonconclusory affidavits' attesting to the nature and extent of [his] search." *Nissen*, 183 Wn.2d at 885 (quoting *Neigh. All.*, 172 Wn.2d at 721). Those affidavits must be submitted "with facts sufficient to show the information [he decides not to disclose] is not a 'public record' under the PRA." *Nissen*, 183 Wn.2d at 886.[5]

FOOTNOTES

[5] *Nissen* recognized that this "adequate" and "good faith" procedure was subject to abuse. 183 Wn.2d at 886. The court made two points regarding this potential for abuse that are applicable here.

First, the superior court has the authority 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." *Nissen*, 183 Wn.2d at 885. And, second, where an "employee asserts a potentially responsive record is 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" disclosure. *Nissen*, 183 Wn.2d at 886 (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 480-81 (2d Cir. 1999) (adopting procedure used by federal courts for the Freedom of Information Act)). Thus, the possibility for in camera review is not foreclosed, but is not immediately required.

¶34 We affirm, but we remand for the superior court to amend its order in light of *Nissen*, 183 Wn.2d 863.

JOHANSON and SUTTON, JJ., concur.

Washington Administrative Law Practice Manual

Annotated Revised Code of Washington by LexisNexis

Annex H

6.01.020 ELECTRONIC MAIL RETENTION

I. POLICY

A. Electronic Mail Retention

1. Electronic mail (e-mail) is a public record in the same manner that other documents are considered public records under state law. The content of the message and any attachments determine how long the record shall be maintained.

2. The employee who sent the original message must retain the record if it falls under the Retention Schedule requirements. Current retention information can be found on the Risk Management Division Records Retention Intranet site.

3. E-mails should not be retained on the server for longer than six (6) months. If retention requirement is longer than six (6) months, remove from the Exchange server and create a longer-term storage mechanism (.pst files, server, external hard drive).

4. E-mail that is considered to have no administrative, legal, fiscal, or archival requirement for its retention is considered "transitory" and can be deleted when no longer needed. According to the State General Records Retention Schedule, the following e-mail may be retained until no longer needed for agency business, then destroyed:

a. Routine Agency Information (GS 50002).

b. Special Announcements (GS 50001).

c. FYI Notices with no business action needed (GS 50004).

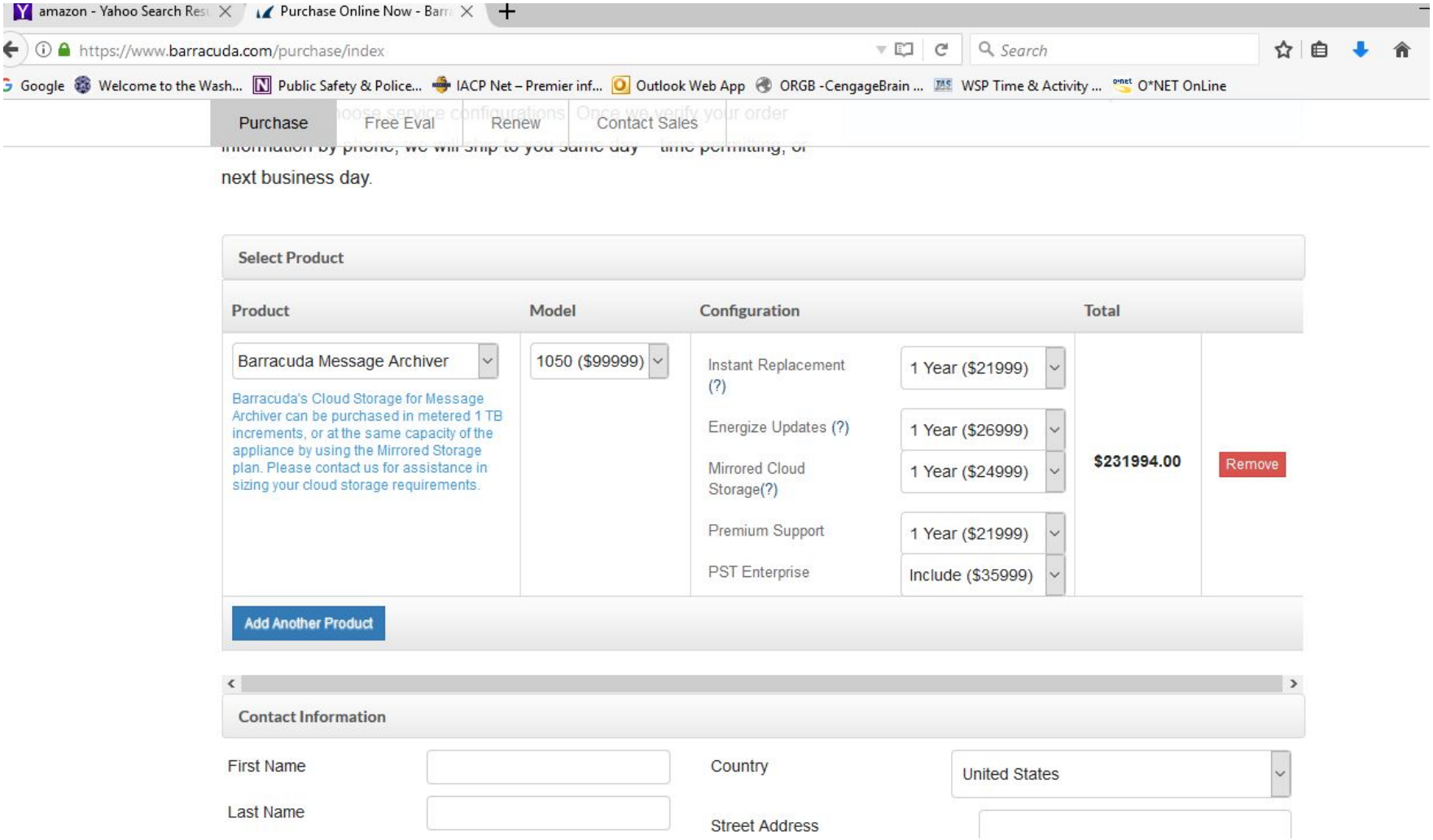
d. Courtesy Copies (GS 50005).

