City of Seattle

Ethics & Elections Commission

May 6, 2021

BY E-MAIL ONLY

Mayor Jenny Durkan
7th Floor, City Hall
Seattle, WA

Dear Mayor Durkan:

I received a complaint under the Whistleblower Protection Code two months ago alleging violations of the Public Records Act by your Legal Counsel, Michelle Chen. The alleged violations occurred in the context of your Legal Counsel's efforts to keep from public view the fact that your text messages from August 28, 2019 to June 25, 2020 no longer exist on your City phone or in any cloud-based account associated with your City phone.

After receiving the complaint, I asked the City Attorney's Office to engage Ramsey Ramerman, a recognized authority on the Public Records Act, to conduct an independent investigation and legal analysis for me in accordance with my duties under the Whistleblower Protection Code. He accepted the assignment and was retained by the City Attorney's Office.

As you can see from the attached report, which I am transmitting to you pursuant to SMC 4.20.830.D.4, I believe your Counsel's efforts violated the Public Records Act by narrowly interpreting requests to exclude your text messages, and violated best practices by failing to inform requestors about the fact that ten months of texts from your phone were unavailable for review or production. Pursuant to SMC 4.20.830.E, please let me know within 60 days what action has been taken to address the conduct.

Very truly yours,

Wayne Barnett

Wayne Barnett
Executive Director

cc: Council President Lorena Gonzalez
City Attorney Pete Holmes*
Mayor's Legal Counsel Michelle Chen*
Public Records Officer Stacy Irwin*
Former Public Records Officer Kim Ferreiro

*Portions of the report contain material that constitutes attorney-client privileged communications provided in the context of an attorney-client relationship with the City Attorney's Office. I have redacted those portions from the public version of the report; only you, City Attorney Holmes, Ms. Chen, and Ms. Irwin are receiving unredacted versions of the report, and that unredacted version should be treated as attorney-client privileged material unless privilege is waived by the Mayor's Office.

Case No. 21-WBI-0304-1

Investigative Report dated May 6, 2021

On March 4, 2021, the Executive Director of the Ethics and Elections Commission received a Whistleblower Complaint from one of the Mayor's Office's Certified Public Records Officers[1], Stacy Irwin, regarding how the Mayor's Legal Counsel Michelle Chen had directed Irwin and her fellow CPRO Kim Ferreiro[2] to process various Public Records Act requests for the Mayor's text messages. Irwin and Ferreiro have agreed to allow their names to be used in this report.

In late August 2020, Chen, Irwin and Ferreiro learned that approximately ten months' worth of the Mayor's text messages (from August 28, 2019 to June 25, 2020) had not been retained on her city-issued phone or in any cloud-based account associated with her city phone. The reasons why those text messages were not retained was not part of the Complaint, and will not be addressed in this Report, except to note that there is no evidence Chen, Irwin or Ferreiro had any knowledge that the text messages were missing prior to the discovery in late August, 2020. Instead, in the Complaint, Irwin makes several allegations that potentially qualify as "improper governmental action" as defined in SMC 4.20.805 related to how the Mayor's Office responded to public records request for those text messages after the loss was discovered. The "improper governmental action" alleged in the Complaint is conduct that potentially violated the Public Records Act, Chapter 42.56 RCW.

The Complaint alleged that:

1. Irwin and Ferreiro were directed by Chen not to inform requesters that the Mayor's text messages had not been retained and the text messages the City was producing in response to their PRA requests were actually copies of the text messages obtained from persons who had sent text messages to or received text messages from the Mayor. These were referred to as "recreated" text messages.
2. Irwin and Ferreiro were directed by Chen to narrowly interpret 48 pending requests that Irwin and Ferreiro had identified as requesting the Mayor's text messages so that the Mayor's text messages were only responsive to 20 of those pending requests. Irwin and Ferreiro were also directed not to inform requestors that their requests were being interpreted to exclude the Mayor's text messages. As a result, at least three requests were closed without the requestors being informed regarding the Mayor's Office's narrowed interpretation.
3. Chen had proposed altering the "recreated" text messages to mask the fact that these versions of the messages did not come from the Mayor's phone.

The Complaint also includes a fourth claim regarding the interpretation of exemptions, but the events relating to this fourth claim occurred more than 12 months before the Complaint was filed, and given the factual circumstances regarding the application of those exemptions, there is no public interest that justifies reviewing them at this time. See SMC 4.20.830(A) (restricting any investigation to events that occurred within 12 months of the Complaint unless the Executive Director determines that the public interest justified an investigation of those older claims).

