



King County Sheriff's Office
 Criminal Intelligence Unit
 Incident Report # C22029639

TYPE OF INCIDENT	<u>DESTRUCTION OF PUBLIC RECORDS</u>		
DATE OCCURRED	<u>7/4/2020 – 11/9/2020</u>		
ASSIGNED DETECTIVE	<u>J. GAGLIARDI #76385</u>	ASSIGNED DATE	<u>9/1/2022</u>
DISPOSITION	<u>REFERRED TO KCPAO FOR REVIEW</u>	DATE CLOSED	<u>9/6/2023</u>

DRAMATIS PERSONÆ

<u>Name</u>	<u>Position Held</u>	<u>Involvement</u>
Jenny Durkan	Mayor, City of Seattle	Possible Destruction of Records
Harold Scoggins	Chief, Seattle Fire Dept.	Possible Destruction of Records
Carmen Best	Chief, Seattle Police Dept.	Possible Destruction of Records
Eric Greening	Assistant Chief, Seattle Police Dept.	Possible Destruction of Records
Idris Beauregard	Division Director, Seattle Public Utilities	Possible Destruction of Records
Christopher Fisher	Chief Strategy Officer, Seattle Police Dept.	Possible Destruction of Records
Kenneth Neafcy	Ops. Coordinator, Office of Emergency Mgmt.	Possible Destruction of Records
Deanna Nollete	Assistant Chief, Seattle Police Dept.	Possible Destruction of Records
Shanon Anderson	Lieutenant, Seattle Police Dept.	Possible Destruction of Records
Valarie Anderson	Director of Administration, Seattle Police Dept.	Possible Destruction of Records
Fred Podesta	Director, Dept. of Finance and Administration	Possible Destruction of Records
Doug Carey	Deputy Director, Finance and Administration	Possible Destruction of Records
Michelle Chen	Legal Counsel, Office of the Mayor	Violated Public Records Act
Stacy Irwin	Public Records Officer, Office of the Mayor	Reported violations of PRA
Kim Ferreiro	Public Records Officer, Office of the Mayor	Reported violations of PRA
Stephanie Formas	Chief of Staff, Office of the Mayor	Witness, Provided deposition
Jennifer Winkler	Records Manager, City of Seattle	Witness, Provided deposition
Reginald Alencastro	IT Technician, Office of the Mayor	Witness, Provided deposition
Emmanuel Arhu	IT Technician, Office of the Mayor	Witness, Provided deposition
Brian Kennedy	Management Systems Analyst, Seattle PD	Witness, Provided deposition
Chris Steel	Program Manager, Seattle PD	Witness, Provided deposition
Andrea Friedhoff	Director of Administration, Office of the Mayor	Witness, Provided deposition
Colleen O'Reilly Bernier	Executive Assistant, Office of the Mayor	Witness, Provided deposition
Kevin Faulkner	Digital Forensics Expert (Defendant)	Forensic Exams of cellphones
Brandon Leatha	Digital Forensics Expert (Plaintiff)	Forensic Exams of cellphones
Braden Heil	IT Technician/Digital Forensics, City of Seattle	Assisted with digital forensics
Gabriel Reilly-Bates	Attorney, Morgan, Lewis & Bockius LLP	Conducted depositions
Steve Fogg	Attorney, Corr Cronin LLP	Counsel for Seattle Employees



**TIMELINE OF EVENTS THAT OCCURRED PRIOR TO THE KING COUNTY SHERIFF'S
OFFICE INVESTIGATION**

May 29, 2020:	A series of protests against police brutality and the murder of George Floyd begin in Seattle, initially centered in the International District and Westlake Park.
June 1, 2020 – June 30, 2020 :	<p>Capitol Hill and Cal Anderson Park become the focus for the protest movement, resulting in numerous conflicts between the protestors and law enforcement.</p> <p>The Seattle Police Department abandons the East Precinct, and the protestors establish the Capitol Hill Autonomous Zone (CHAZ), which is later renamed to the Capitol Hill Occupied Protest or the Capitol Hill Organized Protest (CHOP).</p> <p>Multiple incidents occur inside the protest zone, including burglaries, arson, assaults, and one sexual assault. Seattle PD is unable to respond into the protest zone due to safety issues.</p> <p>Five separate shootings occur in or at the perimeter of the protest zone, resulting in two homicides. CHOP security forces are believed to have been involved in the second homicide.</p>
June 9, 2020:	<i>Black Lives Matter Seattle-King County v. City of Seattle</i> is filed in US District Court for the Western District of Washington, in which Plaintiffs allege that the Seattle Police Department unlawfully infringed upon their right to free assembly and that they used excessive force in the absence of an immediate safety threat.
June 24, 2020:	<i>Hunters Capital LLC v. City of Seattle</i> is filed in US District Court for the Western District of Washington, in which Plaintiffs allege that the City of Seattle's response to the CHAZ/CHOP caused their businesses to suffer extensive economic damage.
July 1, 2020:	The Seattle Police Department clears Cal Anderson Park and the protest zone of protestors, and re-occupies the East Precinct.
July and August of 2020:	The City of Seattle receives dozens of public disclosure requests for communications and documents relating to Seattle PD's actions during the protests, the abandonment of the East Precinct, and the delayed or denied response of emergency services into the protest zone.
August 21, 2020:	Michelle Chen, legal counsel for the Office of the Mayor, discovers that Mayor Durkan's phone is missing all text messages prior to 6/25/2020, and begins attempts to locate or reconstruct the text messages.

<p>September 2, 2020:</p>	<p>Chief Carmen Best retires from the Seattle Police Department. As part of her out-processing, she turns in her department-issued cell phone, which is later found to contain only 15 text messages, all of which were from 9/2/2020.</p>
<p>September 25, 2020:</p>	<p><i>The Estate of Summer Taylor et.al. v. City of Seattle and State of Washington</i> is filed in King County Superior Court, concerning the City of Seattle's response to the George Floyd protests.</p>
<p>October 30, 2020:</p>	<p>The City of Seattle responds to a request to produce all documents and communications involving certain identified persons pursuant to a court order in <i>Hunter's Capital, LLC v. City of Seattle</i>. They make no mention of the Mayor's missing text messages or their ongoing efforts to recover and/or reconstruct them.</p>
<p>November 5, 2020:</p>	<p>The Seattle Attorney's Office retains The Crypsis Group (later acquired by Palo Alto Networks) to perform digital forensics exams of the Mayor's phones, in an attempt to recover any lost text messages and data.</p>
<p>November 6, 2020:</p>	<p>Michelle Chen directs Public Records Officers Stacy Irwin and Kim Ferreiro not to inform requesters that the Mayor's text messages had not been retained and that the messages that were being produced in response to the public records request were reconstructed from other sources. She also initiates a plan to narrowly interpret 48 pending records requests so that the Mayor's text messages would only be responsive to 20 of those requests.</p>
<p>Mid-February of 2021</p>	<p>Michelle Chen directs Stacy Irwin and Kim Ferreiro to remove the call details from the Mayor's reconstructed text messages, which would effectively conceal the fact that the text messages being produced were reconstructed, and obtained from someone other than the Mayor. Irwin objected to this course of action.</p>
<p>Late-February of 2021</p>	<p>While gathering data in response to a court order in <i>Hunter's Capital, LLC v. City of Seattle</i>, the City of Seattle discovers that the phones of Seattle Police Department Chief Carmen Best, Chief Strategy Officer Chris Fisher and Assistant Chiefs Eric Greening and Deanna Nollette are also missing text messages. Additionally, they discover that the phones for Lieutenant Shanon Anderson and Executive Director of Administration Valarie Anderson are both locked, and cannot be accessed.</p>
<p>Early-March of 2021</p>	<p>While gathering data in response to a court order in <i>Hunter's Capital, LLC v. City of Seattle</i>, the City of Seattle discovers that the phones of Seattle Fire Department Chief Harold Scoggins, Seattle Public Utilities Manager Idris Beauregard, and Seattle Office of Emergency Management Operations Coordinator Kenneth Neafcy are also missing text messages.</p>



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

March 4, 2021	Stacy Irwin, a Certified Public Records Officer with the City of Seattle, files a "whistleblower complaint" with the City of Seattle's Ethics and Elections Commission, alleging that Michelle Chen's actions are violations of the Public Records Act.
May 6, 2021:	The City of Seattle's Ethics and Elections Commission completes their investigation of the complaint, and confirms that Michelle Chen violated the provisions of the Public Records Act.
June 3, 2021:	<i>Seattle Times Company v. City of Seattle</i> is filed in King County Superior Court, after the results of the Seattle Ethics & Elections Commission investigation are made public. In this lawsuit, the Plaintiff alleges that a review of the City of Seattle's responses to their own Public Disclosure Requests within the affected period revealed multiple violations of the Public Records Act.
February 11, 2022:	Kevin Faulkner of Palo Alto Networks / Unit 42 (formerly The Crypsis Group) releases his report concerning the digital forensics examinations of Mayor Durkan and Chief Best's cell phones.
April 28, 2022:	Brandon Leatha, who was retained by counsel for Hunters Capital, released a report concerning his own digital forensics examinations of the data used by Kevin Faulkner, as well as examinations of the devices used by Idris Beauregard, Kenneth Neafcy, Eric Greening, Harold Scoggins, and Christopher Fisher.
June 3, 2022:	Kevin Faulkner releases a rebuttal report to the report of Brandon Leatha, in which he provides additional details regarding the examinations of Durkan and Best's devices, and opinions regarding the examinations of the remaining subject's devices.
July 28, 2022:	After months of reporting by <i>The Seattle Times</i> , King County Prosecuting Attorney Dan Satterberg requests that the King County Sheriff's Office initiate "an investigation into the deletion of text messages from the phones of then-Seattle Mayor Jenny Durkan and other city leaders in 2020." ¹

¹ Daniel Beekman, "King County prosecutor has asked Sheriff to investigate Durkan's, other Seattle leaders' deleted texts." *The Seattle Times*, August 18, 2022.

ATTACHMENTS

1. Investigative Notebook Scans (53 pages)
2. Stacy Irwin's "whistleblower" complaint letter, dated 3/4/2021 (2 pages)
3. Seattle Ethics and Elections Commission Investigative Report Case No. 21-WBI-0304-1, dated 5/6/2021 (14 pages)
4. Michelle Chen's response to SEEC Case No. 21-WBI-0304-1, dated 5/10/2021 (6 pages)
5. Independent Review of SEEC Case No. 21-WBI-0304-1 performed by Hilyer Dispute Resolution, dated 7/1/2021 (4 pages)
6. Mayor Durkan's response to SEEC Case No. 21-WBI-0304-1, dated 7/2/2021 (3 pages)
7. PRA Settlement Agreement – *Seattle Times Company v. City of Seattle*, dated 7/25/2019 (6 pages)
8. FRCP 26(a)(2)(B) Expert Report of Kevin T. Faulkner, dated 2/11/2022 (52 pages)
9. Expert Report of Brandon Leatha (redacted), dated 4/28/2022 (37 pages)
10. FRCP 26(a)(2)(B) Rebuttal Expert Report of Kevin Faulkner, dated 6/3/2022 (19 pages)
11. The City of Seattle's Information Technology Security Policy, effective 5/26/2020 (22 pages)
12. Seattle Police Department Manual Section 12.040 – Department-Owned Computers, Devices & Software, effective 6/1/2020 (9 pages)
13. Seattle Police Department Manual Section 12.080 – Disclosure of Department Records, effective 5/7/2019 (5 pages)
14. Seattle Police Department Manual Section 12.111 – Use of Cloud Storage Services, effective 3/1/2017 (3 pages)
15. Deposition of Harold Scoggins in *Hunter's Capital, LLC v. City of Seattle*, dated 9/14/2021 (226 pages)
16. Deposition of Carmen Best in *Hunter's Capital, LLC v. City of Seattle*, dated 11/9/2021 (232 pages)
17. Deposition of Mayor Jenny A. Durkan in *Hunter's Capital, LLC v. City of Seattle* (condensed), dated 12/8/2021 (113 pages)
18. Deposition of Jennifer Winkler in *Hunter's Capital, LLC v. City of Seattle*, dated 1/6/2022 (80 pages)
19. Deposition of Reginald Alencastro in *Hunter's Capital, LLC v. City of Seattle*, dated 3/3/2022 (139 pages)
20. Deposition of Emmanuel Arhu in *Hunter's Capital, LLC v. City of Seattle*, dated 3/3/2022 (109 pages)
21. Deposition of Brian Kennedy in *Hunter's Capital, LLC v. City of Seattle*, dated 3/9/2022 (145 pages)
22. Deposition of Chris Steel in *Hunter's Capital, LLC v. City of Seattle*, dated 3/9/2022 (95 pages)

23. Deposition of Stephanie Formas in *Hunter's Capital, LLC v. City of Seattle*, dated 4/30/2022 (257 pages)
24. Deposition of Andrea Friedhoff in *Hunter's Capital, LLC v. City of Seattle*, dated 6/30/2022 (86 pages)
25. Deposition of Colleen O'Reilly Bernier in *Hunter's Capital, LLC v. City of Seattle*, dated 7/27/2022 (120 pages)
26. Deposition of Kevin Faulkner in *Hunter's Capital, LLC v. City of Seattle* (condensed), dated 8/17/2022 (91 pages)
27. Deposition of Mayor Jenny Durkan in *Estate of Taylor, et al. v. City of Seattle* (condensed), dated 2/28/2022 (112 pages)
28. Deposition of Carmen Best in *Estate of Taylor, et al. v. City of Seattle* (condensed) Volume 1, dated 3/16/2022 (132 pages)
29. Deposition of Carmen Best in *Estate of Taylor, et al. v. City of Seattle* (condensed) Volume 2, dated 5/24/2022 (48 pages)
30. Deposition of Mayor Jenny Durkan in *Seattle Times Company v. City of Seattle* (condensed), dated 3/1/2022 (65 pages)
31. Deposition of Idris Beauregard in *Hunter's Capital, LLC v. City of Seattle*, dated 7/14/2022 (179 pages)
32. Deposition of Christopher Fisher in *Hunter's Capital, LLC v. City of Seattle*, dated 9/30/2022 (274 pages)
33. Emailed Call Notes of Kevin Faulkner (redacted), various dates (18 pages)
34. Response Letter, *Hunter's Capital, LLC v. City of Seattle*, dated 6/27/2020 (3 pages)
35. Preservation Letter, *Hunter's Capital, LLC v. City of Seattle*, dated 6/30/2020 (3 pages)
36. Seattle IT Service Ticket #5181570, dated 10-9-2020 (1 page)
37. City Records Management Program Advice Sheet - Text Messages, date unlisted (but established as mid-2021 in depositions) (2 pages)
38. Mayor's Office Best Practices, dated 6/19/2020 (2 pages)
39. SEA_00141561 Email chain (Greening), dated 10/26/2020 (1 page)
40. SEA_00144308 Email chain (Neafcy), dated 10/28/2020 (3 pages)
41. City of Seattle Memorandum (heavily redacted), dated 9/25/2020 (3 pages)
42. First Set of Interrogatories and First Requests for Production to Defendant City of Seattle and the City's Objections and Responses Thereto, dated 10/30/2020 (44 pages)
43. Second Set of Interrogatories and the City's Objections and Responses Thereto, dated 7/13/2021 (20 pages)

44. Second Set of Interrogatories and the City's Objections and First Supplemental Responses Thereto, dated 8/31/2021 (51 pages)
45. Declaration In Support Of Plaintiffs' Motion For Sanctions Due To Spoliation Of Evidence, with Exhibits, dated 9/28/2022 (494 pages)
46. Reply In Support Of Plaintiffs' Motion For Sanctions Due To Spoliation of Evidence, dated 11/15/2022 (11 pages)
47. Supplemental Declaration In Support Of Plaintiffs' Reply In Support of Plaintiffs' Motion For Sanctions Due To Spoliation Of Evidence, dated 11/15/2022 (35 pages)
48. Order Granting Spoliation Sanctions, dated 1/13/2023 (38 pages)
49. Order Regarding the Motion for Summary Judgement, dated 1/13/2023 (39 pages)
50. Marigold Products Amended Second Set of Interrogatories With Responses and Objections Thereto, dated 4/15/2022 (9 pages)
51. Marigold Products Declaration In Support of Motion for Spoliation, with Exhibits, dated 4/18/2022 (599 pages)
52. Deposition of Jennifer Winkler (Marigold Products), dated 3/30/2022 (16 pages)
53. Seattle Times Company Complaint For Disclosure Under the Public Records Act, dated 6/3/2021 (26 pages)
54. Defendant City of Seattle's Amended Answer to Complaint For Disclosure of Public Records, dated 7/26/2021 (25 pages)
55. *Seattle Times Company v. City of Seattle* Settlement Agreement, dated 5/5/2022 (9 pages)
56. King County Sheriff's Office Letterhead from Detective Myers, dated 8/22/2022 (1 page)
57. – 84. Media Coverage of relevant events reviewed and/or cited herein.
85. TBD – *City of Seattle Email Policy*

INVESTIGATIVE REVIEW**Date & Time Entries:****Wednesday 8/31/2022 1045 hrs**

Acting Sgt Merclich advised me that there was a new Sensitive Investigation that was being assigned to the Criminal Intelligence Unit, and that I was being assigned the lead. He asked me to meet with Chief Olmsted, who would be able to provide further details.

Thursday 9/1/2022 1200 hrs

I met with Chief Olmsted in his office, where I learned that this investigation was related to the missing text messages from the city-owned cell phones used by Seattle Mayor Jenny DURKAN. Chief Olmsted advised me that Prosecuting Attorney Dan Satterberg had made a formal request that the Sheriff's Office initiate an investigation into the possible destruction of public records from the city-issued phones of DURKAN and other city officials in 2020.

Chief Olmsted provided me with a small packet of materials, which included poor-quality photocopies of the digital forensics report completed by Palo Alto Networks, the Seattle Ethics & Elections Commission report dated 5/6/2021 and the review of that report by "Hilyer Dispute Resolution" dated 7/1/2021, as well as a handwritten note from Prosecuting Attorney Dan Satterberg to Sheriff Patti Cole-Tindall. Separate from his packet, Chief Olmsted also provided me with a department letterhead from Detective Chris Myers of the KCSO Digital Forensics Unit, dated 8/22/2022, in which he stated that he has reviewed the digital forensics report completed by Palo Alto Networks, that it was extremely thorough and that he agreed with its findings, and that he believed that an independent examination by the Sheriff's Office Digital Forensics Unit would add nothing to the investigation.

As investigations into public officials are commonly conducted by the FBI under the auspices of public corruption, I asked Chief Olmsted if the FBI had been contacted, and he told me that they had already declined the investigation. From recent news reporting, I am aware that the Seattle Police Department, the Seattle City Attorney's Office, and the Washington Attorney General's Office have also all declined to initiate an investigation.

Chief Olmsted told me that I was free to conduct the investigative review in whatever manner I deemed appropriate, and that there would be no pressure or attempts to direct the investigative review from anywhere within the chain of command. He also stated that he understood that I have other duties and ongoing investigations that may take precedence over this investigative review, and told me that there was no deadline or expected completion date. He asked me to provide him with updates as I felt it to be appropriate, and told me that he was still waiting on final confirmation from the Sheriff as to the scope of the investigation.

Thursday 9/1/2022 1430 hrs

I located the following RCW sections that are relevant to this investigation:

RCW 40.14.010 – Definition and classification of public records.

As used in this chapter, the term "public records" shall include any paper, correspondence, completed form, bound record book, photograph, film, sound recording, map drawing, machine-readable material, compact disc meeting current industry ISO specifications, or other document, regardless of physical form or characteristics, and including such copies thereof, that have been made by or received by any agency of the state of Washington in connection with the transaction of public business, and legislative records as described in RCW 40.14.100.

RCW 40.16.010 – Injury to public record.

Every person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal, or obliterate a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than one thousand dollars, or by both.

RCW 40.16.020 – Injury to and misappropriation of record.

Every officer who shall mutilate, destroy, conceal, erase, obliterate, or falsify any record or paper appertaining to the officer's office, or who shall fraudulently appropriate to the officer's own use or to the use of another person, or secrete with intent to appropriate to such use, any money, evidence of debt or other property intrusted to the officer by virtue of the officer's office, is guilty of a class B felony and shall be punished by imprisonment in a state correctional facility for not more than ten years, or by a fine of not more than five thousand dollars, or by both.

RCW 9A.04.110 – Definitions.

In this title unless a different meaning plainly is required:

(13) "Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer.

In *State of WA v. Juanita Korba* (1992), the WA Court of Appeals, Division Two, affirmed that the criminal code definition of "officer" and "public officer" codified under RCW 9A.04.110 (13) applies to the public records provisions of Title 40, as the 1909 Legislature passed both as part of the same legislative act.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

After reviewing RCWs 40.16.010 and 40.16.020, I believe the most applicable section to be RCW 40.16.020, as it specifically addresses the instance of a "public officer" destroying a public record. However, I also noticed that while RCW 40.16.010 specifically identifies *Intent* as an element of the crime, RCW 40.16.020 makes no such distinction.

Thursday **9/1/2022** **1900 hrs**

I began reviewing the materials that had been provided by the Prosecuting Attorney's Office. I quickly found that I was missing critical back-story and a number of seemingly important documents that would be necessary to provide context in regard to the reports provided. I began researching and establishing a basic timeline regarding this case, saving relevant news articles and documents as they were located.

I also located better quality scans of the original documents that had been provided by the Prosecutor's Office; all of which were located in the DocumentCloud.org uploads associated with the various Seattle Times news reports.

Sunday **9/4/2022** **1630 hrs**

I continued the research and establishment of a basic timeline, and the acquisition of news articles and documents relevant to the investigation.

Monday **9/5/2022** **1947 hrs**

Case number C22029639 assigned, reference CAD #K22245406.

Tuesday **9/6/2022** **1500 hrs**

I continued the research and establishment of a basic timeline, and the acquisition of news articles and documents relevant to the investigation. Based upon the amount of news coverage and civil court proceedings that occurred prior to KCSO's involvement in this investigation, it has become clear that a significant amount of time will need to be spent on the front end organizing and researching the history of the case before the actual investigative review can truly begin.

Wednesday **9/7/2022** **1230 hrs**

I continued the research and establishment of a basic timeline, and the acquisition and review of news articles and documents relevant to the investigation.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Thursday **9/8/2022** **1300 hrs**

I continued the research and establishment of a basic timeline, and the acquisition and review of news articles and documents relevant to the investigation.

Friday **9/9/2022** **1130 hrs**

I created a Case File Index and began organizing the case materials.

Monday **9/12/2022** **1255 hrs**

I spoke with KCSO General Counsel Erin Overbey via telephone, who told me that she had been asked to assist me with obtaining any of the legal documents filed in the various civil proceedings connected to this investigation. She advised me that she has been in contact with Seattle's Office of the Mayor in furtherance of that goal, and that they have been both forthcoming and helpful in answering her questions, so long as it does not violate their attorney-client privilege. Overbey stated that she has obtained a number of documents from the Office of the Mayor, to include the depositions of Mayor Jenny DURKAN, Chief Carmen BEST, and Chief Harold SCOGGINS.

Overbey and I discussed the criminal statutes that are pertinent to this investigation and whether Intent is a required element of the crime, as I am aware that Washington courts have usually found that a criminal defendant's intent must still be shown in cases where the charged offense does not specifically identify intent as an element of the crime. Unfortunately, the most applicable statute (RCW 40.16.020) was passed into law in 1909, and the only subsequent modifications to the law were changing the language to gender-neutral and adding its classification as a Class B Felony. There is neither an associated brief on Legislative Intent, nor any applicable case law or jury instructions available that could provide clarification. Overbey stated that she is going to liaise with the prosecutor's office in an attempt to have a criminal prosecutor review the section and weigh in on the matter of Intent.

I mentioned to Overbey that the scope of the investigation was still unclear, and asked her if the Sheriff had received clarification on that matter from Prosecuting Attorney Dan Satterberg. She confirmed that they had indeed met, that the exact scope of the investigation had been clarified, and would send me that information.

Following our phone conversation, Overbey forwarded me the following additional documents:

- 1) Deposition of Reginald Alencastro in *Hunters Capital, LLC v. City of Seattle*, dated 3/3/2022
- 2) Deposition of Emmanuel Arhu in *Hunters Capital, LLC v. City of Seattle*, dated 3/3/2022
- 3) Deposition of Colleen O'Reilly Bernier in *Hunters Capital, LLC v. City of Seattle*, dated 7/27/2022
- 4) Deposition of Kevin T. Faulkner in *Hunters Capital, LLC v. City of Seattle*, dated 8/17/2022
- 5) Deposition of Stephanie Formas in *Hunters Capital, LLC v. City of Seattle*, dated 4/30/2022
- 6) Deposition of Andrea Friedhoff in *Hunters Capital, LLC v. City of Seattle*, dated 6/30/2022
- 7) Deposition of Brian Kennedy in *Hunters Capital, LLC v. City of Seattle*, dated 3/9/2022
- 8) Deposition of Chris Steel in *Hunters Capital, LLC v. City of Seattle*, dated 3/9/2022

- 9) Deposition of Jennifer Winkler in *Hunters Capital, LLC v. City of Seattle*, dated 1/6/2022
- 10) Deposition of Harold Scoggins in *Hunters Capital, LLC v. City of Seattle*, dated 9/14/2021
- 11) Deposition of Carmen Best in *Hunters Capital, LLC v. City of Seattle*, dated 11/9/2021
- 12) Deposition of Carmen Best in *Estate of Taylor, et al. v. City of Seattle*, dated 3/16/2022
- 13) Deposition of Carmen Best in *Estate of Taylor, et al. v. City of Seattle*, dated 5/24/2022
- 14) Deposition of Mayor Jenny A. Durkan in *Hunters Capital, LLC v. City of Seattle*, dated 12/8/2021
- 15) Deposition of Mayor Jenny A. Durkan in *Estate of Taylor, et al. v. City of Seattle*, dated 2/28/2022
- 16) Deposition of Mayor Jenny A. Durkan in *Seattle Times Company v. City of Seattle*, dated 3/1/2022
- 17) FRCP 26(a)(2)(B) Rebuttal Expert Report of Kevin Faulkner

Monday 9/12/2022 1346 hrs

KCSO General Counsel Erin Overbey sent me an email containing the exact text of the scope of the requested investigation, as provided to Sheriff Patti Cole-Tindal from Prosecuting Attorney Dan Satterberg on 9/2/2022:

“The KCSO will evaluate available information to determine if the City leaders identified in a recent story in the Seattle Times may have engaged in criminal conduct when text messages were deleted from their cell phones. The article identifies former Mayor DURKAN, former Police Chief BEST, and Fire Chief SCOGGINS. I understand that, in the course of considering the evidence, other persons could also be implicated. Thank you for clarifying your request.”

At this point, Mayor DURKAN, Chief BEST, and Chief SCOGGINS are the only named subjects in the investigation.

Tuesday 9/13/2022 1635 hrs

KCSO General Counsel Erin Overbey forwarded me the contact information for Steve FOGG of Corr Cronin LLP, who is representing Mayor DURKAN, Chief BEST, and Chief SCOGGINS in this investigation. FOGG asked Overbey to provide me with his info, in the event that I needed to speak with or otherwise obtain information from any of the above-mentioned parties in regard to this investigation.

Tuesday 9/13/2022 1915 hrs

While skimming through the document titled “FRCP 26(a)(2)(B) Rebuttal Expert Report of Kevin T. Faulkner”, I noticed that “the Leatha Report” is referenced frequently. In the “Case Materials” listed by FAULKNER, it’s cited as “Expert Report of Brandon Leatha and Exhibits, dated April 28, 2022”. This is the first time that I have seen a reference to this report, and I found that a copy was not among any of the materials that I have located or have been provided. As I was unable to locate a copy of this report through open-source searches, I sent an email to Erin Overbey asking if she may be able to obtain a copy through her contacts at the Office of the Mayor.

Wednesday 9/14/2022 1415 hrs

I finished reading through the news reports and court filings that have been made available thus far, and I began the investigative review by doing an initial reading of the following documents:

- 1) Stacy Irwin's "whistleblower" complaint letter, dated 3/4/2021
- 2) Seattle Ethics and Elections Commission Investigative Report Case No. 21-WBI-0304-1, dated 5/6/2021
- 3) Michelle CHEN's response to SEEC Case No. 21-WBI-0304-1, dated 5/10/2021
- 4) Independent Review of SEEC Case No. 21-WBI-0304-1 by Hilyer Dispute Resolution, dated 7/1/2021
- 5) Mayor Durkan's response to SEEC Case No. 21-WBI-0304-1, dated 7/2/2021
- 6) FRCP 26(a)(2)(B) Expert Report of Kevin Faulkner
- 7) FRCP 26(a)(2)(B) Rebuttal Expert Report of Kevin Faulkner

In summary, the City of Seattle first discovered that Mayor DURKAN's text messages from August 28, 2019 through June 25, 2020 were missing from her city-issued phone on August 21, 2020, while responding to multiple Public Disclosure Requests. The City of Seattle enlisted the aid of their IT department in an attempt to locate the missing text messages, but could not recover the data from either the Mayor's phone or any associated backups. They then began the process of reconstructing the missing text messages, using the text message data from the persons with whom the Mayor had communicated. As they were unable to recover any of the lost data using city-owned resources, the City of Seattle retained The Cypsis Group (later acquired by Palo Alto Networks) to perform digital forensics exams of the Mayor's phones on November 5, 2020.

On November 6, 2020, Michelle CHEN, legal counsel for the Office of the Mayor, directed Certified Public Records Officers Stacy IRWIN and Kim FERREIRO not to inform requesters that the Mayor's text messages were lost and that the messages that were being produced in response to the public records request were reconstructed from other sources. CHEN also initiated a plan to narrowly interpret 48 pending records requests so that the Mayor's text messages would only be responsive to 20 of those pending requests, allowing her to close out the remaining requests without acknowledging that the Mayor's text messages were missing.

In mid-February of 2021, CHEN directed IRWIN and FERREIRO to remove the call detail information from the Mayor's reconstructed text messages. This action would effectively conceal the fact that the text messages being produced in response to the public disclosure request had been reconstructed, and that they had been obtained from someone other than the Mayor. IRWIN objected to this course of action and filed a Whistleblower Complaint with the Seattle Ethics & Elections Commission on March 4, 2021.

After investigating the Whistleblower Complaint, the City of Seattle Ethics & Elections Commission found that CHEN's explanations for her actions were not credible, and that she had "violated the Public Records Act by narrowly interpreting requests to exclude [DURKAN's] text messages, and

violated best practices by failing to inform requestors about the fact that ten months of texts from [DURKAN's] phone were unavailable for review or production."²

In late-February and early March of 2021, the City of Seattle was gathering data in response to a court order in *Hunter's Capital, LLC v. City of Seattle* when it discovered that text messages were also missing from the phones of former Seattle Police Department Chief Carmen BEST, Seattle Fire Department Chief Harold SCOGGINS, and at least six other city officials.

On February 11, 2022, Palo Alto Networks (formerly The Cypsis Group) released their digital forensics report detailing their attempts to recover any missing data from the phones of DURKAN and BEST, as well as their determination as to exactly what had happened to cause the data to be missing. The forensics examination of DURKAN's iPhone 8 Plus revealed that it had been factory reset on 7/4/2020, and then immediately restored from an iCloud backup at 1651 hrs.³ "Messages in iCloud" was enabled at the time of the factory reset and the restore from iCloud backup, so all text messages were restored to the phone at this time. At 1719 hrs, the "Disable & Delete" setting for "Messages in iCloud" was enabled. At some point between this 7/4/2020 at 1719 hrs and the window between July 22nd and July 26th, the retention setting for text messages was set to "30 Days", and then reset back to "Keep Forever". The forensics examination of BEST's iPhone XS Max revealed that it was never configured to use "Messages in iCloud", and that it was also set to delete text messages after 30 days. However, FAULKNER stated that this was a recent change to the settings, as only 17 text messages had been deleted via this setting. The remainder of the text messages were deleted over time, as opposed to all at once.

While conducting this research, I also found that the City of Seattle had been the Defendant in a lawsuit brought by *The Seattle Times* in September of 2018. In that lawsuit, *The Seattle Times* alleged that the city had violated the Public Records Act when they failed to release text messages between then-Mayor Ed Murray and members of the Seattle City Council, and the lawsuit was settled by the City of Seattle in July of 2019. As part of the settlement, the City of Seattle was also released from another claim that they had violated the Public Records Act when they were unable to recover text messages that had been automatically deleted from the phone of then-Deputy Mayor Shefali Ranganathan. As part of the settlement, the City of Seattle agreed to provide additional training to its staff in regards to their employees' responsibility to retain public records on City-owned smartphones, on how to determine whether a record can be considered "transitory", and upon the expectation "that substantive (non-transitory) City business should not be conducted on communication tools that automatically delete or are otherwise inaccessible."⁴ This settlement agreement was signed by Michelle CHEN, legal counsel for the Office of the Mayor, on July 25, 2019.

² City of Seattle Ethics and Elections Commission Investigative Report Case No. 21-WBI-0304-1, dated 5/6/2021, cover page

³ Depending upon which report or deposition is referenced, dates and times are presented in either Coordinated Universal Time (UTC), Pacific Daylight Time (PDT / UTC-7), or Pacific Standard Time (PST / UTC-8). For the purposes of this report, all times have been converted to either PDT or PST.

⁴ PRA Settlement Agreement - *Seattle Times Company v. City of Seattle*, dated 7/25/2019, page 4

Wednesday 9/14/2022 1700 hrs

After reviewing these documents, I have learned that while many of the lost/deleted text messages may have been recovered, a majority of those recoveries were from secondary sources and not from the primary device that created the text message.

For the purposes of this investigative review, and in order to define a clear set of investigative parameters, it is my interpretation that the "*destruction of a public record*" is presumed to have occurred when a text message, subject to retention by the Public Records Act, is deleted from its primary retention device, and no backup of that device exists from which that record can be restored.

Also for the purposes of this investigative review, it is my interpretation that the fact that a text message may have eventually been reconstructed from a secondary source other than the original device or a backup of that device does not automatically absolve an individual or entity of responsibility, as the "*destruction of a public record*" must still have occurred in the first place. However, as the Public Records Act does allow for text messages to be deleted depending upon the nature of their content, a review of those reconstructed text messages should also occur, in order to determine whether or not those records were actually subject to retention under the provisions of the Public Records Act.

As a reference, I created a timeline of significant events that occurred prior to my involvement in this investigation (inserted at the beginning of this report).

Wednesday 9/14/2022 1830 hrs

While doing an initial reading of "FRCP 26(a)(2)(B) Rebuttal Expert Report of Kevin Faulkner", I found that FAULKNER identifies the following individuals as being among those that were discovered to be missing text messages: Idris BEAUREGARD, Christopher FISHER, Kenneth NEAFICY, and Seattle Police Assistant Chief Eric GREENING. None of those names appear in the list of deposition transcripts provided thus far by the City of Seattle.

An open-source internet search revealed that between June and July of 2020, Idris BEAUREGARD was a Manager for Seattle Public Utilities, Christopher FISHER was the Chief Strategy Officer for the Seattle Police Department, and that Kenneth NEAFICY was the Operations Coordinator of the Seattle Office of Emergency Management.

All four were added as named subjects in this investigation.

Thursday 9/15/2022 1200 hrs

It is obvious that the circumstances surrounding "the disappearance of thousands of text messages between high-level city officials from the height of 2020's dramatic protests and police actions"⁵ is a matter of great public interest. Unfortunately, the vague explanations initially provided to

⁵ The Seattle Times editorial board, "Start probe into city leaders' missing texts." *The Seattle Times*, June 1, 2022.

the press of “an unknown technology issue”, combined with City Attorney Pete Holmes’ later public statement that his office had warned the Office of the Mayor that this explanation was untrue, given that “someone changed the Mayor’s settings from retain to delete – that is a deliberate act”⁶, have led to speculation that city’s leadership had conspired to delete any potentially incriminating text messages before they could be revealed to the public.

Based upon the material reviewed thus far, all of which is available to the general public, it appears that there are five (5) likely scenarios that could provide explanations for how and why thousands of text messages sent by the city’s leaders happened to be deleted or are apparently missing in the short span of four months:

- 1) The named subjects conspired to remove potentially incriminating public records from their city-issued devices.
- 2) One or more of the named subjects intentionally deleted potentially incriminating public records from their city-issued devices.
- 3) One or more of the named subjects had public records deleted due to technology issues and/or city policies or practices.
- 4) One or more of the named subjects used 3rd party encrypted messaging applications in an attempt to avoid creating public records subject to disclosure.
- 5) An outside influence (i.e., hackers) caused data to be deleted from the devices of one or more of the named subjects.

This investigative review will attempt to determine which combination of the above factors may be responsible for the missing public records.

Thursday 9/15/2022 1730 hrs

I reviewed a transcript of the deposition of Chief Harold SCOGGINS in *Hunters Capital, LLC v. City of Seattle*, dated 9/14/2021. Detailed notes of the applicable portions of the interview can be found on pages 5-7 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

In summary, Chief SCOGGINS stated the following:

On October 8th, 2020, Chief SCOGGINS was woken up in the early morning by a notification from work. He attempted to access his city-issued iPhone, but the passcode wasn’t working. SCOGGINS cycled through the four or five passcodes that he normally uses, but none worked and he was eventually locked out of his phone. SCOGGINS had been unable to remember his passcode once before, but said that cycling through his passcodes had worked, and he had expected the same result in this instance. When he came into work the next day, SCOGGINS contacted IT for help getting his phone unlocked. As the IT department was still working remotely, they were only able to provide suggestions for him to attempt on his own, none of which worked. SCOGGINS searched the internet for help and told IT that he might be

⁶ Lewis Kamb, Daniel Beekman, and Jim Brunner, “Mayor’s office knew for months Durkan’s phone settings caused texts to vanish, emails show.” *The Seattle Times*, August 20, 2021

able to unlock his phone if he downloaded iTunes to his computer, but IT was unable to download iTunes. SCOGGINS felt strongly that he needed be available for calls, and stated that the last time that he did not have his phone overnight was the night of the Greenwood explosion in which multiple firefighters had been injured, and he did not find out until a fire engine was sent to his home. At the end of the day SCOGGINS was still locked out of his phone. Since IT had been unable to help him, SCOGGINS decided to go to the Apple store in University Village for assistance.

Mr. Tyler Weaver, deposing counsel for the Plaintiff, had the following exchange with SCOGGINS concerning the factory reset of the phone at the Apple Store, found on page 119 of his deposition:

SCOGGINS: It was pretty straightforward. I mean, people weren't being allowed in the store. It was at U Village. So I waited in line like everyone else. They even tried to wave me to the front to -- to help me, and I said, "No, I'll just wait in line." He asked me what the problem was when I got to the front of the line. I gave him my phone, said it was locked out. He said, "Let me go in and take a quick look at it." Took it inside the Apple store. He came back out, and he said, "We have to do a hard reset." I said, "Okay, do a hard reset."

WEAVER: Okay.

SCOGGINS: And it was like that.

WEAVER: Did you check with anybody at the City before you suggested -- before you gave the okay to a hard reset to the Apple employee?

SCOGGINS: I didn't.

SCOGGINS stated that he did not have iTunes on his work computer, and had never created an iTunes backup of his phone. SCOGGINS stated that he believed that he had an iCloud account, but that he thought that his iCloud data was full and did not know if an iCloud backup was ever created. SCOGGINS also stated that he was unaware of any city or fire department policies addressing or requiring an employee to create a backup of their city-issued cell phone.

Thursday 9/15/2022 1930 hrs

At the time of this incident, SCOGGINS' city-issued phone was an iPhone 8 on the standard AT&T network. Based upon the timeframe, that iPhone was likely running a version of iOS 13, which was introduced in September of 2019. The Apple website revealed the following details concerning passcode lock-outs on an iPhone 8 running iOS 13:

“An iPhone will disable for 1 minute after six failed passcode attempts in a row. The seventh incorrect passcode attempt will lock you out for 5 minutes, the eighth attempt for 15, and the tenth for an hour. If you go past ten attempts and have still not entered the correct passcode, you’ll receive the message **iPhone is Disabled; Connect to iTunes.**”

When describing what had happened on his phone when he entered the wrong passcode on October 8th, SCOGGINS stated that “the first time it says the phone's locked for a minute. The next time for five minutes. The next time for an hour. The next time a day. And then eventually it's just locked.”⁷ This also explains why SCOGGINS’ was focused on downloading iTunes as a possible solution to his problem, despite having never used the program; both the “Disabled” message and the internet had told him that he needed to use iTunes to restore his phone.

Thursday 9/15/2022 1945 hrs

I began a review of the transcript of the deposition of Chief Carmen BEST in *Hunters Capital, LLC v. City of Seattle*, dated 11/9/2021.

Friday 9/16/2022 1945 hrs

I completed the review of Chief BEST’s deposition of 11/9/2021. Detailed notes of the applicable portions of the interview can be found on pages 8-12 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

In summary, Chief BEST stated the following:

At some point after BEST announced her retirement on 8/11/2020, she used some of her vacation time before her actual retirement on 9/2/2020. While BEST was on vacation, she left her city-issued cell phone on her desk, as she wouldn’t need it while she was away. When she returned to work on 9/2/2020, she turned in her phone, her laptop, and her other city-issued equipment. BEST was unable to explain why her phone contained no text messages when it was later examined, and also stated that her assistant “Tricia” would not have deleted any data from the phone prior to it being turned over to the IT department.

BEST stated that she preferred to conduct business either in person or over the phone, or via email if the first two methods were not an option. She said that she very rarely conducted city business through text messages, and that most of her text messages were “transitory” in nature.

