Division II just issued an opinion, Arthur West v. City of Puyallup, outlining important factors to consider when determining whether an employee's "personal" Facebook posts are, in fact, public records. The bottom line is that this case provides a reminder that now is a good time to reach out to your attorney and make sure your public records policies and procedures are up to date.

Previous case law establishes that text messages on private cell phones can be public records. In light of this precedent, Division II found a post on a "personal" Facebook page can also constitute a public record. However, a public employee's post on their Facebook page is not a public record just because it discusses their job. Beyond containing information that refers to or impacts the government, the employee must prepare, own, use, or retain the post within the scope of their employment for the post to constitute a public record. An employee's post is within the scope of employment when (1) the job requires it, (2) the employer directs it, or (3) it furthers the employer's interest. In West, the Court found that, in a situation where an employee's job does not require posting on Facebook and the employer did not require it, the mere fact that a post on a "personal" Facebook page provided some segment of the public with information about City events or activities does not sufficiently further a City's interests to make the post a public record.

Although the City prevailed in West, the question of whether a post furthers an employer's interest is likely to be fact-based and require legal judgment. Moreover, a government agency is not likely to know about its employee's social media posts on "personal" pages unless it is asking its employees the "right" questions when faced with public records requests. As such, the West case should remind everyone that it is a good idea to reach out to your attorney and make sure your public records policies and procedures are up to date.

About the Author
Mark is a Shareholder at Inslee Best. Mark's practice focuses on resolving real estate, business, and intellectual property disputes for individuals and businesses of all sizes as well as pursuing insurance companies who refuse to provide defenses for their insureds. Mark has handled matters pending before federal and state trial and appellate courts, the Trademark Trial and Appeal Board, and the Federal Trade Commission. If you have any questions regarding this article or public records more generally, Mark can be reached directly at (425) 450-4219 or mleen@insleebest.com.