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NO. 59534-2-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BETH AND DOUG O'NEILL,

Appellants

v.

THE CITY OF SHORELINE, a Municipal Agency; and DEPUTY  
MAYOR MAGGIE FIMIA, individually and in her official capacity,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
HONORABLE BRUCE W. HILYER

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BRIEF OF APPELLANTS

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## ASSIGNMENTS OF ERROR AND RELATED ISSUES

1. The Trial Court erred when it *sua sponte* dismissed the plaintiffs' case on plaintiffs' motion for a show cause hearing and an in-camera review.

### Issues:

- a) Whether parties are entitled to normal civil procedures, including discovery, summary judgment, trial, and the like, in Public Records Act litigation?
- b) Whether Trial Court erred in allocating burdens of production and persuasion when dismissing plaintiffs' claims with prejudice?

2. The Trial Court erred in finding "all responsive records that exist have been provided to the plaintiffs."

### Issues:

Please see issues 1 (a) and (b).

3. The Trial Court erred in finding that "the defendants have established that no additional responsive records are available or contained on the computer hard drive of defendant Fimia and duplication of the hard drive for further in camera inspection is not warranted."

### Issues:

- a) Whether the Trial Court's finding that "no additional responsive records are available or contained on the computer hard drive of defendant Fimia" was an abuse of discretion when a city employee conducted only a very limited search of Fimia's hard drive and no expert for the plaintiff was allowed to forensically examine the hard drive.

4. The Trial Court erred in finding that "Plaintiffs' contention that any undisclosed documents are remaining (incl. on computer discs) is based on unfounded speculation and plaintiffs cannot overcome the City's show of proof that it has fully and completely responded in a lawful and appropriate manner."

### Issues:

- a. Whether plaintiffs were deprived of a meaningful opportunity to overcome the City's show of proof when the court *sua sponte*

dismissed the case?

5. The Trial Court erred when it failed to impose penalties and fees against defendants when the defendants could not produce the full electronic record they admittedly destroyed.

Issues:

- a. Whether plaintiffs are entitled to penalties and attorney fees where the evidence below established a PRA violation?

6. The Trial Court erred in denying plaintiffs' motion for reconsideration and finding:

- a. "No existing public records subject to disclosure are being withheld by the city;
- b. "No past violations of the PRA have been proven, and;
- c. "A 'show cause' hearing was not necessary to adjudicate this case." (Hilyer Order dated January 9, 2007, page 5.)

Issues:

Please see issues 1 (a) and (b), 3 (a) and 4 (a).

7. The Trial Court erred in awarding the prevailing agency its attorney fees and costs.

Issues:

- a. Whether an award of costs and/or fees favoring an agency in PRA litigation violates the letter and spirit of the Act?

- b. Whether the issue of fees favoring the agency is moot where defendants withdrew their request and the court did not alter the final orders, and where the issue is one which will affect citizens in this state again?

8. The Trial Court erred when, on reconsideration, it failed to vacate or rescind its award of fees.

Issues:

Please see issues 7 (a) and (b)

B. STATEMENT OF THE CASE

1. Introduction

This is a case of first impression. Appellants Beth and Doug O'Neill (O'Neills) filed a lawsuit under the Washington Public Records Act, RCW 42.56, seeking access to public records and alleging that the City of Shoreline and Deputy Mayor Maggie Fimia (Respondents), admittedly altered and then destroyed an electronic public record after the O'Neills had requested access to that record. The record in question was an e-mail message – including unique *metadata* associated with the message, in the custody of Fimia at the time the request was made.

On plaintiffs' motion for an order to show cause and for an in-camera inspection, the trial court sua sponte dismissed the case in its entirety. The court found, among other things, 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." CP141. Absent statutory or decisional underpinning, the trial court then awarded "costs" to the agency.

In this appeal the O'Neills contend 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.” While the Respondents did rescind their request for costs in a subsequent proceeding, the order technically still stands, and this specific issue, even if moot, is ripe for review.

2. Statement of Facts

Doug and Beth O’Neill requested access to public records held by the City of Shoreline on September 18, September 19, September 20, September 25, September 27, and October 16, 2006. CP 3-4; Dec. Beth 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:

. . . . I received a – an email today from a Ms. Hettrick and a Ms. O’Neill that made serious allegations. It wasn’t sent to me but came across my desk – serious allegations that council members were using their influence to affect this code enforcement issue. And, so I wanted to ask you Mr. Olander – has any council member – uh – tried to influence the – uh – this issue of the code, potential code, or allegations of a code violation at the Smith property?

(Dec Beth O’Neill, at 3; see also CP 21-22. Because Ms. O’Neill had sent no such email, she was “shock[ed]” by the Deputy Mayor’s statement and caught “completely off guard.” Id.