The Whistleblower Protection Code governs investigation of complaints of "improper governmental action." Under SMC 4.20.830, the SEEC's Executive Director is charged with

[1] The public Records Officers are certified by the Washington Association of Public Records Officers.
[2] While Ferreiro did not sign the Complaint, she has stated that she assisted Irwin in preparing it and fully supports its claims. She has also fully cooperated with this investigation.

investigating Whistleblower Complaints. In this instance, after completing a preliminary investigation, the Executive Director launched a formal investigation into the allegations in Irwin's Complaint. Because these allegations involve the legal requirements of the Washington State Public Records Act, chapter 42.56 RCW, the Executive Director asked the Seattle City Attorney's Office to retain attorney Ramsey Ramerman to conduct the investigation and assist the Executive Director in preparing this report. Ramerman is a recognized authority on the PRA and currently is the co-editor-in-chief of the Washington State Bar Association's Public Records Act Deskbook.

When the Executive Director conducts an investigation and determines that improper governmental action, as defined by SMC 4.20.850(C)(1), has occurred, he is required to provide a written report detailing that determination to complainant (Irwin), to head of the department where the subject of the complaint works (here, the Mayor and City Attorney), and to such other officials as the Executive Director deems appropriate. When the allegations implicate a department head, the Executive Director shall provide the report to the Mayor and the City Council.

SUMMARY CONCLUSIONS

1. The decision by Chen not to inform requestors that the Mayor's text messages had been lost and the City was producing an incomplete set of recreated text messages violated "best practices" for responding to PRA requests but did not necessarily violate the letter of the law. [redacted] but there was no evidence establishing any bad faith. Thus, this allegation, while founded, does not qualify as "improper governmental action."

2. Chen's decision to narrowly interpret the majority of the 48 pending PRA requests for communications from the Mayor's Office so those requests were not requesting the Mayor's text messages violated the PRA's statutory mandate to provide "adequate responses" to PRA request. See RCW 42.56.520. Moreover, the evidence demonstrates that the decision to narrowly interpret these requests was a change of the normal practice in the Mayor's Office that was specifically made because 10-months of the Mayor's text messages had been lost. This decision to narrowly interpret the requests was a violation of the PRA and qualifies as improper governmental action.

3. While it would have been a violation of the PRA to alter the "recreated" text message in the manner proposed by Chen, this investigation has determined that unbeknownst to Irwin or Ferreiro, Chen did not follow through with this proposal, and the recreated texts were produced without alteration. Moreover, Chen's justification for this proposal was not unreasonable – she explained that certain "call detail" information was not part of the original text message, and therefore not responsive to the request. Thus, this allegation, while founded, does not qualify as improper governmental action because the Mayor's Office did not follow through with the proposal.

DISCUSSION

On or about August 21, 2020, while gathering records to respond to various PRA requests, the Mayor's Office[3] discovered that approximately 10 months' worth of the Mayor's text messages[4] had not been retained, starting from August 28, 2019 to June 25, 2020. The Mayor's Office promptly contacted the IT department to seek help recovering the lost text messages. After it was determined that the Mayor's copies of those text messages could not be recovered, the Mayor's Office obtained a log of all of the Mayor's texts from the City's telecom provider and contacted all of the persons at the City who had exchanged text messages with the Mayor to see if the missing text messages could be "recreated" from those other copies. As of November 6, 2020, the Mayor's Office had identified 48 PRA requests that implicated the Mayor's text messages.

In addition to those PRA requests for the Mayor's text messages, the City was also involved in litigation where the City's opponents had made discovery requests for the Mayor's text messages. On October 6, 2020, the Mayor's Office informed the City Attorney's Office about this issue. This prompted the City Attorney's Office to hire an outside entity to conduct a forensic search of the Mayor's phones[5] to determine if any remnants of the missing text could be recovered and why the messages had not been retained.

The Whistleblower Complaint does not make any allegations regarding the cause of the lost text messages and this Report does not address that issue. Instead, the allegations relate to how Chen directed Irwin and Ferreiro to respond to PRA requests submitted to the Mayor's Office that had requested those text messages. While Chen claims in a May 4 letter that two CPROs exercised relative autonomy, the emails provided with the Complaint show Chen was closely managing all of the requests that sought the Mayor's texts and had directed the CPROs to allow her to review any installments before they were released.

