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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RAMIRO VALDERRAMA, Plaintiff, vs. CITY OF SAMMAMISH, Defendant	Case No.: 23-2-04283-2 ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In January 2022, Ramiro Valderrama submitted public records requests for the City of Sammamish to produce all external communications between its current and former councilmembers and any citizen since 2018. In March 2023, he sued the City, alleging that the City failed to adequately respond and did not promptly handle his requests. He filed for partial summary judgment as to liability and the City moved for summary judgment to dismiss the case. Valderrama argues in part that the City should have to file suit against former councilmembers to compel them to produce their personal devices and applications for forensic search to determine whether they contain public records.

Having been fully advised and reviewed the pleadings, declarations, and exhibits in this matter, the undisputed facts show that the City conducted an adequate search that was reasonably calculated to obtain responsive documents, including those that might be in the possession of third parties or former employees. The City also acted promptly considering the context of the request and the subsequent clarifications provided by Valderrama. The PRA does not obligate an agency to sue a former employer in order to determine whether they possess public records. The

Court denies Valderrama's motion for partial summary judgment and grants the City's motion for summary judgment. The Court dismisses the complaint.

I. BACKGROUND

The following undisputed facts have been established for purposes of analyzing the cross-motions for summary judgment:

1. Ramiro Valderrama is a former councilmember and deputy mayor of the City of Sammamish, serving from January 2012 to January 2020. On January 6, 2022, Valderrama submitted a public records request to the City to produce all communications from all Council Members since 2019 with Miki Mullor or Michael Scoles on "external channels" like "WhatsApp, Signal, Slack, Telegram, etc." The City identified this request as PRR 4241.

2. On January 8, 2022, Valderrama submitted another request that asked for all communications including telephone call logs from all Council Members since 2019 with Miki Mullor, Mullor's wife, and Michael Scoles using external channels for communications including but not limited to WhatsApp, Signal Slack, Telegram, etc. and for any correspondence with the wife of Miki Mullor. The City identified this request as PRR 4244. Based on communications with Valderrama, the City ultimately closed PRR 4241 and kept open PRR 4244. At oral argument, Valderrama conceded that there were no outstanding issues with City's responses to PRR 4241 and PRR 4244.

3. On January 28, 2022, Valderrama submitted another request that asked for all communications and copies of phone call logs that all Council Members made to citizens since 2019 on external channels. The next day, Valderrama amended the request to read:

> Council Members have been using external channels for communication with citizens/residents including but not limited to: WhatsApp, Signal, Telegram, etc. I would like to receive copies of all communications and copies of telephone call logs/lists of calls made to citizens from all Council Members since 2018 with any resident using any of these or similar channels inc. WeChat etc. channels.

The City identified the request as PRR 4280.

4. The City provided a 5-day response letter for PRR 4280, and estimated that it would provide its first installment of records by February 28, 2022. The City also asked its councilmembers to search for responsive records and to complete *Nissen* Affidavits.

5. The City produced some responsive records and *Nissen* Affidavits, but there was likewise confusion as to what communications would be responsive to the request. On June 24, 2022, Valderrama provided additional definition of the request:

> The encrypted devices would be special phones calling – the encrypted messaging and phone channels would include: calls and messages on: WhatsApp, Signal, Slack, Telegram, WeChat, Line, Messenger (Facebook), etc. or similar – not the daily city or personal emails. Also not asking for Council personal phone line SMS messages.
>
> If, however, they are using someone else's phone (friend, child spouse, significant other) or device to make the calls on their behalf that would be "hiding" their use that would be akin to cloaking, encrypting and would want those.
> Hope that helps.

6. It is undisputed that the City searched for and produced all responsive records that the City had direct access to and control over. The City provided rolling productions for responsive records.

7. It is undisputed that the City, through two Public Records Officers (PROs) and several attorneys, engaged in efforts to locate and produce documents that were on personal devices or applications used by current and former councilmembers. At oral argument, Valderrama's attorney agreed that there was no dispute regarding the itemized descriptions of efforts undertaken by the PROs and attorneys on behalf of the City to work with current and former councilmembers to search their devices and provide signed *Nissen* declarations. The declarations and exhibits show extensive work by the PROs and attorneys to seek clarifications from Valderrama, to work with current and former councilmembers to use different methods of searching for responsive documents, and to provide either responsive records or *Nissen* declarations explaining the search conducted by the current and former councilmembers.

8. As of the date of the hearing on this motion, the City had received many *Nissen* declarations from current and former councilmembers regarding all three public records requests. The current and former councilmembers also provided responsive records to the City, which the City in turn produced to Valderrama during its productions.