BEST stated multiple times that it was her practice to routinely clean out her text messages by deleting transitory messages, and that she follows the same practice on her personal phone.

⁷ Deposition of Harold Scoggins, page 101 line 21

Mr. REILLY-BATES asked BEST directly, "...did you make a point of deleting all of your texts before you turned your phone in on September 2nd or prior to September 2nd?", to which BEST responded, "I did not."⁸ Mr. REILLY-BATES asked BEST when she first learned that her phone had no text messages on it, and she responded that she had first learned about it by reading it in the newspaper. When asked what her reaction was upon reading that, BEST stated, "I really didn't know what the -- what the major concern was. I figured that the city had the ability to get anything that it wanted out of the city's property."⁹ BEST also stated,

"I thought that there was some sort of record that they could go in and get, you know, old messages and stuff off of the phones if they needed to. Obviously we deal with a number of cases, you know, homicides and others where we pull up old messages and look at what gang members were saying to one another. So I assume the City had that same capability of doing that, especially with a litigation hold and the holds they had on really all of our communications."¹⁰

A few minutes later in the deposition, BEST made a similar statement, to which Mr. REILLY-BATES asked, "You mean even if it's deleted they could go in and recover it? Is that what you're -- is that what you mean?" BEST replied, "If they needed to, yeah, I thought that -- that was just my understanding all that was held. The same with our email, you can delete an email, but I mean, I know all that stuff is -- is being, you know, held. I'm just not going to hold on to, you know, all the emails when I know they can recreate those, you know, from my email."¹¹

BEST's statements consistently indicate that she believed that the city was archiving all text messages sent from a city device, in the same manner that the city archives all emails sent from a city account.

Saturday **9/17/2022** **0940 hrs**

KCSO General Counsel Erin Overbey forwarded me a redacted copy of the "Expert Report of Brandon Leatha and Exhibits, dated April 28, 2022".

Monday **9/19/2022** **1420 hrs**

I reviewed a transcript of the deposition of Mayor DURKAN in *Hunters Capital, LLC v. City of Seattle*, dated 12/8/2021. Detailed notes of the applicable portions of the interview can be found on pages 12-14 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

⁸ Deposition of Carmen Best in *Hunters Capital, LLC v. City of Seattle*, dated 11/9/2021, page 218 line 16

⁹ Deposition of Carmen Best, page 214 line 5

¹⁰ Deposition of Carmen Best, page 213 line 7

¹¹ Deposition of Carmen Best, page 219 line 6

In summary, Mayor DURKAN stated the following:

On 7/4/2020, DURKAN was at a vacation cabin on the beach (the exact location of which was never disclosed due to privacy concerns). While she was walking on the beach, her city-issued phone fell out of her pocket and landed in a puddle of saltwater. This phone already had a cracked screen, so water got into it quickly, and she powered it down immediately. Once she got back to the cabin, she put the phone into a bag of rice for a few hours. She then tried to restart the phone, but it crashed. She said that she had to do a hard reset on the phone in order to get back into it, and chose the "Restore from iCloud Backup" option. After restoring her phone from the backup, DURKAN stated that all of her data and her text messages were restored to her phone, even the most recent ones. She said that she had a slight password issue with getting into her calendar, but she was able to gain access to that application after her assistant got her the correct password.

She managed to get her phone to "limp along" until she could get it replaced, which was around July 9th. On that date, she gave her old phone to her assistant, who took it to IT, and then brought back the new phone once all of the data was transferred over from the old phone. She said that she had some issues with the data migration, specifically mentioning that her contacts had not transferred correctly, so the phone had to be sent back to IT twice, early in the week of July 20th, and then again on the 24th.¹²

When asked about the "30 Day Delete" setting, DURKAN stated that she did not know or hear about the missing text messages until September or October of 2020, and that she did not know about the actual "30 Day Delete" setting until Spring of 2021. DURKAN stated that she does not know how the setting was activated or who activated it, and does not know who later de-activated it.

DURKAN stated that she never performed an iTunes backup of her city-issued phone, but knew that her staff would create some type of backup when they took her phone for PDR purposes. She said that the iCloud account linked to her city-issued phone was a city account created for her by IT, and that she didn't know how or when it would perform backups. However, she did say that "before this happened, it was my understanding that every – all of the electronic data that the City had, whether it be emails, calendars, documents, text messages, was collected and archived, but – and that we had our own separate backup, but apparently that is not correct."¹³

DURKAN stated that she avoided using text messaging for policy decisions, stating that due to the pandemic and then the protests, she was having cabinet meetings almost every day and that most of her communications were in person. She specifically stated that "the practice would be to not communicate things of substance by text."¹⁴

¹² This date was not specifically stated by Mayor Durkan, but was reconstructed by this detective using her recollection of the events that had occurred on that specific day.

¹³ Deposition of Mayor Jenny Durkan in *Hunters Capital, LLC v. City of Seattle*, page 264 line 25

¹⁴ Deposition of Mayor Jenny Durkan in *Hunters Capital, LLC v. City of Seattle*, dated 12/8/2021, page 31 line 10



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Tuesday 9/20/2022 1750 hrs

KCSO General Counsel Erin Overbey forwarded me the following additional documents related to the *Seattle Times Company v. City of Seattle*:

- 1) 21-2-07268-9 SEA – Complaint, dated 6-3-2021
- 2) 21-2-07268-9 SEA – City's Amended Answer to Complaint, dated 7-26-2021
- 3) 21-2-07268-9 SEA – Settlement, dated 5-5-2022

Tuesday 9/20/2022 1830 hrs

I reviewed a transcript of the deposition of Jennifer WINKLER in *Hunters Capital, LLC v. City of Seattle*, dated 1/6/2022. This deposition, as well as the majority of the subsequent depositions reviewed in this matter, was conducted by Counsel Gabriel REILLY-BATES of Morgan, Lewis & Bockius LLP. Detailed notes of the applicable portions of the interview can be found on pages 16-19 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

WINKLER is the City Records Manager for the City of Seattle, having held that position since September of 2001, and is responsible for overseeing the City Records Management Program. The City of Seattle also designated WINKLER as a Rule 30(b)(6) deponent, which authorized her to speak on behalf of the City of Seattle in regards to specific practices, policies, and procedures related to records management, retention, and training.

In summary, WINKLER stated the following:

The City of Seattle has an established retention schedule for records, which follows state law and lists how long each type of record needs to be maintained. The retention schedule and all policies and procedures concerning the preservation of electronic records established by the City Records Management Program are followed citywide, regardless of department. WINKLER stated that this policy establishes that it is the responsibility of the employee to determine how long they should retain each individual text message on their device.

WINKLER stated that she has no personal knowledge as to whether DURKAN, BEST, or SCOGGINS intentionally deleted any public records, and that she is aware of no city policies that address the retention of public records in the event that a phone needs to be reset, replaced, or decommissioned.

WINKLER stated that she is aware of no city policies or procedures that address or use of iCloud or any other cloud-based storage system as a method of backing up or otherwise storing public records. She also stated that although she is aware that there may be some departments within the City of Seattle that use iCloud for backing up cellphones and storing data, the City's Records Management Program does not advise or recommend that iCloud, GoogleDocs, or any other cloud-based storage system be used to maintain public records.

In mid-2021, WINKLER created a City Records Management Program Advice Sheet that specifically addressed the preservation of electronic records that are created by or stored on a city-issued

cell phone. WINKLER stated that this document was created “to give city employees a little bit more in-depth understanding about text messages and their recordkeeping responsibilities”¹⁵ and because “there has been a proliferation of text messaging throughout city employees, and we felt that it was necessary to provide further advice.”¹⁶

However, in apparent opposition to that last statement, WINKLER also stated that the advice sheet was not directly sent to all city employees; rather, she said that it was disseminated to the public disclosure officers for each city department, and was posted to the City’s internal web site so that employees would have access to it.

Based upon the creation date for this advice sheet, it is apparent that it was created in response to this incident. However, WINKLER clearly stated that this advice sheet did not change any policy or procedure, it merely elaborated upon and clarified the existing policy that was in effect in during 2020.

The advice sheet created by WINKLER was identified as “Exhibit 2 CRMP Advice Sheet re Text Messages” in the Exhibit List for the deposition. I made a request for this document, as I do not yet have a copy.

Wednesday 9/21/2022 1010 hrs

I began a review of the transcript of the deposition of Reginald ALENCASTRO in *Hunters Capital, LLC v. City of Seattle*, dated 3/3/2022.

Thursday 9/22/2022 1830 hrs

I completed the review of Reginald ALENCASTRO’s deposition dated 3/3/2022. Detailed notes of the applicable portions of the interview can be found on pages 20-25 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

In summary, ALENCASTRO stated the following:

ALENCASTRO is a “Device Support Technician” with Seattle IT, and was assigned to provide support to the Office of the Mayor during the relevant time frame. He estimated that 97%-98% of the Office of the Mayor staff use Apple devices, and said that he and Emmanuel ARHU are the only IT techs that would have handled any phone replacements for DURKAN.

Despite the fact that the vast majority of the office is issued Apple device, ALENCASTRO has never received any formal training on providing IT support for iPhones or any other Apple device, and would not consider himself to have a high level of expertise in providing support for Apple devices. When asked about the different ways in which text messages could be saved in iTunes and iCloud, ALENCASTRO

¹⁵ Deposition of Jennifer Winkler in *Hunters Capital, LLC v. City of Seattle*, dated 1/6/2022, page 18 line 20

¹⁶ Deposition of Jennifer Winkler in *Hunters Capital, LLC v. City of Seattle*, page 19 line 15

was unable to provide the basic answers of “where” or “if” those messages would be saved given a specific set of circumstances.

ALENCASTRO was only vaguely familiar with the Public Records Act, and could not answer basic questions about what it requires or how its applied. He also could not recall if he had ever received training on preserving documents in accordance with the Public Records Act.

ALENCASTRO stated that, in general, Seattle employees are not given a city iCloud account associated with their city-issued phone; if they want to use any iCloud functionality, they have the option of creating or using an account of their own. The only exception to this is the Mayor, whose phone is linked to a city iCloud account at the time that the device is initially set up.

ALENCASTRO was not aware of any specific policy that governed the replacement of cell phones, but said that they did have a set of informal procedures that they followed. As of late-2019, the primary method of data migration from an old phone to a new phone was a side-by-side transfer using a Bluetooth connection (aka the “bump” method)¹⁷. ALENCASTRO said that the “bump” was preferable to their previous method of using an iCloud backup because it automatically copies over all accounts and applications. ALENCASTRO said that sometimes they would also do an iCloud backup before they started the “bump” transfer, but didn’t provide any details on how they determined when or if that would occur. Once the transfer was complete, ALENCASTRO would compare the two phones side-by-side and make sure that everything got moved over would make sure that it can send & receive, and finally make sure that all Office 365 apps were functioning. The user then got the new phone, and IT would hold onto the old phone for approximately one month, in case there were issues with the data migration.

ALENCASTRO stated that at the end of the one-month period, the old phone would be wiped by a factory reset. When asked about the reasoning behind wiping the phones, ALENCASTRO responded, “The main thing we want to do is just not have someone’s data just floating around in someone’s drawer, you know , in an old, expired phone that’s no longer in use, right? So it’s - - it’s about data privacy mostly.”¹⁸ ALENCASTRO stated that they did not typically reissue an iPhone during this time period, because they had a deal with their provider in which a new iPhone cost only .99¢.

ALENCASTRO did not perform the data transfer and set-up of DURKAN’s new phone in July of 2020, and is not sure of what process ARHU used to complete that task. He stated that as a part of his process, he would have checked to ensure that DURKAN’s iCloud account was signed in, and that the “Messages in iCloud” setting was enabled, but he did not know if that would have been a part of ARHU’s process, or if creating a backup or enabling iCloud backups would also be a part of ARHU’s process. ALENCASTRO stated that although he believed that checking to make sure that “Messages in iCloud” was enabled, there was no policy or procedure that specifically stated that or made that a priority.

ALENCASTRO stated that at no time when he handled the Mayor’s phones did he notice that the iCloud backups had been turned off, and at no time did he change the text message retention settings

¹⁷ Both ALENCASTRO and ARHU would call this the “bump” method, but the official name used by Apple is the “Quick Start”.

¹⁸ Deposition of Reginald Alencastro in *Hunters Capital, LLC v. City of Seattle*, dated 3/3/2022, page 106 line 13

from "Keep Forever" to "Delete After 30 Days" or vice-versa. ALENCASTRO stated that ARHU had told him that he had not made any changes to these settings either. ALENCASTRO also stated that he had never seen anyone in the Office of the Mayor using 3rd party encrypted communications apps like Signal or Telegram.

Friday 9/23/2022 1545 hrs

I began a review of the transcript of the deposition of Emmanuel ARHU in *Hunters Capital, LLC v. City of Seattle*, dated 3/3/2022.

Tuesday 9/27/2022 1300 hrs

I completed the review of Emmanuel ARHU's deposition dated 3/3/2022. Detailed notes of the applicable portions of the interview can be found on pages 26-31 of the Investigative Notebook, which will be scanned and attached to this case at its conclusion.

In summary, ARHU stated the following:

ARHU is a "Desktop Technician" with Seattle IT, and was assigned to provide support to the Office of the Mayor during the relevant time frame. He estimated that 90% of the Office of the Mayor staff use Apple devices, and said that he and Emmanuel ARHU are the only IT techs that would have handled any phone replacements for DURKAN.

ARHU stated that he has no knowledge or awareness of the Public Records Act, although he was aware that everything that they do with their city equipment is subject to public disclosure. ARHU also stated that he does not recall ever receiving any training concerning the Public Records Act while employed with the City of Seattle.

ARHU said that he has also never received any formal training on providing IT support for iPhones or any other Apple device, and stated that he would not consider himself to have a high level of expertise in providing support for Apple devices.

When ARHU was asked about how and when text messages could be saved in iTunes and iCloud, he provided an explanation that was exactly the opposite of fact; ARHU believed that when "Messages in iCloud" was turned off, that no messages would be saved in either iCloud or iTunes. He also stated that he was "not aware that [there's] a separate Messages in iCloud."¹⁹

When ARHU was asked about, and later shown the specific prompt screens and process to reach and utilize the "Disable & Delete" function concerning text message storage in iCloud, he stated that he had never seen these screens, never had to use this function, and was unaware of its existence.

¹⁹ Deposition of Emmanuel Arhu in *Hunters Capital, LLC v. City of Seattle*, dated 3/3/2022, page 11 line 18

ARHU described the process for the replacement of an iPhone as follows: The first step would be to “maybe” creating a backup of the phone, followed by using the “bump” method to copy the content from one phone to the other. Once the data migration is complete, both phones are placed side-by-side and checked to make sure that the data is the same. ARHU stated that to do that, he would make sure that the same applications had been installed and that the number of photos, contacts, etc., are the same. ARHU specifically identified the Contacts, Photos, Videos, Text Messages, and installed applications as the data that he would check to ensure complete data migration. Finally, ARHU said that he would make sure that the iCloud backup is enabled.

When asked if he would also enable “Messages in iCloud”, ARHU responded that he would. However, he then added that “Messages in iCloud” requires that Wi-Fi is on and connected, or else the mobile data would not be backed up. Once again, this is the opposite of fact, and it is clear that ARHU believes that he is talking about iCloud backups (for which this is true) as opposed to “Messages in iCloud”.

ARHU stated that once a phone is replaced, the standard operating procedure is to “hold on to it for a few weeks just to make sure that everything works for them, so - - in case they come back to ask for something, we can go back and verify.”²⁰ At the end of that time period, the phone is wiped by performing a factory reset, and it’s then recycled.

ARHU stated that he had performed the data transfer and set-up of DURKAN’s new phone in July of 2020. This replacement was initiated by the Office of the Mayor when they placed an order for a new phone with Seattle IT. ARHU stated that there was never any kind of evaluation or inspection of the phone to determine its condition before the replacement order was made, and that they did not receive any information as to why the phone needed to be replaced; they simply received an order for a new phone and they filled it.

The new iPhone arrived at Seattle IT on July 7th, and ARHU received DURKAN’s old phone for replacement on July 9th. When ARHU received the old phone for replacement, he saw that it had a cracked screen, but he did not check (or even know to check) for water damage and did not check to see how it was functioning. ARHU also stated that he was unaware that DURKAN’s phone had crashed or otherwise stopped working, and was unaware that she had restored her phone from an iCloud backup on July 4th.

ARHU stated that he did not check any of the phone’s backup or retention settings before he began the data transfer to DURKAN’s new iPhone. ARHU did start an iCloud backup of the old iPhone before beginning the data migration using the “bump” method, but he didn’t know if that backup was ever completed. ARHU said that DURKAN’s iCloud account only had the standard 5GB of storage available, and inferred that the lack of storage space may be one reason that it didn’t complete. Regardless, ARHU said that the “bump” transfer was successful, so he never needed the iCloud backup and never checked to see if it was completed.

²⁰ Deposition of Emmanuel Arhu, page 71 line 18

ARHU stated that after the data transfer, he assisted with another technical issue regarding DURKAN's new iPhone. On July 21st, he was contacted because the phone's Contacts weren't displaying correctly. ARHU said that he spoke to DURKAN's executive assistant, Colleen O'REILLY BERNIER, over the phone, and walked her through the process to make sure that the city's Active Sync account was working correctly. He said that he did not actually handle the phone on this date, as his support was provided over the phone, and does not remember assisting with DURKAN's phone on another date in July.

ARHU stated that he kept DURKAN's old iPhone for about four weeks before he performed the factory reset on the device, and that he did not examine its contents or create a backup of the phone before performing the factory reset.

ARHU stated that he did not make any changes to the existing text message retention settings on DURKAN's iPhone. ARHU also stated that he had never seen anyone in the Office of the Mayor using 3rd party encrypted communications apps like WeChat, WhatsApp, Signal or Telegram.

In both the deposition of ALENCASTRO and ARHU, the deposer (Gabriel REILLY-BATES) directs each subject's attention to a specific email exchange between ALENCASTRO and ARHU on 8/21/2020, reproduced here:

- ALENCASTRO:** OK, because her text messages are only going back to June 2020. A PDR is asking for some older messages. Did you do an iCloud restore from her old phone? It was cracked, right?
- ARHU:** Yes, it was cracked, and I believe iCloud messages were turned off. I did restore everything from the phone though.
- ALENCASTRO:** OK so the text messages couldn't transfer? Is the old iPhone wiped? or still there?
- ARHU:** All the text messages that were on the phone was transferred. The old phone is wiped.
- ARHU:** Cos it's also unsafe for us to keep device with the Mayor's emails and text messages still on with us. But I triple checked to make sure everything got transferred over to the new device.

This contemporaneous email exchange supports both ALENCASTRO's and ARHU's assertions that they performed data wipes on old cell phones in order to avoid potential violations of privacy rights and confidential information, and also confirms that when the data migration was performed on July 8th, all of DURKAN's text messages were transferred from her old iPhone to her new iPhone.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

9/26/2022 - 9/30/2022

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

Monday 10/3/2022 2000 hrs

Up to this point I have been using a standard yellow notepad for notes regarding the deposition reviews; however, as that was becoming unwieldy, I opened an Investigative Notebook. All notes taken thus far will be transcribed over to the Notebook in their entirety, and any additional notes will go into that notebook from this point forward.

I began transcribing my notes into the Investigative Notebook.

10/4/2022 - 10/6/2022

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

Friday 10/7/2022 2000 hrs

I completed transcribing the remaining notes into the Investigative Notebook, and the original notes were destroyed.

Tuesday 10/11/2022 1430 hrs

I discovered that the Microsoft Word document that was being used to track time and date entries for this investigation had crashed at some point over the weekend. This resulted in the permanent loss of data entered between 10/3 and 10/7, consisting of any time/date entries from 10/3 to present as well as the entries containing specific details regarding the depositions of ALENCASTRO and ARHU. All entries from within that timeframe were subsequently reconstructed from memory and from the notes contained within the Investigative Notebook.

Wednesday 10/12/2022 1900 hrs

I began a review of a transcript of the deposition of Stephanie FORMAS in *Hunters Capital, LLC v. City of Seattle*, dated 4/30/2022.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Thursday 10/13/2022 1130 hrs

I completed the review of Stephanie FORMAS' deposition dated 4/30/2022. Detailed notes of the applicable portions of the interview can be found on pages 32-33 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

In summary, FORMAS stated the following:

FORMAS was DURKAN's Chief of Staff from the fall of 2018 through the end of her term as Mayor. FORMAS recalls that she received training on records retention on at least two occasions while employed with the Office of the Mayor, one of which occurred right after she was first hired by the city.

FORMAS seemed to have a solid understanding of the Public Records Act, and detailed a number of her "best practices" that she would use to make sure that she was complying with its requirements. She stated that she was aware that all work-related communications would be subject to public disclosure. When she was asked about her obligations to preserve the records that she had created, FORMAS replied that it was her understanding that all of her work-related emails, any emails sent on her work devices, any documents that she created, her calendar, and her text messages were all automatically saved by the city on either city servers or her Apple iCloud.

FORMAS stated that she received an email from DURKAN on July 4th at 2052 hrs, in which DURKAN tells her that her phone had died, but that she had been able to reset it using a backup from iCloud. However, she did not recall details from any specific conversations with DURKAN about the subject. In fact, for the remaining 23 pages of the deposition, FORMAS is asked numerous questions about what she knew and when she knew it concerning DURKAN's phone, most of which were answered with variations of "I don't recall."

This deposition made a number of references to a "best practices on documents" publication by the city, which is cited as "Mayor's Office Best Practices, June 19, 2020" in the exhibit list of the deposition. I made a request for this document, as I do not yet have a copy.

Tuesday 10/18/2022 1100 hrs

I began a review of a transcript of the deposition of Brian KENNEDY in *Hunters Capital, LLC v. City of Seattle*, dated 3/9/2022.

Tuesday 10/18/2022 2100 hrs

I completed the review of Brian KENNEDY's deposition dated 3/9/2022. Detailed notes of the applicable portions of the interview can be found on pages 34-41 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

In summary, KENNEDY stated the following:

KENNEDY is a "Management Systems Analyst" for Seattle PD, and his primary role is to provide support for the Body Worn Camera program. As an ancillary duty, he also assists with issuing and providing IT support for SPD cell phones. KENNEDY is a Seattle PD employee; he is not an IT technician, and is not affiliated with the City of Seattle's Information Technology Department.

KENNEDY has assisted with issuing and providing IT support for SPD cell phones since sometime in 2018. However, KENNEDY has received no formal training regarding how to provide IT support for cell phones, and has received no formal training on Apple devices, even after SPD switch from Samsung to Apple. KENNEDY stated that he would not consider himself to have a high level of expertise in providing support for Apple devices, and considered himself more of an "advanced user."

When asked about how text messages are saved on Apple devices, KENNEDY stated that text messages are just saved on the phone, or that "if a user has an Apple ID, [...] they can turn on a backup through Apple."²¹ KENNEDY stated that SPD does not create or maintain iCloud accounts for any of its users, to include the Chief of Police. Whether or not an iCloud account is set up is entirely up to the user, based upon their specific needs or wants. KENNEDY said that he does not help users to set up an iCloud account, and that there is no one with that responsibility.

KENNEDY stated that there is no SPD policy, procedure, or directive that either requires or encourages users to back up their city-issued cell phones, and it is not a common practice. KENNEDY went on to explain that he does not suggest or encourage users to perform iCloud backups of their phones because the phones are already set up through a program called InTune and enrolled in Apple's Device Management Program, which serves to simplify the IT management of the phones. KENNEDY stated that iCloud backups require the creation of individual iCloud accounts, which defeat the purpose of and can cause conflict with the functioning of InTune.

KENNEDY described the process for replacing a cell phone as follows: Users are first told to make sure that they download and save anything that they don't want to lose from the old phone, and KENNEDY specifically mentions photos in this regard. KENNEDY stated that creating a backup of the old phone before beginning the transfer is not a part of the process, because he doesn't have the tools. He did not have the software to do a backup on Samsung phones, and he was unable to create a backup through iTunes or iCloud on Apple phones because those programs require that there be an Apple account established and require that he has access to that Apple account. They also require that he be able to use the iCloud or iTunes programs, both of which were discouraged and later blocked by policy. KENNEDY stated that the only data that was typically migrated over was the user's contacts, but that when the user switched from a Samsung to an Apple phone, they were unable to transfer any data at all between the phones.

KENNEDY confirmed that when SPD replaced phones, they did not transfer any photos, notes, text messages, or anything else other than the user's contacts, and stated that it was up to the user to make sure that any important data had been saved before the phone was turned in for replacement.

²¹ Deposition of Brian Kennedy in *Hunters Capital, LLC v. City of Seattle*, dated 3/9/2022, page 17 line 8

KENNEDY stated that essentially, replacing an SPD issued cell phone is the same as setting up a new phone, with the additional step of importing contacts from the old phone to the new phone. He would power the phone on, get it signed in, make sure that the city's installed applications were all functioning, make sure that the camera was in windows compatibility mode, and make sure that the location services were on. When asked if he'd check the settings for iCloud backups and "Messages in iCloud", KENNEDY stated, "I don't deal with Messages or iCloud."²² KENNEDY also stated at a later point in the deposition that it was not part of his process to check or modify any text message retention settings when setting up or replacing SPD phones.

KENNEDY did not recall ever providing support to Chief BEST concerning one of her cell phones. However, KENNEDY did provide assistance to Assistant Chief Eric GREENING with his cell phone. KENNEDY said that he received an email from GREENING's executive assistant (Celina Villa) on 10/26/2020, in which she said that GREENING was locked out of his phone. Celina brought GREENING's phone, which was a Samsung, to KENNEDY's office. KENNEDY stated that he did not have any specific recollection of the methods that he may have used in an attempt to gain access to GREENING's phone, of whether or not GREENING had told him that he was subject to a litigation hold, or even whether or not he personally had actually performed a factory reset on the phone.

KENNEDY said that when performing a factory reset on an SPD phone, it was not part of his process to check for any sort of backups first, as it wouldn't affect the process of restoring functionality to the phone. KENNEDY stated that once they've gone through all of the available options and arrived at the last resort of the factory reset, "[the phone] is a brick [...] so there's no recovery at that point."²³

Wednesday 10/19/2022 1635 hrs

I began a review of a transcript of the deposition of Chris STEEL in *Hunters Capital, LLC v. City of Seattle*, dated 3/9/2022. Detailed notes of the applicable portions of the interview can be found on pages 42-48 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

In summary, STEEL stated the following:

STEEL is a "Strategic Advisor -2" for Seattle PD, and his primary role is as the program manager for the Traffic Photo Enforcement system. As an ancillary duty, he also assists with issuing and providing IT support for SPD cell phones. STEEL is a Seattle PD employee; he is not an IT technician, and is not affiliated with the City of Seattle's Information Technology Department.

STEEL has received no formal training regarding how to provide IT support for cell phones, and has received no formal training on Apple devices, even after SPD switch from Samsung to Apple.²⁴ When asked about his expertise and experience, he said that it is limited to the process that they use to set up their current devices.

²² Deposition of Brian Kennedy, page 69 line 9

²³ Deposition of Brian Kennedy, page 141 line 1

²⁴ In fact, according to STEEL's LinkedIn profile, he doesn't even have any formal training in Computer Science or Information Technology, having received his B.A in Political Science and his Master's in Public Administration.

When asked about the different ways in which text messages could be backed up or saved on an iPhone, STEEL stated that the only method of which he was aware was through iTunes or iCloud, provided that the user had an Apple account. STEEL said that he was unfamiliar with a feature called "Messages in iCloud", and that he did not know of any method or software that could retrieve text messages from an iPhone that had been locked. STEEL was specifically asked about both GrayKey and Cellebrite, and stated that he had not heard of either. STEEL stated that neither he, KENNEDY, nor the Seattle Police Department maintains any type of database of user passcodes or passwords due to privacy and security concerns.

STEEL was asked if Seattle PD has a specific process for preserving data on phones after they are turned in, to which he responded, "We do not reset phones."²⁵ STEEL later would clarify that this applies to all phones that are no longer in use, and that they keep the phones intact in case they are needed for public disclosure requests.

STEEL described two separate processes for setting up departmental iPhones; the first process was used up until August of 2020, and was generally with Verizon as the carrier, and the second process was used after August of 2020, with FirstNet as the carrier.

Prior to August of 2020, the majority of Seattle PD cell phones were Samsungs; however, there were a limited number of iPhones that had also been issued. STEEL stated that the setup process for iPhones was similar to the process for Samsungs; he would make sure that all of the necessary departmental applications were downloaded and would help the user get signed into all of them. STEEL said that they did not check or change any of the iPhone's settings, to include settings regarding iCloud and automatic backups. If the users decided that they wanted to use a pre-existing iCloud account or create a new account, it was up to them and it was done after they were in possession of the phone.

STEEL recalled assisting Chief BEST with setting up her iPhone in September of 2019, using the process that he described above. He recalled helping to get her accounts signed in and making sure that all of her city apps were downloaded and active. He did not transfer any data over from her old iPhone to her new iPhone, and he did not check any of her settings for data retention and backups, as neither was a part of their established setup procedures.

After August of 2020, all Seattle PD cell phones came pre-enrolled in Apple's Device Enrollment Program. This program is a way for organizations to streamline the setup of their devices by pre-configuring the device's settings and automatically downloading a specific set of applications. In order to setup a phone enrolled in the Device Enrollment Program, STEEL would simply log the phone into the city's mobile data management program, synch the user's contacts, and make sure that everything is signed in and functioning. STEEL said that since the phone is enrolled in the Device Enrollment Program, there is no iCloud account associated with the phone, so iCloud backups are not possible.

STEEL stated that on 11/24/2020, he sent an email to the SPD command staff, advising them that they would be switching from Samsung to Apple cell phones. He notified them that they would be able to

²⁵ Deposition of Chris Steel in *Hunters Capital, LLC v. City of Seattle*, dated 3/9/2022, page 51 line 25

keep their phone numbers, but that no other data would be transferred from the old phone to the new phone. STEEL said that all of the Samsungs that were turned in were kept intact (not wiped or recycled) in case they were needed for public disclosure requests, and all were eventually turned over to the legal unit.

STEEL stated that he helped Assistant Chief GREENING with the setup of two Samsungs during 2019, and with his transition from Samsung to Apple in November of 2020.

STEEL stated that he helped Chris FISHER with his transition from Verizon to FirstNet in November or December of 2020. He said that the procedure was the same as he had described earlier, that he did not create a backup or check to see if one existed, as that was not part of the process, and that the old phone was kept intact and turned over to the legal department. STEEL said that FISHER did not go to either himself or KENNEDY for assistance with his cell phone when he was locked out; instead, he went to the city's IT Department for help. STEEL said that he didn't know which phone FISHER was locked out of, but that if it was the one that was enrolled in the Device Enrollment Program, he could have remotely unlocked it without a factory reset. The city's IT Department would not have been able to perform this function.

STEEL also recalled being contacted by Kenneth NEAFCY, after he had been locked out of his cell phone. STEEL said that he did not assist in the setup of NEAFCY's phone, as the phones issued by the Emergency Operations Center are generally issued and managed by their own people, and not Seattle PD. Even though STEEL wouldn't normally provide support for the Emergency Operations Center, NEAFCY reached out to STEEL via email on 10/28/2020 for assistance, which STEEL believed was because he had been unable to get the help that he needed from other sources. STEEL said that NEAFCY's phone had already been factory reset by the time that he received the email, and that he was unable to provide any assistance to NEAFCY.

STEEL stated that there is no SPD policy, procedure, or directive that requires users to back up the data contained in their city-issued cell phones, and further stated that he does not encourage or suggest that users create backups using cloud-based systems. STEEL also explained that SPD did not use iCloud for data storage because there are security concerns with the access to the data.

STEEL was unable to provide specifics on what those security concerns were; however, I can state based upon personal knowledge that there are a number of issues with law enforcement using cloud-based storage, with the most prevalent issue being data security. One needs only look to the near-constant security breaches of celebrity iCloud accounts to understand how vulnerable cloud-based accounts can be to phishing scams, and the compromise of a person's personal identifying information or sensitive information that may jeopardize an ongoing investigation is enough to prevent its use. The second largest issue that I'm aware of is the ownership of the data that is stored – once the data is in the cloud, it's no longer the sole property of the agency. It is owned by the company that controls the cloud-based storage system, which is not subject to the Public Records Act, and that data could potentially be deleted without notice for any number of reasons outside of the control of the agency.

Thursday 10/20/2022 1515 hrs

While conducting the initial research of the news coverage of the investigation, I had located a copy of the City of Seattle's Information Technology Security Policy in the DocumentCloud.org uploads associated with *The Seattle Times* news reporting of May 21, 2021 ("No One is Taking Responsibility for Loss of Seattle Mayor Jenny Durkan's Text Messages"). This policy document is dated May 26, 2020 and was in effect at the time of this incident. A copy of this document will be attached to this report.

After reviewing the depositions of ALENCASTRO, ARHU, STEEL, and KENNEDY, I reviewed the city's IT policy to see how it correlated to their testimony. I noted the following sections in the policy that are specifically relevant to this investigation:

13. SMARTPHONES

Section 13.1: Employees will adhere to City data retention policies and schedules for all City business records that reside on City-owned or employee-owned smartphones or other mobile devices.

Section 13.2: Employees using a City-owned device will comply with all applicable City and departmental policies and workplace expectations while using the smartphone or mobile device.

Section 13.3: City information stored on City-owned or personal smartphones or other mobile devices is a public record subject to disclosure pursuant to the provisions of the Public Records Act, RCW Chapter 42.56 ("PRA"). It is the responsibility of each City employee to retain public records, including those on City-owned or personal smartphones and mobile devices. Retention of text messages is based on the content of the message and the function it documents, not the method of transmission.

14. CITY OWNED DEVICES

Section 14.1: [...] When the City receives a public disclosure request, a discovery request in connection with litigation, or other form of request to which it is legally required to respond, records on a City-owned device must be retained until the City responds to the request. [...].

39. DISPOSAL OF IT ASSETS:

Section 39.1: Disposal of Seattle IT assets, including the sale, transfer, donation, or sustainable disposal (recycling), must be done in adherence with all federal, state and local regulations and in accordance with data classification and handling requirements relevant to industry regulatory requirements (e.g. PCI, NERC, CJIS). Computer hardware must have all software and information securely removed prior to disposal where practicable or be destroyed through approved means.

41. ELECTRONIC DATA AND RECORDS MANAGEMENT:

Section 41.1: All City System Owner/Operators, Data Custodians, and Users are obligated to understand the nature and proper classification of the data they generate, use, or store.

Section 41.2: All City System Owner/Operators, Data Custodians, and Users, are required to properly manage and protect the confidentiality of private or sensitive electronic data they may be using, transmitting, and storing. For classification guidelines and best practices see Classification of Data Guidelines.

Section 41.3: All City System Owner/Operators, Data Custodians, and Users are required to understand and comply with all records retention laws for any electronic data they may be using, transmitting, and storing.

Section 41.4: NOTE: Be aware that the City Records Management Program (CRMP) maintains specific records management information and offers consultation to users and management on their retention obligations under State law.

44. RULES SPECIFIC TO ELECTRONIC COMMUNICATION USAGE:

Section 44.1: Electronic communication (e-mail, IM, IRC, SMS) is a temporary medium and, therefore, inappropriate for substantive policy messages.

Section 44.2: Electronic communications that contain substantive policy messages must be archived per email management rules and guidelines in appropriate retention folders.

Section 44.12: Only City standard applications may be used for any type of electronic communications, including e-mail and Instant Messaging (IM) unless a business need has been documented and an exception granted by Seattle IT Department.

Section 44.15: All Users are required to understand and comply with all records retention laws for any electronic communications they transmit, store or disseminate.

As a whole, the City's IT Security policy makes it clear that the individual employee is required to know and understand the City's policies regarding data retention, and that the retention of any public records that they create, send, or receive is also their responsibility. The policy also clearly states that the retention of text messages is determined by the content of the message.

Paradoxically, the policy states that e-mails and text messages are an inappropriate medium for substantive policy messages, but then describes how to archive e-mails containing substantive policy messages. No mention is made concerning the proper retention for text messages containing substantive policy messages.

There is no section that addresses how to properly archive, store, or otherwise retain text messages or any other public records that are stored within a smartphone or mobile device. As Section 13.3 states that "It is the responsibility of each City employee to retain public records, including those on City-owned or personal smartphones and mobile devices", one can infer that the smartphone or mobile device itself is considered to be the primary retention point for that data.

There is also no section that specifically addresses any kind of standardized process for the issuing, replacement, or decommissioning of city-owned smartphones or mobile devices, but it is possible

that this may be addressed in a "Standard Operating Procedures" or similar type of document. However, Section 39.1 does state that "computer hardware" must have all software and data removed before disposal, and it can be assumed that smartphones and mobile devices would be included in that category. Additionally, Section 41.2 specifically states that "Data Custodians ... are required to properly manage and protect the confidentiality of private or sensitive electronic data they may be ... storing." It is probable that these two sections are a factor in the logic behind the practice of the factory resetting ("wiping") of phones after they have been replaced.

Finally, Section 27.7, while generally addressing remote web-based access to city systems, specifically states that "City documents and data shall be not saved to unauthorized locations" and includes "Unapproved cloud services (e.g. Drop Box, Box, or Google Docs)" among the list of unauthorized locations. Although this section does not directly address smartphones and mobile devices, they certainly allow web-based access to city systems, and the use of iCloud or Google Drive to create backups of iPhones and Samsung Galaxies appears to be specifically prohibited by this section.

It is likely that the documents "CRMP Advice Sheet re Text Messages" and "Mayor's Office Best Practices, June 19, 2020" will have additional information regarding the City's policies and practices regarding the retention and storage of public records contained on smartphones and mobile devices, and I will review those documents once I am able to obtain copies.

Friday **10/21/2022** **1230 hrs**

I began a review of a transcript of the deposition of Andrea FRIEDHOFF in *Hunters Capital, LLC v. City of Seattle*, dated 6/30/2022.

Sunday **10/23/2022** **1600 hrs**

I completed the review of Andrea FRIEDHOFF's deposition dated 6/30/2022. Detailed notes of the applicable portions of the interview can be found on page 49 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

FRIEDHOFF was the Director of Administration and Scheduling for the Office of the Mayor. In that role, she reported to Stephanie FORMAS, and was supervisor to Colleen O'REILLY BERNIER. She did not have much to add to this investigation, other than stating that personnel assigned to the Office of the Mayor were given Public Records Act training when they were first hired, and that she had never physically handled DURKAN's phone after July 6th, so she could not have been responsible for any of the settings being changed.

Wednesday 10/26/2022 1130 hrs

I reviewed a transcript of the deposition of Colleen O'REILLY BERNIER in *Hunters Capital, LLC v. City of Seattle*, dated 7/27/2022. Detailed notes of the applicable portions of the interview can be found on pages 50-52 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

BERNIER served as the Executive Assistant to DURKAN while she was the US Attorney, and came with DURKAN to serve in that same role after she was elected as Mayor of Seattle. BERNIER said that she had worked for DURKAN for nine years, that she and the Mayor would discuss city events together, and that she would consider herself a personal friend of DURKAN.

In summary, BERNIER stated the following:

BERNIER stated that while she was with the Office of the Mayor, she received annual training on the preservation of electronic documents. She said that the training sessions that she attended were usually in January, and covered all documents, to include text messages. She said that these training sessions were for the staff only, and were not attended by DURKAN.

BERNIER stated that the only persons whom she knew to provide IT support to DURKAN were Emmanuel ARHU and Reginald ALENCASTRO. BERNIER stated that she had never assisted DURKAN with changing any settings on her phone, that after the phone was replaced in early July, no one else had access to the phone, that she had never looked at (in) the phone, and that she had never changed any settings in the phone. Furthermore, she stated that she did not know who may have changed the text message retention settings, and that DURKAN had never told her that she had changed those settings.

BERNIER confirmed that she had received an email from DURKAN on 7/4/2020 at 1813 hrs, in which DURKAN wrote, "My work phone crashed and I want to restore data and settings. But I do not have the pw to the MOS calendar. Do you have it, can you get it, please. Thanks."²⁶ BERNIER was also part of another email chain, in which DURKAN sent an email at 2052 hrs reading, "Can one of you send me the password for the MOS calendar account. My phone died but I was able to reset & backup from the cloud. But don't have that pw."²⁷ She said that her phone had died, so she did not see these messages until the next morning.

On 8/24/2020, ARHU asked BERNIER if she had the iPhone that DURKAN had used prior to October of 2019, as he believed it had been returned to the Mayor's Office. BERNIER looked for the phone, but could not find it at that time. However, BERNIER ended up locating the phone in early July 2021, after finding it inside an envelope at the bottom of a folder in one of her desk drawers. She did not look at the contents of this phone, and handed it over as soon as it was found.

BERNIER was also questioned about a text message that DURKAN had sent to staff members on 7/7/2020 at 0823 hrs, in which "the mayor is instructing everybody on this list to not do by text."²⁸ The

²⁶ Deposition of Colleen O'Reilly Bernier in *Hunters Capital, LLC v. City of Seattle*, dated 7/27/2022, page 56 line 17

²⁷ Deposition of Colleen O'Reilly Bernier, pages 57 line 16

²⁸ Deposition of Colleen O'Reilly Bernier, page 98 line 12

exact wording and context of the text message is not reproduced in the transcript; however, the timing of this message is somewhat concerning, given that it was probably DURKAN's first day back in the office after the holiday weekend and was in the immediate aftermath of the factory reset of her phone, and necessitates further investigation.

During the course of her deposition, BERNIER made a number of statements that were in conflict with or in direct opposition to either digital evidence and/or statements made by other involved parties.