e. Junk/Spam Mail (GS 50004).

f. Informational only copies or extracts of documents distributed for reference or convenience, such as announcements or bulletins (GS 50003).

Applies to: All WSP Employees See Also: WSP Policies Attorney General's Records Hold Notice Requirements, Records Retention

Annex I


amazon - Yahoo Search Res
Purchase Online Now - Barr
https://www.barracuda.com/purchase/index
Search
Google
Welcome to the Wash...
Public Safety & Police...
IACP Net – Premier inf...
Outlook Web App
ORGB -CengageBrain ...
WSP Time & Activity ...
O*NET OnLine
Purchase
Free Eval
Renew
Contact Sales
next business day.
Select Product
Product
Model
Configuration
Total
Barracuda Message Archiver
1050 ($99999)
Barracuda's Cloud Storage for Message Archiver can be purchased in metered 1 TB increments, or at the same capacity of the appliance by using the Mirrored Storage plan. Please contact us for assistance in sizing your cloud storage requirements.
Instant Replacement (?)
1 Year ($21999)
Energize Updates (?)
1 Year ($26999)
Mirrored Cloud Storage(?)
1 Year ($24999)
Premium Support
1 Year ($21999)
PST Enterprise
Include ($35999)
$231994.00
Remove
Add Another Product
Contact Information
First Name
Last Name
Country
United States
Street Address

Annex J

Implementation Schedule

Task	Persons Responsible	Due Date	Completed?
Meet with Technical Services Bureau Assistant Chief to discuss Staff Study	Gretchen Dolan	12/31/2017	
Upon approval of the Assistant Chief, contact representatives from each stakeholder group for folder requests and input	Gretchen Dolan	1/15/2018	
Confirm with IT that no additional budget encumbrances are required and determine timetable for implementation	IT staff and Gretchen Dolan	1/31/2018	
Provide IT with folder definitions and retention requirements	WSP records retention coordinator and Gretchen Dolan	2/15/2018	
Project information submitted to Assistant Chief for final approval	Gretchen Dolan	2/16/2018	
Develop short training presentation for agency staff on using new system	Gretchen Dolan	2/28/2018	
Roll out new folders to all agency staff	IT Staff and Gretchen Dolan	3/1/2018	
Conduct follow up research to determine if volumes of emails have stabilized	IT Staff and Gretchen Dolan	9/1/2018	

EXECUTIVE SUMMARY

DEVELOPMENT AND IMPLEMENTATION OF A COMPREHENSIVE EMAIL ORGANIZATION AND RETENTION SYSTEM FOR WASHINGTON STATE PATROL EMPLOYEES

Problem:

- There is no standardized or universal folder storage system for emails in WSP, and retention varies by email topic. Employees are confused about how long to keep emails. This results in many staff either holding emails eternally, or deleting everything. Neither is a lawful option.

Possible Solutions

- Option I: Continue to have each employee be responsible for their own archiving and retention of email. This approach would not resolve the problem. This approach would increase storage cost.
- Option II: Create universal email folders for all employees with built-in retention. Outlook functions currently exist to auto delete and create universal folders. This approach would be the least costly and resolve the issue with existing resources.
- Option III: Purchase a system from an outside vendor such as Barracuda to manage WSP email storage. This approach would remove additional workload for WSP staff to program the above folder structure. A system like this would cost the WSP upwards of $225,000, with additional yearly costs

Recommendation

- It is recommended that the Department implement Option II, a comprehensive email management strategy to include updated policies on email management and technology based solutions of universal email folders and automated retention/destruction to help enforce laws, rules, and regulations. A proposed implementation schedule is outlined in Annex J.

( ) Approved ( ) Denied;

Comments_____

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Chief John R. Batiste Date