Ms. O’Neill then signed up to speak during the time set aside for public comment. Id. During Public Comment Ms. O’Neill disavowed

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<sup>1</sup> While the appellants ordered the Declaration of Beth O’Neill, the trial court “converted [the declaration] to an exhibit” which was apparently not contained in this court’s record. Counsel therefore refers to the declaration directly, and will provided updated references, if available, in a corrected brief.

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.

The next morning, September 19, 2006, Ms. O’Neill called the City of Shoreline and left a voice message for Deputy Mayor Fimia, again requesting a copy of the email. Dec Beth O’Neill, at 4. That afternoon Ms. O’Neill talked with a representative from the City – “Carol or Carolyn” – who advised the email was missing the “To” header. Id. Ms. O’Neill stated in return that she “wanted the entire email string.” Id. Later that same afternoon Carolyn Wurdeman sent an email to Ms. Fimia asking for “information about who the email [was] sent to.” Id. Dec Beth O’Neill, at 4; Dec Beth O’Neill, at Exhibit C). Ms. Fimia answered at 9:07 p.m. that night saying “[T]here was no ‘To’ line in the email.” Id.

On September 20, 2006, the O’Neills visited the Shoreline Clerk’s office to pick up the responsive public record. Dec Beth O’Neill, at 5) Upon arrival the O’Neills were asked by a city clerk to fill in a “Request for Disclosure of Public Record” form, memorializing Beth O’Neill’s September 18, 2006, verbal records request and her two subsequent (September 19, 2007) telephonic requests.<sup>2</sup> Dec Beth O’Neill, at 5, Dec Beth O’Neill, at

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<sup>2</sup> The plaintiffs requests have been cataloged by the defendants as follows: The “first” request (identified as PD-06-135) was made on September 20, 2006, formalized the O’Neills’ three verbal requests made on September 18 and 19, 2006. The “second” request (identified as PD-06-134) was made on September 20, 2007. The “third” request (identified

Exhibit D. Ms. O'Neill wrote on the form that she was seeking access to the "e-mail mentioned by Deputy Mayor Fimia at the 9-18 Council meeting." Id.

In response to their request, the clerk handed the O'Neills a printed record. Dec Beth O'Neill, at 16-17. The plaintiffs later claimed the document provided was only "a portion" of the email originally requested:

The email 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 Beth O'Neill, at 17).

Ms. O'Neill promptly submitted a second records request. In the second form she submitted to the city Ms. O'Neill elaborated on her initial requests, and asked for access to:

Email which Council Member Fimia mentioned at the City Council meeting held on 9/18/06. Maggie Fimia said that the email was from Beth O'Neill and Ms. Hettrick. We are asking for 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 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 Beth O'Neill, at Exh. F.

On September 25, 2006, Ms. O'Neill filed a third PRA request, again utilizing the City's required form. Dec Beth O'Neill, at

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as PD-06-138) was made on September 25, 2006. The "fourth" request (identified as PD-06-139) was made on September 27, 2006. The "fifth" and final request (identified as PD-06-154) was made on October 16, 2006. (Shenk dec. page 2, paragraph 4.

6. In her request Ms. O'Neill sought access to:

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.

Id. In the appropriate section of the form, Ms. O'Neill elaborated:

Any and all correspondence (including memos) relating to this email. Complete transmission/forwarding chain AND ALL metadata pertaining to this document.

Dec Beth O'Neill, at Exh. G, (double underline in original).

On September 27, 2006, Ms. O'Neill filed a fourth PRA request. In this request Ms. O'Neill sought:

Copy of the email that D.M. Fimia said she sent to "Ms. O'Neill through the city" in which she said she asked "whether or not she [Ms. O'Neill] said these things that were attributed to her." I would like any and all information relating to this email, to include all metadata, memos, and any other correspondence relating to this document.

Dec Beth O'Neill, at Exh. I.

Two days later, on September 29, 2006, the City responded to Ms. O'Neill's third and fourth requests. Dec Beth O'Neill, at 7; Dec Beth O'Neill, at Exh. J. In its response, the City provided an "installment" consisting of material the City claimed was responsive to plaintiffs' third and fourth PRA requests, made on September 26, 2006 and September 27, 2006, respectively. In its letter the City wrote that it "anticipate[d] that any remaining responsive records will be available by October 5, 2006." Id. The City advised that one responsive record was attorney-client privileged and

therefore “exempt from public disclosure,” and that Deputy Mayor Fimia would be bringing her computer into the City where a member of the City’s IS department would conduct a search of the hard drive for “any other documents relating to your request.” Id.