BERNIER stated that she did not handle DURKAN's phone at any point after 7/4/2020, and did not make any changes to its settings. However, this testimony is in conflict with a sworn statement made by ARHU during his deposition, where he stated that he had spoken with BERNIER over the phone on 7/21/2020, and had walked her through the process to get the phone's contacts synched up.

Mr. REILLY-BATES picked up on this discrepancy, and drew BERNIER's attention to the following text message exchange between ALENCASTRO and ARHU, which occurred on 7/21/2020:

ALENCASTRO: Did you get to work on the mayor's phone?
ARHU: On the phone with Colleen now.
ARHU: The Mayor's phone's fixed. I had asked Colleen to call me.²⁹

Mr. REILLY-BATES then had the following exchange with BERNIER, concerning her handling of DURKAN's phone on 7/21/2020, which is found on pages 70-73 of BERNIER's deposition; for ease of reading, I have removed the various objections and repeated statements while ensuring that context was not altered:

REILLY-BATES: Okay. So these messages describe a problem that the mayor was having with her calendar and the contacts. Would you agree?
BERNIER: It's hard to say.
REILLY-BATES: Okay. Well --
BERNIER: It says "contacts", but...
REILLY-BATES: Okay. Were you aware of -- that the mayor had a problem with her contacts in July of 2020?
BERNIER: I was.
REILLY-BATES: Okay. And if you could look at rows 8567 and 8568. Emmanuel writes to Regi, "On the phone with Colleen now." In the next message, he writes, 11 minutes later,

²⁹ Deposition of Colleen O'Reilly Bernier, pages 70-71

"The Mayor's phone's fixed. I had asked Colleen to call me." Do you see that?

BERNIER: I do.

REILLY-BATES: So did you receive a call from Emmanuel regarding an issue that the mayor had with her contacts on her phone on July 21st, 2020?

BERNIER: I mean, I don't recall it, but it says I did.

REILLY-BATES: And so Emmanuel called you. He wasn't in the office, right?

BERNIER: I don't recall.

REILLY-BATES: Well, the message is on -- on this chat history says that Emmanuel wrote, "On the phone with Colleen now." And in the next message, he says, "I had asked Colleen to call me." Is it fair to assume that he wasn't in the office?

BERNIER: He probably wasn't in my office, but he could have been in another office in -- you know, in the mayor's office. I don't know.

REILLY-BATES: Okay. Tell me what you remember of this problem and what he had you do to fix the mayor's phone?

BERNIER: The only thing I can remember are contacts. So I kept her contacts on my desktop, and -- you know, in Outlook. And I would keep all of those updated. And as far as I recall, Emmanuel set it so that it would automatically update on her phone as well.

REILLY-BATES: Uh-huh.

BERNIER: And that was not happening.

REILLY-BATES: Uh-huh.

BERNIER: And so Emmanuel and I talked, and I don't recall honestly how -- what happened on the conversation. I don't even know if it got fixed. I just don't recall.

REILLY-BATES: So -- so he had you go into the mayor's phone and -- and change some of her settings at that time to fix this problem?

BERNIER: I don't recall.

- REILLY-BATES:** He didn't -- Emmanuel didn't fix the problem himself, he had you fix the problem; correct?
- BERNIER:** I don't recall.
- REILLY-BATES:** Is it possible -- do you think it's possible that you went into the mayor's settings to make this change to -- to fix this problem?
- BERNIER:** Anything's possible, but I just don't recall.

This portion of the deposition, taken in context with ARHU's sworn testimony and the contemporaneous text message exchange, indicates that on 7/21/2020, BERNIER was in possession of DURKAN's iPhone 11 (FirstNet) while she was on the phone with ARHU, and had access to the settings of that phone while she and ARHU attempted to correct the issue with DURKAN's contacts.

A short while later, Mr. REILLY-BATES asked BERNIER, "do you ever recall discussing the text message retention settings on the mayor's phone with the mayor after her phone was replaced in July of 2020?", to which BERNIER responded, "I do not."³⁰ However, BERNIER was later shown a text message that she had sent to ARHU and ALENCASTRO on 9/17/2020, in which she stated that DURKAN had told her that the settings were set to "Never Delete", which is contrary to her earlier statement. Mr. REILLY-BATES picked up on this discrepancy as well, and had the following exchange with BERNIER:

- REILLY-BATES:** So when -- when did you have a conversation with the mayor in which she told you her phone was set to never delete?
- BERNIER:** I don't recall, but it looks like it would have been around that time.
- REILLY-BATES:** Okay. Did the mayor tell you anything else about the settings on her phone in July 2020, at the time you had this conversation?
- BERNIER:** Not that I recall.³¹

BERNIER was questioned about a series of text messages occurring on 9/17/2020; the first was a message sent from ALENCASTRO to ARHU, and the following messages were between her, ARHU, and ALENCASTRO. While I do not have the document from which Mr. REILLY-BATES obtained these messages, I have reconstructed them as follows, from the line of questioning contained on pages 77 through 80 of BERNIER's deposition:


³⁰ Deposition of Colleen O'Reilly Bernier, page 76 line 4

³¹ Deposition of Colleen O'Reilly Bernier, page 80 line 10

ALENCASTRO: Hey Colleen says she has the Mayor's phone. Can I call her?

BERNIER: Do I need to keep holding her phone? She'll be needing it back shortly.

ARHU: Unfortunately, there is no backup available.

BERNIER: 

BERNIER: Do we need to change something on her phone to make it last longer?

ALENCASTRO: At her convenience we can look at the setting to check if something is out of place.

BERNIER: She did say its set to Never Delete so assume this is from the crash.

These text messages are all in opposition to BERNIER's earlier testimony that she did not handle DURKAN's phone at any point after 7/4/2020, and did not make any changes to its settings. Based on the timeframe in which this exchange occurred, I believe that this exchange is in regards to DURKAN's iPhone 11 (FirstNet). Mr. REILLY-BATES then had the following exchange with BERNIER concerning this text message exchange, which is found on page 78 of BERNIER's deposition; for ease of reading, I have removed the various objections and repeated statements while ensuring that context was not altered:

REILLY-BATES: Do you recall receiving and sending these messages on September 16th, 2020?³²

BERNIER: I don't (*inaudible due to cross-talk*).

(The reporter requests clarification)

BERNIER: I just said, obviously I did.

REILLY-BATES: And was there a meeting between you and Emmanuel to look at the mayor's phone on September 16th, 2020?

BERNIER: Not that I recall.

REILLY-BATES: Well, perhaps -- perhaps you provided the phone -- the mayor's phone to Emmanuel on September 16th, 2020, so he could look for a backup?

BERNIER: I could have done that.

³² Mr. Reilly-Bates has mistakenly cited the date for this conversation as September 16th during this exchange, but correctly cited it as September 17th when introducing it from the source document a few questions prior.

Mr. REILLY-BATES then drew BERNIER's attention to another text message exchange between her and ALENCASTRO on 9/24/2020, which is reproduced on page 83 of BERNIER's deposition:

BERNIER: Can you come up real quick? I have the phone. She needs it back no later than 3:45.

ALENCASTRO: Braden says he will need more time with it. Can we try and schedule it tomorrow when there is more time?"

Once again, this text message sent from BERNIER on 9/24/2020 is in direct opposition to her earlier testimony that she did not handle DURKAN's phone at any point after 7/4/2020. Based upon the digital evidence presented in this deposition, it appears that BERNIER was in possession of DURKAN's iPhone on 7/21/2020, which is within the window of when text message retention settings could have been changed, as well as on 9/17/2020 and 9/24/2020, both of which are outside of the window, but still contradict her earlier testimony.

Despite being confronted with the digital evidence that showed that she had been in possession of DURKAN's phone on multiple occasions after July 4th, BERNIER inexplicably continued to deny that fact. Less than 40 minutes after the latest presentation of a text conversation that rebutted her prior testimony, Mr. REILLY-BATES had the following exchanges with BERNIER concerning her possession of DURKAN's phone, the first found on pages 104 to 105 and the second on pages 105 to 106:

REILLY-BATES: Now, did you ever handle the mayor's new iPhone 11 that she received in July as a replacement for the old phone?

BERNIER: Did I ever handle it?

REILLY-BATES: Yes.

BERNIER: I don't believe so.

REILLY-BATES: So did you have any reason to -- to handle the mayor's new phone after July 9th?

BERNIER: Not that I recall.

REILLY-BATES: And you personally didn't make any changes to the mayor's new phone; correct?

BERNIER: Correct.

Once again, this testimony by BERNIER is contrary to both the digital evidence provided and the sworn statements of other involved parties.

In the beginning of her deposition, BERNIER testified that when DURKAN had an IT issue, she would generally bring the issue to BERNIER first; as DURKAN's Executive Assistant, BERNIER was located



right next to her and would coordinate with IT to get the necessary assistance. Additionally, Andrea FRIEDHOFF, who was BERNIER's direct supervisor, testified in her deposition that part of BERNIER's role was to act as a liaison between the Mayor and the IT Department. FRIEDHOFF testified that BERNIER "would take the phone and either contact me or contact Regi and Emmanuel directly to let them know there was an issue and to figure out time to have it looked at."³³

In light of that fact, BERNIER's subsequent testimony that she had zero conversations with DURKAN about her phone in July of 2020, her testimony that she did not help the mayor to troubleshoot technical issues with her phone, and her testimony that she did not ever discuss the missing text messages with DURKAN all strain credibility. Furthermore, BERNIER herself contradicts those claims, first when she stated that she was aware that DURKAN was having trouble accessing her calendar and contacts on her phone, and again when she acknowledged that she and DURKAN had a conversation concerning the text message retention settings being set to "Never Delete".

Overall, BERNIER used a variant of the phrases "I do not recall" or "Not that I recall" at least 70 times during her 3½ hour deposition, even after Mr. REILLY-BATES attempted to refresh her memory with her own contemporaneous text message conversations.

Based solely upon review of the written transcripts, it is impossible for me to opine as to whether or not BERNIER's counterfactual statements are being made with the intent to deceive and/or are being phrased in such a manner as to avoid providing any additional information. However, as this deposition was provided in a federal civil case, the finding as to whether or not BERNIER's extensive memory lapses were disingenuous attempts to provide evasive and incomplete answers, and therefore a violation of Federal Rule of Civil Procedure 37(a)(4), would be a matter for the federal court to decide.

10/27/2022 - 11/2/2022

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

11/3/2022 - 11/7/2022

During this timeframe I was on scheduled vacation, and did not perform any duties related to this investigation.

Tuesday 11/8/2022 1830 hrs

I began a detailed review of "FRCP 26(a)(2)(B) Expert Report of Kevin Faulkner."

³³ Deposition of Andrea Freidhoff in *Hunters Capital, LLC v. City of Seattle*, dated 6/30/2022, page 19 line 23

Wednesday 11/9/2022 1330 hrs

I completed the review of "FRCP 26(a)(2)(B) Expert Report of Kevin Faulkner." Detailed notes of this document can be found on pages 53-60 of my Investigative Notebook, which will be scanned and attached to this case at its conclusion.

Kevin FAULKNER has over 18 years of experience in digital forensics, and has testified as a subject matter expert in the Federal court system on multiple occasions. FAULKNER's employer, The Crypsis Group³⁴, was retained by the Seattle Attorney's Office on 11/5/2020, with the initial scope of their investigation being to locate or recover any missing text messages of Mayor DURKAN, and to determine how the text messages had come to be deleted. The scope of his investigation was later expanded to the text messages of Chief BEST, after it was discovered that her cell phone was also missing text messages. FAULKNER's investigation was limited to the digital forensics aspects, and he made no attempts to determine who may have made any changes to settings or otherwise cause text messages to be deleted.

In order to complete his investigation, FAULKNER obtained copies of all data extractions performed by the City of Seattle thus far, imaged Michelle CHEN's computer and all computers and laptops used by DURKAN, conducted telephone interviews with some of the involved parties, and took physical possession of the cell phones belonging to DURKAN, and later BEST.

For ease of reading, I have broken down my summary of FAULKNER's report into three sections: Explanations of iPhone Settings, Mayor DURKAN, and Chief BEST.

EXPLANATION OF IPHONE SETTINGS

Backups of iPhones are generally created with either iTunes or iCloud. If iCloud backups are enabled, the device will automatically backup as soon as the device is connected to WiFi and a power source, and the screen is locked. Apple will store these backups on their servers for as long as a device is active and as long as there is storage space available in the user's iCloud account. If a device has not created a backup within the previous 180 days, then Apple will automatically delete all of the device's stored backups.

Text messages (both iMessage and SMS) are stored in one of three places – on the device itself, in iCloud using the "Messages in iCloud" function, and in a device backup stored in iCloud or iTunes. However, text messages are not saved in both the "Messages in iCloud" function and device backups simultaneously; if "Messages in iCloud" is enabled, text messages are not saved in backups, and vice-versa.

When "Messages in iCloud" is enabled, all text messages sent or received from any device linked to that Apple ID are automatically synchronized to and saved in iCloud, in addition to being retained on the device itself. "Messages in iCloud" can be disabled in one of two ways, either by following the path "Settings » iCloud » Messages » Disable and Download Messages" or by following the path "Settings »

³⁴ Faulkner's employer is identified under one of three names, depending upon the documents reviewed. For clarity, the Crypsis Group was acquired by Palo Alto Networks in September of 2020, and FAULKNER's team was later merged with their Unit 42 threat analysis team and renamed Unit 42 Security Consulting.

iCloud » Manage Storage » Messages » Disable & Delete”. Upon selecting “Disable & Delete”, the user will be presented with a message reading, *“This will disable Messages in iCloud and delete all your messages stored in iCloud. You have 30 days to undo this action. Your device will automatically download your messages.”* The user must then select “Delete Messages” in order to confirm the action.

When a user selects “Disable & Delete” and stops using the “Messages in iCloud” function, the following chain of events occurs:

- 1) Messages will no longer synchronize with iCloud and all messages stored under “Messages in iCloud” are automatically downloaded to the device,
- 2) Retention settings for text messages stored on the device are automatically changed to the default retention setting of “Forever”,
- 3) All messages stored under “Messages in iCloud” are marked for deletion after 30 days, and
- 4) All messages will now be included in future iTunes and /or iCloud backups.

If a user wishes to change the retention settings of text messages stored within the device itself, they can follow the path “Settings » Messages » Message History – Keep Messages”, at which point they will be given the options of “30 Days”, “1 Year”, and “Forever”. Should the user select either the “30 Days” or “1 Year” setting, they will be presented with a message reading, *“Delete Older Messages? This will permanently delete all text messages and message attachments from your device that are older than [30 Days / 1 Year].”* The user must then select “Delete” in order to confirm the action. Once the action is confirmed, any messages older than the selected retention period are deleted, and any messages that later reach the selected retention period also will be automatically deleted.

MAYOR DURKAN

At the beginning of FAULKNER’s investigation, DURKAN was missing all text messages between 8/29/2019 and 6/25/2020. On 11/19/2020, FAULKNER was provided with an iExplorer backup³⁵ from Michelle CHEN’s computer, which was collected on 8/29/2019, forensically imaged CHEN’s computer for examination, and took possession of two of DURKAN’s three cell phones. The third phone, which could not be located at that time, was later located in BERNIER’s desk on 6/28/2021, and received by FAULKNER on 7/2/2021. The three cell phones that DURKAN used while in office are identified as follows:

- 1) iPhone 8 Plus (Verizon), in-service between 4/10/2018 and 10/30/2019,
- 2) iPhone 8 Plus (FirstNet), in-service between 10/30/2019 and 7/9/2020, and
- 3) iPhone 11 (FirstNet), in-service between 7/9/2020 and 11/19/2020.

³⁵ Faulkner identifies this as an iTunes backup, but multiple other sources confirm that the program that Michelle Chen used to back up the Mayor’s phone was iExplorer. It is likely that the terms are interchangeable, but I will use the term “iExplorer” for purposes of clarity.

Although the iPhone 8 Plus (Verizon) was taken out of service long before July of 2020, the digital forensics examination of this phone is still relevant, as it helps to establish historical patterns concerning retention settings and backups, and because its examination resulted in the recovery of all of DURKAN's text messages from 8/29/2019 through 10/30/2019. I have summarized FAULKNER's conclusions, based upon his forensics examinations, in the form of a timeline for ease of reading.

iPhone 8 Plus (Verizon)

4/10/2018: The iPhone 8 Plus (Verizon) was placed in-service and set up from an iCloud backup. As of 11/16/2020, this backup was no longer available, and presumably was automatically deleted from iCloud in accordance with Apple policies.

5/24/2019: An iExplorer backup was created on CHEN's computer at 15:56:38 PDT. This backup was not located, and its creation was derived from artifacts present in the following item.

8/29/2019: An iExplorer backup was created on CHEN's computer, with a timestamp of 14:36:37 PDT. This backup indicates that as of this date, DURKAN's text message retention settings were "Keep Messages: Forever" and that "Messages in iCloud" was disabled.

This backup also indicates that it was not configured to automatically backup to iCloud. However, the "LastCloudBackupDate" key indicated that an iCloud backup was created on 8/28/2019 at 22:51:20 PDT, which means that iCloud backups must have been enabled prior to the creation of the iExplorer backup, and were disabled for the purposes of that backup.³⁶ As of 11/16/2020, this backup was no longer available, and presumably was automatically deleted from iCloud in accordance with Apple policies.

As "Messages in iCloud" was disabled, 3,643 of DURKAN's text messages were saved in this iExplorer backup, resulting in the recovery of all of DURKAN's missing text messages between 11/18/2017 and 8/29/2019.

10/30/2019: Before the phone's data was transferred to the iPhone 8 Plus (FirstNet) and the phone was decommissioned, "Messages in iCloud" was enabled at 12:40:35 PDT, followed by the creation of an iCloud backup at 12:41:50 PDT. As of 11/16/2020, this backup was no longer available, and presumably was automatically deleted from iCloud in accordance with Apple policies.

This phone was given to the Mayor's Office at their request, and remained forgotten in a drawer in Colleen O'REILLY BERNIER's desk until it was discovered on 6/28/2021.

³⁶ Although I have never used iExplorer, I have inferred from internet postings that this was done to prevent conflicts between iExplorer and iTunes/iCloud during the backup process.

iPhone 8 Plus (FirstNet)

10/30/2019: The iPhone 8 Plus (First Net) was placed in-service and set up at 13:09:41 PDT, using the 10/3/2019 iCloud backup of the iPhone 8 Plus (Verizon). This restore from backup carried over the previous settings, in which text message retention settings were "Keep Messages: Forever" and "Messages in iCloud" was enabled.

2/9/2020: An iCloud backup was created ³⁷, in which "Messages in iCloud" is enabled. Based upon the "KeepMessagesVersionID" key contained in the 8/21/2020 iExplorer backup of the iPhone 11 (FirstNet), the text message retention settings at this time were still set at "Keep Messages: Forever".

Despite the fact that the phone was configured to automatically backup to iCloud, there were no further iCloud backups after this date. The most likely explanation is that the size of the data to be backed up on DURKAN's phone now exceeded the available storage space in the iCloud account.

As explained earlier, iCloud backups will be maintained by Apple for 180 days, after which they will be deleted if the device has not created a new backup within that time period. The 2/9/2020 backup would have remained available until on or around 8/6/2020, after which time it was automatically deleted from iCloud in accordance with Apple policies.

7/4/2020: According to DURKAN, the phone was partially submerged in saltwater for an unknown amount of time. As a result, the phone was eventually restored from the 2/9/2020 iCloud backup at 16:51:25 PDT. This restore from backup carried over the previous settings, in which text message retention settings were "Keep Messages: Forever" and "Messages in iCloud" was enabled.

As "Messages in iCloud" was enabled, the entirety of DURKAN's text messaging history from 11/18/2017 through this date, consisting of 5,911 unique text messages, was synchronized from iCloud to the device as a result of the restoration process.

At 17:19:44 PDT, 28 minutes and 19 seconds after the iPhone 8 Plus was restored from backup, the "Messages in iCloud" synchronization was turned off, utilizing the "Disable & Delete" function in the "Manage Storage" section of the iCloud storage settings. This action automatically downloaded all 5,911 text messages to the device, stopped the synchronization of future messages with iCloud, set the text message retention settings to "Keep Messages: Forever", and scheduled all text messages stored in iCloud to be deleted in 30 days.

³⁷ The date of this backup is approximate, and was inferred by this detective from artifacts found in the 8/21/2020 iExplorer backup of the iPhone 11 (FirstNet).

iPhone 8 Plus (FirstNet) **OR** iPhone 11 (FirstNet)

Between 7/4/2020 at 17:19:44 PDT and 7/22/2020 at 23:11:47 PDT At an unknown point in time after the moment when the "Disable & Delete" function was enabled on 7/4/2020, the text message retention settings were changed from "Keep Messages: Forever" to "Keep Messages: 30 Days". Once this setting was enabled, any and all text messages older than 30 days are permanently deleted from the phone, and any text messages that reach that 30 Day retention period will be automatically deleted at 03:00:00 PDT the next day.

Due to the fact that the iPhone 8 Plus (FirstNet) was factory reset before it could be examined, FAULKNER's forensic examinations were unable to determine if this change in settings was made on the iPhone 8 Plus (FirstNet) between 7/4/2020 and 7/9/2020, or if it was made on the iPhone 11 (FirstNet) between 7/9/2020 and 7/22/2020.

iPhone 8 Plus (FirstNet) **AND** iPhone 11 (FirstNet)

7/9/2020: The iPhone 11 (First Net) was placed in-service and set up at 12:59:36 PDT, using the "Quick Start" method to transfer the data from the iPhone 8 Plus (FirstNet) to the iPhone 11 (FirstNet).

As "Messages in iCloud" was still disabled on the iPhone 8 Plus (FirstNet), that setting carried over to the iPhone 11 (FirstNet).

The iPhone 11 (FirstNet) was not configured to automatically backup to iCloud³⁸, and no iCloud backup was created prior to the utilization of the "Quick Start" data transfer.

Once the transfer was complete, the iPhone 8 Plus (FirstNet) was retained by Seattle IT in their office, and the iPhone 11 (FirstNet) was issued to DURKAN.

iPhone 11 (FirstNet)

Between 7/22/2020 at 23:11:47 PDT and 7/26/2020 at 03:00:00 PDT At an unknown point in time between Wednesday July 22nd at 23:11:47 PDT and Sunday July 26th at 03:00:00 PDT, the text message retention setting for this phone was changed from "Keep Messages: 30 Days" to "Keep Messages: Forever". This action immediately stopped the automatic deletion of text messages.

³⁸ Faulkner's report was unclear as to whether this setting was enabled at the time of the "Quick Start" data transfer as a setting carried over from the iPhone 8 Plus (FirstNet), or if it was enabled on the iPhone 11 (FirstNet) at some point after the data transfer was complete. As his only source is the 8/21/2020 iExplorer backup of the iPhone 11 (FirstNet), it is likely that he was unable to make that determination with the data available.



iPhone 8 Plus (FirstNet)

Sometime on or around 8/10/2020 Approximately one month after the iPhone 8 Plus (FirstNet) was turned over to Seattle IT, Emmanuel ARHU performed a factory reset on this phone, wiping all of its data.

iPhone 11 (FirstNet)

8/21/2020 An iExplorer backup is created on Michelle CHEN's computer, with a timestamp of 12:29:09 PDT. This backup indicates that as of this date, DURKAN's text message retention settings were "Keep Messages: Forever", and that both "Messages in iCloud" and automatic iCloud backups were disabled.

An analysis of the text messaging history and logs showed that 5,869 text messages were deleted as a result of the "Keep Messages: 30 Days" setting being activated between 7/4/2020 and 7/22/2020.

As this messaging log extends back to November of 2017, 3,845 of these text messages were recovered from other sources, resulting in a final number of 2,024 deleted text messages between 10/30/2019 and 6/25/2020.

iPhone 8 Plus (FirstNet)

9/17/2020 at 18:56 PDT³⁹ Artifacts located in the 7/7/2021 Cellebrite full file system data extraction of this phone indicate that it was either subjected to another factory reset, or that the factory reset that was performed in August by ARHU was completed at this time.

9/18/2020 at 1:19 PDT⁴⁰ A Magnet ACQUIRE data extraction is performed on this phone by Seattle IT Braden HEIL, preserving its configuration and data as of this date. As the device had already been subjected to a factory reset, the preservation contained no configuration settings or data.

iPhone 11 Plus (FirstNet)

10/15/2020 A Magnet ACQUIRE data extraction is performed of this phone, preserving its configuration and data as of this date. This preservation indicates that "Messages in iCloud" is disabled, automatic iCloud backups are disabled, and that the text message retention settings are "Keep Messages: Forever".

³⁹ Faulkner identifies this date as 9/18/2020; however, Leatha's report gives the time/date as 9/17/2020 at 18:56 PDT, which is 9/18/2020 at 01:56 UTC. For consistency, I have converted the time/date to local time.

⁴⁰ This time was not listed in any of the available source materials; it was obtained from Gabriel REILLY-BATES on 2/13/2023 from his copy of the Magnet ACQUIRE and later inserted into this timeline, for the purposes of clarity.

11/19/2020 The "Messages in iCloud" setting is enabled at 12:38:33 PDT, thereby synchronizing all messages stored on the device with iCloud, and the device is configured to backup to iCloud at 12:47:58 PDT. It is likely that this action was performed by Seattle IT, prior to transferring the data from the iPhone 11 (FirstNet) to a new phone.

iPhone 8 Plus (FirstNet) **AND** iPhone 11 (FirstNet)

11/19/2020 After Seattle IT transfers the data from DURKAN's iPhone 11 (FirstNet) to her new phone, FAULKNER takes possession of both the iPhone 8 Plus and the iPhone 11.

FAULKNER then performs a Cellebrite advanced logical data extraction of both phones. As the iPhone 8 Plus (FirstNet) had already been subjected to a factory reset, the extraction contained no configuration settings or data.

iPhone 8 Plus (Verizon)

6/28/2021 BERNIER locates this phone in an envelope at the bottom of a hanging file in one of her desk drawers. She notifies the City of Seattle, who sends the phone to FAULKNER for examination.

7/2/2021 FAULKNER takes possession of the phone and performs a Cellebrite advanced logical data extraction of the phone, which represents its configuration and data as of 10/30/2019 (the date that it was taken out of service).

iPhone 8 Plus (Verizon) **and** iPhone 8 Plus (FirstNet)

7/7/2021 FAULKNER performs a Cellebrite full file system data extraction of both phones, which contains more information than the previous extractions.

iPhone 11 Plus (FirstNet)

7/8/2021 FAULKNER performs a Belkasoft full file system data extraction of this phone, which contains more information than the previous extractions.

Regarding the iPhone 8 Plus (FirstNet), FAULKNER was unable to determine the exact time on 7/4/2020 in which the phone was subjected to a factory reset, as the subsequent factory reset(s) would have overwritten the ".obliterated" file used to make that determination. As such, the date and time that the phone was restored from an iCloud backup is the closest approximation that can be obtained.

After imaging Michelle CHEN's computer, FAULKNER was able to determine that the iPhone 8 Plus (FirstNet) had never been connected or backed up to CHEN's computer, so no iExplorer backups were ever created for that device. Additionally, FAULKNER examined two Microsoft Surface Pro

computers that were assigned to DURKAN, and found no artifacts or evidence that would indicate that DURKAN had ever connected any of her phones to either computer.

When addressing the alteration of the text message retention settings from "Keep Messages: Forever" to "Keep Messages: 30 Days" and back again, Faulkner stated that they had "investigated whether there were any events that could have changed the text message retention settings without manual intervention, and to date have not identified any that apply."⁴¹

CHIEF BEST

After the City of Seattle learned that Chief Carmen BEST was also missing text messages, FAULKNER's engagement was expanded to include her as well. I have summarized FAULKNER's conclusions, based upon his forensics examinations, in the form of a timeline for ease of reading.

iPhone XS Max

- 10/1/2019 Placed in-service and set up at 11:27:45 PDT, from BEST's previous iPhone 8 Plus.
- 9/2/2020 BEST retires from the Seattle Police Department, and turns in her iPhone XS Max.
- 2/24/2021 ArcherHall, a legal discovery firm, performs a Cellebrite advanced logical data extraction.
- 11/8/2021 After FAULKNER takes possession of the phone, he performs another Cellebrite advanced logical data extraction.

Both data extractions indicate that "Messages in iCloud" was never enabled on this device, and that the text message retention settings were "Keep Messages: 30 Days". The extractions also indicated that the device was configured to automatically backup to iCloud. However, the "LastCloudBackupDate" key indicated that the last iCloud backup was created on 10/1/2019 at 11:23:38 PDT. As this key value predates the setup of this phone, it indicates that it is carried over from the settings of the previous phone and means that the iPhone XS Max was never backed up to iCloud, despite being configured to do so. The most likely explanation is that the size of the data to be backed up on this phone now exceeded the available storage space in the iCloud account.

After analyzing the text message database in the data extractions, FAULKNER found that there were 5,133 entries in the table, representing the number of entries created between 11/5/2018 (the date that the iPhone 8 Plus was set up) and 9/2/2020. FAULKNER concluded that only 17 of these entries had been deleted due to the text message setting of "Keep Messages: 30 Days", and that the extractions indicate that text messages were deleted over a period of time, rather than in bulk.

FAULKNER also analyzed a forensic image taken of the computer belonging to BEST's executive assistant, and located an iTunes backup of BEST's iPhone 6s taken on 11/15/2017 and an iTunes backup of BEST's iPhone 8 Plus taken 10/1/2019. FAULKNER was able to confirm that the iPhone XS Max was only

⁴¹ FRCP 26(a)(2)(B) Expert Report of Kevin Faulkner, dated 2/11/2022, page 4



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

connected to this computer on 10/1/2019, which was the date that it was set up from the above iTunes backup, and that it was never backed up on this computer.

Although FAULKNER was able to recover text messages from the two iTunes backups taken in 2017 and 2019, he was unable to recover any text messages from the iPhone XS Max.

It is my understanding that any cell phones that were physically examined by FAULKNER are still securely stored and in the custody of Palo Alto Networks.

Thursday 11/10/2022 1330 hrs

I spoke with Steven FOGG of Corr Cronin LLP, who is the attorney currently representing all seven of the named subjects in this investigation. I advised him that I was close to completing my review of the materials, and that at the end of that review I may have a few follow-up questions for his clients. I told him that I didn't see a need to schedule a full interview just to ask one or two questions, and asked him if he would be amenable to obtaining answers to those questions from his clients, were I to provide him with a list of said questions. He said that would be no problem.

I mentioned to FOGG that I have not yet been able to obtain a couple of documents related to this investigation, and asked him if he might be able to assist me in that regard; he agreed, and also mentioned to me that his office had drafted a "white paper" in regards to this case that I may find interesting. I sent FOGG an email requesting that "white paper", along with copies of the 1st and 2nd set of Interrogatories. Shortly thereafter, I realized that I was also still missing copies of "CRMP Advice Sheet for Text Messages" and "Mayor's Office Best Practices", and sent a follow-up email requesting those documents as well.

Thursday 11/10/2022 1600 hrs

I began a review of a transcript of the deposition of Kevin FAULKNER in *Hunters Capital, LLC v. City of Seattle*, dated 8/17/2022.

Friday 11/11/2022 1100 hrs

I continued the review of Kevin FAULKNER's deposition, dated 8/17/2022. While doing so, I found a reference to three additional individuals that had been discovered to be missing text messages. Those three persons were identified as Deanna NOLLETTE, SHANON ANDERSON, and VALARIE ANDERSON by Mr. REILLY-BATES.

An open-source internet search revealed that between June and July of 2020, Deanna NOLLETTE was an Assistant Chief at the Seattle Police Department, VALARIE ANDERSON was the Executive Director of Administration at the Seattle Police Department, and SHANON ANDERSON was a Lieutenant in the Seattle Police Department's Force Review Unit.

All three were added as named subjects in this investigation.

Friday 11/11/2022 1430 hrs

I completed the review of Kevin FAULKNER's deposition, dated 8/17/2022. Detailed notes of the applicable portions of the interview can be found on pages 61-63 of the Investigative Notebook, which will be scanned and attached to this case at its conclusion.

FAULKNER's testimony regarding the contents of his Expert Report dated 2/11/2022 are consistent with its contents, and will not be reiterated here for the sake of brevity (*too late*).

In summary, FAULKNER stated the following:

FAULKNER did state that he had two amendments to make to his report, the first concerning the changing of text message retention settings. FAULKNER said that he had recently done some additional testing, and discovered that if you have two phones that are on the same iCloud account and have "Messages in iCloud" enabled, you can change the text message retention settings on one of the phones and those settings would be applied to the other phone as well. FAULKNER explained, "Basically if you -- if you set 30 days on one phone, any other phone on the account will automatically change to that same retention setting without you having to do anything on that additional phone."⁴²

However, it should be noted that the digital forensics examinations indicate that "Messages in iCloud" was turned off using the "Disable & Delete" setting on 7/4/2020, prior to the text message retention settings being altered from "Keep Messages: Forever" to "Keep Messages: 30 Days", and back again. The digital forensics examinations also indicate that "Messages in iCloud" remained disabled as of 8/21/2020. As such, the situation that FAULKNER has described above would not be applicable to either of DURKAN's phones.

The second amendment that FAULKNER wished to make to his report was concerning his statement on page 24, footnote 17, in which he stated that it can be difficult to determine when messages are deleted by the retention settings of a phone versus when they are manually deleted, as there is no specific artifact, log, or record that is left behind to indicate which type of deletion occurred. FAULKNER stated, "That is still true. It may be difficult. But in this case, I came to realize, in preparation for this deposition, that it's not difficult to tell them apart for the mayor's phone, and that the artifacts are not consistent with a manual deletion. That's -- that's not really a possibility in this case."⁴³ Based upon this statement, it appears to be FAULKNER's opinion that there were no manual deletions of text messages in DURKAN's phone.

However, FAULKNER was later questioned about Brandon LEATHA's opinion that the analysis of DURKAN's 8/21/2020 iExplorer backup of the iPhone 11 (FirstNet) indicated that there were 191 text messages that were manually deleted between 6/25/2020 and 11/16/2020, and he seemed to have a different opinion than stated earlier. Mr. REILLY-BATES had the following exchange with FAULKNER concerning these 191 text messages, found on page 175 and 176 of his deposition:

⁴² Deposition of Kevin T. Faulkner in *Hunters Capital, LLC v. City of Seattle*, dated 8/17/2022, page 85 line 20

⁴³ Deposition of Kevin T. Faulkner, page 84 line 17

REILLY-BATES: Okay. Now, were you aware of these 191 manual deleted messages when you prepared your report in February of 2022?

FAULKNER: I think I recall seeing some gaps in row IDs that are consistent with manual deletion, but I don't know if I knew of each of them or anything like that.

REILLY-BATES: Okay. And did you -- did you describe the manual deletion of any of the mayor's text messages in your expert report that was issued in February of 2022?

FAULKNER: Not that I recall.

REILLY-BATES: Why not?

FAULKNER: It wasn't something I was asked to look into and opine on. I was looking for other sources of data that could have and recover text messages, or trying to figure out what happened with them.

As the line of questioning continued, FAULKNER explained that the scope of his investigation was solely limited to the deleted text messages from within the timeframe of 8/29/2019 to 6/25/2020. FAULKNER admitted that he had seen the evidence of these manual deletions during his review, but he did not consider them to be within the scope of his engagement with the city, as they had occurred outside of the timeframe in question, and thus not something that should be included in his final report. Based upon this explanation, it appears that FAULKNER's opinion that there were no manual deletions of text messages in DURKAN's phone applies only to only those messages prior to 6/25/2020.

However, FAULKNER stated that he and his team did make a comparison between the 191 manually deleted text messages listed in LEATHA's report and the reconstructed text messages for DURKAN, and were able to determine that 131 of those manually deleted text messages were among the reconstructed text messages.

FAULKNER stated that he had spoken to DURKAN about the events of July 4th over the phone, at the beginning of his investigation. Mr. REILLY-BATES had the following exchange with FAULKNER concerning his discussion with DURKAN, found on page 16 and 17 of his deposition:

REILLY-BATES: Okay. What did Jenny tell you during that phone call?

FAULKNER: Generally, that on July 4th, she went for a walk along the - the water somewhere, realized that her phone was no longer in her pocket, and backtracked where she had walked and found the phone sitting in a puddle.

REILLY-BATES: Okay. What else did she tell you?

FAULKNER: I recall her saying that, when she retrieved the phone from the puddle and brought it home, it was not functioning properly; that there were, like, strange stripes down the screen or something along those lines; that she put it in some rice to dry it out; and after drying it out, worked to get the phone functional again.

REILLY-BATES: Okay. And what did she do -- what did she tell you about what she did to get the phone functional again?

FAULKNER: I recall she -- I believe she mentioned restoring the phone from a -- a backup, but beyond that, I'm -- it was -- I didn't get a lot of technical details of step-by-step what had happened.

FAULKNER went on to state that DURKAN had never told her that she had enabled the "Disable & Delete" function of "Messages in iCloud", and that she didn't recall ever touching the text message retention settings for "30 Days" or "Forever".

FAULKNER stated that when he had spoken to Emmanuel ARHU and Reginald ALENCASTRO, they had indicated that it was their standard practice to create an iCloud backup of user's phone before transferring the data to a new phone. He said that they believed that the "Quick Start" method was more complete, and transferred over settings and data that may not be included in a standard backup and restore. ARHU told FAULKNER that he had done the transfer in July of 2020, that he had used the "Quick Start" method for that transfer. ARHU also stated that after the transfer, he held onto the iPhone 8 Plus (FirstNet), placing it in a drawer in his office, and then performed the factory reset on the phone about four weeks later, which was their normal process.

FAULKNER and Mr. REILLY-BATES discussed the factory reset of DURKAN's iPhone 8 Plus (FirstNet) that occurred in late September of 2020, before it was turned over to Braden HEIL of Seattle IT. This is a date that I have had questions about, as there were contemporaneous text message conversations and confusing testimony during depositions that seem to indicate that DURKAN's phone was reset for a second time, and confusion surrounding the date and time that a reset had actually occurred.

Mr. REILLY-BATES had the following exchange with FAULKNER concerning the reset of DURKAN's phone in September of 2020, found on page 151 and 152 of his deposition:

REILLY-BATES: Okay. And so just to be clear, you did not have any forensic artifacts to suggest that there was a factory reset in August of 2020. That was solely based on the testimony

that you heard, that it was the customary practice to reset a phone; correct?

FAULKNER: Yes, I believe that's fair. Correct.

REILLY-BATES: Okay. Now, were you aware that on September 18th Emmanuel Arhu delivered the mayor's iPhone 8 Plus FirstNet to Braden Heil to conduct a forensic examination of -- of the mayor's phone?

FAULKNER: I recall that the phone was delivered to Mr. Heil on September 18th. I don't recall who delivered it, sitting here today.

REILLY-BATES: Okay. Do you think it's unusual that the phone was factory reset on September 17th, a day before it was to be delivered to the City's information security engineer?

FAULKNER: I would say that the phone, you know, may have been additionally reset and -- on September 17th, or that may have been the final completion of the reset that occurred in August. I can't tell. The forensic artifacts just show me basically when the phone started up after a reset occurred. It doesn't actually say when the reset was initiated. Typically, you reset a phone, and then it reboots immediately, but if for any reason it didn't, that could be the startup. I can't say. All I can see is the reset that occurred on the 17th.

REILLY-BATES: Okay. And would you admit that you're speculating when you state that the reset that occurred on September 17th might have been caused by an earlier reset that restarted up when the phone was turned on again?

FAULKNER: No. I said it could be, and technically, it can be. It's the -- you get the date when it started up, but beyond that, I don't know if it was or wasn't, just that it can be.

REILLY-BATES: Okay. So you have no -- no forensic evidence or no other evidence -- well, I should say you have no forensic evidence from the device or from any data extracted from the device or iCloud backups or iCloud accounts that would substantiate the claim that the reset was started in August and completed on September 17th; correct?

FAULKNER: I have seen no forensic evidence that would -- would prove that it was a single reset that started in August and completed in September.

FAULKNER stated that he did not inspect DURKAN's iPhone 8 Plus (FirstNet) for any sign that it had been damaged by saltwater. When asked if that was something that he would know how to do, FAULKNER responded, "Potentially", and then followed that up with, "I don't know any case where we've ever examined a phone to determine whether or not it had been damaged by saltwater."⁴⁴ FAULKNER did remember that the phone had both a cracked screen, with a crack running diagonally from one of the corners to the center of the screen, and that the glass on the rear of the phone was also cracked, with glass pieces missing. FAULKNER was able to power on the phone and connect to it in order to run his extractions, but did not perform any further function tests of the phone to determine whether it could connect to a network or perform any of its functions.

FAULKNER stated that after he was initially retained to look into DURKAN's devices, the City of Seattle soon expanded the scope of his investigation, and he would eventually analyze data regarding the phones of Carmen BEST, Harold SCOGGINS, Idris BEAUREGARD, Eric GREENING, Christopher FISHER, and Kenneth NEAFKY. However, information regarding their specific situations was not included in his report of 2/11/2022, as there were still attempts to recover that data underway. FAULKNER stated that he did address their situations in his rebuttal report.

FAULKNER was asked about any conversations that he had with Idris BEAUREGARD, relating to the reset of his phone. BEAUREGARD told him that he was having trouble getting into his phone, but FAULKNER couldn't remember off-hand if that was because he couldn't remember his passcode or because his passcode wasn't working. BEAUREGARD told him that he had left the phone on his desk overnight, so that he could try and gain access the next morning, but that the phone had reset. FAULKNER said that the description provided by BEAUREGARD of his phone resetting after the display of a spiral indicator on the screen is consistent with how a phone would automatically reset after a passcode had been entered incorrectly too many times, and that there is typically no warning message indicating that the phone is about to be reset. FAULKNER stated that iPhones will generally erase all data after ten failed passcode attempts, provided that feature is enabled.

