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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE CITY OF SHORELINE, a Washington municipal corporation, and  
DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity,

Petitioners

v.

DOUG AND BETH O'NEILL,

Respondents.

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RESPONDENTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW

LAW OFFICES OF MICHAEL G. BRANNAN  
By: Michael G. Brannan, WSBA#28838  
555 Dayton Street, Suite H  
Edmonds, WA 98020  
425.774.7500

ALLIED LAW GROUP, PLLC  
By: Michele Earl Hubbard, WSBA #26454  
2033 Sixth Avenue, Suite 800  
Seattle, WA 98121  
206.801.7510

ATTORNEYS FOR RESPONDENTS

ORIGINAL

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## I. IDENTITY OF RESPONDENTS

Respondents Beth and Doug O'Neill are private citizens who were improperly denied public records to which they were entitled under The Public Records Act. The O'Neills respectfully request this Court deny review of the issues raised in Petitioners' Petition for Discretionary Review of the decision designated in Part II.

## II. ADDITIONAL ISSUES FOR REVIEW

Respondents Beth and Doug O'Neill oppose review of issues raised in the Petition for Review by this Court of *O'Neill v. The City of Shoreline, et al.*, 145 Wn.App. 913, 187 P.3d 822 (2008) because the law is either settled on the issue raised for review, or the record as developed does not support review and petitioners inappropriately ask this Court for an advisory opinion. However, if the Petition for Review is granted, the O'Neills seek review of the following issues:

1. *Is metadata such a separate and distinct part of an electronic record that citizens shall be required to request metadata separately and explicitly when asking for an electronic public record, particularly where an affirmative act is required to redact metadata from the electronic record and where policies of liberal construction and agency assistance to the requestor favor complete disclosure?*
2. *Should a plaintiff's loss at an optional show cause proceeding – a procedure designed to expedite hearing on a citizen's request for public records – deprive that plaintiff of their statutory right under the PRA to further discovery and a trial?*
3. *Should this Court issue a ruling clarifying that a trial court's award of costs to the responding agency violated RCW 42.56.550(4), which allows an award of costs and fees to "[a]ny person who prevails against an agency," not to "any agency who prevails against a person." While the Court of Appeals determined that the issue was moot, because this is an issue which*

*can and probably will arise again, the Respondents respectfully submit that this court should issue a decision resolving the question.*

### III. STATEMENT OF THE CASE

#### A. Abbreviated Factual and Procedural History

Doug and Beth O'Neill requested access to public records held by the City of Shoreline. CP 3-4; Dec. O'Neill at 2, et seq.<sup>1</sup> The O'Neills' PRA requests began as a response to an erroneous public statement made by Deputy Mayor Maggie Fimia at a September 18, 2006, city council meeting, indicating that she had received an email "from a Ms. Hettrick and a Ms. O'Neill that made serious allegations. . . ." Dec O'Neill, at 3; see also CP 21-22.

During the meeting Ms. O'Neill disavowed transmitting any such email and said "**I will need to see that email. . . . I would like that to be a matter of public record.**" *Id.* Ms. Fimia responded that she would be "happy to share" the email with Ms. O'Neill. *Id.* Over the next few days, the following transactions occurred:

- September 18, 2006, 10:29 p.m. Maggie Fimia: "I removed the 'to' and 'from' lines listing Lisa Thwing as the sender and recipient in order to protect Ms. Thwing from potential public exposure. . . ." CP 21.
- September 19, 2006. Beth O'Neill to Carolyn Wurdeman (telephonically): "[I want] the entire email string." *Dec. O'Neill*, at 4.
- September 19, 2006, 1.27 p.m. Carolyn Wurdeman to Maggie Fimia (by email): Ms. O'Neill [is] requesting information about who the email was to. Do you have that information for Ms. O'Neill? *Dec. O'Neill*, Exhibit C.

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<sup>1</sup> The King County Superior Court transmitted the declaration of Beth O'Neill to Division One as an exhibit, without giving the document clerk's papers page numbers. Consequently the parties and the Court of Appeals have variously referred to the declaration as "Sub #4, Declaration of Beth O'Neill," "Dec. of Beth O'Neill," or simply "Sub 4." See e.g. *O'Neill v. City of Shoreline*, 145 Wn.App. 913, 920 n.3, 187 P.3d 822, 824 n.3 (2008).