1. Failure to Inform Requestors About the Lost Texts and to Explain that the Text Messages that Were Produced Were Recreated Text Messages Obtained from Persons Other than the Mayor.

After it was determined that the Mayor's text messages could not be recovered from her phones, the Mayor's Office sought to obtain copies of the Mayor's text messages from persons in the City who had exchanged text messages with the Mayor. These were referred to as "recreated" text messages. The City was only able to obtain "recreated" copies of some of the Mayor's missing text messages.

When preparing to produce these recreated text messages, Irwin and Ferreiro explained to Chen they believed that when the City produced the recreated text messages, the City also needed to inform the requestors that these were recreated text messages, and that the Mayor's original text messages had been lost. Irwin and Ferreiro's position is documented in their emails to Chen that were provided with the

[3] Irwin, Ferreiro and Chen worked closely together as a unit when responding to PRA requests on behalf of the Mayor's Office. Therefore, when this report refers to actions taken by the "Mayor's Office," it is referring to actions taken by one or more of these three persons that do not implicate fault for the allegations in the Complaint.
[4] In this report, the "Mayor's texts" refers to text messages sent or received by the Mayor on a city-issued phone.
[5] The Mayor's city-issued phone was replaced in October 2019 and again in July 2020, but the forensic investigation could not determine whether the loss of the text messages was related to the replacement of the Mayor's phones.

Complaint. Despite their objections, Chen directed Irwin and Ferreiro to produce the recreated text messages without any explanation and they complied. At least one requestor has noted that the texts were not from the Mayor's phone and filed an appeal challenging the adequacy of the City's response.

When interviewed, Chen stated that she had made this decision not to provide requestors with an explanation regarding the lost texts [redacted] As of October 6, 2020, the Mayor's Office and IT were still trying to determine if the text messages could be recovered or if other copies of those messages could be obtained from other sources. [redacted][6]

[redacted]

In response to the allegations, Chen notes in her May 4 letter that in March 2021, she did agree with Ferreiro's suggestion about providing an explanation when producing the recreated texts. But documentation provided with the Complaint shows that prior to March 2021, Chen rejected similar advice and directed the two CPROs to produce the recreated records without any explanation. Chen's claim that she directed the CPROs to wait to produce text messages until the forensic search was completed is refuted by the same documentation.

2. Decision to Narrowly Interpret Pending PRA Requests to Exclude the Mayor's Text Messages.

By November 6, 2020, the Mayor's office had at least 48 pending PRA requests that Irwin and Ferreiro had determined were seeking the Mayor's text messages and had therefore been kept open while the Mayor's Office, IT and the City Attorney's office investigated the missing text messages and sought to obtain recreated text messages from other sources. Most of these requests were considered "past due" based on the targeted response times that the Mayor's Office had set for itself. The oldest request had been submitted in January 2020.

As documented in several emails and a spreadsheet listing the 48 requests, on or about November 6, 2020, Chen decided to re-interpret the pending requests narrowly, with the result that only 20 of the 48

[6] In March 2021, the City notified opposing counsel about the lost text messages.

requests were requesting the Mayor's text messages. As memorialized in the "Notes" column in the November 6 spreadsheet, Chen determined that text messages were not responsive to the other 28 requests by determining (1) that request for the Mayor's Office's communication were not requests for the Mayor's text messages unless the Mayor was specifically identified; and (2) that requests for "correspondence" (as opposed to communications) were only requests for letters or emails but not text messages.

Here are a few examples taken from that spreadsheet, with the request in the "Summary" column and Chen's direction on how to interpret the requests in the "Notes" column:

Summary of Request	**Notes by Chen**
• Request C064208: all correspondence between Mayor or Deputy Mayor and/or their office staff and 'Tacoma Buffalo Soldiers Museum' and 'Historic Seattle' regarding 'Discovery Park' and 'The Discovery Park Fort Lawton Historic District'	• No - this request asks for correspondence not texts.
• Request C059261: Any and all documents, emails, texts, voice messages, etc. surrounding the decision to withdraw from the SPD East Precinct Building between May 25th, 2020 and the present.	• No - this does not specifically ask for JAMD texts. Does not apply to her.
• Request C059414: I request emails and communications from June 6, 2020 to the current date related to the "retreat" "tactical retreat" "surrender" "abandonment" "evacuation" or similar terms regarding the Seattle Police Department's exit from the East Precinct. I also request the "operational plan" (mentioned by Chief Best in public statements) to evacuate the East Precinct. And, lastly, I request all emails and communications from the Mayor's office since June 6, 2020 that mention the East Precinct.	• No - this does not specifically ask for JAMD texts. Does not apply to her.
• Request C059884: Please provide me with any records or communications (memos, letters, emails, text messages, voicemails, etc.) that reference an FBI-reported threat to the east precinct or any other police department facilities or staff. Please also provide me with any incoming and outgoing communications with staff of the FBI or any communications that refer the FBI at all. Conduct your search between May 25 and present day	• N - this request doesn't even mention MO.