FAULKNER stated that when an iPhone is locked and the user cannot remember the passcode, there are only three ways in which it can be unlocked without a factory reset. The user can:

- 1) correctly enter the passcode,
- 2) connect to a computer running iTunes, provided that the phone has been previously connected to iTunes on that computer, or
- 3) use Cellebrite software to unlock the phone, provided that it is an iPhone 4 or older.

⁴⁴ Deposition of Kevin T. Faulkner, page 70 line 7

FAULKNER said that there were other programs that could possibly unlock a locked iPhone of a later model, but that they were not publicly available, and are only available to law enforcement.

FAUKNER was asked about any conversations that he had with Kenneth NEAFCY, relating to the reset of his phone. FAULKNER confirmed that he had spoken with NEAFCY, but stated that at the moment he could not recall specific details of their discussion, other than the fact that he asked about the models of phones that NEAFCY used.

FAULKNER did not recall seeing any evidence that any of the subjects for whom he analyzed data had ever used any 3rd party or encrypted messaging apps, including WhatsApp, Signal, Telegram, WeChat, or Facebook Messenger. FAULKNER also did not see any evidence of outside interference.

The final 32 pages of FAULKNER's deposition specifically reference notes that FAULKNER had created during his conversations with city officials. As they seem integral to understanding the context of questioning, I will update this Time/Date entry with further information once those notes are received.

UPDATE: WEDNESDAY 11/16/2022 1545 HRS

After I located the document "Emailed Call Notes of Kevin Faulkner" in the PACER download, I completed my notes on FAULKNER's deposition.

Exhibit 6 in the deposition corresponds to the pages labeled "FAULKNER_000001" through "FAULKNER_000003". These notes were from a phone conversation that took place on or around 11/6/2020, between FAULKNER and ARHU, ALENCASTRO, Braden HEIL, Ivan Balbuena (City of Seattle IT), and legal counsel for the City, to include Michelle CHEN. FAULKNER's notes and deposition testimony regarding them are consistent with his report, and the statements that were attributed to others are consistent with their deposition testimonies.

Exhibit 7 in the deposition corresponds to the pages labeled "FAULKNER_000005" through "FAULKNER_000007". These notes were from a phone conversation that took place on or around 6/24/2021, between FAULKNER and ARHU, ALENCASTRO, Susy DeMers (City of Seattle IT), and legal counsel for the City. FAULKNER's notes and deposition testimony regarding them are consistent with his report, and the statements that were attributed to others are consistent with their deposition testimonies.

There is one additional point of interest in these notes, however. In this set of notes, FAULKNER is apparently discussing with the group possible locations for DURKAN's iPhone 8 Plus (Verizon), which was still missing on this date, and writes, "Regi and Emmanuel checked their own desks – its not there. Susy says she has a box of returned phones and she doesn't know who many of them belong to. Susy said they moved floors and then purged phones, got rid of locked or old phones, over 250 phones 3 years ago."⁴⁵

⁴⁵ Emailed Call Notes of Kevin Faulkner, dated 6/24/2021, page "FAULKNER_000007"

No mention is made as to whether any of the data was preserved from these phones before their destruction, but based upon my knowledge of their established practices, it is relatively safe to assume that none of the data was preserved and that the "purging" of these phones resulted in the loss of countless public records.

Exhibit 8 in the deposition corresponds to the pages labeled "FAULKNER_000010" and "FAULKNER_000011". These notes were from a phone conversation that took place on or around 7/28/2021, between FAULKNER and ARHU, ALENCASTRO, and legal counsel for the City. FAULKNER stated that this set of addresses questions that he had for ARHU and ALENCASTRO and their responses. One of FAULKNER's questions was what happened to the iPhone 8 Plus (FirstNet) after it had been reset by Seattle IT in August of 2020. FAULKNER's notes and testimony reflect that ARHU stated that "they have a few old phones and a box that they keep them in."⁴⁶

This exhibit also contains notes of FAULKNER's discussion with ARHU and ALENCASTRO concerning the 9/17/2020 reset of the iPhone 8 Plus (FirstNet). FAULKNER stated that this date, ARHU and/or ALENCASTRO were trying to see if there any backups associated with DURKAN's iCloud account that could be restored onto a phone, but found that none were available. ALENCASTRO told FAULKNER that he didn't remember doing this, and that it must have been ARHU who performed the attempt. While ALENCASTRO wasn't present for the attempted iCloud restore, he said that he believed that the attempt was made on an old surplus or test phone, as he didn't think that DURKAN's phone would be used as a test device, and that the iPhone 8 Plus (FirstNet) should have already been in a factory reset state. ARHU told FAULKNER that he didn't remember the timing of the attempted iCloud restore, and admitted that it was possible that he had used the iPhone 8 Plus (FirstNet) for the attempted iCloud restore. ARHU does not remember performing a second factory reset on the iPhone 8 Plus (FirstNet) on 9/17/2020. When further questioned about ARHU and ALENCASTRO statements regarding whether or not the iPhone 8 Plus (FirstNet) was used in the attempted iCloud restore, FAULKNER stated that:

"They were unsure what phone it was, and thought it might have been a test phone, at one point thought it might have been the cracked screen phone, at other points thought it was not the cracked screen phone. They -- they -- I did not get a clear and specific answer as to exactly which phone it was. It was a bit unclear."⁴⁷

Friday 11/12/2022 1130 hrs

During FAULKNER's deposition, notes that FAULKNER had made during his earlier discussions with city officials were labeled as Exhibits 6 through 10. I requested copies of those documents.

⁴⁶ Emailed Call Notes, page "FAULKNER_000010"

⁴⁷ Deposition of Kevin T. Faulkner, page 216 line 13



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Saturday 11/12/2022 1230 hrs

I reviewed a transcript of the *Reducing Crime* podcast (No35), which featured an interview with Carmen Best that occurred in early May of 2021, and addressed her experiences with the Seattle protests and the CHOP/CHAZ movement. This transcript contained no information relevant to this case, and a copy was not retained or included as an attachment to this report.

Saturday 11/12/2022 1521 hrs

I received an email from Steve FOGG, reading "Joe, thanks again for the call on Thursday. As discussed, I am forwarding our white paper on the applicable law (at least as far as we see it). I'm happy to discuss further at your convenience."

Attached to that email was a pdf file named "Corr Cronin Memo re Overview of RRA Violation Law". I opened that file and found that it consisted largely of legal opinion that is more appropriately reviewed by the King County Prosecutor's Office, and is outside of both the scope of this investigation and my specific expertise. As such, I did not read through the document and will not be including it among the reviewed materials in this investigation.

However, I did note that Attachment C was a copy of the document "CRMP Advice Sheet re Text Messages", which I have not yet been able to obtain from the City. I extracted these two pages from that document and saved them separately, to be reviewed later and attached to this report.

Wednesday 11/16/2022 1230 hrs

After multiple requests to different parties for specific documents have gone unfulfilled, I was able to locate and download some of those documents from PACER, as they had been filed in the United States District Court - Western District of Washington under Case 2:20-cv-00983-TSZ (*Hunters Capital, LLC v. City of Seattle*). Among the documents that I obtained from this PACER download were:

- 1) Seattle IT Service Ticket #5181570, dated 10/9/2020
- 2) SEA_00144308 Email chain (Neafcy), dated 10/28/2020
- 3) SEA_00141561 Email chain (Greening), dated 10/26/2020
- 4) City of Seattle Memorandum (heavily redacted), dated 9/25/2020
- 5) Emailed Call Notes of Kevin Faulkner, multiple dates (redacted)
- 6) Mayor's Office Best Practices, dated 6/19/2020
- 7) Declaration In Support Of Plaintiffs' Motion For Sanctions Due To Spoliation, dated 9/28/2022

The City of Seattle Memorandum, dated 9/25/2020, was written by Michelle CHEN, Kimberly FERREIRO, and others, CC'ed to Saad Bashir (Chief Technology Officer), and was addressed to the City Attorney's Office. The subject line and all three pages have been completely redacted with the

justification "*Attorney Client Privilege / Work Product*". Based testimony from Emmanuel ARHU, this memo likely details the discovery of DURKAN's missing text messages and the recovery efforts thus far.

The document "Emailed Call Notes of Kevin Faulkner" was referenced in FAULKNER's deposition as Exhibits 6 through 10, and it should be noted that large portions of this document have been heavily redacted with the justification "*Attorney Client / Work Product*". As the final 32 pages of his deposition dealt specifically with these call notes, I waited until I had them in hand to conduct a detailed review of this portion of the deposition. For organizational purposes, I have inserted this detailed review into the end of the time/date entry covering FAULKNER's deposition, which was "Friday 11/11/2022 1430 hrs".

Wednesday 11/16/2022 1505 hrs

While sorting through the documents downloaded from PACER, I noticed that two exhibits contained excerpts of depositions taken from Idris BEAUREGARD and Christopher FISHER. Both of these individuals are subjects of this investigation, and neither of their depositions have been provided thus far.

I called Gabriel REILLY-BATES of Morgan, Lewis & Brockius LLP, who has been the deposing attorney for the majority of the reviewed depositions, introduced myself, and asked if he would be willing to make those depositions available for review. He agreed to do so. I asked him if either Kenneth NEAFCY or Eric GREENING had been deposed, and he stated that they had not. I provided him with the list of names for which I have depositions; he indicated that the only other deposition that may be of use would be the deposition of Brandon LEATHA, but that LEATHA's deposition was entirely consistent with the expert report that he had submitted.

Upon the conclusion of the call, I sent Mr. REILLY-BATES an email, formally requesting copies of the depositions of BEAUREGARD and FISHER.

Wednesday 11/16/2022 1700 hrs

After completing the review of FAULKNER's deposition with the Emailed Call Notes that were entered as Exhibits, I reviewed the remainder of the call notes that were not so marked.

"FAULKNER_000004" contains notes from a phone conversation that took place on or around 3/19/2021, between FAULKNER and Michelle CHEN. These notes contain nothing of relevance to this investigation.

"FAULKNER_000008" and "FAULKNER_000009" were not marked as an Exhibit in the deposition, and FAULKNER was not questioned concerning their contents; however, there is information contained in them that may help resolve what happened with the iPhone 8 Plus (FirstNet) on September 17th or 18th of 2020. These notes were from a phone conversation that took place on or around 7/27/2021, between FAULKNER, Braden HEIL, and legal counsel for the City. FAULKNER's notes indicate that HEIL took possession of the iPhone 8 Plus (FirstNet) at City Hall between 12pm and 3pm on the date in question, and started working on it that afternoon. When he powered on the phone, he saw that it was on the

"Hola" language setup screen, so he had to hit "next" and go through some of the setup process to be able to access the phone with the Magnet ACQUIRE data extraction software. He had the phone for only a few hours, before returning it to City Hall.

"FAULKNER_000012" contains notes from a phone conversation that took place on or around 7/30/2021, between FAULKNER and Mayor DURKAN. These notes indicate that DURKAN told FAULKNER that the cracked screen had occurred separately from the time that the phone was dropped into a beach puddle, and that the "phone was not working and she put it in rice".

"FAULKNER_000013" and "FAULKNER_000014" contain notes from a phone conversation that took place on or around 10/28/2021, between FAULKNER, Christopher FISHER, and legal counsel for the City. These notes are consistent with the testimony and reports of FAULKNER, and contain no additional information of relevance.

"FAULKNER_000015" and "FAULKNER_000016" contain notes from a phone conversation that took place on or around 10/28/2021, between FAULKNER, Idris BEAUREGARD, and legal counsel for the City. These notes are consistent with the testimony and reports of FAULKNER, and contain no additional information of relevance.

"FAULKNER_000017" and "FAULKNER_000018" contain notes from a phone conversation that took place on or around 10/28/2021, between FAULKNER, Kenneth NEAFCY, and legal counsel for the City. According to the notes, NEAFCY told FAULKNER that his iPhone 6s was never plugged into a computer. NEAFCY apparently discussed the circumstances surrounding the factory reset of his phone with FAULKNER, and FAULKNER made the following notes on the conversation:

"IT policy says change 6 digit access code every 90 days or so – it said time to change – he put in new one – it changed – and it says incorrect code – he thinks it go [sic] to the point to delete his files"

Wednesday 11/16/2022 1815 hrs

I received the following documents from Mr. REILLY-BATES, via his firm's secure file transfer system:

- 1) Deposition of Idris Beauregard in *Hunters Capital, LLC v. City of Seattle*, dated 7/14/2022
- 2) Deposition of Christopher Fisher in *Hunters Capital, LLC v. City of Seattle*, dated 9/23/2022
- 3) Reply In Support Of Plaintiffs' Motion For Sanctions Due To Spoliation, dated 11-15-2022

I also received a document titled "133374__44458324v2_2022.11.15 [156] Supplemental Calfo Decl ISO Pltfs_ Mtn for Sanctions Due to Spoliation of Evidence.pdf". However, I did not open it at the time it was downloaded, and did not realize until later that it contained embedded permissions that would not allow me to view the document.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Wednesday 11/16/2022 1945 hrs

I began a detailed review of "Expert Report of Brandon Leatha and Exhibits", followed by a review of "FRCP 26(a)(2)(B) Rebuttal Expert Report of Kevin Faulkner" and a comparison between the two documents.

Thursday 11/17/2022 1130 hrs

I completed the review of Brandon LEATHA's expert report, as well as FAULKNER's rebuttal report. Detailed notes of the applicable portions of the interview can be found on pages 64 and 82-85 of the Investigative Notebook, which will be scanned and attached to this case at its conclusion.

LEATHA is the founder and CEO of Leatha Consulting LLC, has over 22 years of experience in digital forensics, and has testified as a subject matter expert in the Federal court system on multiple occasions. LEATHA was retained by the counsel for Hunter's Capital in order to provide an independent review of the digital forensics materials and of FAULKNER's expert witness report, and was able to review the digital forensics exams produced for the devices belonging to DURKAN, BEST, SCOGGINS, Eric GREENING, Kenneth NEAFCY, Christopher FISHER, and Idris BEAUREGARD.

It should be noted that my first read-through of LEATHA's report left me with the impression that he was the "hired gun" type of expert witness, as his report included several misleading statements that were slanted towards the plaintiffs, multiple statements that addressed issues of policy or law and were outside of his stated area of expertise and investigative scope, and because he expressed no findings or opinions that were counter to any arguments already publicly stated by the plaintiffs. However, upon a second read-through of FAULKNER's initial report, I found similar omissions or misleading statements that could be construed as slanted towards the city. In many cases, I have found the omissions or slanted statements can be attributed to the fact that FAULKNER and LEATHA were retained by two different employers with two different investigative scopes, resulting in the differing interpretation of fact. As such, I have ultimately given LEATHA's report more weight than the notes in my Investigative Notebook may reflect.

LEATHA's analysis of the data extractions for DURKAN's and BEST's phones is generally consistent with FAULKNER's analysis, with one exception. LEATHA noted in his report that 191 of the text messages that DURKAN had received after 6/25/2020 had been manually deleted (as was previously mentioned in FAULKNER's deposition). LEATHA arrived at this conclusion after finding gaps in the ROWID message table between 6/25/2020 and 11/16/2020, which indicate deleted messages or conversations; as the "Keep Messages" setting had been changed from "30 Days" to "Forever" on or around 7/25/2020, any messages dating after that change would have to have been deleted manually.

LEATHA performed an analysis of Christopher FISHER's iPhone 7, based upon a data extraction of this phone on 2/22/2021.⁴⁸ FISHER's iPhone was placed in service on 10/1/2019 and taken out of service on 12/9/2020. The data extraction contained only 16 text messages, all dating between 12/3/2020 and

⁴⁸ As the phone was removed from service on 12/9/2020, this data extraction reflects the phone's settings as of this date.

12/8/2020. According to the data extraction, the iPhone 7 was factory reset and restored from an iCloud backup on 11/2/2020 at 16:52:14 PST. The data extraction also indicated that the "Messages in iCloud" setting was disabled, that the text message retention was set to "Keep Messages: 30 Days", and that the last iCloud backup had occurred on 12/2/2020 at 13:20:17 PST. LEATHA stated that based upon his analysis of the ROWID text message table, a total of 15,843 text messages had been deleted from his phone.

LEATHA notes in his report that the City of Seattle had stated that FISHER had experienced an issue with the facial recognition technology on his iPhone 7 and did not remember his passcode, which resulted in him being locked out of his phone. However, LEATHA stated that the iPhone 7 was not capable of supporting facial recognition technology. LEATHA also noted that the data extraction of FISHER's iPhone 7 contained photographs that had been restored from backup through his iCloud account, and that the metadata for those photos indicated that photographs taken between 9/22/2018 and 10/23/2020 were created with an iPhone XS. LEATHA's report indicated that he believed that the city had not provided the correct information, and that FISHER had used an entirely different phone during the relevant time period.

FAULKNER's rebuttal report clears this matter up, indicating that the City of Seattle had made an error in their initial representation of what had happened. The City of Seattle had mis-stated the biometric functionality that FISHER used to access his phone, stating that he used facial recognition instead of thumbprint. Furthermore, FAULKNER's analysis revealed the additional detail that FISHER's iPhone 7 was logged in with FISHER's personal Apple ID ("chrisfish@gmail.com"), while the iTunes store on the same phone was logged in with FISHER's City of Seattle Apple ID ("spd7997cf@gmail.com"). FAULKNER stated that because of this, the photos that were restored to the phone were from FISHER's personal phones, and not his work phones.

As illustrated earlier in this report, when the "Messages in iCloud" function is disabled, all text messages are preserved in backups created by iCloud or iTunes. Based upon this fact, FAULKNER states that "because Mr. Fisher's iPhone 7 was restored from a backup after it had been factory reset, all text messages available in that backup would have been restored onto the iPhone 7."⁴⁹

LEATHA performed an analysis of Kenneth NEAFCY's iPhone 6s and iPhone XS, based upon an iTunes backup of the iPhone 6s dated 3/1/2021, an iTunes backup of the iPhone XS dated 8/16/2021, and a data extraction of the iPhone 6s dated 10/29/2021.⁵⁰ NEAFCY's iPhone 6s was placed in service on 6/15/2017 and removed from service on 3/20/2020, at which point the iPhone XS was placed in service. According to the 10/29/2021 data extraction, NEAFCY's iPhone XS was factory reset on 10/27/2020 at 15:26 PDT.⁵¹ After the iPhone XS was factory reset, NEAFCY apparently began using the iPhone 6s once again, beginning on 10/29/2020 through 3/9/2021. As the iPhone XS was factory reset without apparently ever backing up to iCloud, there is no information available concerning the configuration of its

⁴⁹ FRCP 26(a)(2)(B) Rebuttal Expert Report of Kevin Faulkner, dated 6/3/2022, page 7

⁵⁰ LEATHA's report incorrectly states these dates to be 8/17/2021 and 10/27/2021, respectively.

⁵¹ LEATHA's report indicates on page 20 that this reset occurred at 10:26 pm, but then indicates on page 21 that it occurred at 3:26 pm. As the difference between the two is seven hours, and PDT = UTC-7, I am inferring that these differing times are a conversion error on LEATHA's part, and that the first time is UTC while the second time is PDT.

text message retention settings. However, NEAFCY's iPhone 6s was set to "Keep Messages: Forever" for the life of the phone. LEATHA also noted that 42 text messages had been manually deleted from the phone between 10/27/2020 and 3/1/2021. LEATHA makes no mention concerning whether or not iCloud backups were enabled for NEAFCY's phone; however, he notes that NEAFCY had made attempts to restore his phone from an iCloud backup at the time of the factory reset, but was unable to do so because Apple sent the two-factor authentication code to his locked iPhone. Based upon this, I would infer that NEAFCY's iPhone 6s had iCloud backups enabled at the time of the factory reset.

FAULKNER's rebuttal report identified errors that the City of Seattle had made in their initial representation of what had happened, and included the information that NEAFCY had removed the SIM card from his iPhone XS after the factory reset and placed it in his iPhone 6s, so that he could continue to have a phone for work purposes. FAULKNER also stated that all text messages from 6/15/2017 through 3/20/2020 and after 10/28/2020 were all retained in device backups or on the device itself.

LEATHA performed an analysis of Harold SCOGGINS' iPhone 8 Plus and iPhone 11, based upon iCloud backups of the iPhone 8 Plus dated 2/13/2021 and 2/16/2021, and an iTunes backup of the iPhone 11 dated 3/9/2021. LEATHA does not provide the date that the iPhone 8 Plus was placed in service, but states that it was removed from service on 2/17/2021, when its data was transferred to the iPhone 11. According to the 2/16/2021 iCloud backup, the iPhone 8 Plus was factory reset on 10/8/2020 at 16:15 PDT, iCloud backups were enabled, and the text message retention settings were set to "Keep Messages: Forever" for the life of the phone. No information is presented concerning whether "Messages in iCloud" was enabled; however, it can be inferred that it was not, as no text messages prior to 10/8/2020 were loaded onto the phone after it was reset.

FAULKNER's rebuttal report provided no additional or contrary information relevant to this investigation, other than identifying minor errors that the City of Seattle had made in their initial representation of what had happened to SCOGGINS phone.

LEATHA performed an analysis of Idris BEAUREGARD's iPhone 8, based upon a data extraction of the phone taken on 3/9/2021, and an iCloud backup dated 10/28/2021. LEATHA does not provide any dates for when this phone was placed into and removed from service. According to the 3/9/2021 data extraction, the iPhone 8 was factory reset on 10/9/2020 at 13:50 PDT, iCloud backups were enabled, and the text message retention settings were set to "Keep Messages: Forever" for the life of the phone. No information is presented concerning whether "Messages in iCloud" was enabled; however, it can be inferred that it was not, as not text messages prior to 10/9/2020 were loaded onto the phone after it was reset. LEATHA also noted that 388 text messages had been manually deleted from the phone between 10/9/2020 and 3/9/2021.

LEATHA performed an analysis of Eric GREENING's Samsung Galaxy S8, based upon data extractions dated 3/1/2021 and 10/27/2021. LEATHA does not provide any dates for when this phone was placed into and removed from service. According to the data extractions, the Samsung Galaxy S8 was reset on 10/26/2020 at 09:14 PDT. LEATHA was unable to obtain details concerning the possible number of text messages deleted as a result of the reset, because extracting the text message database would



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

require "specialized software or tools only available in some forensic labs"⁵², to which LEATHA apparently did not have access.

FAULKNER's rebuttal report provided no additional or contrary information relevant to this investigation, in regards to either BEAUREGARD's or GREENING's phone.

Thursday 11/17/2022 1315 hrs

I began a review of a transcript of the deposition of Jenny DURKAN in *Estate of Taylor, et al. v. City of Seattle*, dated 2/28/2022.

Thursday 11/17/2022 1625 hrs

I received a phone call from Steven FOGG, asking if I had received all of the documents that I had requested from his office. I advised him that the only document that I still needed was the "2nd Set of Interrogatories and Amended Responses" filed under *Hunters Capital, LLC v. City of Seattle*, as the version that I had downloaded from PACER was not complete. He told me that he would have it sent over by end of business the next day.

Friday 11/18/2022 1400 hrs

I attended a case update meeting, attended by Sgt Devore and Chief Olmsted in person, and Captain Seo and General Counsel Erin Overbey via Microsoft Teams. I provided the attendees with a general overview of the investigative review thus far, identified the documents that still required review, and identified possible investigative avenues that should be conducted at the conclusion of the review.

During that conversation, I mentioned to those present that one of the pieces of evidence that I would still like to review is the approximately 131 text messages that the city had reconstructed from the approximately 191 text messages that were alleged to have been manually deleted from DURKAN's phone between June and November of 2020. Although I do not want to delve too deep into the content of DURKAN's text messages, I explained that the content of these specific text messages may be important, as they could help to illustrate whether DURKAN was deleting text messages of a transitory nature, or text messages which she is legally required to retain. All present agreed that would be an important aspect to review, and Overbey said that she would try and obtain that information from the city.

⁵² Expert Report of Brandon Leatha (redacted), dated 4/28/2022, page 27



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Friday 11/18/2022 1730 hrs

I completed the review of Jenny DURKAN's deposition in *Estate of Taylor, et al. v. City of Seattle*, dated 2/28/2022. Detailed notes of the applicable portions of the interview can be found on pages 65-67 of the Investigative Notebook, which will be scanned and attached to this case at its conclusion.

This deposition was conducted primarily by a Mrs. Karen Koehler of the law firm Stritmatter Kessler Koehler Moore, representing the plaintiffs. The majority of this 266-page deposition deals with the City of Seattle's response to the protests and the establishment of the CHAZ/CHOP, with only 20 pages addressing the matter of the missing public records. As it pertains to this investigation, DURKAN stated the following, in summary:

DURKAN stated that after she was elected as Mayor, she attended training related to the Public Records Act, which included the preservation of electronic records, and which was provided by the Seattle City Attorney's Office. DURKAN stated that she understood that electronic records include text messages, but did not recall if text messages were specifically addressed or identified in the training. DURKAN also stated that while she knew that her many members of her transition team had attended PRA training, she did not know if anyone from the IT department had attended that session. DURKAN stated that "before this happened it was my understanding that the City backed up and archived all of its electronic data, including text messages"⁵³ and that she "believed that all public records and electronic records were being maintained. Apparently that wasn't the case."⁵⁴

DURKAN was questioned at length by Mrs. Koehler concerning the deletion of her text messages. DURKAN stated that she did not change the text message settings on her phone to "Keep Messages: 30 Days", and that she did not know who may have made that change in the settings. Mrs. Koehler and DURKAN had the following exchange on the subject, found on page 191 of the deposition:

KOEHLER: My understanding is you've testified that you did not change your texts to be deleted after 30 days. Am I correct?

DURKAN: That's correct, that is correct.

KOEHLER: Do you even know how to -- you -- if someone said, "Can you please manually change your phone to delete your texts after 30 days," would you know how to do that?

DURKAN: I do now.

KOEHLER: Okay. But at the time did you know?

DURKAN: To my best of my recollection, no.

⁵³ Deposition of Mayor Jenny Durkan in *Estate of Taylor, et al. v. City of Seattle*, dated 2/28/2022, page 193 line 9

⁵⁴ Deposition of Mayor Jenny Durkan in *Estate of Taylor, et al. v. City of Seattle*, page 195 line 15.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

- KOEHLER:** I mean, I wouldn't know how to do that. Do you believe it was an IT person that did it?
- DURKAN:** Again, I -- I won't speculate as to that.
- KOEHLER:** Did you instruct anybody to delete your texts?
- DURKAN:** No, ma'am.

DURKAN stated that the individuals that would have had access to her phone would have been the IT Department, her assistant (Colleen O'REILLY BERNIER), her office manager (Andrea FRIEDHOFF), or her legal counsel (Michelle CHEN). DURKAN stated that no one outside of the city, to include her family, has ever had access to her phone.

DURKAN stated that she did not routinely delete text messages other than clear phishing attempts and/or spam, and that it was her practice to keep everything on the phone. DURKAN was also asked if she believed that the deletion of her text messages was a violation of the Public Relations Act, to which she responded, "As you have seen from both the text messages that have been recovered and those that -- that have been in existence, like the backups you say, many of those text messages my understanding wouldn't be considered public records because they're transitory."⁵⁵

DURKAN stated that while in her role as Mayor, she used text messages primarily as a method to set up meetings, either in person or via telephone. DURKAN stated that she preferred to conduct business on a more personal basis, and that "it was [her] standard practice to not conduct substantive business by text message."⁵⁶ Furthermore, DURKAN stated that she was always cognizant of the public nature of her city communications, and inferred that she did not put in writing anything that she might consider sensitive or concerning:

"My experience is that if you put it in writing, you can see it in print, and my belief as mayor was that the government has an obligation to be transparent to the public and that what happens on City phones, City devices, belongs to the public. So when you create a record, you create that record and you -- it's likely going to be public."⁵⁷

Friday 11/18/2022 2028 hrs

I received an email from Kelly Sheridan of Corr Cronin LLP, who forwarded me the following three documents from *Hunter's Capital, LLC v. City of Seattle*, which had been requested on 11/10:

⁵⁵ Deposition of Mayor Jenny Durkan in *Estate of Taylor*, page 206 line 17

⁵⁶ Deposition of Mayor Jenny Durkan in *Estate of Taylor*, page 196 line 18

⁵⁷ Deposition of Mayor Jenny Durkan in *Estate of Taylor*, page 197 line 21

- 1) "Plaintiff Hunter's Capital, LLC's First Set of Interrogatories and First Requests for Production to Defendant City of Seattle and the City's Objections and Responses Thereto", dated 10/30/2020
- 2) "Plaintiff's Second Set of Interrogatories to Defendant City of Seattle and the City's Objections and Responses Thereto", dated 7/13/2021
- 3) "Plaintiff's Second Set of Interrogatories to Defendant City of Seattle and the City's Objections and First Supplemental Responses Thereto", dated 8/31/2021

All three documents were saved for later review.

Friday **11/18/2022** **2330 hrs**

I completed the review of a transcript of the deposition of Carmen BEST in *Estate of Taylor, et al. v. City of Seattle* (Volume I), dated 3/16/2022. The entirety of this deposition addressed the Seattle Police Departments response to the protests, and contained no facts pertinent to this investigation.

Saturday **11/19/2022** **0245 hrs**

I completed the review of a transcript of the deposition of Carmen BEST in *Estate of Taylor, et al. v. City of Seattle* (Volume II), dated 5/24/2022. Detailed notes of the applicable portions of the interview can be found on page 68 of the Investigative Notebook, which will be scanned and attached to this case at its conclusion.

This deposition was conducted primarily by a Mrs. Karen Koehler of the law firm Stritmatter Kessler Koehler Moore, representing the plaintiffs. Only four pages of this deposition addressed the matter of BEST's missing public records.

In summary, BEST stated that she did in fact delete text messages off of her phone, as a way of keeping her messages manageable. As the exchange between Mrs. Koehler and BEST is particularly relevant to illustrate her intent concerning the matter, I have replicated it in full, as found on pages 369-372 of the deposition; for ease of reading, I have removed the various objections and repeated statements while ensuring that context was not altered:

KOEHLER: In your own words, why were texts deleted from your phone?

BEST: On occasion I would delete texts, you know, periodically when there was, you know, a buildup of texts on my phone. You know, my understanding is that, you know, transitory texts could be deleted as long as they weren't decision making or anything of that nature. So periodically, you know, I deleted those texts, again, with transitory information.

KOEHLER: How periodically did you delete them?

BEST: No specific cadence to that at all.

KOEHLER: Why did you delete them?

BEST: Just periodically when there's a buildup of messages, you know, I would just delete them. They were transitory and no reason to keep them on the phone. No particular cadence to that, just as I do now with my personal phone.

KOEHLER: What's a transitory text? What does that mean?

BEST: Transitory means just basic not policy making, no decision -- not policy making, not decision making, not, you know, anything specific to that nature. Typically just informational, you know, transitory communication.

KOEHLER: From whom?

BEST: It didn't really matter. I got all kinds of texts from all sorts of folks that, you know, from -- you know, from community members, from, you know, other staff, you know, all -- you know, a number -- a wide variety of people, you know, would send me messages that are, again, transitory in nature.

KOEHLER: Do you understand --

BEST: I wasn't doing -- I wasn't doing policy making on texts. I'll put it that way.

KOEHLER: Why would you think that you could delete anything as a public employee off of a public phone?

BEST: That's always been my understanding, that transitory messages do not need to be retained.

KOEHLER: Were you trained in that?

BEST: I don't know if we had specific training, but that was my understanding based on, you know, whoever was providing that information.

KOEHLER: Do you understand that the fact that you deleted your texts reflects poorly on the issue of transparency of the Seattle Police Department?

- BEST:** Yeah. Well, I'm certainly aware after the fact that people were vastly interested. I'll put it that way.
- KOEHLER:** If you had to do it again, would you keep deleting those texts or not?
- BEST:** Probably wouldn't even keep a phone at this point if I had to do it all again. But, again, at the time my understanding was that transitory messages did not need to be maintained on our phones.
- KOEHLER:** So if the mayor sent you a transitory message, you would delete that?
- BEST:** To my -- you know, just periodically I deleted messages in bulk. I don't -- I didn't look through specific -- any specific message. I mean, just if they're transitory, you know, at some point I just would delete those off, and that was it. Again, I wasn't targeting any specific person or anything like that.
- KOEHLER:** So if the mayor sent you a message that you believe was transitory, then the mayor's message would have been deleted under your system; is that correct?
- BEST:** Yes, it would have been.

Sunday 11/20/2022 0300 hrs

I began a review of the transcript of the deposition of Jenny DURKAN in *Seattle Times Company v. City of Seattle*, dated 3/1/2022.

Tuesday 11/22/2022 0130 hrs

I completed the review of Jenny DURKAN's deposition in *Seattle Times Company v. City of Seattle*, dated 3/1/2022. Detailed notes of the applicable portions of the interview can be found on pages 69-73 of the Investigative Notebook, which will be scanned and attached to this case at its conclusion.

This deposition was conducted primarily by a Mrs. Katherine George of the law firm Johnston George LLP, representing the plaintiffs. In summary, DURKAN stated the following:

DURKAN detailed how she communicated with her department heads and staff, using the timeframe of June-August of 2020 as an example. She stated that she would very rarely send any text messages that were anything other than transitory, because she preferred to have discussions in-person,

or over the phone if that wasn't possible. She stated that she "would sometimes use text messages to communicate about City business, but [her] general practice throughout the time [she] was mayor was not to use text messages for substantive discussions."⁵⁸ Her text messages tended to be sent to her department heads or the people in her office, and were most commonly requests for a meeting or a phone call.

DURKAN stated that during her term as Mayor, there were two different processes that had been used to respond to public disclosure requests for electronic data contained in her city-issued cell phones. Initially, DURKAN would sit down with Ian Warner (Michelle CHEN, who would take DURKAN's phone and physically search for any information that was responsive to the request. If CHEN found text messages or In the second half of 2019 the city purchased iExplorer, which allowed CHEN to simply make a backup of a phone and then search the backup for records that are responsive. DURKAN said that she was never told what the public disclosure request was looking for, and that she was not involved in finding records that were responsive; at most she would be told that they needed her phone. Once the city started using iExplorer, she wasn't even notified of the PDRs, as CHEN would simply search through the backup that she had already created.

DURKAN clearly indicated that she understood that she had an obligation to preserve public records, and that she knew that her text messages were among those public records. She said that it was her practice to preserve any electronic data that was substantive in nature, and that she would only delete messages that were obviously spam or transitory. Mrs. George and DURKAN had the following exchange that is relevant to the subject, found on pages 72-73 of the deposition:

GEORGE: Right. Okay. Have you ever as Mayor deleted any message on a device issued to you by the City of Seattle?

DURKAN: And by message, you mean text message?

GEORGE: Yes.

DURKAN: Okay. So as I said before, there were occasions when I would get text messages that would be like phishy things where I would delete. There -- I won't say there wasn't any occasion it happened, but my practice was to keep all of my text messages on my phone, even those that were, "Call me," or, you know, just very brief non-substantive text messages.

GEORGE: Okay. And what do you mean by phishy things?

DURKAN: Oh, sorry. Phishing is -- There's a lot of scams where people will say, you know, "This is Chase Bank. Your account is overdrawn. Click here immediately." Or more

⁵⁸ Deposition of Mayor Jenny Durkan in *Seattle Times Company v. City of Seattle*, dated 3/1/2022, page 12 line 9

sophisticated ones that will actually use your name and ask you to respond, and by doing that they then get access to your phone with malware. And so anything that looks suspicious like that. We had -- There was periodically a number of people in the City, including myself, there was concerted activity on that front. So there would be -- It would go in waves.

GEORGE: Okay. So you would delete phishy things, but not other text messages from your City phones; is that correct?

DURKAN: My practice was to keep everything.

As well as this exchange, found on pages 75-76 of the deposition:

GEORGE: Okay. Do you know how to delete messages on mobile devices?

DURKAN: Yes.

GEORGE: And I should have said text messages specifically.

DURKAN: Yes.

GEORGE: Okay. Why are messages, text messages, missing from devices that you used as Mayor?

DURKAN: I think you're referring to my City phone and the missing text messages. Is that what you're referring to?

GEORGE: Yes.

DURKAN: I think that, you know, we just received the forensic report that indicated that the messages were missing from the phone because the retention setting on the phone was set for a period of time to 30 days instead of forever. That's my understanding.

GEORGE: Okay. And is it possible that you personally deleted any of the missing messages?

DURKAN: I think you just asked me a series of questions of what my practice was and the types of messages that I would delete from the phone. There could be occasions when there was, you know, scheduling -- "Are you there? Okay." -- that were deleted, but my practice was that anything

that was substantive related to City business I maintained. And I think that the records that we've produced to The Seattle Times from November of 2017 when I became Mayor up until June of 2020, and from July -- and from June 24th through December 31, 2021 demonstrate that.

DURKAN provided a complete accounting for the events of 7/4/2020 during this deposition. She stated that the dismantling of the CHOP/CHAZ and the clearing of Cal Anderson Park on July 1st had resulted in an increased level of hostility towards both the Office of the Mayor and the Seattle Police Department, which culminated in protest of several hundred people outside of her home that evening. That protest included armed individuals in the crowd, and protestors threw fireworks and explosive devices onto her property, so she and her family decided to temporarily leave the home. They went to a small cabin on a beach at an undisclosed location for the 4th of July weekend. DURKAN stated:

“And then that night I received a message in the middle of the night related to the fact that -- I was alerted to the fact that the woman was killed on I-5 and asked to see if we could have conversations the next morning. Had conversations related to that death on I-5, as well as a number of other protest-related events. It's a very, very small cabin, so I decided to -- It was very low tide. In this particular beach you can walk for miles and miles. So I took my calls outside and talked to the person from one of the Black organizations about some concerns they had on responses to some issues. And then took a very long walk, came back, talked my senior deputy mayor, Mike Fong, to kind of organize a number of issues. Decided to go back to the cabin. It was the 4th of July. And was going to make one last call and realized I didn't have my phone, and it had fallen out of my pocket. So I retraced my steps and found the phone sitting in kind of a smallish tidal pool-ish type thing. It wasn't functioning well. So I turned it off, took it back to the house, threw it in a bag of rice.”⁵⁹

After a break and other lines of questioning, DURKAN continued,

“As I said, it was pixilated, so I shut it down. I took it back, put it in a bag of rice, left it there for a period of time, and then went to get it, the data on the phone, and ended up having to restore from iCloud. And so there's -- My best recollection is there's a screen that says, "Do you want to set this up as a new phone, or do you want to restore from iCloud?" I chose restore from iCloud, and that's [when] it took me to my iCloud and was able to download the backup to my phone. And so that restored to my phone the data that was there, and I think that's reflected in the report. It says there was a successful restoration of the data to the phone on July the 4th. And so I was focused on making sure that I could restore and get

⁵⁹ Deposition of Mayor Jenny Durkan in *Seattle Times Company*, page 82 line 7

my phone back working again and getting it to limp along, knowing that I would be able to give it back to IT, you know, within a couple days.”⁶⁰

DURKAN stated that no one else was helping her to restore functionality to her phone or otherwise handling her phone on 7/4/2020. She acknowledged that Kevin FAULKNER's report indicated that the “Disable & Delete” function was activated right after the phone was restored from the iCloud backup, and that it showed the specific prompts that one has to go through to activate that function. However, DURKAN said that she does not remember either activating the “Disable & Delete” function or seeing those specific prompts. DURKAN expanded, “I do recall having trouble getting my calendar to load and trying to get it to load, and in the iCloud settings trying to see if the getting calendar to load up I could do that. I have no recollection of seeing any prompt about messages, and I got my messages.”⁶¹

DURKAN stated that she has never changed any retention settings on her city-issued cell phones. DURKAN further stated that her phone is passcode encrypted and that she has never left her phone unlocked and unattended. She said that other than herself, the only people with access to her phone during the time in question were the IT staff assigned to the Office of the Mayor, and “in a probably very transitory fashion my assistant [Colleen O'REILLY BERNIER] or office manager [Andrea FREIDHOFF], who I would give the phone to give to the IT Department, and then in reverse the IT Department would give it to them to give to me.”⁶²

DURKAN stated that between July 6th and July 26th, her phone was in the possession of the IT department four times. She stated when she came back from the weekend on July 6th, she was still having problems with her email and calendar, and she sent the phone to IT. She told them that it had crashed, and noted that it also had a cracked screen, so they decided that they were going to replace the phone and sent it back to her. She did not know if they had done anything with the phone at that time. On July 9th, she turned her old phone over to IT so that it could be replaced, and subsequently received her new phone. She was unable to access her contacts list on her new phone, so she turned her phone back over to IT twice during the week of July 24th. She stated that she believed that the first time was on the 21st, and the second was on the 24th.

DURKAN stated that city policy required that Two-Factor Authentication be enabled on all city devices, and confirmed that it was enabled on hers.

Friday 11/25/2022 1000 hrs

I began a review of the transcript of the deposition of Christopher FISHER in *Hunters Capital, LLC v. City of Seattle*, dated 9/23/2022.

⁶⁰ Deposition of Mayor Jenny Durkan in *Seattle Times Company*, page 93 line 21

⁶¹ Deposition of Mayor Jenny Durkan in *Seattle Times Company*, page 95 line 5

⁶² Deposition of Mayor Jenny Durkan in *Seattle Times Company*, page 78 line 20



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Tuesday 11/29/2022 1230 hrs

I continued the review of Christopher FISHER's deposition, dated 9/23/2022.