In her Declaration of Beth O’Neill, dated November 20, 2006, the plaintiff describes the materials the City provided in its initial installment:

- A copy of the disputed email which Maggie Fimia pulled up on her zip.com email account and forwarded to herself at 10:29PM on 9/18/06 - 29 minutes after the Council meeting had ended where I had first asked to see a copy of the email and Ms. Fimia had agreed to produce it the following morning. The print out masked the “to” field. Ex. J, p. 1.
- A copy of an email sent by Maggie Fimia to the Council Members, Bob Olander (City Manager), Ian Sievers (City Attorney), and Carolyn Wurdeman, on September 19, 2006 at 10:14AM. Ms. Fimia added a subject heading of “Email alleging improper behavior by “certain City Council members” and then stated that the disputed email contained allegations made by me and that, if I had not made these statements, she would be happy to apologize. . . . Ex. J, p. 3.
- An email from Ms. Wurdeman to Ms. Fimia on September 19, 2006 at 1:27 p.m. asking for the “to” field information, Ms. Fimia’s response at 9:07 p.m. on September 19, 2006 that there was no “to “ in the email, and Ms. Wurdeman’s September 20, 2006 email at 9:50 a.m. to Ms. Fimia asking for the forwarding chain and source of the email to Ms. Fimia. Ex. J, pp. 4, 6.
- An email from councilmember Ron Hansen to Deputy Mayor Fimia dated 9/20/06 10:43AM. . . . Ex. J, p. 9.
- A copy of Councilmember Hansen’s email forwarded by Ms. Fimia at 1:46 p.m. to Representative Maralyn Chase (the State Legislative Representative for our Legislative District) and

Lila Smith, the property owner. Ex. J, p. 12. . . .

- An email from Lisa Thwing to Maggie Fimia dated September 24, 2006, 2:24PM asking Ms. Thwing to “resend the original” of the September 14, 2006 email to Fimia. Ex. J, p. 19. . . . An email from Ms. Fimia dated September 25, 2006 at 11:53 a.m. to City Attorney Ian Sievers purporting to attach the “original” email - this one indicates it was sent by Ms. Thwing to Ms. Thwing on September 18, 2006 at 7:55 a.m. Ex. J, p. 21.
- An email from Lisa Thwing to Maggie Fimia dated September 25, 2006 at 1:06 p.m. . . . Ex. J, p. 23.
- Metadata of an email forwarded on September 26, 2006 at 12:17 p.m. from Ms. Fimia’s email address to Ms. Fimia’s email address in reply to Ms. Thwing’s email address. Ex. J. p. 27. . . .
- An email from Peter Henry which is dated September 26, 2006 (Ex. J, p. 31). . . .

Dec Beth O’Neill, at 7; Dec Beth O’Neill, at Exh. J.

On October 3, 2006, the City provided its “last installment” of records responsive to plaintiffs’ requests. As to the original email originally requested by Ms. O’Neill on September 18, 2006, the City wrote:

The City’s IS Department conducted a search for the original email from Lisa Thwing dated September 18, 2006. . . . The email is no longer on Deputy Mayor Fimia’s computer.

Dec Beth O’Neill, at 7; Dec Beth O’Neill, at Exh. L. The City went on to mention a second record, a September 18, 2006 “confidential communication” between a city official and the official’s attorney, that the City did not release. *Id.* The plaintiffs later asserted in court that the City did not cite any statutory exemption in their letter denying access to this record.

Id.

The City finally wrote that it had produced all documents related to the September 25, 2006 and September 27, 2006 public disclosure requests, and “considers the requests closed.” Id. As declarations later filed by the City averred, the City believed it had properly and thoroughly searched Maggie Fimia’s hard drive and could not locate the email Ms. Fimia claimed she deleted, and any error relating to lost metadata was corrected when a copy of the original email was provided. *See e.g.* CP19-23, Declaration of Joel Taylor, dated November 29, 2006; CP 29-30; Declaration of Tho Dao, dated November 29, 2006, CP 24-28.

Shortly after receiving the City’s October 3, 2006 letter, Beth O’Neill paid a visit to the Shoreline City Attorney. In her declaration filed later in court, Beth testified that an Assistant City Attorney, Ms. Flannery Collins:

said that she knew this was ‘frustrating, but what else could they do? The email was no longer on Maggie Fimia’s computer.’

Dec Beth O’Neill, at 10. Ms. O’Neill told Ms. Collins that she did not accept the City’s answer and did not consider the matter closed. Id.

The next day, October 4, 2006, Beth O’Neill followed up a phone call with a letter to Carol Shenk, the Records and Information Manager for the City of Shoreline. Id.; Dec Beth O’Neill, at Exhibit M. In her letter Ms. O’Neill summarized the facts pertaining to her public record requests, and

declared that “from an ethical and legal standpoint, [Maggie Fimia’s] actions need to be addressed.” Id. Ms. O’Neill asked that her letter be forwarded to the City Attorney’s office and to members of the City Council. Id.

On October 9, 2006, Ms. O’Neill telephoned the City Attorney, Ian Sievers. Id. Ms. O’Neill recounts that Mr. Sievers stated “it was ‘kind of funny’ what happened but that Maggie Fimia had told him that she had had problems with her computer.”<sup>3</sup> Id., at pp. 10-11. In return Ms. O’Neill told Mr. Sievers that she “required nothing less than the full transmission chain of the email.” Id.

