



September 12, 2023

**MEMORANDUM**

To: KCSO Det. Joe Gagliardi  
From: Dan Clark, Leesa Manion  
Subject: KCSO Incident Report #C22029639

Thank you for your extensive investigative review regarding the allegations of destruction of public records. The King County Prosecuting Attorney's Office (KCPAO) asked for this investigation because ensuring public officials are acting in the highest regard for creating and maintaining public records is a matter of utmost importance to our community. It is clear from your investigation that you understood that value and worked tirelessly to uncover the facts regarding these cases. Based upon your investigation and our legal analysis of the facts as you presented, we conclude that there is no legal basis to file criminal charges in this case.

**Factual Summary**<sup>1</sup>

On July 28, 2022, the King County Prosecuting Attorney formally requested that the King County Sheriff's Office initiate an investigation into the possible destruction of public records related to missing text messages of high-level City of Seattle officials during a period of civil unrest in Seattle in June 2020. In particular, this request was based upon the discovery that there were missing text messages related to the city-issued phones of former Mayor Jenny Durkan, Seattle Fire Chief Harold Scoggins, and former Seattle Police Chief Carmen Best. In total, your investigation revealed that text messages from nine (9) higher-level City of Seattle employees were missing during this time frame.

As you concluded in your Executive Summary:

*There was no single factor that led to the destruction of text messages belonging to the high-level city officials during this four-month period; rather, it was a perfect storm of training delinquencies, outdated and conflicting policies and procedures, and insufficient safeguards to prevent the loss of records that primarily contributed to the destruction of these text messages.*

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<sup>1</sup> For a complete recitation of the facts involved in these cases, we would defer to the extensive incident report you prepared for KCSO #C22029639. Below we have outlined a summary of the facts as we understand them. If there are errors or omissions in this summary, we defer to the documents you prepared as that would be a more complete recitation of the facts.

For purposes of this memo, it is helpful to summarize the factual nuances of each case as they bear on the State's evaluation of the evidence and ultimately, its inability to file charges.

### Former Mayor Jenny Durkan

There is an eight-month period where the text messages on former Mayor Durkan's city-owned phone are missing (10/30/19 to 6/24/20). On 7/4/2020, Durkan's phone fell out of her pocket and into salt water. In an effort to salvage the phone, she placed it in a bag of rice for hours and rebooted it. The now-functioning phone took her to a "set up your phone" screen. Durkan restored her phone from an iCloud backup, and there was no loss of data. (Although, use of "Messages in iCloud" function is a violation of City of Seattle policy, Durkan's use of it clearly salvaged her text messages.) Despite the reset, Durkan was unable to access her emails, calendar, or contacts. A few hours later, the "Messages in iCloud" was disabled. Because all messages were already downloaded to her phone, this change did not result in the loss of any data. Durkan received a new phone on 7/9/20 and her old phone was retained by others in the City.<sup>2</sup>

At some point between 7/4/20 and 7/22/20, one of the settings on Durkan's phone changed from "Keep Messages: Forever" to "Keep Messages: 30 days." Once this setting was changed, it resulted in the loss of all texts sent and received between 10/30/19 and 6/24/20. This change could have occurred on either one of Durkan's phones (new or old) and multiple people had access to her phones during this period of time. It is unclear who changed this setting or why. It is this single change that resulted in the loss of data between 10/30/19 and 6/24/20.

Between 7/22/20 and 7/26/20, Durkan's phone settings were changed *back* to "Keep Messages: Forever." This action stopped the destruction of text messages. It is unclear who changed this setting and on which phone it was done.

On 8/10/20, Durkan's old phone was factory reset by a City of Seattle IT employee in accordance with City policies. Because of the factory reset, all downloaded text messages on this phone were destroyed. On 9/17/20, in an attempt to recover these missing texts, the same City of Seattle IT employee performed another factory reset, again destroying any texts on the phone. These two factory resets also prevented investigators from pinpointing exactly when and on which phone the above change to "Keep Messages: 30 days" occurred which resulted in the loss of Durkan's data.