Wednesday 11/30/2022 1500 hrs

I completed the review of Christopher FISHER's deposition, dated 9/23/2022. Detailed notes of the applicable portions of the interview can be found on pages 74-79 of the Investigative Notebook, which will be scanned and attached to this case at its conclusion.

FISHER was the Chief Strategy Officer for the Seattle Police Department, and had served in that role since sometime in 2017. Although the actual day-to-day duties of the role would change over time, FISHER essentially served as an advisor to the Chief of Police, interpreting crime analysis data and trends, liaising with the city council, and assisting with executive communications. FISHER served in this role under Chiefs Katherine O'Toole, Carmen BEST, and Adrian Diaz.

In summary, FISHER stated the following:

FISHER stated that during his time with SPD, he has been issued roughly four different iPhones and a Samsung Galaxy. During the timeframe surrounding the events of this investigation, FISHER said that he was using an iPhone, although he did not initially remember which model.⁶³ FISHER was not positive, but believed that the iPhone 7 had the city's Mobile Device Management program enabled, which limits the types of applications that can be installed and allows for remote changes.

FISHER stated that he did not think that he had ever backed up any of his work iPhones to iCloud, because he didn't think that they had iCloud accounts associated with their work phones. He stated that he had never backed up any of his work iPhones to iTunes, because iTunes can't be installed onto any SPD-issued computers.

FISHER stated that he's had to reset his work phone multiple times, because the passcodes have to be changed frequently and he's very bad at remembering them. He specifically could recall two such occasions, the earlier of the two being on 3/26/2020. FISHER stated that on that date, he had forgotten his passcode and had entered the wrong passcode multiple times, to the point where his phone was telling him that he had only one or two attempts left. FISHER said that he had contacted IT for help, but that they had told him that there was nothing that they could do. FISHER then contacted Seattle PD's Intelligence Unit because he knew that they accessed cell phone data during the course of their investigations. However, FISHER said that the only advice that they gave was to keep trying to remember the passcode or otherwise just type in numbers until it resets, and that he was "incorrect that they could get into a phone that was locked if you didn't have any other tools to access your pass code."⁶⁴ FISHER's

⁶³ FISHER's iPhone was established as an iPhone 7 through the data extraction performed on his phone, and the expert reports of Kevin FAULKNER and Brandon LEATHA.

⁶⁴ Deposition of Christopher Fisher in *Hunters Capital, LLC v. City of Seattle*, dated 9/23/2022, page 195 line 13

phone wasn't logged into iCloud, because he wasn't aware that he could use iCloud, so he had no backups and eventually lost all of his data when the phone had to be reset.

As he did not think that he could use iCloud on his city phone, the only thing that FISHER did to prevent a future passcode lockout was to try and pick passcodes that would be more easily remembered. He stated that he never wrote his passcodes down because the department phones contained data that needed to be kept secure.

FISHER stated that the second occasion occurred in the winter of 2020, around the holidays, but couldn't remember the exact date. He acknowledged that the date of 11/2/2020 that was provided by LEATHA and FAULKNER is probably correct, but that he has no personal recollection of the date. On this second occasion, FISHER once again found himself unable to remember his passcode and had entered the wrong passcode multiple times. FISHER said that he did not remember ever reaching out to IT or anyone else for assistance on this occasion, as he had learned from the previous instance that they couldn't do anything to help, and that he had followed the same advice that he had received in March of 2020.

FISHER and Mr. REILLY-BATES went through the City of Seattle's description of the circumstances surrounding FISHER's missing text messages, which is found on page 19 of the "Plaintiff's Second Set of Interrogatories to Defendant City of Seattle and the City's Objections and First Supplemental Responses Thereto", dated 8/31/2021:

"During the relevant period, Fisher used an iPhone 7. On approximately December 3, 2020, Fisher attempted to gain access to his phone using the facial recognition functionality that he usually used to access his phone. Due to the City's security protocols, his iPhone required him to log in using his passcode to access his phone. Fisher input the passcode he believed he had previously set for his phone, but it was incorrect. He attempted some other passcodes that he had previously used that he thought might still work, but they did not. Fisher then reached out to IT to see if there was an alternative way to access the phone. It is our understanding that IT informed him that there was no way to access the phone without resetting it to its factory settings. Ultimately, Fisher followed this guidance."

FISHER addressed a number of the inaccuracies contained in this paragraph. He stated that he doesn't know where the date of December 3rd came from, as he simply remembered that it was in the winter and around the holidays. He stated that he didn't remember which phone he was using at this time, and that he used the thumbprint for one phone and the facial recognition for the other. He further stated that he believed that the City was combining the two events into one, as he didn't reach out to IT on the second occasion, and that it was Seattle PD's Intel Unit that had told him that there was no way to access the phone.

FISHER stated that he would regularly delete text messages from his phone, but that the messages that he deleted were mostly the system alerts, amber alerts, and obvious spam messages.

FISHER said that he would also occasionally delete the messages that would be considered transitory, such as meeting requests, as it was his understanding that this was allowed.

FISHER was aware that the text message retention settings had been configured to "Keep Messages: 30 Days", stating that he had enabled that setting on his phone at some point. Mr. REILLY-BATES asked FISHER if he could provide an explanation as to why he had enabled that setting, and FISHER responded, "I recall setting it to that at some point when, as a command staff, we had a briefing about, you know, you could -- you could manage your --"⁶⁵ At this point, William Beaver, who was acting as counsel for the City of Seattle, interrupted FISHER's explanation and objected based upon attorney-client privilege. After a bit of legal arguing between Mr. REILLY-BATES and Mr. Beaver, the following exchange occurred, found on page 223 of the deposition:

- REILLY-BATES:** So, Mr. Fisher, is it your position that you turned on the 30-day retention setting on advice of counsel?
- BEAVER:** Objection. Instruct him not to answer. It's clearly a question asking for privileged communication.
- REILLY-BATES:** Mr. Fisher, are -- are you not answering the question based on the instruction of your attorney?
- FISHER:** That's correct.

FISHER was subsequently allowed to reveal the following details concerning the meeting:

- The meeting had occurred prior to June of 2020,
- The meeting was attended by Chief BEST, Mark Baird (Chief Operating Officer), Rebecca Boatwright (Chief Legal Officer), Angela Socci (Executive Director of Budget and Finance), VALARIE ANDERSON, and Assistant Chiefs Tom Mahaffey, Eric GREENING, Steve Hirjack, Deanna NOLLETE, Lesley Cordner, and Adrian Diaz.
- Rebecca Boatwright was the City attorney that spoke during the meeting.
- Following this meeting, FISHER changed the text message retention settings on his phone to "Keep Messages: 30 Days", so that it would automatically delete messages older than 30 days.

FISHER was asked about a portion of Brandon LEATHA's Expert Report, which stated that his iPhone 7 had been restored from an iCloud backup on 11/2/2020 at 16:52 PST. FISHER didn't believe that to be correct, as he had never had an iCloud for his work phone, and does not recall that the phone was ever restored. FISHER was also asked about a portion of Kevin FAULKNER's Rebuttal Expert Report, which stated that because the iPhone 7 had been restored from a backup, all of the text messages would have

⁶⁵ Deposition of Christopher Fisher, page 221 line 11

been restored to the phone as well. FISHER also didn't believe that to be correct, as he did not ever remember having set up any way for the phone to create a backup in the first place.

Thursday 12/1/2022 1100 hrs

In regards to the reset and subsequent restore from iCloud backup of FISHER's iPhone 7, there are a few sets of facts that are being used to reach different conclusions by the involved parties.

Among the undisputed facts:

- FISHER's iPhone 7 was factory reset and restored from an iCloud backup on 11/2/2020 at 16:52:14 PST.
- As of 12/9/2020, the "Messages in iCloud" setting was disabled and text message retention was set to "Keep Messages: 30 Days".
- The iPhone 7 was logged into iCloud with Apple ID "chrisfish@gmail.com", which is FISHER's personal Apple ID.
- The iPhone 7 was logged into iTunes with Apple ID "spd7997cf@gmail.com", which is FISHER's City of Seattle Apple ID.
- Photographs from FISHER's personal cell phones were restored to the iPhone 7 from his personal iCloud account.

The individual statements that are in conflict with each other:

- FAULKNER states that because "Messages in iCloud" was disabled and the iPhone 7 was restored from an iCloud backup, all of the text messages deleted from the phone during the factory reset would have been restored to the device at that time.
- FISHER states that he has never set up his work phone with an iCloud account and has never backed up any of its data, and has no recollection of his phone being restored from a backup. To his understanding, it was a complete reset.

Based upon the data extraction of FISHER's iPhone 7 on 2/22/2021, it is apparent that FISHER's iPhone 7 was indeed "restored from an iCloud backup" on 11/2/2020. However, that data extraction also showed that FISHER's iPhone 7 was logged into iCloud with his personal Apple ID, and that photographs from his personal phone were synced to the iPhone 7 during the restoration process. Additionally, Seattle PD apparently does not require or encourage its employees to create backups with iCloud, and FISHER stated that he had never backed up his work phone or set it up to conduct automatic backups, and wasn't aware that they had access to iCloud on their city-issued phones. Finally, FISHER did not remember any of his text messages being restored to the phone after the factory reset and restoration.

The only logical explanation that accounts for all of these facts is that the iCloud backup that was used to restore FISHER's iPhone 7 was from his personal phone, and not his city-issued phone. Due to the Seattle PD enrollment of the phone in Apple's Device Management Program, it is unclear how much of

FISHER's personal backup was permitted to be applied to the iPhone 7, although it is clear that it did allow the photo album on the iPhone 7 to synchronize with his personal photo album.

As the backup used to restore FISHER's iPhone 7 was from his personal account, FAULKNER's assertion that all of FISHER's text messages were restored is therefore incorrect, and all of FISHER's text messages between 3/26/2020 and 11/2/2020 would have been lost as a result of the factory reset.

Thursday 12/1/2022 1447 hrs

KCSO General Counsel Erin Overbey forwarded me an email from the city, containing their response to the request for the reconstruction of the Mayor's 191 deleted text messages. Included as an attachment to that email was the file "Durkan_Jenny_Comprehensive_20221028.xlsx". Unfortunately, this excel spreadsheet is apparently the entirety of DURKAN's reconstructed text messages, ranging from 11/17/2017 to 3/22/2021 with 28,413 lines of data in the spreadsheet, and I did not see any way to easily extract the information regarding the specific messages that I'm attempting to locate.

I advised Overbey of exactly what I was needed, so that she could make a follow-up request to the City.

Saturday 12/3/2022 0350 hrs

I began a review of a transcript of the deposition of Idris BEAUREGARD in *Hunters Capital, LLC v. City of Seattle*, dated 7/14/2022.

Sunday 12/4/2022 0120 hrs

I completed the review of Idris BEAUREGARD's deposition dated 7/14/2022. Detailed notes of the applicable portions of the interview can be found on pages 80-81 of the Investigative Notebook, which will be scanned and attached to this case at its conclusion.

BEAUREGARD is currently a Deputy Director for Seattle Public Utilities, and had previously served as a Division Director for the Clean Cities division of Seattle Public Utilities. At the time of this incident, BEAUREGARD was using a city-issued iPhone 8.

In summary, BEAUREGARD stated the following:

BEAUREGARD initially stated that he "backed up" his phone often; however, upon further questioning it was revealed that BEAUREGARD's understanding of "backing up" a phone was that he plugged in his phone to his computer and downloaded all of the photographs. BEAUREGARD acknowledged that he wasn't technically savvy, and that he thought that the phone automatically performed backups on its own. BEAUREGARD also stated that he didn't have access iTunes on his computer, so he had never created an iTunes backup.

On 10/8/2020, BEAUREGARD attempted to access his phone using his passcode, but found that it was not working. BEAUREGARD keeps his passcode written on a sticky note on his computer so that he won't forget it, so he knows that the passcode was correct, and has no idea why it wasn't working. He repeatedly tried what he knew to be the correct passcode, and stated that he was progressively locked out of his phone for longer periods of time, starting at around ten minutes and progressing up to an hour. At some point after he was locked out, BEAUREGARD called Seattle's IT department for assistance in getting his phone unlocked, but they were unable to provide any help in that matter. BEAUREGARD's executive assistant suggested that he try to call Apple for help, which he did. Apple made a couple of suggestions and BEAUREGARD followed those instructions, but was still unable to unlock his phone. Apple suggested that he bring the phone into one of their stores for assistance, but BEAUREGARD said that he wasn't able to do that because he didn't have the time. BEAUREGARD said that by the end of his workday he had still been unable to access his cell phone, so he left it on his desk overnight.

BEAUREGARD returned to work on 10/9/2020, and was working on his computer with his phone on the desk next to him, when the screen caught his eye. He looked over and initially thought that his phone had rebooted, but it then walked him through the whole setup procedure as if the phone was brand new. BEAUREGARD followed those steps, and when it was complete he found that his contacts had been restored, but that no text messages and no photos after 2019 had been restored.

BEAUREGARD did not know if his phone had been set to automatically erase all data after a certain number of failed passcode attempts. He further stated that he did not initiate the factory reset of his phone in any way, and was not handling it when it began.

BEAUREGARD stated that he had received training on records retention, and that it was his understanding that he was generally required to keep his emails and text messages. When asked about the 388 text messages that were deleted between 10/9/2020 and 3/9/2021, BEAUREGARD stated that he has occasionally deleted text messages that were "just general simple messages that didn't have -- pertain to anything that had to do with work or something as sensitive as that I felt I needed to keep."⁶⁶ BEAUREGARD provided as an example a conversation about a football game with a co-worker; it was related to work in that it was from another city employee, but the topic wasn't concerning work.

During the deposition, Mr. REILLY-BATES produced a Seattle IT service ticket for this incident, marked as Exhibit 8 for the purposes of the deposition. I had earlier obtained a copy of this ticket during the PACER download, and have attached a copy to this report. Unfortunately, this ticket has created confusion surrounding the circumstances and timeline of the factory reset of BEAUREGARD's phone.

BEAUREGARD stated that he first called Seattle IT for assistance when he was locked out of his phone, during his normal workday on the day before it was factory reset. However, the service ticket shows a creation date of 10/9/2020 at 9:04:47 PM, which is outside of his normal hours, and was 7 hours and 14 minutes after the phone had already been reset. BEAUREGARD stated that he "would never have called IT at that time."⁶⁷ Furthermore, the details of the ticket state, "Please rush. I called and talked to

⁶⁶ Deposition of Idris Beauregard in *Hunters Capital, LLC v. City of Seattle*, dated 7/14/2022, page 132 line 18

⁶⁷ Deposition of Idris Beauregard, page 124 line 1

him and he was able to reset it over the weekend"⁶⁸, which seems to indicate that BEAUREGARD had an active role in or had otherwise personally conducted the factory reset of his phone.

As the forensic exam of BEAUREGARD's phone indicates that the factory reset occurred on 10/9/2020 at 13:50 PDT, which was a Friday, it is apparent that this ticket was created after BEAUREGARD's phone had already been factory reset, and that it also contains information that had been entered no earlier than the following Monday. Additionally, in the above-mentioned "details" field, the statement "Please rush" is incongruous with the following sentence, which is the comment that was likely used to support the closing of the service ticket. This indicates that information in the "details" field had been modified after the initial entry, with no log of which user had created which entry, and no log as to whether or not any information had been deleted or otherwise altered. The service ticket indicates that it was created by "Janet Grant", lists both "Janet Grant" and "ValdezH" (likely Herb Valdez) as the "owner", and has a comment in the "Details" field that is attributed to a "Terry LaFave", but unknown if it was actually entered by him. Additionally, the reason for BEAUREGARD's request for assistance is listed as "Very urgent please: Issue opening iTunes on his iPad and iPhone"⁶⁹, which is a wholly incorrect summation of the incident for which BEAUREGARD was requesting assistance.

Given the obvious issues with the accuracy and providence of statements contained within the service ticket, I do not believe it to be a reliable source of information concerning the circumstances and timeline of the factory reset of BEAUREGARD's phone.

Sunday 12/4/2022 2335 hrs

I began a review of "First Set of Interrogatories and First Requests for Production to Defendant City of Seattle and the City's Objections and Responses Thereto", dated 10/30/2020.

I found that the First Set of Interrogatories contains no information relevant to this investigation, other than the original request for the City of Seattle to produce documents and communications, which subsequently led to the discovery that a number of high-level city officials were missing text messages. That request is detailed below:

REQUEST FOR PRODUCTION NO. 2: Please produce all documents and communications (including but not limited to emails, text messages, voice messages, messages on social media platforms, memoranda, meeting minutes, videos, and photographs) to, from, in the possession of, concerning, or involving the following persons, organizations and City divisions, which concern, relate to, and/or reference the CHOP, CHOP participants, and/or the conditions on Capitol Hill or the CHOP zone during the CHOP occupation:

- a. Mayor Jenny DURKAN;
- b. The Mayor's office, including members of the Mayor's staff;
- c. The Seattle City Council, including the members of the Council and their staff;
- d. Sabrina Bolieu;
- e. Any and all members of the City's business liaison office, including its staff;

⁶⁸ Seattle IT Service Ticket #5181570, dated 10/9/2020

⁶⁹ Seattle IT Service Ticket #5181570, dated 10/9/2020

- f. Bobby Lee;
- g. Michael Wells;
- h. City's Office of Economic Development, including its members and staff;
- i. Peter Holmes;
- j. The City Attorney's Office, including its members and staff;
- k. SPU Director Mami Hara and her staff;
- l. SPU, including its leadership, staff, employees, agents, or contractors;
- m. SDOT Director Sam Zimbabwe and his staff;
- n. SDOT, including its leadership, staff, employees, agents, or contractors;
- o. Adrienne Thompson;
- p. Members of the City's policy staff, including all person responsible for advising on or setting City policies;
- q. SPD Chief Carmen Best and her office or staff;
- r. SPD, including its leadership, officers, staff, employees, agents, and contractors;
- s. SFD Chief Harold SCOGGINS and his office or staff;
- t. SFD, including its leadership, staff, employees, agents, and contractors.

12/6/2022 - 12/9/2022

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

Thursday 12/13/2022 2300 hrs

I located a copy of the *Local Government Common Records Retention Schedule (CORE) Version 4.2 (August 2021)* on the Washington State Archives webpage, which addresses the minimum retention periods for all public records. During the timeframe related to this investigation, Version 4.0 (approved 5/18/2017) and Version 4.1 (approved 8/5/2020) would have been in effect. However, Version 4.2 contains only minor revisions to sections that are not relevant to this investigation, and is deemed acceptable for the purposes of this review.

On page 1, I noted that the document states,

“Public records covered by records series within this records retention schedule must be retained for the minimum retention period as specified in this schedule. Washington State Archives strongly recommends the disposition of public records at the end of their minimum retention period for the efficient and effective management of local resources. [...] Public records must not be destroyed if they are subject to ongoing or reasonably anticipated litigation. Such public records must be managed in accordance with the agency's policies and procedures for legal holds. Public records must not be destroyed if they are subject to an existing public records request in accordance with chapter 42.56 RCW. Such public records must be managed in accordance with the agency's policies and procedures for public records requests.”



King County Sheriff's Office
 Criminal Intelligence Unit
 Incident Report # C22029639

After reading this preamble, it would appear that the destruction of any Public Record that may be subject to “reasonably anticipated litigation” would be a violation of the retention guidelines, and therefore a violation of the Public Records Act.

However, section GS2017-004 Rev. 0 (“Litigation Materials – Development”) addresses Public Records that are “relating to the development of litigation materials (such as pleadings, memoranda, briefs, declarations, discovery materials, reports, etc.) concerning any matter in litigation or reasonably anticipated to be in litigation before any judicial or administrative forum”, and specifically identifies “related correspondence (including procedural/scheduling communications, non-substantive transmittal letters, etc.)”⁷⁰ as being covered under this section. Even though this section specifically identifies records that are reasonably anticipated to be in litigation, it authorizes the destruction of these Public Records as soon as they are no longer needed for agency business, in direct opposition to the document’s preamble.

This document also provides the retention guidelines for “Records with Minimal Retention Value (Transitory Records)” on pages 157-164, and defines “transitory records” as “records created or received by the agency which are typically of short-term, temporary informational use.” On these pages, the guidelines identify fifteen (15) different categories of Public Records for which the “transitory” definition applies; however, there are an additional twenty-one (21) categories of Public Records that carry the “transitory” designation scattered throughout the remainder of the document. The two most applicable sections to this investigation are GS50-02-05 Rev. 2, which covers “Informational Notifications & Communications”, and GS2016-011 Rev. 0, which covers “Scheduling – Appointments/Meetings”.

Screen captures of those sections are attached below:

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
GS50-02-05 Rev. 2	<p>Informational Notifications/Communications Records communicating basic/routine short-term information (regardless of format or media used) that:</p> <ul style="list-style-type: none"> Do <u>not</u> document agency decisions/actions; Are <u>not</u> used as the basis of agency decisions/actions; and Are <u>not</u> covered by a more specific records series. <p>Includes, but is not limited to:</p> <ul style="list-style-type: none"> Basic messages such as “Come and see me when you’re free,” “Call me back at 555-5555,” etc.; Internal communications notifying of staff absences or lateness (such as “Bob is out today,” “Mary is running late,” etc.), <u>provided</u> the appropriate attendance and leave records are retained in accordance with <i>Leave/Overtime – Routine (DAN GS50-04B-09)</i>; Internal communications notifying of staff social events/gatherings (such as potlucks, birthdays, fun runs, cookies in the break room, etc.) or of weather/traffic conditions (such as “Avoid I-5, it’s a parking lot,” “Take care – it has started snowing,” etc.); Email delivery/read receipts, out-of-office notices, etc. <p>Excludes records covered by:</p> <ul style="list-style-type: none"> <i>Leave/Overtime – Routine (DAN GS50-04B-09)</i>. 	<p>Retain until no longer needed for agency business <i>then</i> Destroy.</p>	<p>NON-ARCHIVAL NON-ESSENTIAL OFM</p>

(GS50-02-05 Rev. 2 - Informational Notifications/Communications, page 160)

⁷⁰ Local Government Common Records Retention Schedule (CORE) Version 4.2 (August 2021) Section GS2017-004 Rev.0, page 35



King County Sheriff's Office
 Criminal Intelligence Unit
 Incident Report # C22029639

GS2016-011 Rev. 0	Scheduling – Appointments/Meetings Records relating to the scheduling of appointments/meetings (such as checking participant and room availability, rescheduling, accepting/declining meeting invitations, etc.), <u>provided</u> the calendar record of the appointment/meeting is retained in accordance with <i>Appointment Calendars (DAN GS50-01-36)</i> . Includes, but is not limited to: <ul style="list-style-type: none"> • Meeting invitations and accepted/declined notifications in Microsoft Outlook and other calendaring/scheduling software/apps; • Related correspondence/communications. 	Retain until no longer needed for agency business <i>then</i> Destroy.	NON-ARCHIVAL NON-ESSENTIAL OFM
----------------------	---	---	--------------------------------------

(GS2016-011 Rev. 0 – Scheduling Appointments/Meetings, page 163)

As this document is publicly available in the Washington State Archives and is 197 pages long, I have not attached a copy of it to this report.

Friday 12/14/2022 1800 hrs

I began a review of “Second Set of Interrogatories to Defendant City of Seattle and the City’s Objections and First Supplemental Responses Thereto”, dated 8/31/2021.

Friday 12/16/2022 0245 hrs

I completed the review of “Second Set of Interrogatories”. In this document, the City stated that their general practice regarding the storage of data created on mobile devices was “preserve in place”, meaning that the data’s primary retention point was on the device itself, and that the data was not regularly backed up, stored, or otherwise preserved in any other system. The City of Seattle provided the following details concerning the loss of public records and the circumstances thereof:

MAYOR DURKAN

On 8/21/2020, Michelle CHEN discovered that DURKAN’s iPhone 11 was missing all text messages prior to 6/25/2020. The City stated that it was their “understanding that the Mayor did not intentionally delete any messages from her phone and did not direct anyone to intentionally delete any messages from her phone”⁷¹ and that “it was the Mayor’s understanding that all of her text messages were being preserved on her Electronic Device and/or the associated iCloud account.”⁷² The City further stated:

“On or about August 21, 2020, Michelle Chen backed up the iPhone 11 that the Mayor was using at that time to her (Chen’s) work computer. This process created an image from which the City was able to access messages from June 25, 2020 forward. [...] After discovering during that back-up process that Mayor Durkan’s phone only had texts from June 25 forward, Chen, Kim Ferreiro and Stacy Irwin

⁷¹ Second Set of Interrogatories to Defendant City of Seattle and the City’s Objections and First Supplemental Responses Thereto”, dated 8/31/2021, page 22 line 8

⁷² Second Set of Interrogatories, page 28 line 11

(Mayor's Office PRA employees), and Alencastro and Emmanuel Arhu (Mayor's Office IT), investigated and tried to recover the missing texts. IT staff analyzed the Mayor's "cracked screen" iPhone 8 Plus that she had used until July 9, 2020, but the City understands that that phone had been factory reset by the Mayor's Office IT in or around early August. It was their practice at the time to reset phones approximately a month after a new phone was provided, so the old phone could be disposed of or put back into circulation. Thereafter, on or about September 18, 2020, one of the City's forensic analysts, Braden Heil, also took an image of the iPhone 8 Plus to see if he could locate any of the missing texts. He could not."⁷³

CHIEF BEST

In or around late February 2021, the City imaged BEST's phone pursuant to a court order in *Hunter's Capital, LLC v. City of Seattle*. At some point afterwards, they discovered that BEST was missing all text messages prior to 9/2/2020. The City stated:

"Carmen Best's last day as a City employee was September 2, 2020. The City took possession of her phone on or around that same date and preserved it for purposes of various ongoing lawsuits. The City imaged Best's phone at the same time it was imaging the phones of the other custodians, at the end of 2020 or beginning of 2021. After imaging the phone, the City discovered that Best's phone had no text messages on it dated before September 2."⁷⁴

According to the timestamp of the Cellebrite data extraction for BEST's iPhone XS Max, the exact date that the phone was imaged was 2/24/2021.

CHIEF SCOGGINS

On 3/9/2021, the City imaged SCOGGINS' phone pursuant to a court order in *Hunter's Capital, LLC v. City of Seattle*. At some point afterwards, they discovered that SCOGGINS was missing all text messages prior to 10/8/2020. The City stated:

"During the relevant period, Chief Scoggins used an iPhone 8. On October 8, 2020, Chief Scoggins reported to the City's IT department and an assistant that he had been locked out of his phone. The City understands that, because of pre-existing City of Seattle security protocols, Chief Scoggins was required to enter a passcode in order to access the phone. Chief Scoggins entered what he believed to be the correct passcode, but it did not gain him access to the phone. He asked IT if they could help him unlock his phone, access to which is vital given his role as Fire Chief, and was advised to attempt to recover his iPhone from iCloud. As the City

⁷³ Second Set of Interrogatories, page 29

⁷⁴ Second Set of Interrogatories, pages 19-20

understands the situation, ultimately, he was not successful because the authentication code required to recover the phone was sent to the phone, which he still could not access. The City understands that Chief Scoggins tried to unlock his phone using other methods suggested but could not gain access. Ultimately, the City understands that Chief Scoggins then took his iPhone to the Apple Store at University Village to see if they could help him gain access to it. Because of Apple's Covid-19 policies at the time, Chief Scoggins was not allowed to enter the store to observe the Apple Store employees' efforts to gain access. The Apple Store was able to gain access to the phone, but it appears that the Apple Store employee did so by resetting it, which caused all of Chief Scoggins' text messages to be lost."⁷⁵

The City's explanation incorrectly identifies SCOGGINS' phone as an iPhone 8 instead of an iPhone 8 Plus.

ERIC GREENING

In or around late February 2021, the City imaged GREENING's phone pursuant to a court order in *Hunter's Capital, LLC v. City of Seattle*. At some point afterwards, they discovered that GREENING was missing all text messages prior to 10/26/2020. The City stated:

"During the relevant period, Assistant Chief Greening used a Galaxy S8 phone. The City understands that Greening typically used the biometric (facial or finger recognition) feature of the phone to gain access. Greening was out on vacation the week of October 19, 2020. It is the City's understanding that at some point while he was out of the office or when he returned on Monday, October 26, the City's security protocols required that he input a passcode instead of using the biometric access feature. Greening made a few attempts to gain access using what he thought was his passcode to the phone, but none of the passcodes worked. Worried that the phone would reset if he tried too many times, Greening asked his assistant, Celina Villa, to take his phone to IT to see if they could gain access. He recalls providing her with the phone and receiving it back later that day or the next day. At that point, he was able to access the phone, but his text messages from before that date were no longer available. The City's belief is that SPD IT had to reset his phone because of the passcode issue."⁷⁶

According to the timestamp of the Cellebrite data extraction for GREENING's Samsung Galaxy S8, the exact date that the phone was imaged was 3/1/2021.

⁷⁵ Second Set of Interrogatories, page 19

⁷⁶ Second Set of Interrogatories, page 20

KENNETH NEAFCY

On 3/1/2021, the City imaged NEAFCY's phone pursuant to a court order in *Hunter's Capital, LLC v. City of Seattle*. At some point afterwards, they discovered that NEAFCY was missing all text messages prior to 10/26/2020. The City stated:

"During the relevant period, Neafcy was using an iPhone X. On or about October 26, 2020, Neafcy was prompted by the City's periodic security protocol installed on his iPhone that he needed to change his passcode for accessing the phone. Neafcy followed the instructions to reset the passcode. He then tried to access the phone using the passcode that he had just input, but it did not work. He is not sure whether he mistyped the passcode when he set it or whether another issue with his phone occurred. After he was not able to access his phone, he contacted IT and asked for assistance. IT proposed ways to access the phone, but none of them was successful. He tried to recover the phone from iCloud, but it sent the passcode to the phone that was locked so he could not view it. Because of the upcoming November 2020 election and the need for others to reach him, Neafcy removed the SIM card from his iPhone X and inserted it into an old iPhone 8, allowing him to go back to using his iPhone 8 for work purposes. The City has imaged the iPhone X, and concluded that no text messages exist from the period during which Neafcy was using it."⁷⁷

The City's explanation incorrectly identifies NEAFCY's phones as an iPhone X instead of an iPhone XS, and as an iPhone 8 instead of an iPhone 6s. The City also incorrectly identifies the date of missing text messages as 10/26/2020, instead of 10/28/2020.

CHRISTOPHER FISHER

In or around late February 2021, the City imaged FISHER's phone pursuant to a court order in *Hunter's Capital, LLC v. City of Seattle*. At some point afterwards, they discovered that FISHER was missing all text messages prior to 12/3/2020. The City stated:

"During the relevant period, Fisher used an iPhone 7. On approximately December 3, 2020, Fisher attempted to gain access to his phone using the facial recognition functionality that he usually used to access his phone. Due to the City's security protocols, his iPhone required him to log in using his passcode to access his phone. Fisher input the passcode he believed he had previously set for his phone, but it was incorrect. He attempted some other passcodes that he had previously used that he thought might still work, but they did not. Fisher then reached out to IT to see if there was an alternative way to access the phone. It is our understanding

⁷⁷ Second Set of Interrogatories, page 20-21

that IT informed him that there was no way to access the phone without resetting it to its factory settings. Ultimately, Fisher followed this guidance.”⁷⁸

According to the timestamp of the Cellebrite data extraction for FISHER's iPhone 7, the phone was imaged was 2/22/2021. As established earlier, the City's explanation above contains multiple additional inaccuracies and conflates two separate incidents that FISHER had with his city-issued iPhone.

IDRIS BEAUREGARD

On 3/9/2021, the City imaged BEAUREGARD's phone pursuant to a court order in *Hunter's Capital, LLC v. City of Seattle*. At some point afterwards, they discovered that BEAUREGARD was missing all text messages prior to 10/9/2020. The City stated:

“During the relevant period, Beauregard used an iPhone 8. The City understands that on October 9, 2020, Beauregard attempted to access his phone, but his passcode would not work. He does not believe that he had the wrong information for the passcode, as it was the one he had previously used. When he could not access his phone, he called IT and submitted a request for assistance (called a heat ticket). The City understands that Beauregard was informed by IT that, because it was an iPhone, he should contact Apple to see if they had a work-around that he could use. Apple informed him that because he did not have iTunes, he could not gain access to the phone. He left his phone on his desk with the idea that he would work to gain access the next day. However, the City understands that when he looked at his phone the next day, he saw that his iPhone screen showed a spiral icon. Once the spiraling stopped the phone reset itself. None of his text messages pre-dating the phone's automatic reset were available after the phone reset itself.”⁷⁹

SHANON ANDERSON & VALARIE ANDERSON

The City stated that they have been unable to access the phones belonging to SHANON ANDERSON and VALARIE ANDERSON, stating that both phones are password protected. In regards to these two phones, the City stated:

“Last winter, SPD moved all of its cellphones to AT&T/FirstNet. As part of that transition, both Shanon Anderson and Valarie Anderson turned in the phones they had been using during summer 2020. The phones were collected and maintained by SPD IT. When the City accessed their phones in order to image them, the City found that both phones were password protected and the City could not access them using the passwords that they had provided when they turned in the phones. After trying multiple times to access the phones, the City chose to stop so

⁷⁸ Second Set of Interrogatories, page 21-22

⁷⁹ Second Set of Interrogatories, page 21

as to not inadvertently trigger the phones' automatic reset function. The City is working with an outside vendor to try to circumvent the passcode issue to gain access to the phones. The City will advise Plaintiffs whether it is successful in this attempt."⁸⁰

The City also provided some general information concerning their policy regarding the storage of data created on mobile devices, stating that the City's general practice was to "preserve in place" such data, in accordance with applicable retention schedules and litigation holds, and that there was no practice or policy requiring or encouraging regular backups of the data.

It should be noted that the City's responses contain a number of errors and omissions, only some of which have been noted above. There are also instances where the City presents contradictory facts or statements between its responses to the Interrogatories.

Friday 12/21/2022 1123 hrs

I spoke with KCSO General Counsel Erin Overbey via telephone, regarding timing for a possible briefing to the King County Prosecutor's Office. During that conversation, I mentioned to Overbey that we had not yet received a response from the city concerning the reconstruction of the Mayor's 191 deleted text messages, and asked her if she could touch base with the city again to see if we could obtain that document. Overbey told me that the city had essentially told her that they have been more than helpful with our investigation, but that they are now done helping us and see no reason to keep providing us documents that might put their people in jail.

Friday 12/22/2022 0343 hrs

I sent an email to Steve FOGG and Gabriel REILLY-BATES, advising them that the city had told Overbey that they are done responding to our requests for documents and are no longer willing to provide us with any further information. I asked Mr. FOGG and Mr. REILLY-BATES for assistance in obtaining whatever document was created that contained the 131 reconstructed text messages.

Friday 12/22/2022 1105 hrs

I received an email from Steve FOGG, stating, "Joe, thanks for the email. I discussed this with the City this am and my understanding is that the City will send you the text messages you requested later today."

⁸⁰ Second Set of Interrogatories, page 22

At 1114 hrs, I received an email from Overbey containing the file “_191 Deleted Texts.xlsx” forwarded from Joe Groshong of the Seattle City Attorney’s Office. Groshong’s email stated, “The attached contains the copies of the 191 messages found on others’ phones. Note that there are duplicates--it will show that there are 213 recreated texts when you first open it. If you sort on Column E (Dup) and select N you will see the non-duplicative texts.”

I opened the document and saw that there were 212 lines of data⁸¹ with an associated date range of 6/25/2020 through 9/9/2020. I called Overbey and asked if she had any information on how these particular text messages had been determined to be the ones that were manually deleted; she said that she did not. She also did not have any information as to who had created the document or how the results had been extrapolated from the full set of reconstructed text messages.

I inspected the document’s core properties, and found that the Author was listed as “Martha J Dawson”, the Company was listed as “K&L Gates LLP”, and the Creation Date was listed as 1/21/2022 at 1100 hrs. I am aware from information contained in the depositions that I have reviewed that K&L Gates was retained by the City of Seattle to assist with the reconstruction of lost text messages from the phones of other city employees. An internet search confirmed that Martha Dawson is a partner at K&L Gates LLP, and that she specializes in “e-discovery analysis and technology”. I called and left a voicemail for her at 1134 hrs. At 1217 hrs, Dawson returned my call and confirmed that she was the creator of the document, stating that they had determined which of the reconstructed text messages had been manually deleted through comparisons between the digital forensics examination results and the full set of reconstructed text messages.

Wednesday 12/28/2022 1630 hrs

I began a review of the file “_191 Deleted Texts.xlsx”, in order to determine if any of the text messages that had been manually deleted from DURKAN’s phone would qualify as a public record that would need to be retained in accordance with the Public Records Act. While I began with using the filters as specified by Mr. Groshong, I discovered that they appeared to be filtering out unique text messages that had been marked as “Duplicate” for an unknown reason. As such, I conducted my examination without the use of the pre-set filters.

I noted that of the 212 reconstructed text messages, eighteen (18) were work-related messages between DURKAN and Michelle CHEN, and that some of those text messages could potentially be exempt from Public Disclosure under RCW 5.60.060(2)(a) as attorney-client privileged communications. As such, I will maintain an electronic copy of this document for eventual review by the King County Prosecutor’s Office, but I will not be attaching a copy of the document to this report.

I reviewed each of the 212 reconstructed text messages contained in the document. Of those messages, forty-eight (48) were duplicates of other messages within the same document, leaving a total

⁸¹ Line 1 contains the categories and embedded filters for the data tables; Groshong erroneously counted this row by simply looking at the last line of data in the table.

of 164 unique text messages that had been manually deleted and reconstructed from the period between June and November of 2020. Of the remaining messages:

- Seventy-nine (79) were related to scheduling phone calls, press briefings, and interviews for DURKAN, or were otherwise related to DURKAN's general availability.
- Twenty-seven (27) were basic messages such as pleasantries and acknowledgments (i.e., "Copy", "Thank you", "Very nice VM", etc.) or banter (i.e., "Sounds like a personal problem", "Faked me out!", etc.).
- Eighteen (18) were the aforementioned work-related messages between DURKAN and Michelle Chen that may contain privileged communications.
- Eighteen (18) were informal, internal communications that addressed office business (i.e., "Number in calendar - memos tps in email", "Today's briefing materials are updated and in your Daily Reading/Prep time slot", etc.)
- Seven (7) were message reactions (i.e., "Liked", "Laughed At", etc.) that contained no unique information.
- Five (5) were emoji responses containing no text.
- Four (4) were brief summaries of a recent incident sent to DURKAN by Chief BEST or Chief Adrian Diaz (i.e., "Person located at 725 hours in the 1400 block of Lake Washington Blvd with a GSW. Homicide is responding as it appears suspicious.")
- Four (4) were informal communications related to IT/technology issues (unrelated to this investigation) between DURKAN and her staff or IT personnel (i.e., "Please see email re need for link at 11:30", "please tell Shefali ASAP that none of my devices will let me use the CPC link", etc.)

There are two additional text messages between DURKAN and Colleen O'REILLY BERNIER that I am unable to accurately classify, both of which were sent on 9/4/2020 at 11:23 AM. This document does not denote whether the messages were sent or received by DURKAN; however, by comparing the date/time stamps and CHAT_IDs with the data contained in "Durkan_Jenny_Comprehensive_20221028", I was able to determine that these two messages were sent by BERNIER and received by DURKAN. The first message contains the text "Part one of two texts from Formas" with no additional information. The second message reads "Part two", also with no additional information. Most likely, both texts contained a screen capture of the text from Stephanie FORMAS and, given that the text was recovered, the screen captures were most likely recovered as well but were not inserted into this document.

Based upon my understanding of the CORE Retention Schedule's guidelines, it is my opinion that all of the text messages contained in this reconstruction, with the exception of the two messages that cannot be accurately classified with the available information, would be considered "transitory records", and could legally be destroyed as soon as they were no longer needed for agency business. Therefore, it is my opinion that no violation of the Public Records Act occurred when these 162 messages were manually deleted from DURKAN's phone.

There are still an additional 29 text messages that were manually deleted and have not yet been reconstructed. However, DURKAN testified in her depositions that she routinely deleted spam and

“phishing” text messages from her phone; as these are sent from outside of the city, they will likely never be recovered.⁸² However, these spam messages are also more likely to have been sent via an SMS text message, which means that the City’s cell phone carrier (FirstNet) could have a log of the date and time that they were received, as well as the associated (and likely spoofed) phone number. A comparison of FirstNet’s SMS records compared with the reconstructed text messages could help to define the number of spam text messages that were received by DURKAN and may be of interest to some parties. However, in regard to this investigation, such an examination would serve no purpose other than to reduce the number of manually deleted text messages that have not yet been reconstructed.

Additionally, Seattle IT policy requires that Two-Factor Authentication (2FA) be utilized for access to certain city assets, and those 2FA confirmation requests are most commonly sent to a user’s cell phone via an SMS text message. While those text messages could possibly be reconstructed from the 2FA server used by the City, this would also serve no purpose other than to reduce the overall number of manually deleted text messages that have not yet been reconstructed.

The deletion of spam and phishing text messages is authorized by DAN GS50-02-03 Rev. 0 of the CORE Retention Schedule, and the deletion of 2FA messages is authorized by DAN GS2010-004 Rev. 1 of the CORE Retention Schedule. It is my opinion that messages of this type could account for at least 25% of the remaining unreconstructed text messages.