- September 19, 2006, 9.07 p.m. Maggie Fimia to Carolyn Wurdeman (by email): “There was no ‘To’ line in the e-mail.” *Id.*
- September 20, 2006. Beth O’Neill to City, (in person on the City’s public records request form): “[I am seeking access to the] e-mail mentioned by Deputy Mayor Fimia at the 9-18 Council meeting.” *Dec. O’Neill*, Exhibit D.
- September 20, 2006. City to Beth O’Neill, (provided over the counter): print out of an “email [which] does not show the ‘to’ field or the email where the subject heading was changed or how it reached Ms. Fimia or Ms. Wurdeman.” *Dec. O’Neill*, at 5; *Id.*, Exhibit E.
- September 20, 2006. Beth O’Neill to City, (in person on City’s public records request form immediately upon receipt of the aforementioned photocopy): “[I am seeking access to] all information relating to this email: how it was received by Maggie Fimia, from whom it was received, and the forwarding chain of the email. As it stands now, the email which was provided to us today (9/20/06) from Maggie Fimia through the City Manager’s office is not sufficient, It [sic] is simply a piece of paper which could have been put together by anyone and called an email. Further documentation is required in order to validate this document.” *Dec. O’Neill*, at 6. *Id.*, Exhibit F.
- September 25, 2006. Beth O’Neill to City, (on the City’s public records request form): “[I am seeking access to the] email transmission attributed to Ms. Hettrick and Ms. O’Neill in a statement made by Deputy Mayor Fimia at the City Council meeting on 9/18/06.” Ms. O’Neill further wrote that she wanted “Any and all correspondence (including memos) relating to this email. Complete transmission/forwarding chain AND ALL metadata pertaining to this document.” *Dec. O’Neill*, at 6; *Id.*, Exhibit G.

As the Court can see from the foregoing, with her first request – “I will need to see that email. . . . I would like that to be a matter of public record” – Ms. O’Neill implicitly asked to see the entire electronic record. When presented with partial responses, Ms. O’Neill asked again and again for the entire, unredacted electronic record, each time more specifically and technically identifying the

discrete but integral parts of the whole email.<sup>2</sup> With her first request Ms. O'Neill also placed the Petitioners on notice that they were duty-bound to preserve the entire electronic record, inviolate.

On November 21, 2006, still not in receipt of the entire original electronic record and frustrated with what they perceived as "elected local officials lying to us and the public and breaking the law," the O'Neills filed suit in the King County Superior Court seeking access to public records and alleging that the City of Shoreline and Deputy Mayor Maggie Fimia (Petitioners), admittedly altered and then destroyed an electronic public record after the O'Neills had requested access to that record. (CP 3-9)

Along with their complaint, the O'Neills filed a "Motion for an Order to Show Cause," seeking to compel the defendants to appear and show cause why they should not produce for inspection the public records requested, and seeking an award of attorney's fees and costs as authorized by the PRA. CP 10-11.

On November 29, 2006, the defendants filed their response. CP 40-52.<sup>3</sup> The defendants argued, *inter alia*, that RCW 40.14 and WAC 434-635-050 authorized the City to "treat the electronic copy of an email as a transitory, duplicate copy that should be deleted once the electronic copy is no longer needed." CP 49.

On or about November 30, 2006, the plaintiffs filed their reply. In their memorandum the plaintiffs argued facts gleaned from the defendants response:

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<sup>2</sup> If the email were an orange, Ms. O'Neill's request might have gone like this: "I will need to see that orange . . . I would like that orange to be a matter of public record." Subsequent requests for the orange would have identified the parts of the orange, e.g. the skin, the seeds, etc. Production of anything less than the full orange would be in derogation of the PRA.

<sup>3</sup> See also CP 14-23, 24-25, 29-30, 31-36, 37-38,

(1) Deputy Mayor Fimia possessed an electronic copy of an email at the time it was requested through a Public Records Act (“PRA”) request, (2) Fimia removed the “to” and “from” field from such email when she provided it to fulfill O’Neill’s PRA request and that she did so deliberately to hide information from O’Neill and the public (Resp. at 4, lines 20-23; Fimia Decl. at ¶¶ 4-11), and (3) Fimia then deleted the original email containing responsive metadata and other information from her computer destroying records which Defendants claim cannot now be provided to O’Neill. Fimia Decl. at ¶¶12-16, 20.