On October 10, 2006, Mr. Sievers telephoned Ms. O’Neill, and in responding to her request for “nothing less than the full transmission chain of the email” made the day before, stated that the information the City provided thus far was “as good as it gets.” Id.

Less than a week later, on October 16, 2006, Ms. O’Neill sent her fifth PRA request. Id. In this request Ms. O’Neill specified she was seeking access to:

Any and all communications related to the Public Disclosure Requests I previously made through the City of Shoreline (PD 06-138 , PD 06-139). This current request includes, but is not limited to, any and all email/voicemail communications that were sent/made relating to the above-listed Public Disclosure Act Requests.

Any and all emails/voicemails/memos relating to the email that

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<sup>3</sup> Apparently no objections were made to hearsay type statements, nor was this allegation denied.

Deputy Mayor Fimia stated she received from me (her statement made 9/18 during City Council Meeting).

Any and all communications/documents/files/memos/emails/voicemails to/from City Staff relating to the issue of the email attributed to me by Deputy Mayor Fimia. Also, any related documents to this email (9/18/06 attributed to me by Fimia) that may be in City of Shoreline computer system including but not limited to the full transmission of that email.

Id., Exhibit N.

On October 24, 2006, the City produced records responsive to Ms. O'Neill's October 16, 2006 (fifth) PRA request. Id., Dec Beth O'Neill, at Exhibit O.

On October 25, 2006, the City supplemented its October 3, 2006 response to Ms. O'Neill's September 27, 2006 (fourth) PRA request. Id. See Exhibit P. In a cover letter to Ms. O'Neill, Carol Shenk, on behalf of the City wrote:

I am writing in response to your September 27, 2006, request for a copy of the e-mail that during the September 25, 2006, Council Meeting, Deputy Mayor Fimia stated that she sent to you "through the City," and any and all information relating to this e-mail to include all metadata, memos, and any other correspondence relating to this document.

This letter is to confirm that the City of Shoreline has no record of an email sent to you from Deputy Mayor Fimia.

Id. Ms. O'Neill picked up the released records that same day. Dec Beth O'Neill, at 11.

Sometime during October, 2006, the O'Neills visited the City of Shoreline's offices where they were permitted to review the City's file related

to their public records requests. Dec Beth O’Neill, at 12. At this time the O’Neills discovered one record that had not been provided by the City, an email from City Attorney Ian Sievers to Deputy Mayor Maggie Fimia sent September 22, 2006 at 3:17 p.m. Id. Upon request the City provided the O’Neills a photocopy of the email on the spot. Id. See also Exhibit Q. The September 22<sup>nd</sup> Sievers email contained attorney-client privileged material, and the City later advised the court that “[i]n October 2006, this September 28, 2006 attorney-client privileged email was mistakenly released to Beth O’Neill.” CP 33.

On November 21, 2006, frustrated with what they perceived as “elected local officials lying to us and the public and breaking the law,” the O’Neills filed their Complaint for Disclosure of Public Records. CP 3-9.

### 3. Procedural History

In their complaint the O’Neills named as defendants the City of Shoreline, a Municipal Agency, and Deputy Mayor Maggie Fimia, individually and in her official capacity. Id. The Complaint laid out the following salient facts, which for the convenience of this court, are recited at some length here:

- **D. Agency Withholds and Destroys Public Records [and] Denies Release of Records Requested.**

The City has affirmatively denied as allegedly exempt two records – a September 18, 2006 email and a September 23, 2006 email – neither of which are exempt and not exempt in their entirety.

Upon information and belief, the City is withholding additional responsive records without acknowledging that it is withholding such records or citing any exemption or grounds for withholding such records. The City has destroyed one or more other documents after the O'Neills issued public record requests for them. The City has informed the O'Neills that it cannot produce certain records responsive to their requests which existed at the time of their requests and were required to be maintained at present based on relevant retention schedules, as the records have been improperly destroyed.

• **E. Agency and Deputy Mayor Destroy Public Records.**

1. On September 18, 2006, Plaintiff Beth O'Neill made a Public Records Act request to Deputy Mayor Maggie Fimia and the Shoreline City Council during a Council meeting. During the meeting Deputy Mayor Maggie Fimia referred to an email allegedly sent by Ms. O'Neill allegedly accusing the Council of improper conduct. Ms. O'Neill immediately made a request for that email and denied authoring it. Deputy Mayor Fimia agreed to produce the email the following day. The Council meeting adjourned at 9:58 p.m. on September 18, 2006. Deputy Mayor Fimia retrieved the email to which she referred on her home computer at 10:29 p.m. on September 18, 2006 and redacted and printed out a copy of it masking the "to" header from the message.