Documentation provided with the complaint shows that the latter three requests were fulfilled and closed based on the narrowed interpretation.

The decision to narrowly interpret these requests represented a change in how the Mayor's Office had interpreted the scope of similarly worded request. Prior to Fall 2020, when the Mayor's Office received a PRA request for its communications, it interpreted "communications" to include the Mayor's text messages and emails, even if the request did not specifically identify the Mayor herself. Under this

practice, the Mayor's text messages would have been responsive to all 48 pending requests. Beginning in early 2021, the Mayor's Office reverted to this prior practice of interpreting new PRA requests for communications to include the Mayor's text messages.

When first interviewed, Chen explained that she made the decision to narrowly interpret the requests in an effort to reduce the backlog of pending requests, which was historically high for the Mayor's Office. This explanation is consistent with the explanation she provided to Irwin and Ferreiro on November 9, when she explained that she adopted the narrowed interpretation because the duty to conduct "an adequate search" had to be balanced with the "competing interest" in responding to requests in a "timely and responsive" manner. The documentation provided with the Complaint shows Chen made this decision over the objections of Irwin and Ferreiro. No documentary evidence was provided that showed Chen consulted with the City Attorney's Office regarding these narrowed interpretations prior to February 2021 (after at least three of requests were closed using the narrowed interpretations).

In her May 4 letter, Chen claims that her notes in the November 6 spreadsheet only reflected her "initial" attempt to interpret the requests, and Chen identifies a second spreadsheet that she emailed the CPROs on February 10, in which she claims she adopted a broader interpretation the requests in the notes column so that the Mayor's texts were responsive to those requests. Chen further claims that she did not direct the CPROs to close any requests based on the narrowed interpretations in the November 6 spreadsheet.

Chen's assertion that the notes in the November 6 spreadsheet was only intended to be an initial interpretation that she did not intend the CPROs to act on, and that the notes in the February 10 spreadsheet reflected her final interpretation is not credible. First, in a November 9 email, Chen unequivocally told the CPROs that "The Notes column [in the November 6 spreadsheet] explains what I think should happen next." While Chen may have changed her mind at some later date, it is clear that as of November 9, Chen expected the CPROs to take actions based on her interpretations in the November 6 spreadsheet. This is further confirmed by two email exchanges between Chen and the CPROs on December 2. In the first email exchange (provided by Chen), Chen notes that there were only six or seven requests that were being held open while the forensic search was being completed. Given that there were 48 requests in the November 6 spreadsheet, Chen's December 2 email suggests that she believed the remaining requests were resolved based on her narrow interpretation of many of those requests. Nothing in that email suggests that the CPROs should delay responding to the requests that Chen had determined were not requesting the Mayor's texts. In the second exchange, Ferreiro raises her and Irwin's concerns about Chen's direction to narrowly interpret the requests and in response, and Chen responds by telling Ferreiro not to expect any change of course. Thus, as of at least December 2, Chen was still standing by her direction in the November 6 spreadsheet.

Moreover, Chen's February 10 spreadsheet does not show that Chen had directed the CPROs to abandon the narrow interpretations of 28 of the pending requests in the November 6 spreadsheet. First, Chen sent a follow-up email on February 11 providing guidance to Ferreiro on what requests should be included on the spreadsheet: "In terms of guidance for determining which PDRs request Mayor's text messages, I have selected only PDRs that specifically mention Mayor in the PDR request summary and specifically say 'texts', 'all electronic communications', 'all communications,' or 'all records' between mayor and …." In other words, Chen was instructing Ferreiro to update the spreadsheet using a narrow interpretation that had not changed from Chen's guidance on November 6 in any material way. This guidance from Chen on the 11th conflict with the boarder interpretations Chen had made in notes column

in the February 10 spreadsheet, suggesting that Chen did not intend the CPROs to apply those broader interpretations.