CP 53-54.

The O’Neills also argued that the City’s retention policies contradicted state law, as did the defendants practice of deleting emails, and that “email messages such as correspondence which relates to official business are public records and must be retained and are subject to the PRA and the penal provisions of RCW 40.16. See Ex. A at 27.” CP 54.

On November 5, 2006, Judge Hilyer ruled on the plaintiff’s motions. Based upon the record before him, the judge found that “all responsive records that exist have been provided to the plaintiffs,” and that “no additional responsive records are available or contained on the computer hard drive of defendant Fimia.” CP 141. The Court therefore denied the plaintiffs Motion to Show Cause and ordered that:

since all relief requested by the Plaintiffs in their Complaint has been denied by the Court, this action is DISMISSED with costs awarded to Defendants.

*Id.* Further briefing on the plaintiffs’ motion for reconsideration followed, and on January 9, 2006, the court entered its final order denying the motion. CP 352.

On or about February 8, 2007, the O’Neills filed their appeal with

Division One of the Washington Court of Appeals. In their appeal the O'Neills contended, *inter alia*, that (1) dismissal of their lawsuit in a preliminary hearing, without oral argument or a meaningful opportunity to explore and be heard on the issues, is in derogation of the letter and spirit of the PRA, and; (2) the court's award of costs to the responding agency violates RCW 42.56.550(4), which allows an award of costs and fees to "[a]ny person who prevails against an agency," not to "any agency who prevails against a person."

The O'Neills also argued that the metadata associated with the electronic record requested is an inextricable part of the record, and that her request "to see that email" should be viewed as inclusive of metadata accompanying the record; that citizens should not be required to request an electronic record, and to separately request the metadata which is a part of the electronic record. Such a policy is inconsistent with RCW 42.56.100 which requires agencies to provide the "fullest assistance" to citizens requesting access to public records.

On July 21, 2008, the Court of Appeals issued its decision in the case. As it relates to the Respondents' proposed issues, the O'Neill Court correctly determined that metadata does qualify as a public record under the liberally construed PRA (*O'Neill*, 145 Wn.App. at 924, 187 P.3d at 827), however the Respondents believe that the decision incorrectly segregates metadata from the larger electronic record which contains the metadata, thereby allowing responding agencies to produce part of a record when the requestor implicitly asks for the record in its entirety. This is not unlike producing a copy of a law review article or appeals court decision to a requesting citizen but redacting all the footnotes.

The decision also incorrectly establishes a plaintiff's loss at a show cause proceeding as dispositive of the plaintiff's PRA claims, without allowing plaintiff the succor of normal civil procedures such as discovery and a trial. This holding is in derogation of the liberally construed PRA, and it improperly subordinates civil rules governing all civil proceedings to the show cause procedure found in RCW 42.56.550 without any foundation in law or policy.

Finally, the *O'Neill* Court declined to resolve the open question of whether the trial court's award of costs to the responding agency violated RCW 42.56.550 (4), which lays out a one-way fee and cost shifting provision, in determining that the issue was moot. *O'Neill*, 145 Wn.App. at 939, 187 P.3d at 834.

#### **IV. ARGUMENT**

##### **A. The *O'Neill* Decision As It Affects Petitioners' Issues Is Consistent With Settled Law**

The decision below as it pertains to the issues the Petitioners have raised does not create new law, does not conflict with existing law, does not raise issues of constitutional magnitude, and does not raise unresolved issues of public concern. RAP 13.4(b).

1. The Purported "Conflict" Between The State Retention Guidelines And The PRA Does Not Meet The Criteria Of RAP 13.4(b).

The Petitioners below argued that deletion of the requested public record (an email) and the metadata associated with the email was consistent with the City's records retention policy and thus not a violation of the PRA. *O'Neill*, 145 Wn.App. at 934, 187 P.3d at 831. The Court of Appeals disagreed, and correctly resolved the issue by reliance upon the PRA and this Court's decision in

*Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn. 2d 243, 261–62, 884 P.2d 592, 602–603 (1994), which establishes that if statutes mesh with the PRA they operate to supplement it, and if there is a conflict, “the provisions of the Act govern.” *Id.* See also RCW 42.56.030. None of the RAP 13.4(b) elements are met, and this Court should decline to review the Court of Appeals on this issue.