9. As of today, PRR 4280 remains open. The City indicated that the next production would occur in January. It is not disputed that the only outstanding productions are potentially records on personal devices or applications of former councilmembers.

10. Valderrama filed this suit in March 2023. He alleged that the City violated the Public Records Act by failing to conduct an adequate search and by failing to promptly respond to the requests. The parties conducted discovery, including depositions of current and former councilmembers. The City moved for summary judgment to dismiss the claims and Valderrama moved for partial summary judgment to establish violations of the PRA.

II. MATERIALS REVIEWED BY THE COURT

11. The Court reviewed the following materials for purposes of deciding the cross-motions for summary judgment:

a. Defendant's motion for summary judgment (Sub. 27);

b. Declaration of Kari Lester and exhibits attached thereto (Sub. 23);

c. Declaration of Lita Hachey and exhibits attached thereto (Sub. 26);

d. Declaration of Alexandra Kenyon and exhibits attached thereto (Sub. 28);

e. Declaration of Krista Kielsmeier and exhibits attached thereto (Sub. 30);

f. Declaration of Kari Sand and exhibits attached thereto (Sub. 31 & 32);

g. Declaration of Amber Anderson (Sub. 33);

h. Amended Declaration of Amber Anderson and exhibits attached thereto (Sub. 39);

i. Plaintiff's Motion for Summary Judgment (Sub. 35);

j. Declaration of Pat Schneider and exhibits attached thereto (Sub. 36);

k. Declaration of Ramiro Valderrama (Sub. 37);

l. Notice of Errata Re: Valderrama's Motion for Partial Summary Judgment (Sub. 40);

m. City's Opposition to Plaintiff's Motion for Partial Summary Judgment and Motion to Strike (Sub. 45);

n. Supplemental Declaration of Kari Lester and exhibits attached thereto (Sub. 46);

o. Plaintiff Valderrama's Response to Defendant's Motion for Summary Judgment (Sub. 47);

p. Declaration of Patrick J. Schneider in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment and exhibits attached thereto (Sub. 48);

q. Declaration of Ramiro Valderrama in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment (Sub. 49);

r. Declaration of Lyman Howard (Sub. 50);

s. Notice of Errata Re: Plaintiff Valderrama's Response to Defendant's Motion for Summary Judgment (Sub. 52);

t. City's Motion to File Overlength Reply to Include Motion to Strike/Exlcude (Sub. 58);

u. Declaration of Kari Lester in Support of Motion for Order Shortening Time and to File Overlength Brief (Sub. 59);

v. City's Reply in Support of its Motion for Summary Judgment (Sub. 60 & 61);

w. Valderrama's Reply in Support of Motion for Partial Summary Judgment (Sub. 62);

x. Declaration of Patrick Schneider in Support of Plaintiff's Response to Defendant's Motion to Strike and Reply in Support of Plaintiff's Motion for Partial Summary Judgment and exhibits attached thereto (Sub. 63);

y. Valderrama's Response to Motion to Strike (Sub. 65);

z. Declaration of Stephanie Rudat (Sub. 66);

aa. City's Reply on Motion to Strike and Motion to Strike Declaration of Karen Moran (Sub. 69);

bb. Valderrama's Response to City's Second Motion to Strike (Sub. 70);

cc. Valderrama's Response to City's Motion to Strike Declaration of Karen Moran (Sub. 71);

dd. The case file, including the complaint (Sub. 1) and answer (Sub. 10); and

ee. The oral arguments of counsel at hearing.

III. DISCUSSION

A. The Public Records Act (Chapter 42.56 RCW)

12. "The PRA is a strongly worded mandate for broad disclosure of public records." *Banbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 408, 259 P.3d 190 (2011) (plurality opinion) (cleaned up). Under the general public records disclosure mandate, public agencies, which includes municipalities, are required to produce all public records upon request unless an exemption applies. RCW 42.56.070(1). A public record consists of three elements: (1) any writing (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function (3) prepared, owned, used, or retained by any state or local agency. RCW 42.56.010(3); *West v. Puyallup*, 2 Wn. App. 2d 586, 592, 410 P.3d 1197 (2018).

13. After receiving a request for public records, an agency must respond within five business days by (1) providing the records; (2) providing an internet address and link on the agency's web site to the specific records requested; (3) acknowledging that the agency has

received the request and provide a reasonable estimate of time that the agency will need to respond; or (4) deny the public record request, along with a proper claim of exemption. *Belenski v. Jefferson Cty.*, 186 Wn.2d 452, 456-57, 378 P.3d 176 (2016); RCW 42.56.520(1); RCW 42.56.210(3).