Second, the February 10 spreadsheet only contained 10 of the 28 requests and Chen does not claim that she had also reinterpreted the scope of the requests not contained on the February 10 spreadsheet. Third, it is not clear that Chen actually notified the CPROs regarding her broader interpretation. The "notes" column with modified interpretations the February 10 version of the spreadsheet was "hidden" and both CPROs assert that they never saw those modified interpretations. The CPRO's claim is supported by the fact that when Ferreiro updated the February 10 spreadsheet on February 11, she did not "unhide" the notes column, she removed the 10 remaining requests that had been narrowly interpreted in the November 6 spreadsheet, and she added six new requests without updating the hidden notes column. These actions are all consistent with Ferreiro's claim that she had not seen the revised "notes" column in the February 10 spreadsheet, and suggest that it is likely that the CRPOs were not informed of any boarder interpretation. Collectively, this evidence undermines Chen's assertion that she had intended the Mayors' office to interpret the request using the boarder interpretation in the February 10 spreadsheet. But even if that was her intent, by February 10, the City had already fulfilled at least three requests using the narrow interpretations in the November 6 spreadsheet.

Chen also challenges the claim that she directed the CPROs to exclude the Mayor's texts from the latter three requests identified above.

With regards to Request C059414, Chen claims that when she directed Irwin to close the request on December 22, 2020, she had assumed that the responsive text messages from the Mayor's office had already been produced, and therefore was not intending Irwin to close the request based on the narrowed interpretation. Chen's claim is refuted by the documents she provided with her May 4 letter. First, when Chen directed Irwin to close the request, she was responding to Irwin's email, where she asked Chen, "Do you want me to go ahead and close it [Request C059414] because he specifically doesn't call out the mayor …?" In other words, Irwin was asking if Chen stood by the narrowed interpretation of the request in November 6 spreadsheet. Chen's response – "Please close it" – demonstrates that Chen did still intend Irwin to use the narrowed interpretation. Second, Chen notes in her May 4 letter that she did not direct the CPROs to start searching and producing the Mayor's recreated texts until February 9, 2021, so it would have been unreasonable for her to assume on December 22 that Irwin had already produced the Mayor's recreated texts in earlier installments. Third, the emails Chen produced along with her May 4 letter shows that Irwin had previously provided Chen with copies of the earlier installments, so Chen knew (or should have known) that the Mayor's texts had not been included in earlier installments.

With regards to Request C059261, Chen notes in her May 4 letter that she sent Irwin an email on November 9 directing her not to close this request. But the documentation provided with the Complaint shows that Chen directed Irwin to produce the final installment without waiting for the Mayor's text messages on December 11, 2020, a full month after this November 9 email. And while Chen does direct Irwin to hold off closing the request in that November 9 email, it was only because of two unanswered questions that had nothing to do with the question of whether or not the Mayor's text were responsive to the request. Moreover, in that same November 9 email, Chen responds to concerns Irwin raised about the narrowed interpretation of the request by reminding Irwin that the duty to search for records had to be balanced with the duty to provide prompt responses. Thus, nothing in this email exchange refutes the documented assertion in the Complaint that Chen directed Irwin to produce the final installment to this request without including the Mayor's text messages.

With regards to Request C056884, Chen claims in her May 4 letter that Irwin unilaterally closed this request without consulting with Chen. Not only does documentation provided with the Complaint conflict with this claim, but all of the records reviewed as part of this investigation show that Chen was closely monitoring all of the requests for the Mayor's texts, and it is not credible to believe that Irwin would have made the unilateral decision to exclude the Mayor's texts when producing the responsive records.

In summary, the documentation reviewed in this investigation demonstrates that at Chen's direction, the Mayor's office relied on Chen's narrowed interpretation of the requests as documented in the November 6 spreadsheet to exclude the Mayor's text messages when fulfilling those requests, resulting in the requests being closed without producing the Mayor's texts.

3. Proposal to Alter the Recreated Text Messages to Remove Nonresponsive Information.

When the City was able to locate copies of the Mayor's text messages on the phones of other employees, the City used software that extracted the text message along with call-detail information, including the phone number of the phone the message was extracted from. The software combined the substance of the text and the call-detail information into a single document. This meant that when the City produced one of the "recreated" text messages, it would also have to produce the call-detail information. The call-detail information would allow the requestor to see that the copies of the Mayor's text messages being produce were obtained from someone other than the Mayor.