2. The O’Neill Court’s Identification Of Metadata In An Electronic Record Does Not Create A New Category Of Record Subject To The PRA And Thus No Issue Exists Under RAP 13.4(b).

The Petitioners’ second issue is also resolved by reference to well settled law. RCW 42.56.100 requires agencies to adopt reasonable rules to ensure that citizens are allowed “full public access to public records” and to “protect public records from damage or disorganization.” The Petitioners urge that agencies should instead be permitted to treat the original electronic version of an email as a transitory, duplicate record that can and should be deleted once the electronic record has been printed – or even partially printed out. Characterizing the metadata that Beth O’Neill requested as, “at most . . . a public record with no retention value,”<sup>4</sup> the Petitioners betray an apparent antipathy toward those provisions in the PRA that require agencies to preserve and protect public records – in whatever form the record might exist<sup>5</sup> – from damage and destruction once a request for the record has been made. RCW 42.56.100.

Upon hearing Deputy Mayor Maggie Fimia refer to the contents of an electronic record at a public meeting, Beth O’Neill asked to “see that email.”

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<sup>4</sup> Petition for Review, at 11.

<sup>5</sup> See e.g. RCW 42.56.010(2) & (3); RCW 40.14.010.

(Dec. O'Neill, at 3). With these three words, Ms. O'Neill effectively enshrined the original email in the protective armor of the law, thereby divesting the Deputy Mayor and the City of Shoreline of any authority to destroy, damage, or otherwise corrupt the original record. As the O'Neills argued below, metadata, like the footnotes in a document, is an inextricable part of an electronic record, and as such, is subject to protection and disclosure under the PRA. The recent case of *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640 (D. Kan. 2005), is instructive.

In *Williams*, the plaintiff requested production of Excel spreadsheets in native format and the court ordered that the spreadsheets be produced in the manner in which they were ordinarily maintained. *Williams*, 230 F.R.D. at 644-56. The defendant produced the spreadsheets in electronic format but scrubbed the metadata and locked the cells, thereby preventing access to the underlying formulas. *Id.* at 644. At a discovery conference, the court ordered defendant to show cause why it scrubbed the metadata, locked the cells, and should not be sanctioned for such actions. *Id.* at 644-45. The court examined case law and the current and proposed Federal Rules of Civil Procedure, finding insufficient guidance on the issue of whether the production of electronically stored information as ordinarily maintained would require the production of metadata. *Id.* at 648-52. The court then relied on The Sedona Principles and comments for its holding that “[b]ased on these emerging standards, the Court holds that when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to

production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.” *Id.* at 652 (citing *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery*, Cmt. 12.a. (*The Sedona Conference Working Group Series*, July 2005 Version)).<sup>6</sup>

This much is common sense. If the law requires an agency to protect and preserve a requested record, then the agency must simply protect and preserve the requested record. The petitioners attempt to justify their illegal acts by analogizing to an “envelope” and arguing that in most circumstances the envelope can be discarded while the letter is retained. In most circumstances this may be true – unless the envelope accompanies the letter in a file and a citizen asks to see the letter, or unless the envelope contains unique and important data that must be retained. Certainly at the point a request is made for the letter, the law immediately executes and protects the integrity of the letter, along with the accompanying envelope not yet been destroyed, and which may contain valuable (to the requestor) routing or other information about the source of the letter. It is not the agency’s prerogative to determine whether the envelope has any retention value after a request for the record is made.

3. The O’Neill Court Did Not Expand The Definition Of Identifiable Public Records And The Petitioners’ Hypothetical Examples Do Not Create An Issue For Review Under RAP 13.4(b).