### Former Seattle Police Chief Carmen Best

Best announced her retirement on 8/11/20 with an effective date of 9/2/20. Prior to her departure, she used accrued vacation leave, during which she left her phone (with passcode written on a note on the phone) on the desk in her office. Upon returning to work on 9/2/20, Best turned in her phone to SPD. In compliance with City of Seattle policies, Best's phone had disabled "Messages in iCloud" function. Five and a half months after she retired, City of Seattle

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<sup>2</sup> The "old phone" was an iPhone 8 Plus and her "new phone" was an iPhone 11.

IT employees discovered that there were only 17 text messages on her phone, and that several thousand text messages had been manually deleted. Notably, although they were unable to pinpoint exact dates or times, forensic analysts concluded that these messages were not deleted in one bulk session.

Best testified in civil litigation that she routinely deleted text messages off her phone, believing (mistakenly) that the City of Seattle was automatically archiving all texts in a cloud just like her email, and that she was simply removing the texts off the device itself. Best had reason to believe this was the case. Det. Gagliardi was able to confirm that the City's IT system automatically retains emails as a back-up system even when a City of Seattle employee manually deletes them. City of Seattle IT trains employees that they could delete emails from their inbox or even their deleted files and it would be automatically archived by the City. Other City of Seattle employees testified to their similar belief that their texts, like their emails, were automatically retained by the City.

Finally, there is a significant period of time during which Best was away from her phone (2-3 weeks prior to retirement and 5.5 months after retirement). And during both periods of time, Best's phone was accessible to others with the passcode written on a note attached to the phone.

#### Chief Harold Scoggins - Seattle Fire Department

In preparing for civil litigation, the City of Seattle discovered that Chief Scoggin's phone had no text messages prior to 10/8/20. On the morning of 10/8/20, Scoggins was awoken with a notification from work on his work phone. When he tried to access the message, he found his passcode was not working. (The City of Seattle requires frequent passcode changes, and many employees had difficulty remembering their passwords since they were able to use biometrics to open their phone, except to reset their passcode). He attempted to use past passcodes but ended up locked out of his phone after too many failed attempts. Scoggins contacted Seattle IT for help, but they were unable to assist. Scoggins searched the internet to find a work-around but was unsuccessful. Scoggins drove to a local Apple Store for help. An employee took the phone into the store and returned to tell Scoggins the only way to access the phone was with "a hard reset." Scoggins authorized the "hard reset" and later indicated that he was unaware that would delete all of the phone's data. He testified that he needed immediate access to his phone in case of an emergency and was concerned about not having access for any period of time. Unfortunately, there was no iCloud backup enabled for this phone. Scoggins was not technically proficient and only used his phone primarily as a telephone and for its calendar function.

#### Others

Other high-ranking employees in the City of Seattle also lost text messages during this period of time. (Fisher, Beauregard, Greening, Neafcy). Many lost them in a similar fashion. The City of Seattle required employees to frequently change their passcode after a certain period of time. After a change of passcode, the phone would allow the user to use biometrics to open their phone. But then to change passcodes as required, the user needed to remember their prior passcode. Unfortunately, many employees forgot their original passcodes (after only using biometrics for a long period of time) and tried multiple times to enter variations of past

passcodes. After a specified number of attempts, the iPhone locks and the user is unable to access it. The phone then triggers an automatic reset function and wipes away past data. Many of the employees wrongly assumed that the City of Seattle was automatically archiving data (similar to Best's assumption above). Notably the City of Seattle prohibited use of "iCloud" backup setting.

### **Legal Analysis**

There are two possible crimes related to the destruction of public records. The first crime is a more general statute, pertaining to any individual who modifies a public record. It is entitled "Injury to Public Record" (RCW 40.16.010) and is a Class C felony. It reads:

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.