14. There are two viable causes of action under the PRA for violations, which are the two claims Valderrama brought here. A requestor may bring an action for an agency's denial of an opportunity to inspect or copy a public record and a challenge of an agency's unreasonable estimate of time to respond to the PRA request. RCW 42.56.550(1), (2). The burden is on the agency to demonstrate that it has conducted a reasonable search. *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 84, 514 P.3d 661, 767 (2022). But once "an agency makes a prima facie showing that it has conducted an adequate search, the requester must rebut that showing." *Neighborhood Alliance of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 741, 261 P.3d 119 (2011) (Madsen, J. concurring).

15. "Under this approach, the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate." *Id.* at 719-20 (cleaned up). The adequacy of a search is determined by whether the search is reasonably calculated to uncover all relevant documents. *Id.* at 720. Agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. *Id.* The search should not be limited to one or more places if there are additional sources for the information requested, but an agency need not search every possible place a record may conceivably be stored, only those places where it is reasonably likely to be found.

16. When there is evidence that an employee of an agency has public records on their personal devices, employees are responsible for searching their files, devices, and accounts for records responsive to a relevant PRA request. *Nissen v. Pierce Cty*, 183 Wn.2d 863, 886, 357 P.3d 45 (2015). If an employee claims that information in a personal account is not a public record, they must submit an affidavit or declaration stating facts in good faith sufficient to

support that claim. *Id.* In explaining this analysis, the Supreme Court in *Nissen* explained that such records were subject to disclosure because an act performed by an agency employee within the scope of his or her employment is tantamount to an act by the agency. *Id.* at 876; *see also West*, 2 Wn. App. 2d at 596. The *Nissen* Court also stated that records an agency employee prepares in their official capacity can be public records, and the Court equated "official capacity" and "scope of employment" when referring to an elected official. *Nissen*, 183 Wn.2d at 882.

17. But personal communications that are work-related are not automatically subject to the PRA. *Id.* at 878. Only records that an employee prepares, owns, uses, or retains within the scope of employment qualify as public records. *Id.* For example, an employee is not acting within their scope of employment when they "discuss their job on social media." *Id.* at 879. 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. *Id.* at 878. The PRA applies only to "records related to the employee's public responsibilities," which is a case and record specific analysis. *Id.* at 878.

18. Valderrama points to record retention statutes, Title 40 RCW. Although those statutes include penal provisions for injury to or misappropriation of a public record, the retention laws do not create an independent cause of action for an individual seeking public records, as Valderrama conceded at oral argument. *See* RCW 40.16.020. A violation of the record retention laws is not a violation of the PRA. To be sure, the destruction of public records is at least as harmful (if not more harmful) than an agency's failure to adequately search for and produce public records, which is likely why there are penal provisions. And while the PRA prohibits agencies from destroying public records scheduled for destruction if there is an active request, there is no allegation that occurred here. *See* RCW 42.56.100.

B. Standard of Review

19. The parties bring cross-motions for summary judgment, so the Court applies the familiar standards of CR 56. The Court must determine whether, viewing the facts in the light

most favorable to the nonmoving party, there is a dispute of material facts such that the moving party is entitled to a judgment as a matter of law. CR 56(b). There is no material dispute about the facts. As such, this matter may be resolved fully on the affidavits presented by the parties. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 152-53, 240 P.3d 1149 (2010).

C. The City's Motions to Strike

20. The City submits three motions to strike exhibits and parts of declarations that Valderrama submitted. The Court denies the motions to strike, but acknowledges, as explained below, that Valderrama's claims rely on speculation and/or hearsay. Because the evidence might be admissible for another purpose, i.e., not for the truth of the matter, the Court will address those issues in the lens of a motion for summary judgment rather than through the motions to strike.

D. The Claims Now at Issue

21. Through the briefing of the parties and the oral argument, Valderrama has focused his claim to the responses provided by three individuals: former Councilmember and Mayor Malchow, former Councilmember Gamblin, and current Councilmember Treen. There appear to be no other outstanding issues regarding other Councilmembers before the Court. The Court will focus its analysis on those responses. Although there is brief mention about the claim that the City failed to act promptly, much of the argument folds the "promptness" analysis into the analysis about whether the City conducted an adequate search.