However, DURKAN was also subject to two Litigation Holds during this time period, the first of which was served on 7/22/2020 in the matter of *Hunter’s Capital, LLC v. City of Seattle*. On 6/30/2020, the City of Seattle was sent a Preservation Letter from Calfo Eakes LLP, representing the Plaintiff in *Hunter’s Capital, LLC v. City of Seattle*. That letter specifically requested that the City “act to ensure that all potentially relevant documents, communications and/or information are preserved”⁸³, and specifically identified “all communications, documents, and complaints (including text messages, voice messages, emails, memoranda and meeting minutes) to, from, in the possession of, or involving [Mayor Jenny DURKAN] and relating to the CHOP/CHAZ or the conditions on Capitol Hill.”⁸⁴

According to the City of Seattle, the Litigation Holds that they had sent out had “instructed employees to preserve ... text messages, emails, memoranda, and meeting minutes” and “included a FAQ attachment instructing employees to not delete documents that again referenced text messages on employees’ mobile devices.”⁸⁵ The Litigation Hold that was served upon DURKAN on 7/22/2020 essentially negated the authority to destroy transitory records under the CORE Retention Schedule, but only in regards to those records that are potentially relevant in the matter of *Hunter’s Capital, LLC v. City of Seattle*. Any records that are not relevant to that matter are still subject to the standard retention rules.

⁸² As an ancillary assignment, I have been assigned as a Fusion Liaison Officer at the Washington State Fusion Center since September of 2015. While so assigned, I have learned that the City of Seattle detects and intercepts multiple phishing attempts via email and text messages every month.

⁸³ Preservation Letter, *Hunter’s Capital, LLC v. City of Seattle*, dated 6/30/2020, page 1

⁸⁴ Preservation Letter, page 2

⁸⁵ Second Set of Interrogatories, page 25-26

Of the 162 reconstructed text messages that I was able to categorize, and exempting the eighteen (18) messages that may contain privileged communications, it is my opinion that all but two of these messages would be outside of the scope of the Litigation Hold and still be considered "transitory records", and thus could legally be destroyed as soon as they are no longer needed for agency business. The two messages that are potentially responsive to the Litigation Hold are:

- 1) A text message sent from Deputy Mayor Casey Sixkiller to DURKAN on 7/7/2020 at 5:18 PM, which reads, "I think we should keep the park closed until we resolve this situation." (Chat_100139733)
- 2) A text message sent from Deputy Mayor Casey Sixkiller to DURKAN on 9/1/2020 at 7:23 AM, which reads, "Good morning Mayor. Operation Cal Andersen will be occurring this AM, likely around 930-10. SPD and SPR are aligned on mission objectives. We expect this will take a few hours." (Chat_100139743)

According to the Chat_ID logs, DURKAN did not respond to either message, and there are no manually deleted text messages between DURKAN and Sixkiller that could have been among the unreconstructed messages, as Casey Sixkiller's text messages were completely available and his Chat_ID logs display an uninterrupted and consecutive record from Chat_10139674 on 3/6/2020 through Chat_100139785 on 9/28/2020.⁸⁶ DURKAN's lack of response to either of these text messages is consistent with her earlier testimony that it was her "general practice ... not to use text messages for substantive discussions."⁸⁷

Although DURKAN did not send these messages and was solely a recipient, under the City's "preserve in place" policy she would still be the custodian of these two records, and would have had a duty to preserve them under the Litigation Hold if they were deemed responsive. However, as the Litigation Hold was created in response to a civil proceeding in the Federal court system, the King County Sheriff's Office has no jurisdiction, and this is therefore a matter for the federal court to decide.

Wednesday 1/4/2023 1730 hrs

While reviewing the reconstructed text messages for DURKAN, I located the original text messages that had been referenced in the deposition of Colleen O'REILLY BERNIER, in which the mayor had instructed her staff to not use text messages (page 36-37 of this report). The timing of that text message was concerning, as it occurred on 7/7/2020, in the immediate aftermath of the factory reset of her phone on 7/4/2020, but the deposition did not reproduce the exact wording of the text or provide any context.

That text string was initiated on 7/7/2020 at 8:22 AM by Ernie Apreza, the Communications Director for the Office of the Mayor. The recipients were DURKAN, BERNIER, Stephaie FORMAS, and Kelsey Nyland, a spokesperson for the Office of the Mayor. The text by Mr. Apreza read, "Hi Mayor,

⁸⁶ Durkan_Jenny_Comprehensive_20221028.xlsx

⁸⁷ Deposition of Mayor Jenny Durkan in *Seattle Times Company v. City of Seattle*, dated 3/1/2022, page 12 line 9

kicking off a text thread to run proposed interviews by you before locking them in. Kelsey will provide proposed outlets and times." On 7/7/2020 at 8:23 AM, DURKAN responded to the group, "Let's not do by text. Thanks", followed by another text at 8:24 AM in which she wrote, "I can do a call at 8:45 or 10:30." Mr. Apreza responded, "OK" at 8:28 AM, and the text string ends there.⁸⁸

Based upon the full context of the text string, I see no evidence that the request to "not do by text" was connected to either the factory reset of DURKAN's phone or to any attempt to evade public disclosure; rather, it is consistent with DURKAN's previous testimony that she prefers face-to-face meetings or phone calls to text messaging.

While reviewing this document, I decided to check these text logs against DURKAN's testimony regarding the events of 7/4/2020, in order to see how well they aligned. DURKAN gave testimony on the events of this day during all three of her depositions, but her deposition for *Seattle Times Company v. City of Seattle* provided the most detailed accounting of these events.⁸⁹

DURKAN stated that she had "received a message in the middle of the night" concerning the death of Summer Taylor, who was struck by a car at approximately 1:30 AM while protesting on I-5. According to the text message logs, DURKAN received a text message on 7/4/2020 at 2:26 AM from Sakara Remmu, who was the emeritus chair of Black Lives Matter Seattle-King County, stating "What happened on i5 with Omari is, unfortunately, related."⁹⁰ As this incident involved Washington State Patrol and not the Seattle Police Department, it is unlikely that DURKAN would have received any notification from Chief BEST on the matter.

DURKAN further stated that she had "asked to see if we could have conversations the next morning." According to the text message logs, DURKAN received a text message on 7/4/2020 at 7:48 AM from Stephanie FORMAS with an update on the incident and injuries. DURKAN responded at 7:56 AM, "Can you send me Omari video. He was there, filmed it and maybe was almost hit. I want to make sure he is ok. Also we should communicate with families/protestors. Just awful."

DURKAN then stated,

"Had conversations related to that death on I-5, as well as a number of other protest-related events. It's a very, very small cabin, so I decided to -- It was very low tide. In this particular beach you can walk for miles and miles. So I took my calls outside and talked to the person from one of the Black organizations about some concerns they had on responses to some issues. And then took a very long walk, came back, talked my senior deputy mayor, Mike Fong, to kind of organize a number of issues. Decided to go back to the cabin. It was the 4th of July. And was going to make one last call and realized I didn't have my phone, and it had fallen out of my pocket. So I retraced my steps and found the phone sitting in kind of

⁸⁸ Durkan_Jenny_Comprehensive_20221028.xlsx, Chat_100162065 through Chat_100162068

⁸⁹ Deposition of Mayor Jenny Durkan in *Seattle Times Company*, page 82

⁹⁰ "Omari" is Omari Salisbury, an independent journalist and founder of Converge Media, who had been active in reporting the City's response to the protests, and who had been the only journalist allowed to sit in on a closed-door meeting with Mayor DURKAN on 6/26/2020. Mr. Salisbury was present and interviewing protesters when the incident on I-5 occurred.

smallish tidal pool-ish type thing. It wasn't functioning well. So I turned it off, took it back to the house, threw it in a bag of rice.”

On 7/4/2020 at 11:40 AM, DURKAN sent a text message to Sakara Remmu, stating “Thank you for talking. Would very much like to meet with frontline families and discuss the support needed, and how we make that happen”, and another at 11:42 stating, “If there are people you think I can connect with -- I would appreciate it. Take care.” Based upon these texts, it appears as if DURKAN had just completed a phone call with Sakara Remmu, and was sending these text messages to follow-up on that conversation. At 11:44 AM, DURKAN received the last text message of the day in that string.

After the text message at 11:44 AM, there are no further text messages that were either sent or received until 8:18 PM, when DURKAN sent a text message to Chief BEST consisting of, “Was just checking in on a few things. Call when convenient.”

When asked how long her phone had been in the bag of rice, DURKAN testified:

“I was on the beach like midday, and then I threw it in the bag of rice, and left it there for a while. I was going to be cooking dinner for Fourth of July barbecue. And so my recollection is, I left it [in the rice] until, like, 4:45, 5:15, sometime – sometime before dinner, to see if I could get the phone up and running again.”⁹¹

The forensic extractions of DURKAN’s phone indicated that it was restored from an iCloud backup at 4:51 PM, followed by the deactivation of “Messages in iCloud” through the “Disable & Delete” function at 5:19 PM.

At 6:13 PM, DURKAN sent an email to Colleen O’REILLY BERNIER, in which she wrote, “My work phone crashed and I want to restore data and settings. But I do not have the pw to the MOS calendar. Do you have it, can you get it, please. Thanks.”⁹² After getting no response from BERNIER, DURKAN sent another email at 8:52 PM, this time to BERNIER, Andrea FRIEDHOFF, Laura Benbow, and Stephanie FORMAS. In that email, DURKAN wrote, “Can one of you send me the password for the MOS calendar account. My phone died but I was able to reset and backup from cloud. But don’t have that pw.”

The timeline established by the contemporaneous emails and text messages indicate that there was approximately 5 hours and 7 minutes between the time of DURKAN’s last text message and the time when her phone was restored from an iCloud backup. While it is likely that I would be able to narrow this window down further if I were able to determine the time and length of the phone call between DURKAN and Deputy Mayor Mike Fong, DURKAN’s phone records are outside of the current scope of this investigation.

Regardless, I believe that DURKAN’s account of the events is consistent with forensic evidence and the contemporaneous emails and text messages, and have no cause to doubt her veracity.

⁹¹ Deposition of Mayor Jenny Durkan in *Hunters Times, LLC v. City of Seattle*, page 258 line 10

⁹² Deposition of Colleen O’Reilly Bernier, page 56 line 17

Friday 1/6/2023 1226 hrs

While earlier reviewing the "Second Set of Interrogatories to Defendant City of Seattle and the City's Objections and First Supplemental Responses Thereto", dated 8/31/2021, I made a note of the City's statement that "for Deanna Nollette, the City believes that it has recovered the text messages that previously were not obtainable and is in the process of reviewing those texts for production."⁹³

I sent an email to KCSO General Counsel Erin Overbey, asking her if the city would be able to confirm that NOLLETTE's text messages had been completely recovered, and if they could provide any details concerning the recovery.

On 1/10/2023 at 1651 hrs, I received an email response from Overbey, forwarded from Joe Groshong of the Seattle City Attorney's Office. His response stated the following:

"Assistant Chief Deanna Nollette was initially reported as an individual with missing data, due to a piece of software that prevented technicians from collecting texts from her devices. A vendor was eventually able to access iCloud backups from two of Asst. Chief Nollette's phones. That data was collected successfully on July 2, 2021. The two backups collectively contain 27,503 texts, and include messages from May 28, 2020 to April 27, 2021."

1/7/2023 - 1/13/2023

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

Saturday 1/14/2023 1630 hrs

I reviewed the documents "Mayor's Office Best Practices" and "City Records Management Program Advice Sheet – Text Messages." Both of these documents were created specifically to supplement the established policies and procedures with information that is more specific in nature.

The "Mayor's Office Best Practices" document is dated 6/19/2020, and addresses the issue of text messages in relation to the Public Records Act. The document explains the basic responsibilities of the Office of the Mayor and of each individual employee in regards to text message retention, but the majority of the document deals with exactly when and how a public record can be exempted from disclosure. Based on the overall content, it appears as if this document was designed to assist Public Records Officers assigned to the Office of the Mayor with how to apply PRA exemptions. Of interest to this investigation, the document states,

"It is the responsibility of each City employee to retain public records, including those on City-owned or person smartphones and mobile devices. Retention of

⁹³ Second Set of Interrogatories, page 16 line 21

text messages is based on the content of the message and the function it documents, not the method of transmission. Retention policies can range from immediate deletion for transitory records to several years based on the content.”

“City Records Management Program Advice Sheet – Text Messages” is undated; however, Jennifer WINKLER testified in her deposition that she created it in mid-2021, but explained that it was simply a clarification of existing practice and not new policy. This document contains a great deal more information than the “Mayor’s Office Best Practices”, and is clearly oriented towards general City employees. Under the heading “Basic Text Message Policies”, the document states,

“An employee should limit texting regarding City business to transitory texts that can be deleted once the message serves its purpose. In the event communications that are more than transitory are necessary, such communications should occur in person, by telephone, by email, or my memorandum, but not by text. Using this approach will avoid complications with retention and producing texts for the purposes of responding to public records requests.

This document defined a “Transitory” text message as “a text message that only documents information of a temporary, short-term value, and that is not needed as evidence of a business transaction.” It provides an extensive list of examples of what the City considers to be a transitory text message, and advises employees that “Transitory texts may be deleted by the user once the texts have served their purpose.”

Additionally, there is section of the document titled, “*Doesn’t the City ITD retain all the text messages sent via a City issued device?*”, which indicates that this question or misunderstanding is common enough to require being specifically addressed. The section states, “City IT does not have the ability to retain text messages from all City issued phones.”

The next section is titled, “*But doesn’t the phone company have all the text messages?*”, indicating that this is also a common question or misunderstanding. This section explains that the phone companies do not maintain the actual content of the text messages, and clearly identifies that it is the employee’s responsibility to ensure that their messages are being retained properly.

WINKLER testified in her deposition that the purpose of this document was “to give City employees a little bit more in-depth understanding about text messages and their recordkeeping responsibilities”⁹⁴ and that they had created it after “there [had] been [a] proliferation of text messaging throughout City employees, and we felt that it was necessary to provide further advice”⁹⁵ However, WINKLER stated that this document was only disseminated to the Public Disclosure Officers for the various City departments before it was uploaded to the City’s intranet.

⁹⁴ Deposition of Jennifer Winkler, page 18 line 20

⁹⁵ Deposition of Jennifer Winkler, page 19 line 15

The dissemination of this document seems to defeat the reason why the document was created in the first place; if this document was not widely disseminated and was only posted to the City's Intranet page, it is more likely than not that very few employees even knew that it was available, let alone opened the link and read the document.

Tuesday 1/17/2023 0520 hrs

While reviewing my notes, I realized that I had not yet reviewed another incident concerning the destruction of text messages, in which the City of Seattle was the defendant in a lawsuit (*Marigold Products, Inc. v. City of Seattle*) filed in King County Superior Court on 11/13/2020. I downloaded a number of documents related to that case for later review, including a Motion for Spoliation in which the Plaintiff alleged that the City of Seattle had intentionally destroyed evidence while violating the state's public records law and its own policies.

Wednesday 1/18/2023 1030 hrs

I reviewed the documents that I had downloaded related to *Marigold Products, Inc. v. City of Seattle*, and learned the following:

On 7/28/2021, during the discovery phase of the proceedings, the counsel for Marigold Products determined that the text messages belonging to two city officials involved in this incident had been destroyed. Those two officials were Fred PODESTA, then Director of the Department of Finance and Administrative Services, and Doug CAREY, who was then the Deputy Director of the Department of Finance and Administrative Services. According to the court filings in this case, both PODESTA's and CAREY's text messages were destroyed after they left employment with the City of Seattle.

Both PODESTA and CAREY were added as named subjects in this investigation.

In January of 2019, PODESTA took a new job as the Chief Operating Officer for Seattle Public Schools, at which point he turned in his city-issued cell phone. At the time of his separation, PODESTA was working for the Human Services Department, and the City of Seattle stated that "if there was no immediate need to repurpose a cell phone it was HSD's policy to wipe the phone and surplus it. Given the age of Mr. Podesta's phone (an Apple 6s), it was likely wiped and surplused."⁹⁶

In March of 2020, CAREY retired from the City of Seattle, at which point he turned in his city-issued cell phone. At the time of his separation, CAREY was working for the Department of Finance and Administrative Services, and the City of Seattle stated that "at that time, it was FAS's policy to wipe the phone and surplus it. Carey handed his phone in and it was wiped and surplused by the FAS Director's office assistant Mickey Bannister-Mingo."⁹⁷

⁹⁶ Marigold Products, Inc.'s Amended Second Set of Interrogatories, dated 4/15/2022, page 5 line 21

⁹⁷ Marigold Products Interrogatories, page 7 line 4



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

In each case, while defending the lack of text messages that were responsive to the Plaintiff's request, the City of Seattle stated that "pursuant to the City's record retention policies, the person who creates records, including text messages, determines what documents should be preserved, and no such texts were preserved." However, it appears by the city's own statement that their own policies are what directly led to the destruction of any text messages that may have been preserved by each employee at the time that they turned in their city-issued phones.

On 3/30/2022, Jennifer WINKLER was deposed in *Marigold Products, Inc. v. City of Seattle*, for which she was also designated as a Rule 30(b)(6) deponent by the City of Seattle.

In the deposition for *Hunters Capital, LLC v. City of Seattle*, dated 1/6/2022, WINKLER stated that she is aware of no city policies that address the retention of public records in the event that a phone needs to be reset, replaced, or decommissioned.

However, during her deposition for *Marigold Products, Inc. v. City of Seattle*, WINKLER was asked "What happens when employees or officials no longer are associated with the city, whether they leave the employment or they no longer have their official position? What's the policy on how to retain their documents as they exit the city?" After she provided a general answer concerning electronic records, WINKLER was asked specifically about text messages. In response, WINKLER stated that under the city's retention policies, those records "should be reviewed for content, and if they are found to be substantive in nature, should be moved to a more stable platform on the city's network."⁹⁸

I do not believe that the discrepancies between these two depositions are indicative of any attempt at deception by WINKLER, as the questioning leading up to the two different answers was divergent enough in context to account for the discrepancy in the answer. However, it does provide added information that can be useful in understanding some aspects of this investigation.

That deposition also contained the following exchange between WINKLER and Andy Murphy, who was conducting the deposition on behalf of the Plaintiff, beginning on page 26:

- MURPHY:** What happens to the data on a cell phone if it's not moved to a stable platform of the City's?
- WINKLER:** I am not familiar with the process that departments employ on phones after they have been turned in.
- MURPHY:** Is it department-specific what happens to the phones?
- WINKLER:** Yes.
- MURPHY:** Is anyone in the City responsible to verify compliance with the City's record retention policies?
- WINKLER:** No.

⁹⁸ Deposition of Jennifer Winkler in *Marigold Products, Inc. v. City of Seattle*, dated 3/30/2022, page 20 line 9

- MURPHY:** How does the City assess whether its record retention policies are being complied with?
- WINKLER:** We do not have a tool or mechanism to audit compliance with retention policies.
- MURPHY:** Are you aware of any ability to recover data on an employee's cell phone if the data was not moved to a stable platform?
- WINKLER:** I am not aware of that.

As has been established by the sworn depositions reviewed earlier in this report, two very different practices were in place regarding what happens to a city-issued cell phone after it is removed from active service, depending upon whether the phone belonged to the Office of the Mayor or to Seattle PD. Under Seattle PD's established practice, the phone is to be kept intact and is stored until the data is no longer required to be retained. However, under the Office of the Mayor's established practice, the phone is subjected to a factory reset ("wiped") approximately 30 days after it is replaced, before its eventual disposal or recycling.

Based upon WINKLER's testimony in this deposition (in which the City of Seattle designated her a Rule 30(b)(6) deponent and authorized her to speak on behalf of the City), it appears as if the City of Seattle could potentially have a different established practice for each one of its 40-something city departments. Furthermore, it appears as if the City of Seattle has no reliable way of tracking whether or not the public records contained within those phones are actually being retained in accordance with the Public Records Act and their City Records Management Program.

Additionally, while WINKLER stated that the City Records Management Program states that cell phone data should be moved to a secure server owned by the City, no such server has ever been identified or apparently used to retain data from any smartphones or other mobile devices.

I searched the City of Seattle's website and Open Data Portal, but was unable to find any documents that addressed the policies or procedures regarding city-issued cell phones for either the Department of Finance and Administration or for the Human Services Department.

Wednesday 1/18/2023 1450 hrs

While reviewing the Motion for Spoliation from *Marigold Products, Inc. v. City of Seattle*, I noted that the Exhibits attached to the motion included only excerpts from the deposition of Jennifer WINKLER. In order to make sure that none of WINKLER's statements were cited out of context, I decided that I needed to review the entire deposition.

I found that Mike Fandel of Miller Nash LLP was one of the filing attorneys, and I left a voicemail for him requesting a complete copy of the deposition.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Thursday 1/19/2023 1503 hrs

Mike Fandel returned my call, and agreed to provide a copy of the deposition. Shortly thereafter, I received an email containing "March 30 2022 30(b)(6) Deposition of Jennifer Winkler.pdf" as an attachment. I reviewed the full text of the deposition and found that the statements were accurately cited and that there was no additional information of relevance to this investigation.

However, I did note the following exchange of interest, located on pages 16-17 of the deposition:

MURPHY: Does it make a difference to the City's retention policies if the documents at issue relate to threatened litigation?

WINKLER: When we have -- from a records management point of view, no, it would not.

MURPHY: Why not?

WINKLER: Could you please repeat the original question?

MURPHY: If a record is related to threatened litigation, does it change how the City retains the documents?

WINKLER: Thank you. I appreciate that. When we have gotten questions such as this in the past, I have referred them to the law department.

MURPHY: So, is it fair to say that the policies about records retention do not specifically address what to do with threatened litigation, and that is instead an issue that the City Attorney's Office advises on?

WINKLER: Yes.

MURPHY: When there has been threatened litigation regarding a particular issue, what does the City do to retain those records?

WINKLER: We are not involved in the litigation hold or preservation process. We do assist in running the physical records management for physical records at our City records center. If we have been informed by a department that there is litigation, then we hold any documents that may be eligible for destruction.

MURPHY: If your office isn't responsible for litigation holds, who -- which department is?

WINKLER: That would be the City Attorney's Office.

While the City Records Management Program may not be responsible for litigation holds and orders to preserve the specific records that they designate, it is still ultimately responsible for the actual retention of those public records according to page 1 of the *Local Government Common Records Retention Schedule (CORE)*. WINKLER's testimony in this matter seems to identify a possible failure point in the City Record Management Program, where the bureaucratic process may contribute to the loss of records that must be retained.

This is well-evidenced by the fact that the City of Seattle was advised that *Hunter's Capital, LLC v. City of Seattle* had been filed in US District Court in on 6/24/2020, had received a preliminary notice to preserve documents on 6/27/2020, and had received a full Preservation Letter on 6/30/2020, but still did not serve any Litigation Holds upon its employees until it served nineteen (19) individuals on 7/22/2020, thirteen (13) individuals on 7/27/2020, sixteen (16) individuals on various dates in September of 2020, and four (4) individuals in October of 2020.

Further evidence of this exists in the fact that even though specific individuals had been served with Litigation Holds, no effort was apparently made by the City Records Management Program or the City Attorney's Office to identify and flag any specific devices that may contain records covered under this Litigation Hold. This specific failure point led allowed for the factory reset of DURKAN's iPhone 8 Plus (FirstNet) by Emmanuel ARHU in August of 2020. As an IT technician, ARHU has had no public records training and was unaware that DURKAN and the phone were subject to a Litigation Hold; he was simply acting in accordance with IT Security Policy section 39.1 and practices established by the IT Department in order to comply with that policy.

The City's records retention policies are clear in the fact that the primary retention point for records contained in a smartphone or other mobile device is the device itself. The Seattle Police Department complied with this policy by an established practice wherein the device is kept intact and is handed over to and stored by the department's legal unit until it is no longer required to be retained. If the City as a whole had followed this practice, or if there had been a mechanism in place for the City to flag a particular device for retention, ARHU would not have irrevocably destroyed the records contained on DURKAN's iPhone 8 Plus (FirstNet), and it is possible that the "Disable & Delete" activation of "Messages in iCloud" would have been discovered and reversed before all of DURKAN's text messages were deleted from iCloud on 8/4/2020.

Friday 1/20/2023 1100 hrs

The Seattle Times published a news article with the headline, "Judge slaps sanctions on Seattle for deleting thousands of texts between top officials." According to the article, US District Court Judge Thomas Zilly ordered the *Hunter's Capital, LLC v. City of Seattle* case to trial, and also found "substantial circumstantial evidence that the city acted with the requisite intent necessary to impose a severe sanction and that the city's conduct exceeds gross negligence."⁹⁹

⁹⁹ Mike Carter, "Judge slaps sanctions on Seattle for deleting thousands of texts between top officials." *The Seattle Times*, January 20, 2023



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

It is worth noting that this ruling and the Honorable Judge Zilly's finding are in regards to a civil trial, which has a lower standard of proof than that of a criminal trial. In a civil trial, the burden of proof is typically "a preponderance of evidence", which is simply defined as "it is more likely than not." This is a much lower threshold than is required for a criminal trial, which is "beyond a reasonable doubt." Furthermore, these findings appear directed at the City of Seattle as a whole. As such, Judge Zilly's findings do not automatically indicate that there is cause to file criminal charges against any particular individual.

Included within the article were links to the two orders released by Judge Zilly, both of which were uploaded and stored in the DocumentCloud.org archive associated with *The Seattle Times* reporting. I downloaded both the "Order Granting Spoliation Sanctions" and the "Order Regarding the Motion for Summary Judgement" for later review, in the event that they contain additional evidence.

Monday 1/23/2023 1200 hrs

As of this date, neither Eric GREENING nor Kenneth NEAFCY have been deposed in the matter of *Hunter's Capital, LLC v. City of Seattle*, and there has been no sworn testimony or statement made directly by either of them regarding the circumstances surrounding the factory resets performed on their city-issued phones. In my conversation with Mr. REILLY-BATES of 11/16/2022, he had explained to me that they had a limited amount of time and resources available for the depositions in this case, and that their firm had made the decision not to depose either of them.

Among the documents that were obtained from the PACER download on 11/16/2020 were two separate email chains, each documenting a request for IT assistance for GREENING and NEAFCY. These two email chains contain contemporaneous discussions surrounding the circumstances of those factory resets, and are summarized below.

ERIC GREENING

In "SEA_00141561 Email chain (Greening)", Celina Villa (GREENING's Executive Assistant) sent an email to Brian KENNEDY on 10/26/2020 at 8:41 AM. In that email, she asks, "We spoke last week and you were going to help me fix my boss's locked cell phone? Are you around?" KENNEDY responds that he is, and asks Celina Villa to bring GREENING's phone down to him at 9:01 AM.

According to the data extraction of GREENING's phone, it was subjected to a factory reset approximately thirteen minutes later.

KENNETH NEAFCY

In "SEA_00144308 Email chain (Neafcy)", Kenneth NEAFCY sent an email to Susy DeMers (Seattle IT), Chris STEEL (Seattle PD IT), and Laurel Nelson (Deputy Director, Office of Emergency Management) on 10/28/2020 at 12:51 PM. In that email, he writes,

"I really need someone to assist me with getting my work phone back on line. Currently the phone is completely wiped and has ZERO functionality. What do we need to do to get my work phone functioning again?"

STEEL responds at 1:15 PM, advising NEAFCY that there's not much he can do, as his phone is not managed by SPD. STEEL told NEAFCY that if the phone has already been reset, he should be able to go through the prompts to set it up, provided that he has his Apple ID and password. NEAFCY responded at 1:29 PM, stating:

"My ID is my email address: kenneth.neafcy@seattle.gov When I try to reset the password for my work apple account it sends the code to my work phone number which won't display it so I have no way to reset the password. Now what?"

Susy DeMers responds at 1:31 PM, advising him that "TJ" may be able to help him, and asking if he has an option for the code to be sent to his email. NEAFCY responds at 1:32 PM, stating:

"TJ has done all he can. Its not going to my city account it will only send it to my city phone number which I cant access and it wont display it on the front screen. Now what?"

Susy DeMers brings Smith Lutu (Seattle IT) into the email chain, stating that he's "the Apple whisperer", and Smith Lutu asks NEAFCY about his availability. NEAFCY responds at 1:53 PM,

"I am neck deep in dealing with the EOC election response activation and am getting considerable heat from the Mayor's office and others who are unable to reach or text me on my work phone. I really need this phone back up and running tonight and if that cant be done then I need a new phone with a new number tomorrow. I really need some help here... please."

Smith Lutu responds, stating that STEEL had already provided the same support that he would have, and that "Apple ID troubleshooting will take more time than its worth." He then advises Susy DeMers to get NEAFCY a new phone as soon as possible.

On 10/28/2020 at 2:37 PDT, NEAFCY sent a text from his iPhone 6s but from the same phone number as his iPhone XS, which is consistent with the City's statement that NEAFCY had removed the SIM card from his iPhone XS and placed it into his iPhone 6s in order to have a functional phone.

According to the data extraction of NEAFCY's iPhone XS, it was subjected to a factory reset on 10/27/2020 at 3:26 PDT, which was 21½ hours prior to when NEAFCY sent the first email. None of the materials provided by the city have identified this delay, nor provided any explanation. However, based upon the information contained in this contemporaneous email chain, it is likely that "TJ" (T.J. McDonald, Technology Coordinator for the Office of Emergency Management) had been working on restoring functionality to NEAFCY's phone in that time period, and that NEAFCY only reached out to Seattle PD IT and the Seattle IT Department once his in-house IT tech was unable to solve the problem.



Wednesday 1/25/2023 1300 hrs

I attended a case update meeting, attended by Sgt Devore and Captain Seo in person, and General Counsel Erin Overbey via Microsoft Teams. I provided the attendees with a general overview of the investigative review thus far and answered any relevant questions.

Saturday 1/28/2023 1300 hrs

I began a review of "Declaration In Support Of Plaintiffs' Motion For Sanctions Due To Spoliation Of Evidence", dated 8/31/2021.

Monday 1/30/2023 1500 hrs

I completed the review of "Declaration In Support Of Plaintiffs' Motion For Sanctions Due To Spoliation Of Evidence", which was submitted by Counsel Angelo Calfo of Morgan, Lewis & Bockius LLP, representing Hunter's Capital, LLC. In this declaration, Mr. Calfo makes a number of statements which are materially false, and a larger number of statements in which only portions of the known facts are presented in order to reach a desired conclusion. In many of these cases, it appears that Mr. Calfo has cherry-picked or mischaracterized facts from the City's early filings that support his position, even though those facts had already been shown to be in error through sworn depositions from the involved parties, and in some cases were corrected by the City in supplemental filings. I have enumerated each of these facts on pages 86 through 98 of the Investigative Notebook, and will not further belabor this report with a recounting of the considerable factual issues contained within this document.

After reviewing this Declaration, I found no evidence that had not already been established via other sources.

Monday 2/6/2023 1200 hrs

I located the Seattle Police Department's policy sections that address public records and the use of city-issued cell phones on the website for Seattle PD. The applicable sections were:

- 1) 12.040 – Department-Owned Computers, Devices, & Software, effective 10/1/2021
- 2) 12.080 – Disclosure of Department Records, effective 5/7/2019
- 3) 12.111 – Use of Cloud Storage Services, effective 3/1/2017

Section 12.080 – Disclosure of Department Records contains the standard recounting of the Public Records Act, stating that all departmental records must be identified to the public provided that they are not part of an open and active investigation, and that employees that withhold known records that relate to a Public Disclosure Request may be subject to civil liability and/or departmental discipline.

Section 12.111 – Use of Cloud Storage Services section 2 specifically states the following:

Employees May Only Store, Edit, and Share City Files on Cloud Storage Services Provided by the Department or the City.

Employees may store, edit, and share files on city-provided cloud storage such as Microsoft Office 365's OneDrive.

Employees will not use personal cloud storage services, such as Drop Box Google Drive, and iCloud, for any city file.

As Section 12.040 has an effective date from after the timeframe for this incident, I will attempt to obtain a more relevant copy from Seattle PD.

Wednesday 2/8/2023 1700 hrs

I located and downloaded the court filings related to the *Seattle Times Company v. City of Seattle*, which consisted of the following documents:

- 1) Complaint For Disclosure Under the Public Records Act, dated 6/3/2021
- 2) Defendant City of Seattle's Amended Answer to Complaint For Disclosure Under the Public Records Act, dated 7/26/2021
- 3) Settlement Agreement, *Seattle Times Company v. City of Seattle*, dated 5/4/2022

All three were saved for later review.

Wednesday 2/8/2023 1939 hrs

While reviewing case materials related to the Spoliation Motion, I had attempted to open the file named "133374__44458324v2_2022.11.15 [156] Supplemental Calfo Decl ISO Pltfs_ Mtn for Sanctions Due to Spoliation of Evidence", which was one of the files that Mr. REILLY-BATES had provided for my review via his firm's secure file transfer system on 11/16/2023. However, I was unable to access the file, as it contains embedded permissions that do not allow me to view the document. I sent an email to Mr. REILLY-BATES, hoping to obtain a copy with the embedded permissions removed.

Thursday 2/9/2023 0935 hrs

I received an email in response from Mr. REILLY-BATES, in which he stated,

"The supplemental declaration explains the process of how we created the reconstruction of the Mayor's messages, and starting on p. 8 there is a partial reconstruction. Please note that Ex 1. Does not contain every reconstructed text message. We only inserted messages we thought were relevant. We have a

master document that contains all of them, but I would need to run it by my team before sending it to you since it is work product. But hopefully the Declaration and the Ex. 1 spreadsheet will give you a good idea of how we accomplished it.”

Included as an attachment to the email was another copy of the file, with the permissions removed. I saved that to my case file, renaming it as “11-15-2022 Supplemental Declaration In Support Of Plaintiffs’ Motion For Sanctions Due To Spoliation Of Evidence”.

Monday 2/13/2023 1525 hrs

As I have been unable to locate the information in any of the provided materials, I sent Gabriel REILLY-BATES an email asking if he would be able to provide the timestamp for the Magnet ACQUIRE data extraction performed by Braden HEIL in September of 2020. At 1937 hrs, Mr. REILLY-BATES responded to my request:

“The Magnet Acquire image of “Mayor Durkan’s iPhone 8 Plus (FirstNet), model: A1897, serial number: FD1XR5Y8JCM2” was started at 2020-09-18 20:19:05 UTC and completed at 2020-09-18 20:19:07 UTC, or September 18, 2020, at 1:19 pm PDT. The “.obliterated” file found on the same phone was created at 2020-09-18 01:56:34 UTC, or September 17, 2020, at 6:56 pm PDT. In summary, Mayor Durkan’s iPhone 8 Plus (FirstNet) completed a full factory reset at 6:56 pm PDT on September 17, 2020, and a forensic image was created the following day at 1:19 pm PDT.”

2/14/2023 - 2/19/2023

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

Monday 2/20/2023 1500 hrs

As stated earlier in this report, there has been confusing and sometimes contradictory testimony regarding the factory reset(s) performed on DURKAN’s iPhone 8 Plus (FirstNet) after it had been replaced and was in the possession of Emmanuel ARHU. In his expert report, Brandon LEATHA stated that this phone had been factory reset “a second time” and had “completed the factory reset process on September 17, 2020, at 6:56pm PDT.”¹⁰⁰ Within the context of his report, the phrase “a second time” was clearly referring to the factory reset of 7/4/2020 being the first time. However, during the course of the depositions, this fact began to get muddled by the testimonies indicating that this same phone had also been factory reset in August of 2020, thereby creating the possibility that DURKAN’s iPhone 8 Plus (FirstNet) had been subjected to a factory reset a total of three times.

¹⁰⁰ Expert Report of Brandon Leatha, page 13

Both ARHU and Reginald ALENCASTRO testified in their respective depositions that it was an established practice to perform a factory reset of decommissioned phones before they were recycled. Although neither was aware of any written policy or procedure that states this as a fact, both testified that it was commonplace and both had performed factory resets on decommissioned phones. Furthermore, ARHU testified that he had personally performed the factory reset on DURKAN's iPhone 8 Plus (FirstNet) approximately four weeks after it had been replaced, in accordance with what he understood to be their standard operating procedure. Based upon his testimony, that factory reset would have occurred on or around either Friday, August 7th or Monday, August 10th.

ALENCASTRO stated that he was first made aware of the fact that DURKAN was missing text messages on August 21st, after a phone call from Michelle CHEN. Following that conversation, ALENCASTRO and ARHU had a text message exchange (reproduced on page 26 of this report), in which ARHU specifically told ALENCASTRO that "The old phone is wiped." Furthermore, Kevin FAULKNER testified during his deposition that ARHU had also told him that he had wiped the iPhone 8 Plus (FirstNet) during their phone conversation, which had taken place on or around July 28, 2021.

When he was asked about what actions they had taken in their attempts to recover the missing text messages, ALENCASTRO stated,

"So we tried first getting her -- getting her old phone, see if we could recover from that. And -- but then that had been wiped. So we tried, I believe -- I believe we tried on a -- on a fresh handset, a spare handset we had, we tried to restore it from a previous backup of iCloud. And then we were unsuccessful, and then we got our resident forensics guy to try to recover it with his -- with his -- his computer, and I think that was unsuccessful also."¹⁰¹

Based upon a contemporaneous text message exchange (reproduced on page 40 of this report) between ARHU, ALENCASTRO, and Colleen O'REILLY BERNIER, at least one of the above attempts occurred on 9/17/2020.

The pages labeled "FAULKNER_000010" and "FAULKNER_000011" of the document "Emailed Call Notes of Kevin Faulkner" contain FAULKNER's notes from a phone conversation that took place on or around 7/28/2021, between FAULKNER and ARHU, ALENCASTRO, and legal counsel for the City. In this conversation, FAULKNER had been questioning ARHU and ALENCASTRO about their attempts to find any backups associated with DURKAN's iCloud account on 9/17/2020. According to these notes and to FAULKNER's testimony during his deposition, ALENCASTRO stated that he hadn't been present for the attempt, but that he believed that they had used a surplus or a test phone for their attempt to restore a phone from an iCloud backup, and believed that their attempts had occurred before the iPhone 8 Plus (FirstNet) had been turned over to Michelle CHEN. However, ARHU stated that he had been the one that had tried to restore the phone from a backup and admitted that it was possible that he had used the

¹⁰¹ Deposition of Reginald Alencastro, page 113 Line 21

iPhone 8 Plus (FirstNet) for the attempted iCloud restore, although he did not remember performing a second factory reset on the device during his attempt.

The pages labeled "FAULKNER_000008" and "FAULKNER_000009" of the document "Emailed Call Notes of Kevin Faulkner" contain FAULKNER's notes from a phone conversation that took place on or around 7/27/2021, between FAULKNER, Braden HEIL, and legal counsel for the City. According to these notes and to FAULKNER's testimony during his deposition, HEIL took possession of DURKAN's iPhone 8 Plus (FirstNet) at City Hall between 12pm and 3pm on 9/18/2020, and started working on it that afternoon. When he powered on the phone, he saw that it was on the "Hola" language setup screen, so he had to hit "next" and go through some of the setup process to be able to access the phone with the Magnet ACQUIRE data extraction software. He had the phone for only a few hours, before returning it to City Hall.

According to the timestamps for the Magnet ACQUIRE data extraction of Durkan's iPhone 8 Plus (FirstNet), the extraction was performed on 9/18/2020 at 1:19 PM PDT, and that time is consistent with the timeframe that HEIL had relayed to FAULKNER concerning when he took possession of the phone.

Finally, FAULKNER testified during his deposition that "the forensic artifacts just show ... when the phone started up after a reset occurred. It doesn't actually say when the reset was initiated. Typically, you reset a phone, and then it reboots immediately, but if for any reason it didn't, that could be the startup."¹⁰² However, FAULKNER also testified that he has seen no forensic evidence that "would prove that it was a single reset that started in August and completed in September."¹⁰³

The situation that FAULKNER describes, wherein a factory reset has begun, but the phone is either purposely shut down or the phone battery dies before the factory reset process can complete, leads to a situation that is often called "soft bricking." While this is a possible explanation as to how a factory reset could have occurred in August but would not be completed until September, it is extremely unlikely. This situation is called "soft bricking" because the interruption of the factory reset process results in the corruption of the phone's iOS operating system. Once power is restored to the phone or the phone is turned back on, this corruption will not allow the phone to progress past the initial Apple logo screen, and will require the operating system to be reinstalled in order to restore functionality to the phone.

Neither ARHU nor FAULKNER made any mention of any need to reinstall the iPhone 8 Plus (FirstNet)'s operating system, and FAULKNER's notes of his conversation with HEIL indicate that he was able to power up the phone and go through the setup process without any apparent difficulty. Additionally, based upon ARHU and ALENCASTRO's stated levels of training and expertise in providing support for Apple products, I find it unlikely that they would have had the skills or equipment necessary to easily reinstall the iOS operating system.

Furthermore, the lack of any forensic evidence that a factory reset had occurred in August of 2020 does not mean that such a reset did not occur. According to both FAULKNER and LEATHA's expert

¹⁰² Deposition of Kevin Faulkner, page 152 Line 2

¹⁰³ Deposition of Kevin Faulkner, page 153 Line 6

reports, the most common and best indicator used to identify when a factory reset has occurred is a file named ".obliterated". This file is created the first time that an iPhone boots up after a factory reset has occurred, and this first boot occurs automatically once the factory reset process is complete. However, any subsequent factory reset would permanently delete any pre-existing ".obliterated" file, and would replace it with a new ".obliterated" file reflecting the date and time of the subsequent factory reset.

Based upon the testimonies of ALENCASTRO and ARHU, which included ARHU's personal recollection that he had performed a factory reset of the iPhone 8 Plus (FirstNet) in August of 2020, and based upon the contemporaneous and subsequent text message and phone conversations in which he also states that he performed that factory reset, there appears to be no reason to doubt that DURKAN's iPhone 8 Plus (FirstNet) was subjected to a factory reset in accordance with established practice on or around August 7th or 10th of 2020.