When the Mayor's Office first produced the recreated text messages to one of the pending requests in December 2020 (without explaining that these were recreated texts or what had happened to the original copies of the texts), the City also produced the call-detail information. But in mid-February 2021, Chen proposed to Irwin that the City remove the call-detail information, reasoning that the call-detail information was not responsive to the pending requests, and would not have been included in the record if the City had been using a more primitive method of obtaining the texts, such as making an "old fashion photocopy" of the message on the screen of the phone.

Irwin objected, and ultimately Chen decided to continue to produce the recreated text messages without removing any call-detail information.

ANALYSIS

1. Providing Explanations to Requestors Regarding the Lost and Recreated Text Messages

When the Mayor's Office determined that the Mayor's text messages had been lost and could not be recovered, it properly attempted to obtain copies of those text message from other sources. Compare Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 723 (2011) (agency violated PRA when it failed to search for missing record on employee's old, recently replaced computer when the agency determined that the requested record was not located on the employee's current computer) with West v. Dep't of Natural Resources, 163 Wn. App. 235, 244-46 (2011) (no PRA violation where emails were inadvertently lost before request was made, and agency made a good-faith effort to recover the lost emails).

Normally, when an agency produces the requested records, the PRA does not require the agency to provide any explanation regarding those records. Bonamy v. City of Seattle, 92 Wn. App. 403, 409 (1998). But when an agency cannot produce all of the specific records that had been requested because some of the records were not retained or could not be located, the best practice is for the agency to "explain, at least in general terms, the place searched." Neighborhood Alliance, 172 Wn.2d at 723; see also Fisher Broadcasting v. City of Seattle, 180 Wn.2d 515, 523 (2014) ("When an agency denies a public records request on the grounds that no responsive records exist, its response should show at least some evidence that it sincerely attempted to be helpful.").

The Neighborhood Alliance case is instructive because it also included a "recreated" record. In that case, the plaintiff made a PRA request after it was provided with a leaked but undated county seating chart that assigned cubicles to a "Ron" and a "Steve" for two open positions that had not been posted. It was believed that "Steve" was Steve Harris, the son of a county commissioner, and "Ron" was Ron Hand, a former employee. After posting the positions, the County in fact did end up hiring Steve Harris and Ron Hand for those two positions.

In an effort to prove the County was engaged in illegal hiring practices, the Plaintiff made a PRA requests for two categories of documents: (1) a log from the computer used by the person who had prepared the seating chart that identified the date the seating chart was created; and (2) documents that identified the "Ron" and "Steve" that were listed on the seating chart.

Shortly after the first media story appeared about the leaked seating chart, the employee who had prepared the seating chart was assigned a new computer. When content of her old computer was copied onto her new computer, this had the effect of changing the "creation date" of all of her documents – including the seating chart – to the date of this transfer. To fulfill the request for the log, the County took the log from the new computer, which meant it contained the incorrect "creation date" for the seating chart. The County not only failed to search the old computer, it made no effort to explain to the requestor that the log was not generated from the actual computer that had been used to draft the seating chart or otherwise address the issue of the erroneous date.

All of these facts eventually came out after the Plaintiff sued and engaged in discovery. Ultimately, the Supreme Court ruled that the County violated the PRA by failing to search the old computer to obtain an accurate log, but it also noted that the County should have informed the Plaintiff that the log it provided was essentially as recreated record, and was not the log actually requested. Neighborhood Alliance, 172 Wn.2d at 723.

While the Supreme Court's statements in Neighborhood Alliance and Fisher regarding whether an agency needs to provide an explanation are arguably "dicta," and therefore non-binding, it is unquestionably a best practice for an agency to explain any such anomaly that materially impacts what records are produced, and the failure to provide an explanation could be a factor in any penalty determination. See also RCW 42.56.100 (requiring agencies to provide the "fullest assistance" to requestors); PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS § 6.4(5) at 6-21-22 (WSBA 2d ed. 2014) (noting the importance to communicating with requestors).

Here, Irwin and Ferreiro were correct when they informed Chen that the City should explicitly inform requestors that the Mayor's Office was producing "recreated" text message obtained from other

sources and why this was necessary. [redacted] the investigation did not uncover any evidence that Chen's decision not to provide an explanation when producing the recreated text was not made in a good-faith effort [redacted]

Chen's claim in her May 4 letter that she had directed the CPROs to wait for the results of the forensic search before responding to requests that sought the Mayor's text messages is refuted by her own statements documented in the emails provided with the Complaint and therefore is not credible. Likewise, Chen's claim that the CPROs were exercising any independent discretion when responding to the requests for the Mayor's text messages is also refuted by contemporaneous emails and therefore not credible.