E. The Motions Are Not Premature

22. The City argues that the claims should be dismissed as premature because the public records request is still open. *See Hobbs v. State*, 183 Wn. App. 925, 935-936, 335 P.3d 1004 (2014). The City is correct that agencies need the opportunity to conduct a search, respond, and close the request before bringing suit. But as confirmed during oral argument, the only outstanding issue at this time that keeps the request open is the potential that former councilmembers have responsive documents. The parties' arguments hinge either on analyzing

the obligations of the City with respect to former councilmembers, which would provide guidance as to the request at issue, or addressing responses by former councilmembers that are not delaying the closure of the request.

F. The Adequacy of the City's Search Depends on the Clarity of the Request

23. The City argues that PRR 4280 is vague. On its face, PRR 4280 is at least overbroad in that it seeks both public records and personal communications between councilmembers and any member of the public. The undisputed facts show that the City understood that the request sought only public records, but erred on the side of producing records that would not be considered public records. Given the breadth of the request, the City needed several opportunities to seek clarification to understand the nature of the request. Valderrama provided additional clarification. These additional clarifications caused the City to close and then reopen PRR 4280, to contact and provide amended *Nissen* declarations, to inquire of other councilmembers, and to conduct further searches of current and former councilmembers.[1]

24. Valderrama's request is not impermissibly vague, but the lack of clarity in the request has to be considered when evaluating whether the City conducted an adequate search or was prompt in fully responding to the request.

G. Searching Former Employees' Personal Devices or Applications for Public Records

25. Turning to the merits of the claims, with respect to Malchow and Gamblin's responses, Valderrama's argument is essentially that the PRA obligates the City to affirmatively file suit against any former employee who might have responsive public records on their own personal devices or applications to forensically search their devices and applications. As explained below, the Court concludes that the PRA does not provide for such an obligation on an

[1]Contrary to Valderrama's argument, the City only briefly closed PRR 4280 once, on October 31, 2022. The City reopened the request a few days later upon Valderrama's request. In February 2023, the City closed another PRR but accidently used the email string referring to PRR 4280, but even Valderrama's contemporaneous email responses make clear he understood the mistake and that PRR 4280 remained open.

agency. For purposes of analyzing whether the City reasonably searched for records involving Malchow and Gamblin, it is necessary to further address the City's obligations under the PRA.

26. Valderrama grounds his argument in *Nissen* to say that if a *Nissen* declaration is made in bad faith, then the City must file suit to recover public records, including those in possession of former employees. Valderrama also relies on *Kitsap County v. Smith*, 143 Wn. App. 893, 180 P.3d 834 (2008). But neither *Nissen* nor *Smith* go so far as to impose an obligation on an agency to bring suit to recover public records in the possession of former employees. In fact, as *West* points out, the *Nissen* Court focused on the employer/employee and agency relationship when holding that *current* employees have to search for public records on their personal devices when appropriate. Because of the employer/employee relationship, the agency has tools (i.e. disciplinary measure) to compel the employee's compliance with the PRA. But once that employer/employee relationship no longer exists, those tools no longer exist and the fundamental analysis in *Nissen* no longer applies.

27. Similarly, just because an agency *may* bring suit to recover public records possessed by former employees, as in *Smith*, that does not mean that the agency *must* bring such a suit. *Smith* does not impose such an obligation. The Court thus concludes that the PRA did not require the City to file suit against former employees to attempt to retrieve any potential public records.

28. To be sure, the PRA requires the agency to conduct an adequate search. When an agency is aware that former employees may possess public records on their personal devices and applications, it needs to make reasonable efforts to obtain the public records. This analysis examines the conduct of the agency and its response to third parties and does not evaluate whether third parties acted appropriately.

H. The Adequacy of Searches

29. With that framework in mind, the Court turns to analyze the adequacy of the City's search. The undisputed evidence shows that the City acted reasonably. It sent out a

response within five business days and provided rolling productions. Although the request itself was less than clear, the City sought clarification from Valderrama to ascertain what public records he was looking for and then forwarded those requests to current and former councilmembers. The record is replete with communications from the City's PROs and attorneys seeking clarification from Valderrama, forwarding such clarification and advice to current and former councilmembers, drafting and obtaining signatures of *Nissen* declarations from current and former councilmembers detailing their efforts to search for responsive records, and producing the records to Valderrama. The declarations are reasonably detailed and nonconclusory. *See Block v. City of Gold Bar*, 189 Wn. App. 262, 274-275, 355 P.3d 266 (2015).

30. Valderrama makes much of the fact that because there were multiple iterations of *Nissen* declarations for several of the councilmembers, they must have acted in bad faith. But the undisputed evidence shows that the councilmembers updated their *Nissen* declarations after obtaining new facts or clarifications and then conducting different searches. Even if the declarations initially lacked sufficient details, the declarants provided additional details to explain the efforts undertaken. The undisputed facts show that they were made in good faith.