According to the timestamp of the ".obliterated" file contained in the Magnet ACQUIRE data extraction of 9/18/2020, the iPhone 8 Plus (FirstNet) was subjected to a factory reset on 9/17/2020 at 6:56 PM PDT. Based upon the testimonies of ARHU and ALENCASTRO and upon contemporaneous text message conversations, ARHU was involved in the attempt to locate an iCloud backup for DURKAN's phone on 9/17/2020, and FAULKNER testified that ARHU had admitted that he may have used DURKAN's decommissioned iPhone 8 Plus (FirstNet) in an attempt to look for that iCloud backup.

As no evidence exists to support the theory that the phone's factory reset of August 2020 was interrupted and eventually completed in September of 2020, the only logical explanation remaining is that the iPhone 8 Plus (FirstNet) had in fact been subjected to a third factory reset on 9/17/2020 at 6:56 PM PDT.

2/24/2023 - 3/4/2023

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

Sunday 3/5/2023 1400 hrs

I reviewed the court filings associated with the *Seattle Times Company v. City of Seattle* case, beginning with the initial Complaint for Disclosure, which was filed on 6/3/2021.

In the Complaint, the Plaintiff alleged that the City of Seattle had committed violations of the Public Records Act by failing to promptly disclose records upon request and by unlawfully withholding public records without any applicable exemption. The Plaintiff described in detail how the City had responded to some of their Public Disclosure Requests, and I noted that as of December 2020, the Public Records Officers for the Seattle City Council were still taking screenshots of text messages as they appeared in the actual device, and apparently did not have access to iExplorer or any similar program that would allow them to export those messages into a more manageable and searchable format. It is

important to note that screenshots of this nature would not indicate whether or not any messages had been manually deleted from a text string or were otherwise missing, as there are no associated Chat_ID logs or other identifiers that would be able to identify any irregularities.

In the Complaint, the Plaintiff stated that DURKAN's phone "was set to automatically delete messages after 30 days, notwithstanding requirements to retain them longer and in conflict with the City Information Technology (IT) Department's retention settings."¹⁰⁴ The Plaintiff cited the Seattle Times reporting of 5/21/2021 ("No one is taking responsibility for loss of Seattle Mayor Jenny Durkan's text messages") as a source for that statement, and the article itself cites the City of Seattle's Information Technology Security Policy that has already been reviewed, beginning on page 33 of this report.

However, this statement in the Complaint is factually incorrect. The only section of the IT Security Policy that specifically addresses the retention of text messages is Section 13.3, which states that retention is "based on the content of the message and the function it documents, not the method of transmission."¹⁰⁵ There is no section of the IT Security Policy that dictates what setting should be enabled in regards to text message retention settings, and Emmanuel ARHU and Reginald ALENCASTRO both testified in their respective depositions that they don't even look at those settings when setting up new phones.

In the City's response to this particular section of the Complaint for Disclosure, dated 7/26/2021, the City stated that "mobile phones issued to City employees do not have a mechanism enabling retrieval of text messages without the phone itself."¹⁰⁶

The City of Seattle settled this lawsuit with the Seattle Times Company on 5/5/2022.

3/6/2023 - 3/15/2023

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

Thursday 3/16/2023 1900 hrs

I received notification that *The Post Millennial* had recently published a news article, in which it was alleged that Chief SCOGGINS had purposely deleted text messages with protestors associated with the CHAZ/CHOP in an attempt to conceal those communications. Although I have never heard of *The Post Millennial*, I made a note to locate and follow-up on the information.

¹⁰⁴ Complaint For Disclosure Under the Public Records Act, dated 6/3/2021, page 9 line 1

¹⁰⁵ City of Seattle Information Technology Security Policy, effective 5/26/2020, page 6

¹⁰⁶ Defendant City of Seattle's Amended Answer to Complaint for Disclosure of Public Records, page 8 line 19

Monday 3/20/2023 1600 hrs

I located the article by *The Post Millennial*, which had been published on 3/15/2023 with the headline, "EXCLUSIVE: Seattle fire chief faces backlash after coordinating with BLM, Antifa rioters during CHAZ occupation."

The basis of the article is that "a group of Seattle firefighters have sent a letter to the King County Sheriff, King County prosecutor Leesa Manion, and Seattle Mayor Bruce Harrell calling into question Seattle Fire Chief Harold Scoggins' ability to continue to lead the department following the discovery of evidence that he allegedly coordinated with the BLM/Antifa occupiers of the deadly Capitol Hill Autonomous Zone (CHAZ) in 2020."¹⁰⁷ According to the article, the letter sent by the group of Seattle firefighters called for a full investigation into Chief SCOGGINS' actions, alleging that he was involved in "conspiracy to commit spoliation[sic]" and that he had "committed blatant and deliberate criminal acts and still holds the position of Seattle Fire Chief." However, neither the news article nor the quotes from the letter contain any information supporting these allegations, other than citing the fact that SCOGGINS took his phone to an Apple Store and had it factory reset after he had received notice of a Litigation Hold.

Having never heard of *The Post Millennial*, I researched that media source and found that it was a Canadian online news website that was created in 2017. According to the website *Media Bias/Fact Check*, *The Post Millennial* is rated to have only "Medium Credibility" due to their "publishing unsubstantiated claims and having several failed fact checks."¹⁰⁸

Monday 3/20/2023 1700 hrs

I began a review of the "Order Granting Spoliation Sanctions" issued by the Honorable Judge Zilly on 1/13/2023.

Wednesday 3/22/2023 1500 hrs

Sgt Devore requested that I print the current progress of my report for him to begin reviewing. I advised him that the current document was still rough, and included personal notes for follow-up interspersed throughout the narrative, as well as a large section of drafts at the end, none of which would be in the final version. I printed a copy of the report (96 pages, 8 pages of which were rough draft text and notes), adding a watermark reading "DRAFT – 3/22/2023" to the background of every page. This printed version will be shredded when Sgt Devore has completed his review.

¹⁰⁷ Ari Hoffman, "EXCLUSIVE: Seattle fire chief faces backlash after coordinating with BLM, Antifa rioters during CHAZ occupation." *The Post Millennial*, March 15, 2023.

¹⁰⁸ <https://mediabiasfactcheck.com/the-post-millennial/>

Wednesday 3/22/2023 1830 hrs

I completed the review of the "Order Granting Spoliation Sanctions" issued by the Honorable Judge Zilly on 1/13/2023. Detailed notes of the applicable portions of the interview can be found on pages 99-100 of the Investigative Notebook, which will be scanned and attached to this case at its conclusion.

Judge Zilly indicated that he had granted the Plaintiffs' motion for spoliation sanctions for the following reasons:

"As set forth in this Order, the City failed to timely notify these officials of their duty to preserve CHOP-related messages, City officials deleted thousands of text messages from their City-owned phones in complete disregard of their legal obligation to preserve relevant evidence, and the City ignored litigation holds and multiple letters from Plaintiffs requesting that it preserve all CHOP-related communications between high-level City officials such as Mayor Durkan, Chief Best, and Chief Scoggins. Further, the City significantly delayed disclosing to Plaintiffs that thousands of text messages had been deleted. Notably, all text messages sent directly between these officials during the CHOP period cannot be reproduced or recovered. As a result, substantial evidence has been destroyed by the City and is unavailable to Plaintiffs to support their positions in this litigation."¹⁰⁹

Judge Zilly's order further stated that the "Plaintiffs have not presented sufficient evidence from which the Court could conclude that the seven City officials acted pursuant to some elaborate conspiracy to delete their text messages", but did find that they had "presented substantial circumstantial evidence that the City acted with the requisite 'intent to deprive'" regarding the spoliation of evidence.¹¹⁰

The following is not intended as a critique of the Order Granting Spoliation Sanctions; rather, it is simply an effort to clarify statements contained within this Order that are in opposition to evidence that has been revealed during this investigation, and which may cause confusion at a later date.

Judge Zilly's order states that "on June 19, 2020, Mayor Durkan's office sent a memorandum to its employees informing them of their responsibility to retain public records such as text messages on their 'City-owned or personal smartphones and mobile devices'."¹¹¹ When making this statement, Judge Zilly relied upon and cited a similar statement in Mr. Calfo's "Declaration In Support Of Plaintiffs' Motion For Sanctions Due To Spoliation Of Evidence". However, the statement in the original declaration is factually incorrect. The document that is cited in support of this statement is "Mayor's Offices Best Practices", dated 6/19/2020. This document is simply two pages typed in Microsoft Word, and appears to be part of a larger document; it is not a City of Seattle Memorandum, and I have seen no evidence to support that it was widely disseminated throughout the Office of the Mayor. In fact, during their

¹⁰⁹ Order Granting Spoliations Sanctions, dated 1/13/2023, page 3 line 13

¹¹⁰ Order Granting Spoliations Sanctions, page 26 line 1

¹¹¹ Order Granting Spoliations Sanctions, page 4 line 8

respective depositions, Jennifer WINKLER testified that she was not familiar with the contents of the document and had never seen it before¹¹², Andrea FRIEDHOFF testified that she didn't remember ever seeing it and guesses that it was created by Michelle CHEN¹¹³, Stephanie FORMAS testified that she didn't recall this specific document, but may have seen an earlier version during a PRA training session,¹¹⁴ and Colleen O'REILLY BERNIER testified that she didn't recall ever seeing this document, but that it looks like something that might have been a part of their training and may have been created by "Wayne", who is the individual from the City Attorney's Office that conducts their PRA training.¹¹⁵

Judge Zilly's order asserts that DURKAN had performed the factory reset and restore from backup of her phone on 7/4/2020, "despite having already received a letter from Plaintiffs regarding the preservation of her CHOP-related communications."¹¹⁶ While DURKAN certainly *should* have been aware of the existence of this letter, there is no evidence to suggest that to be the case. The letters in question were regarding active litigation and were addressed directly to Carolyn Boies and Joseph Groshong at the Seattle City Attorney's Office Civil Division. As this is an entirely different building than the Office of the Mayor, it would have never been seen or received by DURKAN or any of her staff. There are no contemporaneous emails supporting DURKAN's knowledge of the contents of the letter, and DURKAN testified during her deposition for *Hunter's Capital, LLC v. City of Seattle* that she had only seen the letter dated 6/24/2020,¹¹⁷ which had been addressed to the Office of the Mayor and sent to her city email address, and which contained no mention of the preservation of any documents. While the simple knowledge of the existence of a potential claim is often legally sufficient for the purposes of civil litigation, I am unaware of that same standard ever being applied in regards to a criminal prosecution.

Thursday 3/23/2023 1930 hrs

I began a review of the "Order Regarding the Motion for Summary Judgement" issued by the Honorable Judge Zilly on 1/13/2023.

3/24/2023 - 3/27/2023

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

¹¹² Deposition of Jennifer Winkler, page 39 line 12

¹¹³ Deposition of Andrea Freidhoff in *Hunter's Capital, LLC v. City of Seattle*, dated 6/30/2022, page 24 line 7

¹¹⁴ Deposition of Stephanie Formas in *Hunter's Capital, LLC v. City of Seattle*, dated 4/30/22, page 223 line 16

¹¹⁵ Deposition of Colleen O'Reilly Bernier, page 22 line 14

¹¹⁶ Order Granting Spoliations Sanctions, page 6 line 7

¹¹⁷ Deposition of Mayor Jenny Durkan in *Hunters Capital, LLC v. City of Seattle*, page 254 line 14

Tuesday 3/28/2023 2000 hrs

I completed the review of the "Order Regarding the Motion for Summary Judgement" issued by the Honorable Judge Zilly on 1/13/2023. While it provides a great deal of background information, it does not contain any information that is of great relevance to the scope of this investigation.

Thursday 3/30/2023 1900 hrs

While reviewing the investigation thus far, I considered the usefulness of having Mayor DURKAN's iPhone 8 Plus (FirstNet) inspected for evidence of water intrusion. That phone is currently in being held in Unit 42's secure evidence facility in New York, under the control of Kevin FAULKNER.

During FAULKNER's deposition, he testified that neither he nor his staff had ever physically opened up the phone to inspect its components for water damage, and further testified that he was unaware of any case where he or his company has been asked to determine whether or not a phone has been damaged by water.¹¹⁸

The most reliable method to determine whether water damage has occurred, as well as the extent of that damage, is to disassemble the phone and perform an inspection of the logic board, batteries, and various connections for evidence of water corrosion or discoloration. The iPhone 8 Plus is also equipped with a "Liquid Contact Indicator" (LCI), which is located in the SIM card slot and turns red when it comes in contact with any liquid. However, this is not as reliable an indicator since it requires the SIM card slot itself to be exposed to water. DURKAN's phone had both a cracked front screen as well as significant cracking on the rear glass, to include pieces of glass missing at the corner, and either one of these could allow water intrusion. As DURKAN's phone was only partially submerged, it is possible that there could be water damage inside the phone, but without the LCI indicating that fact. Additionally, the LCI can also display a false positive; although a single, strategically placed raindrop is unlikely to trigger the LCI, the amount of water vapor found in the air of a humid or steamy environment (i.e., an enclosed bathroom during a hot shower) could easily trigger the LCI.

I ultimately decided that inspection of Mayor DURKAN's iPhone 8 Plus (FirstNet) for evidence of water damage was unnecessary. As there was no data lost when DURKAN's iPhone was submerged and restored from an iCloud backup on 7/4/2020, an inspection of the DURKAN's iPhone would only serve to prolong the investigation without the possibility of producing any meaningful results.

Thursday 4/6/2023 1250 hrs

While reviewing my notes, I realized that I had not yet obtained the version of Seattle PD Manual Section 12.040 that had been in effect during the timeframe relevant to this investigation.

¹¹⁸ Deposition of Kevin T. Faulkner, pages 68-70

I called Sgt Anthony Bennett of Seattle PD's Policy Unit, and asked him if he could send me a copy of the version of Section 12.040 that had been in effect between September and October of 2020. At 1256 hrs, Sgt Bennet sent me a copy of that policy, which had an effective date of 6/1/2020.

Section 12.040 – Department-Owned Computers, Devices, & Software section 13 specifically states the following:

Employees Will Retain Public Records According to the City Records Management Program.

This includes, but is not limited to, text messages and photographs.

Employees seeking long-term retention may elect to transfer the content from the device to an appropriate Department network or system.

This section does not provide a link to or any other information about the City Records Management Program for Seattle, and I am unable to determine at this time if a Seattle PD employee is easily able to access that information from within their departmental intranet. However, this section does infer that the primary retention point for public records created by or contained in a cell phone is the device itself.

Section 12.040 – Department-Owned Computers, Devices, & Software section 14 specifically states the following:

Employees Will Hold and Preserve All Public Records Relating to Litigation or Anticipated Litigation.

Employees will hold and preserve all requested records until the City Attorney's Office releases the legal hold.

Employees will retain all records, including transitory records, responsive to a pending public records request until the Department's response to the request has been completed.

Much like the general policy for the City of Seattle, the policy for Seattle PD also assigns the responsibility for the retention of public records to the individual employee. However, by specifically stating that an employee must retain transitory records that are responsive to a pending public records request or anticipated litigation, it also specifically implies that employees are under no obligation to retain transitory records that are *not* responsive to one of those situations. As transitory records can usually be destroyed almost as soon as they're received, the verbiage in this section creates the situation wherein an SPD employee may legally and within departmental policy delete transitory messages that may *eventually* be responsive to a public records request or litigation, so long as they have not yet been made aware of that request or pending litigation.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Thursday 4/6/2023 1400 hrs

I began working on the Investigative Summary portion of this report, which begins on page 126. Unless otherwise noted by a specific time/date entry, the majority of the following two weeks was spent drafting this summary.

Friday 4/7/2023 1800 hrs

Sgt Devore asked me for a quick update on the progress of the investigative review, and then advised me that it needed to be submitted by the close of business on 4/19/2023.

Sgt Devore also requested an informal case briefing and progress update, which he scheduled for 4/13/2023 at 1300 hrs.

Thursday 4/13/2023 1200 hrs

I provided Sgt Devore with an informal case brief and progress report, and advised that I should be able to complete the Investigative Summary by the aforementioned date.

Friday 4/14/2023 1245 hrs

While drafting the section of the Investigative Summary regarding Mayor DURKAN's text message retention settings being restored to "Keep Messages: Forever", I realized that FAULKNER may not have had access to the reconstructed text messages of Mayor DURKAN when he established the timeframe of "between 7/22/2020 at 11:11 PM PDT and 7/26/2020 at 03:00 AM PDT". FAULKNER stated that he had inferred this date range from the available data, and I wondered if those reconstructed text messages may be able to narrow down the timeframe of when the message setting was restored.

FAULKNER's available data consisted of the data extraction of DURKAN's iPhone 11 (FirstNet). He established the beginning of the timeframe from an artifact in the chat log, which indicated that the associated text message dated 6/22/2020 at 11:11 PM PDT had been deleted by the "Keep Messages: 30 Days" setting. This text message was among the reconstructed text messages, and was simply a "thumbs up" emoji sent to DURKAN by Chief BEST, in response to an apology for an accidental phone call.

FAULKNER established the end of the timeframe from the oldest active text message, which was dated 6/25/2020 at 10:38 AM PDT. As this text message would have been automatically deleted on 6/26/2020 at 03:00 AM PDT, the retention setting would have needed to have been changed to "Keep Messages: Forever" prior to 03:00 AM PDT.

I reviewed the file "Durkan_Jenny_Comprehensive_20221028.xlsx" to see if there were any relevant messages, and found that the City was able to recover fifteen (15) text messages dated



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

6/23/2020 between 11:36 AM PDT and 10:37 PM PDT, and fourteen (14) text messages dated 6/24/2020 between 6:48 AM PDT and 6:51 PM PDT.

As DURKAN was obviously actively texting during this timeframe, I wondered if any of these messages could be compared to the chat log, or if it could be determined as to whether or not the messages were deleted manually or via the "Keep Messages: 30 Days" setting.

I attempted to locate a contact number for FAULKNER, but was unsuccessful. Using the "Contact" function on the Palo Alto Networks website, I requested contact from a company representative. At 1408 hrs, I received an email from Andrew Cabri of Unit 42/Palo Alto Networks. I responded and requested contact with FAULKNER, and Andrew responded that he had passed my contact information along to FAULKNER.

Wednesday **4/19/2023** **1649 hrs**

I submitted a hard-copy draft of the investigation to Sgt Devore for review; due to the size of the report, a hard-copy of that draft was also provided to Captain Seo for simultaneous review.

4/20/2023 - 6/25/2023

No work was conducted on this investigation while it was pending review.

Wednesday **5/9/2023** **1018 hrs**

A Case Briefing for KCPAO and KCSO was scheduled for 6/9/2023 from 1300-1600 hrs.

Tuesday **6/6/2023** **1309 hrs**

Sgt Devore requested a digital copy of the Investigative Review, which was provided.

Wednesday **6/7/2023** **1538 hrs**

The Case Briefing for KCPAO and KCSO was rescheduled for 6/27/2023 from 1300-1600 hrs.

Monday **6/26/2023** **1300 hrs**

I attended a pre-Case Briefing meeting, attended by Sgt Devore and Captain Seo in person, and General Counsel Erin Overbey via Microsoft Teams. I provided all present with a brief run-through of the case presentation to be provided to KCPAO, in conjunction with the associated PowerPoint slides.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Overbey asked that I remove any references to any determinations of probable cause for criminal charges from the Investigative Review and the PowerPoint presentation; she said that she was relaying this request on behalf of KCPAO, as they wished to review the material and come to that conclusion on their own.

I began working on the requested modifications to the Investigative Review and PowerPoint presentation.

Monday **6/26/2023** **2053 hrs**

I submitted the updated Investigative Review to Sgt Devore.

Tuesday **6/27/2023** **1300 hrs**

I presented a case briefing to King County Prosecutor Leesa Manion and her staff.

Upon conclusion of the case briefing, I was asked to perform a review of the reconstructed text messages of Chief BEST, in order to determine if any of the text messages that had been manually deleted from her phone would qualify as a public record that would need to be retained in accordance with the Public Records Act, as well as to ensure that there was no evidence of that text messages were destroyed in an attempt to avoid public disclosure.

General Counsel Erin Overbey stated that she would reach out to her contacts at the city and to Steve Fogg in order to obtain the reconstructed text messages.

Wednesday **6/28/2023** **1840 hrs**

I received an email from Erin Overbey, in which she told me that Steve FOGG would be able to assist me in obtaining the reconstructed text messages of Chief BEST.

6/28/2023 - 7/18/2023

During this timeframe, other assignments prevented my ability to perform anything other than minor tasks related to this investigation.

Wednesday **7/12/2023** **1625 hrs**

I called Steve Fogg, and advised him of the meeting with KCPAO and their follow-up request. I then sent a follow up email, containing more detailed information that might help him to obtain the necessary information.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

Thursday **7/13/2023** **1021 hrs**

I received an email from Steve FOGG, containing a link to a secure file transfer system. FOGG's email stated that the documented provided in the link was the Declaration of Martha Dawson of K&L Gates, and that Exhibits 8 and 9 contain the reconstructed text messages for Chief BEST.

Wednesday **7/18/2023** **1426 hrs**

I downloaded the document that had been provided by Steve FOGG. The document is titled "2023-04-03 DKT 376 Declaration of Dawson ISO Def Response.pdf", and is 272 pages in length. I scrolled down to Exhibit 8 (page 122) and Exhibit 9 (page 230), and confirmed that they represented the reconstructed text messages of Chief BEST.

I began reviewing this declaration.

Thursday **7/19/2023** **1422 hrs**

After reviewing the document provided by Steve Fogg, I found that it only contained the reconstructed text messages for Chief BEST within the date range of 5/25/2020 to 6/25/2020.

I called Erin Overbey and explained to her that the document provided only covered a narrow range of reconstructed text messages. Based upon the request made by KCPAO, it was my understanding that they wanted a review to me made of all of Chief BEST's reconstructed text messages from June 2020 through to her retirement as Chief of Police.

Overbey stated that she would attempt to get a copy of the complete reconstruction.

Monday **7/24/2023** **0655 hrs**

I received an email from Steve FOGG containing the full reconstruction of Chief BEST's text messages, from 5/25/2020 through her retirement. This document was emailed to him by Martha Dawson of K&L Gates on 7/21/2023 at 0906 hrs.

Wednesday **7/26/2023** **1819 hrs**

I downloaded and began reviewing the reconstruction of Chief BEST's text messages. This document (*Best_Carmen_Comprehensive_20200525-20200902.xlsb*) contains 10,666 text messages from 5/25/2020 through 9/2/2020. As was the case with the spreadsheet containing the reconstructed text messages of DURKAN, I found that using the filters on this document also filtered out unique text messages that had been marked as "Duplicate". As such, I conducted my examination line-by-line, without the use of the pre-set filters.



King County Sheriff's Office
Criminal Intelligence Unit
Incident Report # C22029639

7/27/2023 - 8/14/2023

During this timeframe, other assignments prevented my ability to perform any duties related to this investigation.

Tuesday 8/15/2023 1100 hrs

I continued my review of Chief BEST's reconstructed text messages.

8/16/2023 - 8/22/2022

During this timeframe I was on scheduled vacation, and did not perform any duties related to this investigation.

Wednesday 8/23/2023 1517 hrs

I received a phone call from Erin Overbey, who needed to relay another request for follow-up from the King County Prosecutor's Office. She said that they wanted to know if I had seen or reviewed the City of Seattle's policy regarding the retention of city emails, and wanted to know if Chief BEST's understanding of that policy, as stated during her depositions, was consistent with the policy itself.

Thursday 8/31/2023 0330 hrs

I completed my review of Chief BEST's reconstructed text messages.

Tuesday 9/5/2023 2300 hrs

I completed the written summary of the reconstructed text messages of Chief BEST.

This document contained 10,666 reconstructed text messages, which were sent between the period of 5/26/2020 and 9/1/2020. It should be noted that this reconstruction included text messages both sent and received by BEST, and I made no attempt to distinguish between the two. I noted that thirty-six (36) of these messages included either Michelle CHEN, Rebecca Boatwright, or Julie Kline as either a sender or recipient, and contained information that could potentially be exempt from Public Disclosure under RCW 5.60.060(2)(a) as attorney-client privileged communications. As such, I will maintain an electronic copy of this document for eventual review by the King County Prosecutor's Office, but I will not be attaching a copy of the document to this report.

I reviewed each of the 10,666 reconstructed text messages contained in the document. Of those messages, 8,353 were duplicates of other messages within the same document, leaving a total of 2,313 unique text messages. Of these messages:

- (556) were concerning specific events related to the civil unrest between May and July of 2020, including protest demonstrations and the abandonment of East precinct. The information contained in these messages was largely information updates (i.e., *"Orders given. Crowds being moved away from Westlake"*, *"east precinct just went into lockdown"*, *"Broadway protest peaceful so far"*, *"The group is now moving eastbound on Pine"*, *"5th Ave barriers in front of HQ being removed. Bike fencing moved to sidewalk"*, etc.), coordination with other City departments and outside agencies (i.e., *"Guard nrt from Boeing to Century Link"*, *"[Metro] will need additional info on event tonight at Hing Hay"*, *"23 county in uniform standing by here"*, etc.), staffing and assignments (i.e., *"SPD resources arriving at centurylink. Grossman and Lim and Floyd here to organize personnel"*, *"Redirecting all of patrol save skeleton crew to respond"*, etc.), and notifications of departmental response to a specific incident (i.e. *"Homicide call out, CHOP ZONE 12th and E. Pine St #20-200050"*, *"FIT responded to 12th and Pine to investigate a use of force with a claim of injury"*, etc.).
- (405) were informal, internal communications that addressed routine office business such as personnel issues, requests for information or updates, or coordination with other city departments (i.e., *"Plan is to come off Blue/Gold effective tomorrow"*, *"Bike and ACT will start at 1500 as well for demo/crowd issues"*, *"I need a copy of the IAP"*, etc.).
- (384) were related to scheduling phone calls, press briefings, meetings, or other appearances, or were otherwise related to BEST's general availability.
- (356) were basic messages such as pleasantries and acknowledgments (i.e., *"Copy"*, *"Thank you"*, *"Very nice"*, etc.) or banter (i.e., *"They're getting some really good cardio"*, *"You just cannot make this stuff up"*, etc.).
- (321) were automated alerts generated by one of two different systems used by the City of Seattle to quickly send out information to city employees (i.e., *"Demonstration West Pct Building West Pct on Lockdown per 213 213, Lt. Daly"*, *"EOC Activation 401 Pine St EOC is activated and monitoring demonstration events"*, etc.).
- Seventy-three (73) were links to and/or comments upon media reports from both national and local news sources (i.e., *"Are you watching news from Minneapolis?"*, *"Happening now"* with an associated link to a twitter post, etc.).
- Fifty-five (55) were message reactions (i.e., *"Liked"*, *"Laughed At"*, etc.) that contained no unique information.
- Thirty-six (36) were the aforementioned work-related messages between BEST and one of the City's named legal advisors that may contain privileged communications.
- Twenty-two (22) contained no message data and no linked photos or files in the spreadsheet provided.
- Twenty-one (21) were emoji responses containing no text.
- Twenty-one (21) were informal communications related to IT/technology issues (unrelated to this investigation), most commonly related to problems accessing virtual meetings or shared documents (i.e., *"Got kicked off"*, *"I can't access - please email"*, etc.).
- Fifteen (15) contained no message data, but the spreadsheet contained a hyperlink to an associated image (extensions .jpeg, .jpg, .png, or .HEIC) or contact card (extension .vcf).

As twenty-two (22) of the text messages in the spreadsheet contained no associated text or attachments, I was unable to accurately classify those specific messages and therefore unable to determine whether or not they would be considered "transitory records".

Although the (556) messages related to the events of May and June might seem to be public records that should not be destroyed, a thorough review reveals otherwise. All these text messages are of a temporary nature and are classified as "Transitory records" under DAN GS2016-009 Rev. 0 ("*Records Documented as Part of More Formalized Records*"), and/or DAN GS50-02-05 Rev. 2 ("*Informational Notifications/Communications*") of the CORE Retention Schedule. The majority of the text messages in this category find their exemption in the fact that the information documented therein was subsequently documented in official Seattle Police incident reports and after-action reviews. Had that information not been documented in official reports, these text messages would have then been considered non-transitory and subject to retention.

Based upon my understanding of the CORE Retention Schedule's guidelines, it is my opinion that all of the text messages detailed above, with the exception of the twenty-two (22) messages that I could not accurately classify, would be considered "transitory records", and could legally be destroyed as soon as they were no longer needed for agency business.

Additionally, there were forty-eight (48) text messages sent between Chief BEST and Seattle City Councilmembers Teresa Mosqueda and Lisa Herbold from the night and early morning of June 6th and 7th, which was when both councilmembers had taken up positions at the front of the protest lines outside of the East Precinct. A total of fourteen (14) messages were with CM Herbold, of which BEST sent five (5). The remaining thirty-four (34) messages were with CM Mosqueda, of which BEST sent six (6). Although these conversations are of public interest, a thorough examination revealed only two (2) messages that might be considered to be public records. Twenty-nine (29) of these messages were attempts between BEST and the councilmembers to find each other in the crowd or to call one another, eleven (11) of the messages were one-sided attempts by CM Mosqueda to tell Chief BEST how and where to deploy her officers, to which BEST offered no response, and six (6) of these messages were a conversation between CM Herbold and BEST about how far back the police line had moved in one specific instance. All of these messages would be considered "transitory records", and could legally be destroyed as soon as they were no longer needed for agency business.

The only two messages that could possibly be considered public records would be the initial text and response between CM Mosqueda and Chief Best. On 6/6/2020 at 8:59 PM, CM Mosqueda wrote:

"Chief, please stop. There is no need to use these dangerous tactics. This is excessive use of force and absolutely unnecessary. I got multiple reports that it was absolutely peaceful. Families are there! STOP traumatizing protesters & neighbors! Please tell your officers to stop using these tactics and deescalate now."

At 9:12 PM, Chief BEST responded:

"Councilmember I understand your concern. I am here at the precinct and I'm going to give a sequence of events as we know them and provide that to the media. I would be more than happy to sit down and talk with you about the issues you expressed. All I really want is to be able to do this peacefully and in the best manner possible. I'm open to any conversation on it."

Based upon my understanding of the CORE Retention Schedule's guidelines, it appears that both of these messages would be considered "Transitory records" under DAN GS50-02-05 Rev.2 2 ("*Informational Notifications/Communications*"), as they do not document agency decisions or actions and were not used as the basis of an agency's decisions or actions. The only thing that differentiates these two specific text messages from the thousands of other text messages reviewed in this investigation is the fact that they occurred in a conversation with an elected official who was present at an active crowd management scene. While I know that CM Mosqueda and Herbold's presence that night was documented in official Seattle PD reports of the incident, I am unaware as to whether or not this specific conversation between CM Mosqueda and Chief BEST was documented or otherwise noted in those reports. It is my opinion that these two messages would also be considered "transitory records" pursuant to the above authority; however, I will defer to the opinion of the King County Prosecutor's Office on this specific matter.

Based upon all of the above, it is my opinion that no violation of the Public Records Act occurred when these 2,313 messages were deleted from BEST's phone.

However, Chief BEST was also subject to a Litigation Hold during this time period, which was served on 7/27/2020 in the matter of *Hunter's Capital, LLC v. City of Seattle*. On 6/30/2020, the City of Seattle was sent a Preservation Letter from Calfo Eakes LLP, representing the Plaintiff in *Hunter's Capital, LLC v. City of Seattle*. That letter specifically requested that the City "act to ensure that all potentially relevant documents, communications and/or information are preserved"¹¹⁹, and specifically identified "all communications, documents, and complaints (including text messages, voice messages, emails, memoranda and meeting minutes) to, from, in the possession of, or involving [Chief Carmen BEST] and relating to the CHOP/CHAZ or the conditions on Capitol Hill."¹²⁰

According to the City of Seattle, the Litigation Holds that they had sent out had "instructed employees to preserve ... text messages, emails, memoranda, and meeting minutes" and "included a FAQ attachment instructing employees to not delete documents that again referenced text messages on employees' mobile devices."¹²¹ The Litigation Hold that was served upon BEST on 7/27/2020 essentially negated the authority to destroy transitory records under the CORE Retention Schedule, but only in regards to those records that are potentially relevant in the matter of *Hunter's Capital, LLC v. City of Seattle*. Any records that are not relevant to that matter are still subject to the standard retention rules.

¹¹⁹ Preservation Letter, *Hunter's Capital, LLC v. City of Seattle*, dated 6/30/2020, page 1

¹²⁰ Preservation Letter, page 2

¹²¹ Second Set of Interrogatories, page 25-26

But until she was served on 7/27/2020, BEST was under no legal obligation to keep or maintain these text messages, and BEST stated that it was her practice to routinely clean out her text messages by deleting transitory messages from her phone. Furthermore, FAULKNER stated that the digital forensics examinations with which he is familiar have no way of determining any sort of timeframe for when a message was deleted, and that a date range for deleted messages can only be inferred from other artifacts present in the forensics examination. Unfortunately, as BEST's phone was never subjected to a backup in iTunes or iCloud (in accordance with departmental policy), none of those artifacts are present, and there is no way of knowing which or how many of these text messages were deleted before BEST was served with the Litigation Hold. Of the 2,313 reconstructed text messages, only 198 were sent or received on or after 7/27/2020.

Out of the 2,313 reconstructed text messages that I was able to categorize, and exempting the thirty-six (36) messages that may contain privileged communications, it is my opinion that approximately half of those messages would be responsive to the Litigation Hold, and thus be subject to retention pursuant to court order. However, as the Litigation Hold was created in response to a civil proceeding in the Federal court system, the King County Sheriff's Office has no jurisdiction, and this is therefore a matter for the federal court to decide.

Wednesday **9/6/2023** **1300 hrs**

I submitted a hard-copy draft of the updated investigation to Captain Seo for review and a password-encrypted digital copy for Sgt Devore to review.

INVESTIGATIVE SUMMARY

At the beginning of this Investigative Review, I identified five (5) possible scenarios that could provide explanations for how and why thousands of text messages sent by the city's leaders happened to be deleted or are otherwise lost within the short span of four months.

After reviewing over 5,720 pages of sworn testimony, digital evidence, and contemporaneous communications, I have found no evidence to support the theory that some or all of the named individuals had conspired to remove potentially incriminating Public Records from their city-issued devices.

I have also found no evidence to support the theory that one or more of the named subjects used a 3rd party encrypted messaging application in order to circumvent the Public Records Act. During the timeframe relevant to this Investigative Review, the more popular and commonly known 3rd party messaging applications included "Signal", "Telegram", "Facebook Messenger", "WhatsApp", "AirSend", "Wire", "Riot" (renamed to "Element" in July of 2020), and "Discord". The data extraction of Mayor DURKAN's iPhone 11 (FirstNet) revealed a database of 653 messages sent using Microsoft Teams between the dates of 4/15/2020 and 11/17/2020, all of which had been retained within the device. Outside of Microsoft Teams, whose messages are all automatically archived City's servers regardless of any retention settings on the phone or computer in which its installed, the data extractions performed on the phones belonging to Chief BEST, Chief Scoggins, Christopher FISHER, Idris BEAUREGARD, and Kenneth NEAFICY all revealed no evidence of any unauthorized communications application, encrypted or otherwise, other than the artifacts of applications that often come pre-installed on all phones. Furthermore, none of the IT personnel that set up or performed work on those phones testified that they had ever seen any non-standard messaging apps installed on any of the devices in question.

Finally, I have found no evidence to support the theory that the Public Records had been deleted or otherwise removed from the devices due to unauthorized access from a source outside of the City of Seattle. Unauthorized access (aka "hacking") almost always leaves forensic evidence behind in the form of registry artifacts, log files, malware, etc. Neither Kevin FAULKNER nor Brandon LEATHA found any evidence or digital artifacts that would indicate that any of the devices in question had been compromised by an outside source.

However, considerable evidence does exist to demonstrate that Public Records have been destroyed in multiple ways over this span of four months, to include manual deletions, deletions caused by retention settings contained within the device, deletions due to device failure and/or user error, and deletions resulting from City policies and/or established practices.

It is both interesting and important to note that while state law indicates that the Government Agency is responsible for the retaining of public records, the City of Seattle's policy regarding text messages redirects this responsibility onto its employees while providing them with very little in the way of tools, training, or resources necessary to comply with this policy, and then attempts to take no responsibility when public records are inevitably discovered to be missing.

Below is a summary of my findings for each individual, along with other contributing factors that led to the destruction of public records belonging to the City of Seattle:

MAYOR DURKAN

On 8/21/2020, the City of Seattle discovered that all text messages from prior to 6/25/2020 had been deleted from Mayor DURKAN's city-issued iPhone 8 Plus (FirstNet). At some point in the next two months, Michelle CHEN located an iExplorer backup of DURKAN's iPhone 8 Plus (Verizon) that she had created on 8/29/2019. As the "Messages in iCloud" function on the iPhone had been disabled at the time that backup was created, it contained 3,643 of DURKAN's text messages dating between 11/18/2017 and 8/29/2019. As a result of FAULKNER's investigation, an additional 202 of DURKAN's text messages dating between 8/29/2019 and 10/30/2019 were located in DURKAN's iPhone 8 Plus (Verizon). As such, the public records that are to be considered "destroyed" under the investigative parameters defined earlier, and therefore a violation of RCW 40.16.020, shall consist of all text messages from the eight months between 10/30/2019 and 6/24/2020.

As the destruction of these public records resulted from a number of events occurring in rapid succession in a specific order, I will break each event down in order to determine its overall significance towards any potential criminal charges.

At some point prior to 7/4/2020, DURKAN's iPhone 8 Plus (FirstNet) was damaged, resulting in damage to the glass of the front screen (a thin crack running diagonally from one of the bottom corners to the center of the phone) and to the glass on the rear of the phone (more significant damage, consisting of glass cracked and missing around one of the corners).¹²²

FIRST FACTORY RESET AND RESTORE FROM ICLOUD BACKUP

On 7/4/2020, shortly after 11:44 AM, DURKAN was walking along a beach at an undisclosed location when she discovered that her iPhone 8 Plus (FirstNet) had fallen out of her pocket. She retraced her steps and found the phone partially submerged in a puddle on the beach. Durkan stated that the phone wasn't functioning well and was fuzzy and pixelated, so she shut it off, brought the phone back to the house and placed in it a bag of rice for a few hours. Prior to 4:50 PM PDT¹²³, DURKAN stated that she removed the phone from the bag of rice and powered it back on, but the phone crashed, rebooted itself, and immediately took her to a screen that gave her the options of "Restore from Backup" or "Set up as New iPhone". The forensic examination of DURKAN's iPhone 11 (FirstNet) iExplorer backup of 8/21/2020 indicated that her iPhone 8 Plus (FirstNet) was restored from an iCloud backup at 4:51 PM PDT.

¹²² Deposition of Kevin T. Faulkner, page 69

¹²³ During her deposition in *Hunter's Capital LLC v. City of Seattle*, Mayor DURKAN recalled that she had removed the phone from the bag of rice before she began to prepare dinner, and estimated that time to be between 4:45 PM and 5:15 PM. According to Apple, the process to restore an iPhone from an iCloud backup can take anywhere from a few minutes to a few hours, depending upon the size of the backup and the speed of the WiFi connection.

In all of her testimonies and in all of the contemporaneous email exchanges, DURKAN used the terms “crashed” or “died” to describe what had happened to her phone after she had first powered it up upon removing it from the bag of rice. In her deposition for *Hunter's Capital, LLC v. City of Seattle*, DURKAN was directly asked, “Did you reset your phone?”, to which she responded,

“I don't recall whether I reset it or whether it -- because if it crashed, it reset, but my recollection is, there's that screen where you can say, you know, do you want to start your phone as a new phone or restore it from the cloud, and I chose from the cloud, and then restored it from the iCloud backup for the phone.”¹²⁴

Although her initial reaction to the question was that she didn't recall, she qualified that statement by explaining that her phone had reset after it had crashed, and then described the contents of the “Data & Apps” screen of the iPhone setup process.

It is well-known that water damage can cause both hardware and software malfunctions on an iPhone, ranging from simple problems with the speakers or the charging port all the way up to the complete “bricking” of the phone. One of the common software malfunctions includes corruption of the iOS operating system. Depending upon the specific files that become corrupted, this could result in the phone being stuck in an endless reboot cycle, in which it appears to complete a startup and then immediately reboots, in the phone being frozen on the “Apple” screen, or in the phone attempting to repair itself by reinstalling the operating software. The reinstallation of iOS would result in a factory reset of the phone, and is wholly consistent with the testimonies provided by DURKAN.

As there is no evidence that Mayor DURKAN initiated a factory reset of her phone by manually following the path “Settings » General » Reset » Erase All Content and Settings”, there is no probable cause to believe that she was directly responsible for the factory reset of the iPhone 8 Plus (FirstNet) on 7/4/2020 prior to 4:51 PM PDT.

Regardless of responsibility, the factory reset and subsequent “Restore from iCloud Backup” of the iPhone 8 Plus (FirstNet) did not result in the loss of any of Mayor DURKAN's text messages, and is therefore not a causal factor in the eventual “destruction of public records.”