While this first allegation in the Whistleblower Complaint raises a valid concern based on best practices, the failure to provide an explanation does not violate any express statutory requirement in the PRA. And because Chen made this decision not to provide an explanation based on [redacted] Chen's actions regarding the first claim did not amount to "improper governmental action" as defined in SMC 4.20.805.

2. Narrowly Interpreting Certain Requests to Exclude the Mayor's Text Messages.

When responding to PRA requests, agencies are required to provide "the fullest assistance to inquirers," which requires agencies to "respond with reasonable thoroughness and diligence." Andrews v. Wash. State Patrol, 183 Wn. App. 644, 653 (2014). When a request is unclear and could be interpreted broadly or narrowly, and the agency intends to interpret the request narrowly, then the agency should inform the requestor about that interpretation so the requestor has an opportunity to clarify if the requestor intended a broader interpretation. See, e.g., Gale v. City of Seattle, 2014 Wash. App. LEXIS 346, at *30-*32 (Wash. App. Feb. 20, 2014) (unpublished) (City properly limited scope of its search to certain terms where City told the requestor what search terms it planned to use and invited the requestor to provide additional terms). But when an agency adopts an interpretation of a request for the purpose of excluding certain records from the scope of the request without proving the requestor the opportunity to clarify, the agency violates the PRA. See, e.g., Neighborhood Alliance, 172 Wn.2d at 721 n.10, 727 (holding agency's unilateral, narrow interpretation of the plaintiff's request violated the PRA and justified an increased penalty award); see also Cedar Grove Composting, Inc. v. City of Marysville, 188 Wn. App. 695, 727-728 (2015) (agency violated the PRA when it intentionally interpreted a request narrowly to avoid producing certain records).

For example, in Neighborhood Alliance, in response to the plaintiff's request for records that identified the "Ron" and "Steve" on the leaked "seating chart," the County interpreted it as specifically requesting documents that contained all three categories of information: the term "seating chart" and information that identified Ron and Steve. The County adopted this interpretation knowing that the County did not use the term "seating chart," and instead referred to the documents like the leaked document as a "floor plan" or "cubicle layout." In other words, the County adopted an interpretation that the County knew would exclude the records the requestors were trying to obtain. Neighborhood Alliance,

172 Wn.2d at 721 n.10. The Court held that held that this narrowed interpretation violated the PRA, especial when it effectively allows an agency to "silently withhold" the records the requestor is seeking. See Neighborhood Alliance, 172 Wn.2d at 721 n.10, 724, 727 & n.16.

Here, Irwin's Complaint regarding Chen's direction to narrowly interpret the request is well taken. First, there is no principled basis for excluding the Mayor's text messages from the scope of requests for all communications with the Mayor's Office, or from requests for the Mayor's "correspondence." See West v. City of Tacoma, 12 Wn. App. 2d 45, 80-81 (2020) (rejecting city's argument that the requestor should have requested "communications" if he wanted emails instead of just requesting "records"). The Mayor is of course part of the Mayor's Office, and text messages are a form of correspondence. It is also noteworthy that the Mayor's emails were not excluded from requests for all communications with the Mayor's Office.

Second, Chen's narrowed interpretation marked a change in practice for the Mayor's Office that cannot be justified by the wording in the requests or any change in the law. Prior to Fall 2020, the Mayor's Office had interpreted similar requests to include the Mayor's text messages. Moreover, in recent months, the Mayor's Office has returned to that interpretation. This is strong evidence to show that the narrowed interpretation was adopted to limit the number of requests that could be impacted by the lost text messages. While Chen has stated that she adopted this narrowed interpretation to help comply with another mandate of the PRA – the duty to provide a prompt response – there is no basis for silently narrowing the scope of a request to meet that obligation.

Finally, if Chen believed the intended scope of the requests was in fact unclear, at the very least Chen should have directed Irwin or Ferreiro to inform the requestors that the City had interpreted the request to exclude the Mayor's text messages. See Canha v. DOC, 2016 Wash. App. LEXIS 836 at *9 to*10 (Wn. App. Apr. 25, 2016) (unpublished) (rejected claim that agency interpreted request too narrowly when agency informed requestor of its interpretation and requestor did not provide any clarification before filing suit). Had this been done, it would have given the requestors the opportunity to clarify or to make new requests for those text messages.