2. Ms. O'Neill repeated her Public Record Act request twice to Ms. Fimia by voicemails on September 19, 2006. At 10:14 a.m. on September 19, 2006, Fimia emailed Council members and staff describing the email and again attributing it to Ms. O'Neill. On September 19, 2006, City personnel informed Plaintiffs that the email she had requested under her Public Records Act request of September 18, 2006 was available for inspection. The email, printed out by Fimia at 10:29 p.m. on September 18, 2006, has been redacted to mask the "to" header. Fimia was asked to bring her home computer to the City to retrieve the missing email or emails. The City subsequently informed the O'Neills that the emails – which existed on September 18 and 19, 2006, could not be retrieved and allegedly had been destroyed. Ms. Fimia subsequently asked an individual known to her who she claimed was the alleged sender to "re-send" the original email to her.

3. Defendant Deputy Mayor Maggie Fimia and the City of Shoreline have violated RCW 40.16.010 by willfully and unlawfully

removing, altering, mutilating, destroying, concealing or obliterating a public document. Violations of RCW 40.16.010 is (sic) a class C felony.

4. Defendant Fimia and the City of Shoreline destroyed and concealed the email to hide the true identity of its sender and to conceal the falsity of Fimia's claim that Plaintiff Beth O'Neill was the author and sender of the message.

• **F. Agency Refuses to Identify Records Withheld and Explain How Exemptions Apply.**

The City has not adequately identified records being withheld, any exemptions being cited as the basis for withholding, and an explanation how the exemptions apply. Other than two emails – September 18, 2006 and September 22, 2006 – the City has not disclosed any detail, including the number of records, regarding the documents being withheld or destroyed.

• **G. Agency Delays Release of Records Requested.**

The City needlessly and improperly delayed production of the records.

• **[H.] The O'Neills Attempts to Resolve Matter Without Litigation.**

The O'Neills repeatedly attempted to obtain the records without resort to litigation. The O'Neills have given the City every opportunity to provide the requested records. The City persists in refusing to release records or provide an explanation of what is being withheld or explain how records which existed at the time of the requests were allowed to be destroyed.

CP 5-7. The complaint recited applicable law, and sought attorney fees and statutory penalties. CP 7-9. Presumably because the court dismissed the case, the defendants did not file an answer to the complaint.

Along with their complaint, the O'Neills filed a "Motion for an Order to Show Cause" and a "Motion to Lodge Public Records For In Camera

Review And For Preparation Of A Detailed Index Of Records Withheld And Exemptions Alleged.” CP 10-11, 12-16. In their motion seeking an in-camera review, the O’Neills sought, *inter alia*, to compel the defendants to “provide the Court with an exact duplicate of the hard drive of Deputy Mayor Maggie Fimia’s home computer,” and for “a detailed index identifying all responsive records being withheld or allegedly destroyed, the exemption if any being cited for each, and the date of destruction and alleged authority for destruction of any records destroyed.” CP 12-13.

In their Motion for an Order to Show Cause, the O’Neills sought an order requiring 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. The motions were accompanied by a lengthy declaration of Beth O’Neill, to which numerous exhibits were attached. Dec Beth O’Neill. The matter was set for hearing on December 1, 2006, before the Hon. Bruce Hilyer.

On November 29, 2006, the defendants filed a response to the plaintiffs’ two motions. CP 40-52. Accompanying their Response to plaintiffs’ motions were five declarations, including declarations of Maggie Fimia, Joel Taylor, Carol Shenk, Tho Dao, and the Shoreline City Attorney, Ian Sievers. CP 14-23, 29-30, 31-36, 24-25 and 37-38, respectively. Notably the defendants argued 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. The City complied with the retention schedule by printing out the original September 18, 2006 email, filing it and retaining it.” CP 49. The City then argued:

Even if somehow the blind copied recipient information was available in a record received by the City, it would not be considered a “public record.” To be a “public record,” a document must relate to the “conduct of government or the performance of any governmental or proprietary function.” RCW 42.17.020(41). Private citizens uninvolved and unaware that they were included as recipients of an email being sent the Deputy Mayor would not be considered information related to the conduct of government or the performance of any governmental or proprietary function.

Id. See also CP 36.

The defendants also indicated they were not opposed to an in-camera review of “the exempt record” – which they attached to the judge’s working copy of their brief – and they sought denial of the plaintiffs’ two motions stating that “an *in camera* review of the Deputy Mayor’s hard drive would be a poor use of the court’s time as the City has provided all existing documents to Plaintiffs, with the exception of one attorney-client privileged document.” CP 40. The defendants stated that the City had produced “a total of sixty-two (62) documents, and withheld two (2) as attorney-client privileged” in response to the plaintiffs’ public records requests. CP 41. The defendants noted that

. . . in addition to the exempt documents, the City also could not locate one responsive document in its original form (the original September 18, 2006 email from Lisa Thwing), but was able to provide Plaintiffs with a forwarded version of the email as well as a duplicate copy of the email. . . .