When Mayor DURKAN was attempting to bring her iPhone 8 Plus (FirstNet) back to working order after removing it from the bag of rice, she restored the phone from an existing iCloud backup, which dated to approximately 2/9/2020. This iCloud backup contained much of her information, but did not include her contacts, calendar, or emails, as those are synced to the City's servers and not stored within the iCloud backup. As such, there was no loss of records in any of those categories. Text messages were also not a part of this backup, as the “Messages in iCloud” function was enabled both at the time the iCloud backup was created and at the time that the iPhone 8 Plus (FirstNet) had fallen into the water.¹²⁵ As such, all of DURKAN's text messages up to the moment that the phone fell into the water were stored

¹²⁴ Deposition of Mayor Jenny Durkan in *Hunters Capital, LLC v. City of Seattle*, page 256 line 6

¹²⁵ FRCP 26(a)(2)(B) Expert Report of Kevin Faulkner, page 28

in iCloud, and all 5,911 messages were synchronized to the iPhone 8 Plus (FirstNet) after the completion of the "Restore from iCloud Backup" process.¹²⁶

As all of DURKAN's text messages were restored to the phone from a backup of that same device with no loss of data, there was no "destruction of public records" caused by the factory reset and subsequent iCloud restoration of Mayor DURKAN's phone on 7/4/2020.

"DISABLE & DELETE" OF "MESSAGES IN iCloud"

On 7/4/2020 at 5:19 PM PDT, exactly 28 minutes and 19 seconds after the phone had been restored from an iCloud backup, the synchronization of "Messages in iCloud" was disabled via the "Disable & Delete" toggle, using the path "Settings » iCloud » Manage Storage » Messages » Disable & Delete". Mayor DURKAN stated that she does not specifically remember disabling this setting and does not remember seeing the various prompts that were outline in FAULKNER's report, but also consistently stated that she had been manipulating the settings of her phone in this timeframe while attempting to restore her calendar and contacts, and that she was the only person in possession of the phone at this time. It is therefore logical to conclude that DURKAN was directly responsible for activating the "Disable & Delete" function for "Messages in iCloud".

As described in detail on page 44 of this report, when a user selects "Disable & Delete" and disables the "Messages in iCloud" synchronization, a very specific chain of events occurs. Based upon that information, the following occurred when Mayor DURKAN selected the "Disable & Delete" option:

- 1) Any text messages sent or received on the device from that point forward would no longer be synchronized with iCloud.
- 2) All text messages stored under "Messages in iCloud" were automatically downloaded to the device.
- 3) All messages stored under "Messages in iCloud" were marked for deletion from iCloud in 30 days, on or around 8/4/2020.
- 4) Text messages will be included in all future iTunes and /or iCloud backups.

The retention settings for Mayor DURKAN's text messages were already set to "Keep Messages: Forever" at the time that "Disable & Delete" was selected, and no change was made to that setting.

As the "Disable & Delete" did not "mutilate, destroy, conceal, erase, obliterate, or falsify" any of the text messages stored in the iPhone 8 Plus (FirstNet) and made no adverse alterations to system settings that would cause any of those actions, there was no "destruction of public records" caused by Mayor DURKAN's activation of this setting on 7/4/2020 at 5:19 PM PDT.

Additionally, while the activation of "Disable & Delete" does seem to compromise safeguards in place to prevent the loss any data, the use of unapproved cloud-based services to store city data is specifically prohibited under the City of Seattle's Information Technology Security Policy section 27.7, and testimony by Jennifer WINKLER, who was authorized by the City to speak on their behalf in regard to the

¹²⁶ FRCP 26(a)(2)(B) Expert Report of Kevin Faulkner, page 29

City Records Management Program, stated that “the records management program does not advise or recommend using cloud-based solutions [...] for any type of public record storage.”¹²⁷ Although it seems counterintuitive on the surface, Mayor DURKAN was actually in violation of City of Seattle policy while her phone was storing backups and text messages in iCloud. As her phone had already stopped automatically creating iCloud backups after the 2/9/2020 backup, the disabling of “Messages in iCloud” served to bring her fully within the IT Security Policy for the City.

Additionally, iExplorer backups of DURKAN's iPhone 8 Plus (Verizon) indicate that the “Messages in iCloud” setting was disabled on that phone as well, and was only enabled one minute and six seconds before the phone was backed up to iCloud, in order to facilitate the transfer of data from the iPhone 8 Plus (Verizon) to the iPhone 8 Plus (FirstNet) on 10/30/2019. As that setting carries over to the settings of the new phone, it appears as if the fact that “Messages in iCloud” was enabled on the iPhone 8 Plus (FirstNet) was simply due to the fact that the setting was never disabled after the initial setup and transfer of text messages was complete.

“KEEP MESSAGES: 30 DAYS”

At some point in time between 7/4/2020 at 5:19 PM PDT and 7/22/2020 at 11:11 PM PDT, the text message retention settings for Mayor DURKAN's phone were changed from “Keep Messages: Forever” to “Keep Messages: 30 Days”. As iPhones do not log or otherwise track when changes to the text message retention settings occur, FAULKNER was unable to determine an exact date from the available data, and had to rely on artifacts left from associated settings to establish this date range. As soon as this setting was altered, any text messages older than 30 days would have been immediately deleted from the device, and any text messages that reach that 30 Day retention period would be automatically deleted at 3 AM the following day.

This change in text message retention settings is the single factor that caused the destruction of all of Mayor DURKAN's text messages sent or received between 10/30/2019 and 6/24/2020.

However, due to the fact that Mayor DURKAN's iPhone 8 Plus (FirstNet) had been subjected to a factory reset in both August and September of 2020 by Emmanuel ARHU, FAULKNER was unable to determine whether this change in retention settings had occurred on the iPhone 8 Plus (FirstNet) between 7/4/2020 at 5:19 PM PDT and when it was replaced on 7/9/2020 at 12:59 PM PDT, or on the iPhone 11 (FirstNet) between 7/9/2020 at 12:59 PM PDT and 7/22/2020 at 11:11 PM PDT.

Between 7/4/2020 at 5:19 PM PDT and 7/9/2020 at 12:59 PM PDT, the iPhone 8 Plus (FirstNet) was known to be in the possession of Mayor DURKAN, of Andrea FRIEDHOFF and Emmanuel ARHU for a short period of time on 7/6/2020, and of Colleen O'REILLY BERNIER and ARHU for a short period of time on 7/9/2020. During this time period, it is unlikely that FRIEDHOFF or BERNIER had access to the text message retention settings on this phone, as they were most likely just acting as a liaison to facilitate the

¹²⁷ Deposition of Jennifer Winkler in *Hunter's Capital, LLC v. City of Seattle*, page 33 line 12

initial examination of the phone on July 6th, and its replacement on July 9th. However, they still had access to the phone, and the possibility cannot be eliminated by available evidence.

Between 7/9/2020 at 12:59 PM and 7/22/2020 at 11:11 PM PDT, the iPhone 11 (FirstNet) was known to be in the possession of Mayor DURKAN, of ARHU and BERNIER during the initial set-up, and of BERNIER for a short period of time on 7/21/2020. During this time, BERNIER was on a phone call with ARHU while attempting to fix an issue with the syncing of DURKAN's contacts, and was more likely than not actively manipulating the settings within the phone at that time. While BERNIER denied making any changes to the settings of DURKAN's phone in her deposition, she also made a number of other statements during the course of her testimony that were demonstrably false. DURKAN, FRIEDHOFF, and ARHU have also all denied making any changes to the text message retention settings of the phone.

ARHU and ALENCASTRO's testimonies have been consistent in that they both stated that they do not even look at the text message retention settings on the phone while performing either an initial set-up or a replacement. Based upon all of the testimony and evidence reviewed, it is possible that BERNIER is directly responsible for the text message retention settings being changed to "Keep Messages: 30 Days". However, the evidence supporting this theory is circumstantial at best.

As there is no direct evidence linking a specific person to the alteration of this text message retention setting, and as there is no way to determine exactly when the change in settings occurred or who was in possession of the phone at that time, I am unable to find probable cause that a specific individual is responsible for the destruction of public records caused by the change in this setting.

"KEEP MESSAGES: FOREVER"

At some point in time between 7/22/2020 at 11:11 PM PDT and 7/26/2020 at 03:00 AM PDT, the text message retention settings for Mayor DURKAN's phone were changed from "Keep Messages: 30 Days" to "Keep Messages: Forever". As before, FAULKNER was unable to determine the exact date that this change took place, but was able to establish it as occurring in a much smaller window of time. As the oldest active text message in DURKAN's data extraction was on 6/25/2020 at 10:38 AM PDT, this text message would have been deleted on 7/26/2020 at 3:00 AM PDT had the settings remained at "Keep Messages: 30 Days". FAULKNER also found an artifact of a text message that had been deleted by the "30 Day" function, which was dated 6/22/2020 at 11:11 PM PDT, and used that to establish his date range.

In order to narrow this range down further, I reviewed all the reconstructions of Mayor DURKAN's text messages from this timeframe. The text message from 6/22/2020 at 11:11 PM PDT was reconstructed, and consisted of a "Thumbs Up" emoji sent from Chief BEST to Mayor DURKAN and Deputy Mayor Shefali Ranganathan. The City was able to reconstruct a total of fifteen (15) text messages sent or received by DURKAN on 6/23/2020 between 11:36 AM PDT and 10:37 PM PDT, and a total of fourteen (14) text messages sent or received by DURKAN on 6/24/2020 between 6:48 AM PDT and 6:51 PM PDT, confirming that she was actively texting at this time.¹²⁸

¹²⁸ It is worth noting that every single one of these text messages would be considered "transitory records", and could have been legally deleted on the day that they were received.

While it's possible that DURKAN could have manually deleted all of these messages, that would not have been consistent with what is known about the timing and nature of the text messages that she did manually delete. Unfortunately, I have been unable to confer with FAULKNER about the chat logs and whether these messages could also have been deleted via the "30 Day" setting.

The only person known to be in possession of the phone between 7/22/2020 at 11:11 PM PDT and 7/26/2020 at 03:00 AM PDT is Mayor DURKAN, and DURKAN has consistently testified that she did not change this setting, and was unaware that this setting had been changed until the news reporting in spring of 2021.

However, an interesting, if circumstantial, piece of information, is that both DURKAN and Michelle CHEN were served with a litigation hold in *Hunters Capital, LLC v. City of Seattle* on 7/22/2020. It is extremely likely that the service of the litigation hold was the catalyst that led to the discovery that DURKAN's text message retention settings were set to "Keep Messages: 30 Days".

Based upon DURKAN's reconstructed text messages, it appears as if she was working remotely on 7/22/2020 and returned to the office on 7/23/2020 and/or 7/24/2020. It is possible that Michelle CHEN, as legal advisor to the Mayor, may have met with DURKAN upon her return to the office in order to discuss the litigation hold, and may have accessed her phone in order to confirm that her data was being retained. It is further possible that she may have changed the setting herself to "Keep Messages: Forever" to make sure that the City was complying with the Litigation Hold, possibly without realizing that the previous retention setting had already caused the deletion of some of DURKAN's text messages. Unfortunately, due to attorney/client privilege CHEN is not available for an interview on the matter, and none of her personal or electronic conversations on the topic are available to review.

Regardless of who changed the setting to "Keep Messages: Forever", this action caused no destruction of public records.

CHIEF BEST

On 2/24/2021, the legal firm ArcherHall performed a Celebrite advanced logical data extraction of Chief BEST's iPhone XS Max while preparing discovery for *Hunter's Capital, LLC v. City of Seattle*. Shortly thereafter, the City of Seattle discovered that all text messages from prior to 9/2/2020 had been deleted from BEST's city-issued iPhone. During his investigation, FAULKNER was able to determine that 16,829 text messages had been sent or received on the iPhone XS Max between 10/1/2019 and 9/2/2020. As such, the public records that are to be considered "destroyed" under the investigative parameters defined earlier, and therefore a violation of RCW 40.16.020, shall consist of all text messages from the eleven months between 10/1/2019 and 9/2/2020.

On 8/11/2020, the Chief BEST announced her retirement from the Seattle Police Department, effective 9/2/2020. At some point after that announcement, BEST used up an unknown amount of her accrued vacation leave, during which time she left her city-issued iPhone XS Max on the desk in her office. Upon returning to work, BEST turned in her city-issued phone, along with her laptop and her other

city-issued equipment. BEST's iPhone XS Max was turned over to and preserved by the Seattle Police Department's Legal Unit.

The forensics examination of BEST's iPhone XS Max indicated that while it was configured to backup to iCloud, it had never done so, most likely due to the fact that the phone's contents exceeded the basic 5GB of storage provided for free with every iCloud account. The forensics examinations also revealed that "Messages in iCloud" had never been enabled on this device. Both of these settings are consistent with the City of Seattle's Information Technology Security Policy section 27.7, Seattle Police Department Manual section 12.111, and the testimonies of Jennifer WINKLER, Brian KENNEDY, and Chris STEEL concerning established practice and procedure of both the City and the Seattle Police Department.

Additionally, the forensics examinations revealed that the text message retention settings were set to "Keep Messages: 30 Days". However, an analysis of the text message logs in the iPhone XS Max indicated that only seventeen (17) of BEST's text messages had been deleted by the "Keep Messages: 30 Days" retention setting, and that the rest of her text messages had been manually deleted.

In both of her depositions, Chief BEST stated she very rarely conducted city business or made policy-making decisions in text messages, and that most of her text messages were "transitory" in nature. She also stated in both depositions that it was her practice to routinely clean out her text message inbox by deleting transitory messages, and that she also routinely cleans out the text message inbox on her personal phone as well.

The forensics examinations seem to confirm this practice by BEST, as the text message logs show that all but seventeen (17) of her text messages had been manually deleted over a period of time. These logs also confirmed that BEST did not delete all of her text messages in bulk just prior to turning in her phone. Unfortunately, even the most detailed forensics examinations are unable to determine exactly when any individual text message was deleted, as that data is not recorded by the phone's operating system.

An examination of the reconstructed text messages of Chief BEST revealed that of the 2,313 text messages recovered, all would have been classified as "transitory" under the CORE Retention Schedule's guidelines. According to state law and both City of Seattle and Seattle Police Department policies, text messages that are considered "transitory records" can be deleted as soon as they are no longer needed for department business, provided that they are not responsive to a public disclosure request or any current or anticipated litigation. However, as state law and both city and departmental policy allow this type of text message to be deleted almost as soon as they are received, there is no way to determine whether or not BEST's text messages were deleted before they were subject to the retention requirements of state law or city and departmental policy.

The use of the text message retention setting "Keep Messages: 30 Days" is concerning, as it sets up two potential circumstances where a text message could be deleted in violation of the Public Records Act:

- 1) A text message could be identified as being subject to retention by the device's custodian and not deleted as a "transitory record", but could subsequently be automatically deleted after 30 days, or
- 2) A text message could be automatically deleted after 30 days, without the requisite review by the device's custodian necessary to determine whether it is subject to retention under the Public Records Act.

However, there are two additional factors that provide context and possibly exculpatory evidence, and must be considered in regard to the use of this setting.

Chief BEST, along with Christopher FISHER, Mayor DURKAN and everyone else that was asked this specific question, all testified that they believed that the City was automatically archiving all of their text messages anyways, and BEST testified that she believed that she was only deleting text messages from the device itself. This is exactly the way that the City's email system is organized, and the City's Public Records training specifically told city employees that they could delete any messages from their inbox or even their deleted files, as it was all automatically archived by the City. If the Intent to "mutilate, destroy, conceal, erase, obliterate, or falsify" is determined to be a required element of the crime of Destruction of Public Records, these statements would tend to show the opposite.

Additionally, when asked about why his phone's text message retention settings were "Keep Messages:30 Days", Christopher FISHER testified, "I recall setting it to that at some point when, as a command staff, we had a briefing about, you know, you could -- you could manage your --"¹²⁹ before being interrupted by an objection from the City's legal counsel, based upon attorney-client privilege. However, FISHER was allowed to testify that Chief BEST (along with Eric GREENING, FISHER, VALARIE ANDERSON, and Deanna NOLLETE) were all present at this command staff briefing that had been held prior to June of 2020, that Seattle Police Department's legal advisor Rebecca Boatwright had spoken during that briefing, and that following this meeting, FISHER changed the text message retention settings on his phone to "Keep Messages: 30 Days", so that it would automatically delete messages older than 30 days.

While the actual topic of discussion contained in that command staff briefing is undiscoverable based upon attorney-client privilege, the nature of the objection and the subsequent details revealed seem to strongly suggest that these individuals may have changed their text message retention settings to "Keep Messages: 30 Days" according to the advice provided by their department's legal advisor.

Finally, Chief BEST's phone was not in her sole possession for a significant period of time, both in the weeks before she officially retired, and in the 5½ months after she had retired and before the text messages were discovered to be missing. Tricia Colin, BEST's executive assistant, would have had access to BEST's office during the time that she was on vacation, although BEST believed that Mrs. Colin would not have made any changes to the settings of her phone. Additionally, once BEST retired, her phone was turned over to and preserved by the Seattle Police Department's Legal Unit in case it was needed for any

¹²⁹ Deposition of Christopher Fisher, page 221 line 11

public disclosure requests, and an unknown number of persons could potentially have had access to the phone during this time period.

Although one would hope that a phone sitting on the desk of a police chief and a phone being held by a department's Legal Unit would be relatively safe from manipulation, the possibility that another individual had access the phone while it was outside of BEST's possession cannot be eliminated by available evidence.

CHIEF SCOGGINS

On 3/9/2021, the City of Seattle imaged Chief SCOGGIN's iPhone 8 Plus while preparing discovery for *Hunter's Capital, LLC v. City of Seattle*. Shortly thereafter, the City discovered that all text messages from prior to 10/8/2020 were missing. The forensic examination of SCOGGINS' iPhone 8 Plus revealed that the phone had been subjected to a factory reset on 10/8/2020 at 4:15 PM PDT, and was unable to recover any of the text messages destroyed as a result of this factory reset. As such, the public records that are to be considered "destroyed" under the investigative parameters defined earlier, and therefore a violation of RCW 40.16.020, shall consist of all text messages from the two year and ten month between 12/18/2017 and 10/8/2020.

Chief SCOGGINS testified during his deposition that he had been woken up in the early hours of 10/8/2020 by a notification from work, on his city-issued phone. When he attempted to open the phone to read the notification, he found that his passcode wasn't working. SCOGGINS stated that this had happened in the past, and that cycling through some of his frequently used passcodes had gotten him into the phone on that occasion. He attempted the same process, but ended up locked out of his phone. When he came into work the next morning, SCOGGINS contacted Seattle IT for assistance unlocking his phone; however, the IT personnel were still working remotely, and all of the options that they proposed over the phone were unsuccessful. SCOGGINS searched the internet for assistance and learned that he could unlock his phone if he downloaded iTunes, but stated that IT was unable to download iTunes. However, SCOGGINS was unaware that this solution would only help to unlock his phone in the event that he had recently plugged his phone into iTunes, and that downloading iTunes after-the-fact would not solve the problem.

Having been unable to get help from the City's IT personnel, SCOGGINS took his city-issued iPhone 8 Plus to the Apple Store in University Village for assistance. Due to COVID restrictions in place at the time, SCOGGINS was not allowed to enter the store, and handed his phone to an Apple tech and asked for assistance with unlocking the phone. The tech took the phone into the store for awhile, then returned and told SCOGGINS that the only way to get back into the phone was to conduct a hard reset. SCOGGINS then specifically authorized the factory reset by saying, "OK, do a hard reset".¹³⁰

Kevin FAULKNER and Brandon LEATHA's forensic examinations of SCOGGINS' iPhone 8 Plus data extractions revealed that the phone had been subjected to a factory reset on 10/8/2020 at 4:15 PM PDT.

¹³⁰ Deposition of Harold Scoggins, page 119 line 15

Unfortunately, as there were no iCloud or iTunes backups available for this phone from before this date, none of the associated settings for the phone prior to 10/8/2020 were recoverable. According to the 2/16/2021 backup created of the iPhone 8 Plus, iCloud backups were enabled and the text message retention settings were set to "Keep Messages: Forever". No mention was made as to whether "Messages in iCloud" had been enabled; however, it can be inferred that it was not, as no text messages prior to 10/8/2020 were loaded onto the phone after it was factory reset.

Additionally, although the 2/16/2021 backup indicated that the iPhone 8 Plus was configured to automatically backup to iCloud, the phone was factory reset as a new phone on 10/8/2020 and was not restored from a pre-existing iCloud backup. Based upon this fact, it is logical to infer that the iPhone 8 Plus was not configured to backup to iCloud prior to 10/8/2020, and that this setting could have been enabled by the Apple Tech after the phone was subjected to a factory reset.

Although the iPhone 8 Plus was not in his possession at the time that the factory reset had occurred, the facts illustrate that Chief SCOGGINS is directly responsible for the destruction of all public records that had been created by or stored within his city-issued iPhone 8 Plus between 12/18/2017 and 10/8/2020, as he specifically authorized the unnamed Apple tech to perform the "hard reset" as his representative.

However, if the Intent to "mutilate, destroy, conceal, erase, obliterate, or falsify" is determined to be a required element of the crime of Destruction of Public Records, there are additional factors that must be considered.

Based upon Chief SCOGGINS' sworn testimony and all of his actions on the day of October 8th, it is apparent that his goal was simply restoring the functionality of his phone, so that he would not be out-of-contact with the City in the event of an emergency.

Chief SCOGGINS acknowledged that he was not technically proficient in the use of iPhones; his statements indicate that he basically uses his phone as a phone and a calendar, and not much else. He did not understand the function of iTunes, he did not know what a recovery email was, he does not use social media, and he stated that he did not know if his iPhone was backing up to iCloud or ever even paid attention to creating backups as he thought that the IT department created those for him.

Additionally, there is no evidence that SCOGGINS had an understanding of the fact that a "hard reset" would permanently delete all of the data stored on the device, and there is no indication that the Apple tech had provided SCOGGINS with any such warning. Given Chief SCOGGINS apparent level of technical knowledge regarding the functions of the iPhone, it is more likely than not that the idea of a "hard reset" could have been analogous to the idea of a forced restart in his understanding.

ERIC GREENING

On 3/1/2021, the City of Seattle imaged Eric GREENING's Samsung Galaxy S8 while preparing discovery for *Hunter's Capital, LLC v. City of Seattle*. Shortly thereafter, the City discovered that all text messages from prior to 10/26/2020 were missing. The forensic examination of GREENING's Samsung Galaxy S8 revealed that the phone had been subjected to a factory reset on 10/26/2020 at 9:14 AM PDT, and was unable to recover any of the text messages destroyed as a result of this factory reset. As such, the public records that are to be considered "destroyed" under the investigative parameters defined earlier, and therefore a violation of RCW 40.16.020, shall consist of an unknown number of text messages between the unidentified date that the phone was placed into service and 10/26/2020.

GREENING was not deposed by Plaintiffs in *Hunter's Capital, LLC v. City of Seattle*, and the only available information concerning the factory reset of his city-issued phone come from the City's statement in "Second Set of Interrogatories and the City's Objections and First Supplemental Responses Thereto" and from a contemporaneous email conversation between Celina Villa, who was GREENING's executive assistant, and Brian KENNEDY, the Seattle PD IT tech that performed the factory reset of GREENING's phone.

GREENING typically used the phone's biometric authentication feature in order to access his phone. While GREENING was on vacation during the week of October 19th-23rd, the City's security protocol required GREENING to change the passcode on his phone; however, as he normally used the biometric authentication to access the phone, he was unable to remember the passcode.¹³¹ GREENING stopped trying to access his phone, as he was worried that he would trigger the automatic reset function, and asked Mrs. Villa to help arrange IT support when he returned to the office.

On 10/26/2020, GREENING returned to work, and Mrs. Villa brought the phone to KENNEDY shortly after 9:01 AM PDT. At 9:14 AM PDT, Kennedy performed a factory reset of GREENING's phone. According to the City, GREENING recalled providing Mrs. Villa with the phone and receiving it back either later in the day or the next day, at which point he discovered that his text messages and all other data was gone.

KENNEDY did not recall ever contacting GREENING or Mrs. Villa about the phone before performing the factory reset, and did not recall providing GREENING with any sort of admonishment that a factory reset would permanently delete all of the data stored within the phone.

Based upon the above information, it is apparent that GREENING had taken prudent steps to avoid accidentally triggering a factory reset, and that he was neither in possession of his phone when the factory reset was performed nor even aware of its occurrence until after it had already been completed.

¹³¹ Based upon the testimony of multiple persons, when the City's security program required the passcode to be changed after a certain period of time, it required the actual passcode to be entered and did not recognize any biometric authorizations that may be stored within the phone.

CHRISTOPHER FISHER

On 2/22/2021, the City of Seattle imaged Christopher FISHER's iPhone 7 while preparing discovery for *Hunter's Capital, LLC v. City of Seattle*. Shortly thereafter, the City discovered that the phone contained only 16 text messages, all dating between 12/3/2020 and 12/8/2020, and that all text messages from prior to 12/3/2020 were missing. The forensic examination of FISHER's iPhone 7 revealed that the phone had been subjected to a factory reset on 11/2/2020 at 4:52 PM PST, and was unable to recover any of the text messages destroyed as a result of this factory reset. As such, the public records that are to be considered "destroyed" under the investigative parameters defined earlier, and therefore a violation of RCW 40.16.020, shall consist of an unknown number of text messages between 10/1/2019 (the date that the phone was placed into service) and 12/3/2020.

FISHER typically used the phone's biometric authentication feature in order to access his phone. On 3/26/2020, the City's security protocol required FISHER to change the passcode on his phone; however, as he normally used the biometric authentication to access the phone, he was unable to remember the passcode. FISHER attempted what he thought to be the correct passcode multiple times, and finally stopped because he was afraid that he may trigger the automatic reset function. FISHER reached out to Seattle IT for assistance, but was told that there was nothing that they could do. FISHER then contacted a Detective with the Seattle Police Department's Intelligence Unit, as he believed that they have been able to access locked phones in the course of their investigations. However, the Detective told him that they did not have any tools or programs that would allow them to do that, and said that if he didn't remember his passcode he should just punch in numbers until it resets. FISHER followed that direction, and subsequently triggered the automatic reset function. As FISHER did not think that he could have a Seattle PD iCloud account, his iPhone 7 was not logged into iCloud and was not creating backups, so the phone was subsequently set up as a brand-new phone.

On 11/2/2020, the City's security protocol once again required FISHER to change the passcode on his phone, and once again he was unable to remember the passcode as he had used the biometric authentication ever since he had reset it. FISHER did not attempt to contact anyone in the IT Department or anyone else for assistance, as he had just gone through that process, and simply tried to find the correct passcode until he triggered the automatic rest function.

The forensics examination of FISHER's iPhone 7 indicated that it was factory reset on 11/2/2020 at 4:52 PM PST, that the "Messages in iCloud" setting was disabled, and that the text message retention was set to "Keep Messages: 30 Days". The examination also indicated that the phone was restored from an iCloud backup on 11/2/2020; however, FISHER's work phone was signed into his personal iCloud account, so the backup that it was restored from was likely a backup of his personal phone. No settings or details concerning the iPhone 7's configuration are available from prior to 11/2/2020, as the factory reset on that date permanently deleted any forensic evidence related to the factory reset that occurred on 3/26/2020.

The disabling of "Messages in iCloud" and iCloud backups is consistent with the City of Seattle's Information Technology Security Policy section 27.7, Seattle Police Department Manual section 12.111,

and the testimonies of Jennifer WINKLER, Brian KENNEDY, and Chris STEEL concerning established practice and procedure of both the City and the Seattle Police Department.

The use of the text message retention setting "Keep Messages: 30 Days" is concerning, as it sets up two potential circumstances where a text message could be deleted in violation of the Public Records Act:

- 1) A text message could be identified as being subject to retention by the device's custodian and not deleted as a "transitory record", but could subsequently be automatically deleted after 30 days, or
- 2) A text message could be automatically deleted after 30 days, without the requisite review by the device's custodian necessary to determine whether or not it is subject to retention under the Public Records Act.

However, there is additional information that provides context and possibly exculpatory evidence, and must be considered in regards to the use of this setting.

When asked about why his phone's text message retention settings were "Keep Messages:30 Days", Christopher FISHER testified, "I recall setting it to that at some point when, as a command staff, we had a briefing about, you know, you could -- you could manage your --"¹³² before being interrupted by an objection from the City's legal counsel, based upon attorney-client privilege. However, FISHER was allowed to testify that Chief BEST (along with Eric GREENING, FISHER, VALARIE ANDERSON, and Deanna NOLLETE) were all present at this command staff briefing that had been held prior to June of 2020, that Seattle Police Department's legal advisor Rebecca Boatwright had spoken during that briefing, and that following this meeting, FISHER changed the text message retention settings on his phone to "Keep Messages: 30 Days", so that it would automatically delete messages older than 30 days.

While the actual topics of discussion contained in that command staff briefing are undiscoverable based upon attorney-client privilege, the nature of the objection and the subsequent details that were revealed seem to strongly suggest that these individuals may have changed their text message retention settings to "Keep Messages: 30 Days" according to the advice provided by their department's legal advisor.

Based upon the above information, Christopher FISHER is directly responsible for the destruction of all public records that had been created by or stored within his city-issued iPhone 7 between 10/1/2019 and 12/3/2020.

However, if the Intent to "mutilate, destroy, conceal, erase, obliterate, or falsify" is determined to be a required element of the crime of Destruction of Public Records, there are additional factors that must be considered.

FISHER, along with Chief BEST, Mayor DURKAN, and everyone else that was asked this specific question, all testified that they believed that the City was automatically archiving all of their text messages, and FISHER further testified that he didn't know that data would be lost after a factory reset,

¹³² Deposition of Christopher Fisher, page 221 line 11

because he “assume[d] the City had ways to get messages back on a device it owned.”¹³³ If the Intent to “mutilate, destroy, conceal, erase, obliterate, or falsify” is determined to be a required element of the crime of Destruction of Public Records, these statements would tend to show the opposite.

KENNETH NEAFCY

On 3/1/2021, the City of Seattle imaged Kenneth NEAFCY's iPhone XS while preparing discovery for *Hunter's Capital, LLC v. City of Seattle*. Shortly thereafter, the City discovered that all text messages from prior to 10/28/2020 were missing. The forensic examination of NEAFCY's iPhone XS revealed that the phone had been subjected to a factory reset on 10/27/2020 at 3:26 PM PDT, and was unable to recover any of the text messages destroyed as a result of this factory reset. As such, the public records that are to be considered “destroyed” under the investigative parameters defined earlier, and therefore a violation of RCW 40.16.020, shall consist of an unknown number of text messages between 3/20/2020 (the date that the phone was placed into service) and 10/27/2020.

NEAFCY was not deposed by Plaintiffs in *Hunter's Capital, LLC v. City of Seattle*, and the only available information concerning the factory reset of his city-issued phone come from the City's statement in “Second Set of Interrogatories and the City's Objections and First Supplemental Responses Thereto”, from a contemporaneous email conversation in which NEAFCY is requesting help from IT, and from notes that Kevin FAULKNER had taken during his conversation with NEAFCY on or around 10/28/2020.

On 10/27/2020, the City's security protocol required NEAFCY to change the passcode on his iPhone XS, which he did. However, he was subsequently unable to access the phone with the new passcode that he had just input. According to the City, NEAFCY was unsure if he had mistyped the passcode when he changed it, or if something else occurred. Regardless, the attempts to enter an incorrect passcode eventually triggered the automatic reset function, and subjected NEAFCY's phone to a factory reset at 3:26 PM PDT. After the phone was reset, NEAFCY attempted to follow the prompts to restore it from an iCloud backup, but was unable to do so as Apple was sending the confirmation codes in the form of a text message to his work phone number, which he could not access because the phone wasn't set up. At some point during the events of 10/27/2020, NEAFCY turned to T.J. McDonald, who is the Technology Coordinator for the Office of Emergency Management, for assistance in regaining access to his phone.

On 10/28/2020 at 12:51 PM PDT, NEAFCY initiated an email chain to Susy DeMers of the Seattle IT Department and Chris STEEL, who assists in managing the phones for the Seattle Police Department, requesting help with his phone. In that first email, NEAFCY stated that the phone had already been reset, and later in the email chain states that Mr. McDonald had already been unable to solve the problem. Mrs. DeMers brings Lutu Smith of the Seattle IT Department into the email chain, and Mr. Smith ultimately recommends that NEAFCY be provided with a new phone as soon as possible. Mr. Smith provides NEAFCY with a contact number in the event that NEAFCY needs further assistance while waiting

¹³³ Deposition of Christopher Fisher, page 191 line 17

for his new phone; at 2:37 PDT, NEAFCY sent a text from his old iPhone 6s but from the same phone number as his iPhone XS, which is consistent with the City's statement that NEAFCY had removed the SIM card from his iPhone XS and placed it into his iPhone 6s in order to have a functional phone.

Based upon the above information, Kenneth NEAFCY is directly responsible for the destruction of all public records that had been created by or stored within his city-issued iPhone XS between 3/20/2020 and 10/27/2020.

However, if the Intent to "mutilate, destroy, conceal, erase, obliterate, or falsify" is determined to be a required element of the crime of Destruction of Public Records, there are additional factors that must be considered.

As NEAFCY was never deposed, the contemporaneous email chain provides the best window into his thought processes at the time. It is easy to recognize the urgency, and even panic, contained within the tone of the emails that he had sent. His final email in the chain reads:

"I am neck deep in dealing with the EOC election response activation and am getting considerable heat from the Mayor's office and others who are unable to reach or text me on my work phone. I really need this phone back up and running tonight and if that cant be done then I need a new phone with a new number tomorrow. I really need some help here... please."

Based upon these emails, it is apparent that NEAFCY's main goal was restoring the functionality of his phone so that he could perform his immediate duties as the Operations Coordinator for the Emergency Operations Center.

Additionally, the destruction of public records that occurred on NEAFCY's device was not the result of a conscious decision to perform a factory reset by following the path "Settings » General » Reset » Erase All Content and Settings". Rather, this factory reset occurred due to the "Erase Data" setting that was enabled on his iPhone, triggered after ten failed passcode attempts. According to Kevin FAULKNER's sworn testimony, there is no warning provided after the 9th failed passcode attempt that the phone is about to be reset; it occurs automatically after the 10th failed attempt.

There is no evidence to suggest that NEAFCY was aware that he was about to destroy any public records when he entered what he believed to be the correct passcode for the 10th time, and there is no evidence that NEAFCY was even aware that this function was enabled on his city-issued phone.

IDRIS BEAUREGARD

On 3/9/2021, the City of Seattle imaged Idris BEAUREGARD's iPhone 8 while preparing discovery for *Hunter's Capital, LLC v. City of Seattle*. Shortly thereafter, the City discovered that all text messages from prior to 10/9/2020 were missing. The forensic examination of BEAUREGARD's iPhone 8 revealed that the phone had been subjected to a factory reset on 10/9/2020 at 1:50 PM PDT, and was unable to recover any of the text messages destroyed as a result of this factory reset. As such, the public records

that are to be considered "destroyed" under the investigative parameters defined earlier, and therefore a violation of RCW 40.16.020, shall consist of an unknown number of text messages between the unidentified date that the phone was placed into service and 10/9/2020.

On 10/8/2020, BEAUREGARD attempted to access his phone using his passcode, but found that it was not working. He could not remember if he had recently been prompted to change his passcode by the City's security protocol, but stated that it was a possibility. BEAUREGARD had his passcode written down, so he knew that it was the correct passcode, and he kept trying to gain access with the same code, resulting in him becoming locked out of his phone for progressively longer periods of time. BEAUREGARD called Seattle's IT Department for assistance, but they were unable to provide a solution. BEAUREGARD called Apple Support, but their suggestions did not work either. BEAUREGARD left his phone on his desk overnight and returned to work the next day. At or around 1:50 PM PDT, BEAUREGARD was working at his desk when the screen on his phone lit up and caught his eye. BEAUREGARD initially thought that the phone had just rebooted, but it then walked him through the setup procedure for a brand new phone.

BEAUREGARD did not know if his phone had been set to automatically erase all data after a certain number of failed passcode attempts. He further stated that he did not initiate the factory reset of his phone in any way, and was not handling it when it began.

The forensics examination of BEAUREGARD's iPhone 8 indicated that it was factory reset on 10/9/2020 at 1:50 PM PDT, that the text message retention was set to "Keep Messages: Forever", and that iCloud backups were enabled. However, as the phone was set up as brand new after the automatic reset, it can be inferred that either iCloud backups were not enabled prior to 10/9/2020, as the phone would have been restored from an existing backup if they were, or that there was not enough storage available in BEAUREGARD's iCloud account to create a backup. Additionally, it can be inferred that the "Messages in iCloud" setting was disabled prior to 10/9/2020, as no text messages were restored to the phone after the factory reset.

Based upon the above information, Idris BEAUREGARD is directly responsible for the destruction of all public records that had been created by or stored within his city-issued iPhone 8 between the unidentified date that the phone was placed into service and 10/9/2020.

However, if the Intent to "mutilate, destroy, conceal, erase, obliterate, or falsify" is determined to be a required element of the crime of Destruction of Public Records, there are additional factors that must be considered.

BEAUREGARD admitted that he was not technically savvy. This is best illustrated by the fact that he thought that backing up a phone meant downloading the pictures to a hard drive, and that he thought that iTunes was simply a music app and was confused as to how it could do backups. BEAUREGARD also believed that the City was automatically creating backups and storing the content of his city-issued phone through iCloud.

Additionally, the destruction of public records that occurred on BEAUREGARD's device was not the result of a conscious decision to perform a factory reset by following the path "Settings » General » Reset » Erase All Content and Settings". Rather, this factory reset occurred due to the "Erase Data"

setting that was enabled on his iPhone, triggered after ten failed passcode attempts. According to Kevin FAULKNER's sworn testimony, there is no warning provided after the 9th failed passcode attempt that the phone is about to be reset; it occurs automatically after the 10th failed attempt.

There is no evidence to suggest that BEAUREGARD was aware that he was about to destroy any public records when he entered what he believed to be the correct passcode for the 10th time, and BEAUREGARD stated that he was unaware that this function was enabled on his city-issued phone.

DEANNA NOLLETTE

In "Second Set of Interrogatories and the City's Objections and Responses Thereto", filed in *Hunter's Capital, LLC v. City of Seattle* on 7/13/2021, the City made first mention that Assistant Chief Deanna NOLLETTE was possibly missing text messages from her department-issued iPhone XR. In that filing, the City provided a table that indicated that NOLLETTE's phone was imaged on 7/2/2021, and that there were additional backups of her phone dating from 11/23/2020, 11/30/2020, and 3/4/2021. There was no information concerning when the City learned that NOLLETTE was possibly missing text messages, and no information concerning the circumstances of those potentially missing messages.

On 1/10/2023, Joe Groshong of the Seattle City Attorney's Office stated that NOLLETTE was reported as potentially missing text messages because a software issue was preventing their IT technicians from extracting the text messages from her phone. He then stated that they were successfully able to access NOLLETTE's phone on 7/2/2021, and had recovered all of the text messages contained in the phone.

No information was provided concerning the text message retention settings of that phone, or whether any text messages had been manually deleted or otherwise deleted due to retention settings.

Based upon the available information, there appears to have been no "destruction of public records" associated with Deanna NOLLETTE or her city-issued iPhone XR.

SHANON ANDERSON & VALARIE ANDERSON

In "Second Set of Interrogatories and the City's Objections and Responses Thereto", filed in *Hunter's Capital, LLC v. City of Seattle* on 7/13/2021, the City made first mention that they were as-of-yet unable to access the city-issued iPhone (unidentified model) of SHANON ANDERSON and the city-issued Galaxy S9 of VALARIE ANDERSON, as both of those devices were password-protected. The City provided no explanation as to why they were unable to access those devices in their filing.

In "Second Set of Interrogatories and the City's Objections and First Supplemental Responses Thereto", filed in *Hunter's Capital, LLC v. City of Seattle* on 8/31/2021, the City provided additional information, stating that these two devices were turned in to the department in the winter of 2020, when the Seattle Police Department transitioned from Verizon to FirstNet. The City stated that when

they attempted to image the phones, they found that the passcodes provided by SHANON ANDERSON and VALARIE ANDERSON at the time that they were turned in would no longer unlock the phones. The City stated that they were working with an outside vendor in an attempt to extract the data without triggering the automatic reset function.

The City has not provided any information on either of these phones since this filing, and it is unknown if they were ever able to access the contents of these phones.

Based upon the available information, I am unable to determine if there was actually any "destruction of public records" associated with either SHANON ANDERSON or VALARIE ANDERSON, as the devices associated with each of them remain inaccessible.

FRED PODESTA

In "Amended Second Set of Interrogatories With Responses and Objections Thereto", filed in *Marigold Products, Inc. v. City of Seattle* on 4/15/2022, the City stated that Fred PODESTA turned in his city-issued iPhone 6s in January of 2019, after resigning his position in the City of Seattle's Human Services Department to take a job with Seattle Public Schools. The City stated that it was the Human Services Department's established policy to perform a factory reset of a decommissioned phone if there was no immediate need to reissue it, and stated that PODESTA's phone was wiped in accordance with this policy.

Based upon the above information, the established policy of the City of Seattle is directly responsible for the destruction of all public records contained within this device.

DOUG CAREY

In "Amended Second Set of Interrogatories With Responses and Objections Thereto", filed in *Marigold Products, Inc. v. City of Seattle* on 4/15/2022, the City stated that Doug CAREY turned in his city-issued phone (unidentified make/model) in March of 2020, after retiring from the City's Department of Finance and Administrative Services. The City stated that it was the Department of Finance and Administrative Services' established policy to perform a factory reset of a decommissioned phone, and stated that CAREY's phone was wiped in accordance with this policy.

Based upon the above information, the established policy of the City of Seattle is directly responsible for the destruction of all public records contained within this device.

DISPOSITION:

Refer to the King County Prosecutor's Office for review.