The Petitioners argue that the O’Neill decision has imposed an “unprecedented” and “onerous” new duty upon agencies to search for electronic

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<sup>6</sup> See also [http://www.thesedonaconference.org/publications\\_html](http://www.thesedonaconference.org/publications_html).



records when a request for an electronic record is made. To this assertion the Petitioners add that “the City has no current expertise or software to conduct a search.” Petition at 14. But it is common knowledge among computer users that searching a hard drive for records which contain the name “Fimia,” for example, is as simple as typing “Fimia” into a search engine, depressing the “enter” key, and letting the machine do the work.<sup>7</sup> In any event, the issue raised is purely factual, if not hypothetical, and the trial court, not this Court on review of a decision of the Court of Appeals, is uniquely situated to ascertain the facts.

4. The O’Neill Court’s Award Of Attorney Fees Is Consistent With, Not Contrary To, Settled Washington Law.

The Court of Appeals awarded the O’Neills’ attorney fees because they were the partially prevailing party. *O’Neill v. City of Shoreline*, 145 Wn.App. 913, 940, 187 P.3d 822, 834 (2008). This is consistent with well settled law governing attorney fee awards in PRA cases, and with the underlying qui tam nature of the Act. This Court made plain this ruling in *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117, 1125 (2005), when it held that “Fees, costs, and penalties are awarded for ‘any action in the courts.’” RCW 42.17.340(4). Nowhere in the PRA is prevailing party status conditioned on causing disclosure. *Id.*, at 103. Indeed, in dicta this Court once used this standard for identifying the prevailing party in PRA litigation: “‘one who has an affirmative judgment rendered in his favor at the conclusion of the entire case.’” *Spokane Research & Defense Fund v. City of Spokane*, 155

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<sup>7</sup> Conversely, searching for all records among an agency’s paper files that contain “Fimia” truly could be onerous, and may be beyond the scope of agency duty under the PRA.

Wn.2d 89, 104 n.11, 117 P.3d 1117, 1125 n.11 (2005), quoting *PAWSI*, 114 Wn.2d at 684, 790 P.2d 604 (quoting *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't*, 55 Wash.App. 515, 525, 778 P.2d 1066 (1989)).

Without attorney fee awards to prevailing citizens in PRA litigation, aggrieved citizens will have no incentive to serve as private attorneys general enforcing the Act, and the PRA will be without an effective enforcement mechanism. Indeed, awards of minimal penalties and *de minimus* fees unquestionably will chill future citizen participation under the auspices of the PRA, and eventually make a shambles of the Act. A private attorney general simply will not represent the public interest, as anticipated by the PRA, without a penalty incentive that is reasonably predictable and sufficient to compensate the citizen for their expense and trouble. The O'Neills have been put to great expense and trouble, and they prevailed in the Court of Appeals. Just as the law solidly provides that the taxpayers shall compensate agency attorneys for their defense of even recalcitrant agencies under the Act, so too does the law provide that taxpayers shall compensate citizen attorneys for their prosecution of recalcitrant agencies under the Act. The Petitioners' claim that the O'Neill court erred is unfounded and meets none of the criteria of RAP 13.4(b).

**B. If Review is Granted by this Court, Respondents Seek Review of the Following Additional Issues Pursuant to RAP 13.4(a) and (d):**

1. *Is metadata such a separate and distinct part of an electronic record that citizens shall be required to request metadata separately and explicitly when asking for an electronic public record, particularly where an affirmative act is required to redact metadata from the electronic record and where policies of liberal construction and agency assistance to the requestor favor complete disclosure?*

In *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993), the court was asked to resolve the question whether printing hard-copy paper versions of electronic records sufficiently preserved federal electronic records material consistent with the Federal Records Act. The court held that

the mere existence of the paper printouts does not affect the record status of the electronic materials unless the paper versions include all significant material contained in the electronic records. Otherwise, the two documents cannot accurately be termed "copies"--identical twins--but are, at most, "kissing cousins." Since the record shows that the two versions of the documents may frequently be only cousins--perhaps distant ones at that--the electronic documents retain their status as federal records after the creation of the paper print-outs, and all of the FRA obligations concerning the management and preservation of records still apply.

*Id.*, at 1283. Significantly the appellate court variously referred to e-mail hard copy printouts as "dismembered," "amputated," or "lopp[ed] off," where these print outs were missing transmission and receipt information, which in its view was "integral," "fundamental, and "meaningful," to the preservation of a complete electronic record under the Federal Records Act:

Our refusal to agree with the government that electronic records are merely "extra copies" of the paper versions amounts to far more than judicial nitpicking. Without the missing information, the paper print-outs--akin to traditional memoranda with the "to" and "from" cut off and even the "received" stamp pruned away--are dismembered documents indeed.