CP 42; CP 34

Deputy Mayor Fimia testified in her declaration at length about her receipt and processing of the September 18, 2006 email (hereafter the “Thwing email.”):

3. I use both the City of Shoreline’s email system and my own private email, “zipcon,” for City business emails. I also use my private email, “zipcon,” for personal emails.

4. On September 18, 2006, I received an email on my personal computer from Ms. Lisa Thwing, a citizen. Thwing forwarded this email from Diane Hettrick dated September 14, 2006. . . . Thwing did not include any information or comments, but only the text from the Hettrick email.

5. The original email did not list the recipients of the Diane Hettrick email. The original email listed the recipient of the Lisa Thwing email as “Lisa Thwing.” No other recipients were listed on the original email from Lisa Thwing.” It is my understanding that Lisa Thwing sent the email to herself and blind carbon copied (“bcc”) all other recipients and, as a result, only her name and email address would show up as a recipient, while any other recipients, including myself, would not show up as recipients, on the email. My husband’s email address ([mcdonald9-1@zipcon.net](mailto:mcdonald9-1@zipcon.net)) would also appear as metadata since he set up our zipcon network account.

Id.

Ms. Fimia further wrote that after she returned from the September 18, 2006 City Council meeting at which Ms. O’Neill

requested a copy of the Thwing email, Ms. Fimia “forwarded the original email from Lisa Thwing to my email account.” CP 2.

In forwarding the email, I removed the “to” and “from” line listing Lisa Thwing as the sender and recipient in order to protect Ms. Thwing from potential public exposure. I did not remove any additional information from the email.

Id.

The next day, September 19, 2006, Ms. Fimia sent the “forwarded email” to various individuals in City government. Id. Ms. Fimia testified that “this email did not include the sender or recipient information of the original email (i.e. Lisa Thwing), nor did it include the sender or recipient information of the forwarded email (i.e. Maggie Fimia). It only included the September 14, 2006 email from Diane Hettrick.” Id. Ms. Fimia goes on to state:

On September 20, 2006, I understood that Ms. O’Neill desired the sender/recipient information of the September 18, 2006 email. I attempted to locate the original email I had received from Lisa Thwing, but could not locate it in my email folders.

Id., page 3 par.12. On or about September 24, 2006, Ms. Fimia telephoned Lisa Thwing and requested a copy of the original email. Id. Ms. Thwing promptly complied. Id.

Ms. Fimia then “did finally relocate . . . what appeared to be the original email received from Ms. Thwing.” Id., par 14. She forwarded this email to Ian Sievers, the Shoreline City Attorney. Sometime thereafter Ms.

Fimia learned that she “would need to also provide the “metadata” from the original email.” Ms. Fimia “was not familiar with that term, or with the fact that the electronic version could have additional information on (sic) it.” Id, par. 15. Ms. Fimia went back to her computer again to locate the original email “in order to provide the metadata, but [she] could not locate it.” Id., par. 16. Ms. Fimia then concluded that she had “inadvertently deleted the email.” Id. Paragraph 16.

On September 29, 2006, Ms. Fimia received from Lisa Thwing another copy of the original email, which she then provided, “along with [the] email’s metadata, to city staff for distribution to Ms. O’Neill.” Id. Par. 18.

Other City officials described for the court their efforts at locating or reconstructing the original email or a copy of the original email. In his Declaration dated November 29, 2006, Joel Taylor, a Computer and Network Specialist for the Information Services Department of the City of Shoreline, discussed his efforts at locating or salvaging the missing email on Maggie Fimia’s computer hard drive:

I searched the deleted items folder and the inbox of the Deputy Mayor’s email system. I searched the “from” field in the deleted items folder and the inbox for all emails from “Lisa Thwing.” Using the search tool, I searched for the subject of the email: “Current city council meeting being broadcast this week.” I was unable to locate the original September 18, 2006 email from Lisa Thwing in the deleted items folder and the inbox.

I also could not retrieve the September 18, 2006 email from Lisa Thwing from the City's back-up drive since the Deputy Mayor received this email on her own personal email system, and not the City's email system.

CP 30.

Tho Dao, Manager of Information Services for the City, discussed his efforts at complying with the O'Neill's public records requests in a declaration dated November 29, 2006. CP24-25. In his declaration Mr. Dao states that he sent an email to himself and blind carbon copied ("bcc") several recipients, including Maggie Fimia at her personal (as opposed to City) mail address. Id. Mr. Dao subsequently printed out the email he sent from Ms. Fimia's computer, "along with the metadata/source information for that email." Id. The result, according to Mr. Dao, was that the email he printed out:

did not show any of the "bcc" recipients. [citing exhibit] Further, the metadata/source information for the email only showed [Maggie Fimia] as the recipient, as well as her husband, [who] set up the account. The metadata/source information did not show the other "bcc" recipients.

Mr. Dao stated finally that the City did not have software necessary to copy the hard drives of Macintosh computers, which the Deputy Mayor owned. Id.