31. As mentioned, Valderrama focuses his analysis to current Councilmember Treen and former Councilmembers Malchow and Gamblin. The Court will address each in turn:

a. Current Councilmember Treen

32. The undisputed evidence shows that Councilmember Treen first submitted a *Nissen* declaration mistakenly stating that he had not checked his personal devices because he did not use them for city business. He later executed a supplemental declaration explaining that he was mistaken and that he did search for the applications at issue on his personal devices for Mullor and Scoles, who were identified by Valderrama. He testified that the searches did not reveal any communications relating to the conduct of City business. Based on this testimony, the City reasonably relied on his sworn statements and conducted an adequate search.

33. Valderrama discusses Dr. Scoles' vague testimony about having a Slack channel, but never connects Treen to that channel. Treen further explained that he could not open the Slack application on his phone. *See Block*, 189 Wn. App. at 275 (adequate search even though the public official's devices lost data and had technological difficulties). The City's search with respect to Councilmember Treen was reasonably calculated to adequately search for responsive records and did not violate the PRA.

34. Valderrama argues that Councilmember Treen asked a contractor IT support staff person about how to scrub his phone, demonstrating that he acted in bad faith. But the undisputed testimony is that Treen clarified that he was asking about how to search for documents on his devices for purposes of responding to the request, not to delete documents.

b. Former Councilmember Malchow

35. Malchow was on City Council when Valderrama submitted his public records request but resigned in June 2022. For the reasons explained above, the analysis of the City's actions are different from when she was on City Council and when she was not. While she was on City Council, the undisputed evidence shows that she conducted a reasonable search. She provided *Nissen* declarations both during and after her role as a councilmember of searching for responsive public records.

36. Valderrama makes much of a transcript of WhatsApp messages and copies of WhatsApp messages from third parties with Malchow to argue that she withheld records. Even assuming that those messages constitute public records, they do not show that Malchow acted in bad faith when signing her *Nissen* declarations. The only evidence is that Malchow could not access the messages on the WhatsApp platform. *See Block*, 189 Wn. App. at 275. She searched for what records were available on her devices.

37. Valderrama points to communications between Stephanie Rudat and Malchow. First, it is unclear how these communications qualify as public records, particularly where they do not further a business interest for Malchow. But even if they did, there is no testimony that

Malchow unreasonably withheld the public records. The record shows that she produced what was within her control. Further, most of these records were voluntarily provided by Malchow after she was no longer on City Council, demonstrating that the City was reasonably working with a former employee to spend time searching for records and providing *Nissen* declarations.

c. Former Councilmember Gamblin

38. Former Councilmember Gamblin was not on City Council when Valderrama submitted PRR 4280. The City nonetheless spent months attempting to contact and work with Gamblin to search for records and draft and sign *Nissen* declarations. That there have been delays is not because the City did not act diligently. The undisputed evidence shows the contrary. The City diligently pursued records potentially in Gamblin's control. Although it took months to obtain a *Nissen* declaration from Gamblin, that is not the fault of the City, but of Gamblin, who no longer worked for the City. Further, Valderrama did not clarify that he sought public records on former Councilmember Gamblin's personal devices until September 2022. Once the City was aware of that clarification, it took reasonable steps to reach out to former Councilmember Gamblin to see if it would be possible to search for the public records on his personal device.

39. Valderrama argues that Dr. Scoles and Rudat testified about communications Gamblin had with Mullor and others on Slack. But this testimony is hearsay and speculation. There is no evidence in the record showing Gamblin had responsive records of Slack communications on his personal devices. The City has thus far conducted an adequate search of Gamblin and the undisputed evidence demonstrates that there is no PRA violation.

IV. ORDER

40. The Court has considered the other arguments raised by the parties in their briefing and at oral argument. In light of the Court's review of the arguments and submitted materials as well as the analysis above, the Court ORDERS the following:

1. The City's motions to strike are DENIED;
2. Valderrama's motion for partial summary judgment is DENIED; and

3. The City's motion for partial summary judgment is GRANTED, and the matter is DISMISSED.

Dated this 15th day of December, 2023.

Electronic Signature Attached.

JUDGE PAUL M. CRISALLI

King County Superior Court
Judicial Electronic Signature Page

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Case Title:	VALDERRAMA VS CITY OF SAMMAMISH
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Signed By:	Paul M Crisalli
Date:	December 15, 2023

Judge: Paul M Crisalli

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