\* \* \* \*

In our view, as well as the district judge's, the practice of retaining only the amputated paper print-outs is flatly inconsistent with Congress' evident concern with preserving a complete record of government activity for historical and other uses.

*Id.*, at 1285.

Here the *O'Neill* Court held that Beth O'Neill did not ask for the metadata portion of the email until the third time she clarified her request to "see that email" by writing out that she wanted "Complete transmission/forwarding chain AND ALL metadata pertaining to this document." *Dec. O'Neill*, at Exh. G, (double underline in original). In view of the law as it is evolving, Ms. O'Neill request to "see that email" should have put the Petitioners on notice that she wanted to see the metadata associated with the email too.

2. *Should a plaintiff's loss at an optional show cause proceeding deprive that plaintiff of their statutory right under the PRA to further discovery and a trial?*

The Court of Appeals essentially resolved that a citizen who does not prevail in a show cause proceeding may have their case dismissed *in toto*, without any real opportunity through discovery and other procedural devices to prove the defendants wrong. *O'Neill v. City of Shoreline*, 145 Wn.App. 913, 938, 187 P.3d 822, 833 (2008). The Court seems to have based its decision on *Wood v. Thurston Cy.*, 117 Wn.App. 22, 27 (2003, Div. II), an unappealed Division II case that relied on the same erroneous assumptions about the nature of PRA litigation as did Division III in its 2004 decision of *Spokane Research and Defense Fund v. City of Spokane*, 121 Wn.App. 584 (2004, Div. III) ("*SRDF*").<sup>8</sup> The *Wood* court held that RCW 42.17.340 specifically outlined the

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<sup>8</sup> *SRDF* held that a plaintiff who failed to follow the show cause procedure outlined at RCW 42.17.340, instead opting for the summary judgment procedure of CR 56, could not recover attorney's fees and penalties upon proving a violation of the PDA. The Court of Appeals held that "[t]he statutory procedure serves the purpose of the PDA, and the trial court acted properly in denying relief outside the PDA's procedural framework." *Id.*, at 591. It concluded that such an interpretation was "consistent with the general rule that a civil rule

course of proceeding under the PDA action, so that RCW 2.28.150 did not apply. Importantly, both *Wood* and *SRDF* predated *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89 (2005) (en banc) (“*SRDF II*”), the appeal from *SRDF* resulting in reversal. In *SRDF II*, this Court concluded that the show cause proceeding of RCW 42.17.340 is optional. “Fees, costs, and penalties are awarded for ‘any action in the courts.’ RCW 42.17.340(4). The language allows for any kind of civil action.” *SRDF II*, at 104. Directly challenged was the assumption by the *SRDF* court that the show cause procedure of RCW 42.17.340 operated to the exclusion of the civil rules governing all civil proceedings. *SRDF II* clearly found that the show cause procedure was not the type of special proceeding identified in CR 81. *Id.* The court added:

¶ 31 The civil rules “govern the procedure in the superior court in all suits of a civil nature ... with the exceptions stated in rule 81.” CR 1. There is only one form of a civil action. CR 2. CR 81 states the civil rules govern to all civil proceedings “[e]xcept where inconsistent with rules or statutes applicable to special proceedings.” CR 81. ...

¶ 32 **All of these proceedings are statutorily defined, whereas actions under the PDA are not. The statute simply does not define a special proceeding exclusive of all others. When a statute is silent on a particular issue, the civil rules govern the procedure. *King County Water Dist. v. City of Renton*, 88 Wn.App. 214, 227, 944 P.2d 1067 (1997). Thus, normal civil procedures are an appropriate method to prosecute a claim under the liberally construed PDA.**

*Id.*, at 104-105 (emphasis added). In finding that the show cause procedure outlined at RCW 42.17.340(1) was not a statutorily defined proceeding sufficient