By its plain language, the law requires both willful and unlawful action on behalf of the individual to constitute criminal conduct. To date, there are very few cases that have analyzed this statute. In one case, a lawyer lied to a judicial officer about another judge's ruling, then took a court file from the clerk and intentionally altered the prior judge's ruling without court permission. While it is unclear if there were eventual criminal charges filed, the Washington State Supreme Court cited this statute in upholding the lawyer's disbarment. In re Disciplinary Proceeding against Kamb, 117 Wn.2d 851 (2013).

In another case, a court clerk modified her future son-in-law's driving record, allowing his driver's license to be reissued. She was convicted of Injury to Public Record under RCW 40.16.010 and her conviction was affirmed. State v. Depoe, 116 Wn. App. 1055 (2003) (Unreported). In both cases, it is clear that the individuals in question willfully and unlawfully sought to permanently modify original public records for their own gain. Their actions were flagrant and in direct conflict with the statute.

To sustain a conviction in the cases at hand pursuant to this statute, the State would need to establish a malintent (willful and unlawful conduct). The State is unable to meet that burden here. The instant cases offer a wide range of activity that resulted in the deletion of text messages. There is no evidence that the involved individuals intended to permanently delete anything. In all but one instance, the facts reflect that involved individuals actually were trying to *recover* access to their phones, which due to a confluence of technical issues, unfortunately resulted in the *loss* of data. The State would be unable to establish any criminal intent to delete data in these cases.

The situation is different as to former Chief Carmen Best's phone, which showed signs that texts were *manually* deleted. However, the facts do not establish criminal conduct in that case either. Best explained in a civil deposition that she was under the reasonable but mistaken belief that she was merely deleting *duplicates* of original texts being stored by the City of Seattle in the cloud,

as the City of Seattle does with emails. If Best was under the misimpression that she was deleting only a copy of a public record and not the original, it cannot be proven beyond reasonable doubt that she was acting willfully or unlawfully to alter an actual public record.

In addition, the State would be unable to prove that the text messages were “filed or deposited in a public office, or with any public officer, by authority of law,” as required by RCW 40.16.010. The language of the statute refers to documents or other records officially filed, not simply communications by public employees in the course of their employment.

The second potential statute is “Injury and misappropriation of record” codified as RCW 40.16.020 in 1909. It states:

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.

This statute does not have an explicit mental state requirement, however, a requirement that the official acting knowingly is implicit. Courts regularly read a mental state element into statutes that do not include a mental state. Elonis v. United States, 575 U.S. 723, 734 (2015). In determining whether a mental state requirement is implied, courts consider many factors, including the seriousness of the penalty and whether the lack of a mental state would result in criminalizing entirely innocent conduct. State v. Yishmael, 195 Wn.2d 155 (2020). If RCW 40.16.020 were interpreted as a strict liability crime, a public official who accidentally dropped their paperwork into a puddle walking to work and thereby destroyed the documents would be guilty of a Class B felony. It is clear that this result was not the legislature’s intent.

Also, as written, the statute would criminalize the *lawful* destruction of public records. After this statute was drafted, the legislature established retention schedules for public documents. These schedules identify when records may be lawfully destroyed. If RCW 40.16.020 is read literally and in isolation, it would *criminalize* compliance with these retention schedules. A public official who complies with retention schedules should not be guilty of a Class B felony under RCW 40.16. Indeed, these two statutes must be read in conjunction with each other to make sense. State v. Armendariz, 160 Wn.2d 106 (2007).

Based on the above, RCW 40.16.020 must be interpreted as including a requirement of criminal intent to establish criminal liability for a Class B felony. Otherwise, accidental conduct (dropped paperwork in puddle) and lawful conduct (compliance with retention schedules) would be felonious.

If Best was under the misimpression that she was deleting only a copy of a public record and not the original, it cannot be proven beyond a reasonable doubt that she was acting willfully or unlawfully to alter an actual public record.

In sum, the State cannot establish beyond a reasonable doubt that any of these City of Seattle employees had a criminal intent to destroy public records. Unable to prove this legal requirement, we cannot sustain a criminal conviction. As a result, pursuant to the Rules of Professional Conduct 3.8(a), the State is prohibited from filing charges in these cases.