In her declaration dated November 29, 2006, Ms. Carol Shenk, the Records and Information Manager for the City, identified the O'Neill's five public disclosure requests, characterizing them as "closely related to each

other, [such that] each subsequent request expanded on the previous request.”

CP 31.

Ms. Shenk went on to outline how the City responded to each of the requests, and stated that the city had provided 62 pages and exempted only two records, one of which was mistakenly released to Beth O’Neill. CP 32. As to Ms. O’Neill’s initial request for access to the September 18, 2006 email, Ms. Shenk stated that “The City produced the requested document to plaintiff on September 20, 2006.” Id.

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

(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 denied their motion to lodge public records for an in-camera review. Id. In a handwritten annotation, the Court further found that:

Plaintiffs’ contention that any undisclosed documents are remaining (incl. on computer discs) is based on unfounded speculation and plaintiffs cannot overcome the City’s show of proof that it has fully and completely responded in a lawful and appropriate manner.

Id. The Court finally 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.

On December 15, 2006, the plaintiffs filed a motion for reconsideration. CP 306-17. In the body of their motion the plaintiffs pointed out to the Court that their complaint included a claim based on the “admitted destruction of public records after a request for them was made and still pending,” CP 307. The plaintiffs wrote further that:

The evidence provided to the Court shows that (1) Defendant Fimia altered public records to be provided to Plaintiffs in response to their PRA request by removing the “to” and “from” fields on an email [citation], (2) Fimia lied to City personnel and said the email did not have a “to” and “from” field [citation], (3) Fimia was instructed by City personnel to bring her computer into the City so the City could retrieve the metadata and to and from information which was responsive to Plaintiffs’ requests [citation], and (4) Fimia deleted the email from her computer after the O’Neill request and before she brought the computer in to the City. [citation]

Id., p. 2.

The plaintiffs objected to the Court’s *sua sponte* dismissal of their lawsuit, arguing that such dismissal violated their rights to due process and to a hearing or trial. CP 308. The plaintiffs’ also argued that the Court’s award of costs to the prevailing agency was against the weight of authority, and against the policy of the Public Records Act, which provides a “one-way fee and cost shifting provision . . . intended to encourage broad disclosure and to deter agencies from improperly denying access to public records.” Id. The plaintiffs supported their motion with declarations of attorneys and other individuals with knowledge about the PRA. *See e.g.* Declarations of Toby Nixon, Dwayne Swinton, Michael Brannan, CP 149-153, 154-169, 158-163, respectively.

In return, the defendants argued that dismissal was appropriate, because a “hearing with live witnesses is not required to be held in conjunction with a public records disclosure lawsuit; rather the court has

discretion in determining whether the hearing is required or whether a decision can be made on the written record.” CP 327.

The defendants also argued that they had no duty to retain or produce electronic records, basing their argument on WAC 434-635-050. The defendants urged that preservation of the original email “by printing it out and providing a hard copy to the Plaintiffs” was sufficient under the Act, and that even if metadata had been provided, the Plaintiffs still would not have received the information they sought. Finally, the City pointed out that it had only sought statutory attorney fees of \$200, and costs under CR 54(a) and RCW 4.84.060. “Although the statute does not explicitly state that an agency cannot collect costs and attorney fees, and although there do not seem to be any reported cases on whether an agency successful in its defense of a lawsuit by a requesting party can obtain attorney fees, the City will drop its request for costs and attorneys fees....” Id., page 8.

In their reply, filed on or about January 8, 2007, the plaintiffs reiterated that a show cause proceeding under the PRA should not pre-empt a requestor’s right to a trial, and that the defendants should not be the final arbiter of whether “plaintiffs’ requests for the records were worthy or whether plaintiffs would have learned anything from them.” CP 341. The plaintiffs also urged, in a factual declaration provided by the undersigned, that:

The City apparently [makes] a false distinction between the record originally requested, and the “metadata” associated with the record. There is no difference between the two, however, and I urge this court not to accept this misleading argument.

Metadata IS part and parcel of many electronic records, and any request for an electronic record necessarily includes a request for the metadata. While the law in this jurisdiction regarding electronic records is evolving, the law as to public records is clear. RCW 40.14.010 requires that

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. . . (emphasis added)

*See also* AGLO 1981 No. 18; RCW 42.17.020(36). Thus if the record requested was electronic and contained metadata – as many electronic records do – then production of anything less than the full electronic record would not place a responding agency in compliance with the PRA’s mandate of full disclosure.

By analogy, if a responding party is asked in litigation to produce a Microsoft Word document resident on that party’s computer hard drive, and that electronic document contains large sections of hidden text (text formatted as “hidden” so that the information is readable on screen, but invisible when the document is printed out), then obviously the responding party must provide the record in its entirety, hidden text and all, “regardless of physical form or characteristics.” RCW 40.14.010; RCW 42.17.020(36). Failing to produce the hidden text, like failing to produce metadata associated with an electronic record, does not give the requesting party access to the full record, and could effectively constitute spoliation of

evidence under the rules of discovery.