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will not apply if it is inconsistent with a special statutory proceeding. CR 81(a); (citations omitted).” *Id.*

to exclude application of the civil rules, it follows that *Wood* is implicitly overruled along with *SRDF*.<sup>9</sup> After all, if the show cause procedure is optional under *SRDF II*, then it cannot be a mandatory “course of proceeding” that is “specifically pointed out by statute.” Accordingly, the *Wood* court was wrong in holding that RCW 2.28.150 did not apply in providing a right to trial on disputed facts. In *SRDF II*, the court rejected *SRDF*’s view that intervention by a PDA claimant was improper. In dismissing *SRDF*’s interpretation that the PDA outlined a specific course of proceeding to the exclusion of all others, the Supreme Court applied CR 24 in light of the PDA’s silence. *SRDF II*, at 105. The purpose of the show cause mechanism is to provide an expedited means by which to obtain injunctive relief (viz., delivery of the records), without needing to wait over a year for a trial date. *SRDF*, at 591 (“The purpose of the PDA is to ensure speedy disclosure of public records.”)

As in the case of intervention (CR 24) and motions for summary judgment (CR 56), since the PDA says nothing about the right to trial (under CR 38 and CR 39), it follows that implying such a right to the extent allowed by the civil rules is equally proper. While RCW 42.17.340(1) (and its successor, RCW 42.56.550(1)) does appear to provide a more favorable burden of persuasion than CR 56 by forcing the defendant to show cause, the fact that a plaintiff should elect to follow the show cause procedure over CR 56 should not cause them to forfeit all other remedies provided by the civil rules, including trial. If that were the case, then RCW 42.17.340 would need to (a) expressly indicate

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<sup>9</sup> Such civil rules include CR 57 (Declaratory Judgments, noting that the right to jury trial may be demanded under the circumstances and in the manner provided by rules 38 and 39); CR 38 (Jury Trial of Right); and CR 39 (Trial by Jury or by the Court); as well as all discovery rules CR 26-CR 36.

that it was the only statutorily prescribed course of proceeding, and (b) that if the plaintiff lost the hearing, the suit would be dismissed with prejudice. RCW 42.17.340/RCW 42.56.550(1) does not state either of these propositions. Rather, *SRDF II* held that failing to statutorily define the show cause proceeding rendered CR 81's exception inapplicable. This meant that plaintiffs could still recover reasonable attorney's fees and statutory penalties through summary judgment or trial, not solely by show cause. RCW 42.17.340(4); *SRDF II*, at 104.

*SRDF II*'s interpretation comports with the "strongly worded mandate" for expressly liberal construction of the Act as a whole. *Telford v. Thurston County Bd. of Comm'rs*, 95 Wn.App. 149, 158, 974 P.2d 886, review denied, 138 Wash.2d 1015, 989 P.2d 1143 (1999); RCW 42.17.010. It would be inconsistent with the statutory purpose of the PRA, a citizen-driven initiative, to deny PRA requesters the same rights given to all other civil litigants and harshly restrict them to a live-or-die expedited, summary proceeding. No other show cause proceeding known to the Respondents purports to operate in such a punitive fashion.<sup>10</sup>

Even civil litigants losing on their motions for summary judgment are not precluded from re-noting CR 56 motions on new evidence or legal authority, as the O'Neills might have done upon consulting with a qualified forensics computer expert, or trying their case to a judge or jury. Their case is not

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<sup>10</sup> In all other circumstances, if the movant for injunctive relief (e.g., civil litigants seeking writs of replevin, restitution, attachment, or garnishment) loses at the show cause hearing, they do not forfeit their entire case and right to a trial on disputed facts. Rather, instead of receiving immediate relief, they must bide their time until full adjudication at trial.

dismissed simply by losing their initial dispositive motion.<sup>11</sup> Had the O'Neills brought a losing CR 12 motion on the pleadings or a losing CR 56 motion for summary judgment, their claims would still stand unless the defendants succeeded on their own dispositive motions or prevailed at trial. In this case, neither defendant filed a dispositive motion, and indeed, they only requested the case be dismissed in a response brief. As stated above, it is easier for a party to show probable cause than to prevail on the party's own summary judgment motion.