Chen's claim that the narrowed interpretations recorded in the "Notes" column in the November 6 spreadsheet was only an initial interpretation and that by February 10 she had adopted a broader interpretation does not excuse her conduct. First, by February 10, the City had already closed at least three of the requests based on the narrowed interpretation, so the revised interpretations came too late. Second, although the "notes" column in the February 10 spreadsheet contained broader interpretations of 10 of the requests, that column was "hidden" and remained hidden in Ferreiro's updated February 11 spreadsheet, demonstrating that Ferreiro was not aware of Chen's revision to her interpretations of the request. Third, Chen directed Ferreiro on February 11 to update the spreadsheet using a narrowed interpretation, not the broader interpretation in the hidden "notes" column. Thus, the February 10 spreadsheet does not establish that Chen had rescinded her prior direction to narrowly interpret certain request before those requests were completed.

Chen's claim that she was not responsible for the narrowed interpretation of the three request that were closed is not credible in light of the documentary evidence that shows Chen was closely monitoring all of the requests that implicated the missing text messages.[7]

[7] Chen has also complained that she was not given sufficient time to review her records to respond to the allegations in the Complaint. Chen was notified about the Complaint on April 6, and when she was interviewed on April 9, she was informed of the specific allegations, including the allegation that she had narrowly interpreted the request in the

In summary, Chen's decision to narrowly interpret requests to exclude the Mayor's text messages, and her direction to Irwin and Ferreiro to fulfill at least three of those requests based on this narrowed interpretation without informing the requestor about the text messages violated the PRA. As a result, Chen's actions qualify as "improper governmental action" as defined in SMC 4.20.805.

3. Proposal to Remove Non-Responsive Information from Recreated Text Messages.

Under Washington Law, once an agency determines that a particular record is responsive to a PRA request, an agency can only redact information from that record based on a valid exemption. Mechling v. City of Monroe, 152 Wn. App. 830, 854-55 (2009). In other words, Washington Courts have effectively rejected a practice common at federal agencies where federal agencies regularly redact information in records responsive to Freedom of Information requests based on the determination that the information was not responsive to the request. See, e.g., Conti v. Dep't of Homeland Sec., 2014 U.S. Dist. LEXIS 42544 at *75 (S.D.N.Y Mar. 24, 2014) (holding agency properly redacted nonresponsive information in response to FOIA request). Thus, Irwin's allegation regarding Chen's proposal to remove the call-detail information is based on an accurate reading of the Washington law.

But because the Mayor's Office ultimately decided not to follow this plan and instead chose to produce the text messages without removing the call-detail information, there was no violation of the PRA and thus no improper governmental action. Nor was there evidence demonstrating that Chen made this proposal in bad faith. As Chen explained, the call-detail information was not part of the substantive text message and would not have been part of the response if the City could produce the Mayor's copies of the text messages. Nor would the call-detail information have been included if the City had chosen to recreate the lost text messages by photocopying the screen of the other employee's phones.

SUMMATION

First, while the failure to explain to some requestors that the City was producing recreated copies of the Mayor's text messages was contrary to best practices, it did not clearly violate the law, and thus did not amount to improper governmental action.

Second, Chen's decision to narrowly interpret pending PRA requests to avoid the need to disclose to those requestors information that could lead that discovery that 10-months' worth of the Mayor's text messages were not retained violated the Public Records Act and amounts to improper governmental action.

Third, because the Mayor's Office ultimately did not carry through with the plan to redact call-detail information from the recreated text messages that was not responsive, there was no improper governmental action based on this claim.

The records reviewed during this investigation show that Irwin and Ferreiro were knowledgeable public records officers who strived to follow best practices when responding to PRA requests. It is recommended that the Mayor's Office give full consideration to the opinions of and guidance from its

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November 6 spreadsheet. This allowed Chen adequate time to obtain and review her documents and to respond to the allegations. Chen nevertheless waited until April 26 to request her records from IT. Thus, if she was not able to fully review those documents, it is because of her own decision not make this request to IT until this later date. Moreover, the documentation Chen did provide establishes at the very least that Chen knew Ferreiro was applying Chen's narrow interpretation of Request C059414 when Chen directed her to close that request, and that direction alone amounts to "improper governmental conduct." Therefore, additional records could not change that conclusion.

public records officers in the future and consider consulting with the public records unit at the City Attorney's Office before disregarding any advice the public records officers might provide.

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