Importantly, the special unlawful detainer proceeding referenced by *SRDF II* does not eliminate the right to a trial where the plaintiff loses at the summary show cause hearing. Trial on disputed facts is required. In *Housing Authority of City of Pasco and Franklin Cy. v. Pleasant*, 126 Wn.App. 382, 394 (Div. III, 2005), the Housing Authority argued that the tenants were not entitled to a trial because the show cause hearing was the only summary proceeding required under the statute. But the Court of Appeals rejected this contention, noting that, “[a] show cause hearing is not the final determination of the rights of the parties in an unlawful detainer action.” *Id.*, at 394 (quoting *Carlstrom v. Hanline*, 98 Wn.App. 780, 788 (2000)).

A similar right to trial applies in replevin proceedings. While a plaintiff may seek a show cause hearing for a right to possession pending trial, there is no question that even if the plaintiff loses at the show cause hearing that she is

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<sup>11</sup> See CR 56(d) (if only partial summary judgment be granted, the court shall ascertain undisputed and disputed facts for resolution at trial); CR 56(b) (judgments presumed tentative where multiple claims or multiple parties involved and not all issues resolved on motion for summary judgment; leave must be obtained to certify as final a partial judgment, whether for or against the movant).

entitled to a trial on the replevin cause of action.<sup>12</sup> Other similar proceedings, injunctive in nature, allow for temporary relief pending trial.<sup>13</sup> Temporary restraining orders and preliminary injunctions often culminate in a show cause-type hearing. Where the proponent of the injunction loses at this hearing, however, that denial of her motion does not operate to bar her from seeking the same relief at a trial on the merits.

3. *Should this Court should issue a ruling clarifying that RCW 42.56.550(4) allows an award of costs and fees to “[a]ny person who prevails against an agency,” not to “any agency who prevails against a person?”*

The trial court ordered the plaintiffs to pay the defendants’ costs. The court’s award of costs to the responding agency violates RCW 42.56.550(4), which allows an award of costs and fees to “[a]ny person who prevails against an agency,” not to “any agency who prevails against a person.” The statute does not cut both ways. The fee shifting provision is unilateral, and designed to compensate private attorneys general, acting on behalf of all citizens of this state to ensure compliance with one of its more important statutes. If agencies are permitted to recover fees and costs in PRA litigation, the probable effect is to chill future citizen and attorney participation under the act, rendering the PRA functionally useless for all but the very wealthy.

While the Court of Appeals determined that the issue was moot, this court has the authority to review a moot issue where it presents issues of continuing public interest, or where the court determines that a decision on the

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<sup>12</sup> Ch. 7.64 RCW; RCW 7.64.035(3) (allowing court to enter final judgment at the show cause hearing only if the defendant does not raise an issue of fact requiring a trial on the issue of possession or damages).

<sup>13</sup> See, for example, prejudgment attachment (Ch. 6.25 RCW) and garnishment (Ch. 6.26 RCW).

merits is appropriate, considering “(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur.” *In re Swanson*, 115 Wn.2d 21, 24 (1990). The instant case meets both tests. There is no basis in the law for an agency to receive fees or costs. RCW 42.56.550(4). The Legislature did see fit to include a bilateral fee shifting provision in the Open Public Meetings Act, under RCW 42.30.120(2), but no such language exists in the PRA. Because this is an issue which both the appellants and the City contend can arise again, this court should issue a decision resolving the question.

#### **V. REQUEST FOR COSTS AND ATTORNEY FEES**

RCW 42.56.550(4), requires that “any person who prevails“ in a PDA case “shall be awarded all costs, including reasonable attorney’s fees, incurred in connection with such legal action.“ This provision is mandatory and it’s “strict enforcement . . . discourages improper denial of access to public records.” *SRDF II*, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005). Should the O’Neills prevail in this matter before this Court, they respectfully request costs and reasonable attorney fees as provided by statute.

#### **VI. CONCLUSION**

Because *O’Neill v. City of Shoreline, et al.*, is consistent with settled policy and law, the Petition for Review should be denied. In the alternative, if this Court grants review, the Court should permit briefing and argument on the issues the O’Neills raise.

DATED this 24<sup>th</sup> day of November, 2008.

/s/ Michael G. Brannan

Michael Brannan, WSBA #28838

Michele Earl Hubbard, WSBA #26454

Of Attorneys for Respondents