CP 346-47.

On January 9, 2006, the court entered its final order denying the plaintiffs' motion for reconsideration and including the following findings.

- a) "No existing public records subject to disclosure are being withheld by the city;
- b) "No past violations of the PRA have been proven, and;
- c) "A 'show cause' hearing was not necessary to adjudicate this case.

CP 352. The Court did not rescind or vacate its earlier award of costs favoring the defendants. On February 8, 2007, plaintiffs timely filed this appeal.

## C. ARGUMENT

### 1. Standard Of Review: This Court Reviews De Novo The Trial Court's Order Of Dismissal

Courts conduct a *de novo* review of agency actions challenged under the portions of the PRA at issue in this case. RCW 42.56.550(3). Where the record consists entirely of declarations, affidavits and other documentary evidence, the appellate court stands in the same position as the trial court and is not bound by the trial court's factual determinations. Progressive Animal Welfare Soc'y v. University of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994) ("*PAWS II*"). In such instances this court can and should engage in the same inquiry as the trial court and review all of the facts in the record

together with the trial court's findings *de novo* and make an independent determination of all matters found to be in error. Ames v. City of Fircrest, 71 Wn.App. 284, 292, 857 P.2d 1083 (1993) (with complete record, appellate court can decide issues of fact and law).

In exercising review of agency action the statute commands that:

Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550(3) The statute further directs Courts that "The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy." RCW 42.17.251; *PAWS II, supra* at 251.

2. The Trial Court Abused Its Discretion When It (1) Held Against The Clear Weight Of The Evidence That The Defendants Did Not Violate The PRA When Defendants Admitted Altering And Destroying A Public Record After The Record Had Been Requested, and; (2) Sua Sponte Dismissed The Case Thereby Depriving Plaintiffs Of The Right To Adjudication

- a. Abuse of Discretion Standard

An abuse of discretion occurs when a court's decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Doe I v. Washington State Patrol, 80 Wash.App. 296, 302, 908 P.2d 914 (1996); ACLU v. Blaine 95 Wash.App. 106, 975 P.2d 536 (1999). In evaluating whether a trial court has abused its discretion, our Supreme Court, in the

time-honored case of State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971), articulated a two-part test:

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

Id., at 26. Under the second prong of the Junker analysis, which in the context of public records litigation provides a logical touchstone upon which a determination of “reasonableness” is based, this court must review the trial court’s decision in light of the compelling interests of those affected by the decision, and the “comparative weight of the reasons for and against the decision one way or the other.” Junker, *supra*, at 26.

“The comparative and compelling public or private interests of those affected by the order or decision” in PRA litigation, are nothing less than “the sovereignty of the people and the accountability to the people of public officials and institutions.” PAWS II, 125 Wn.2d 243, 250-51, 884 P.2d 592 (1994); RCW 42.56.030. Our legislature, citizenry and the appellate courts have so extolled the essential relationship between the Public Records Act

and the maintenance of a free democratic society as to leave no doubt that any judicial decision threatening the functioning of the Act should be corrected:

The Public Disclosure Act was passed by popular initiative and stands for the proposition that, “full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.”

PAWS II, 125 Wn.2d 243, 250-51, 884 P.2d 592 (1994), quoting RCW

42.17.010(11). As our high court has declared, “the Legislature leaves no doubt about its intent” in passing the Public Disclosure Act:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. . . . RCW 41.17.251.

Id., 125 Wn.2d at 260.

b. The Trial Court Abused Its Discretion When It Held Against The Clear Weight Of The Evidence That The Defendants Did Not Violate The PRA

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 City’s own evidence established that it violated at least this provision of the Public Records Act by the alteration and deletion of an email after a request was made for that email,

and by its apparent failure to erect adequate protocols to ensure that city employees working from home “protect public records from damage or disorganization.” RCW 42.56.100. In view of the evidence presented below, the O’Neills had a statutory right to a show cause hearing, and, if desired, to discovery and a summary judgment proceeding or a trial.

RCW 42.56.550 authorizes citizens to bring a motion in the superior court requiring the agency to show cause why it has denied inspection of the public record(s) sought. RCW 42.56.550(1). The burden of proof is on the agency to show that its denial is in accord with a statute which exempts, prohibits or limits disclosure of the public record. *Id.* Review by the court in this instance is *de novo*; the court is not required to defer to the agency’s decision. RCW 42.56.550(3). The court is required to take into account the broad public policy of the Public Records Act favoring disclosure, even if such disclosure “may cause inconvenience or embarrassment to public officials and others.” *Id.*

Here the O’Neills requested an identifiable public record which the Deputy Mayor admitted she altered to protect someone from “public exposure.” This admission alone established a violation of the Act, sufficient to entitle the plaintiffs to per diem penalties and attorney fees. As established by the City’s own declarations and other materials:

- On September 18, 2006, upon returning home from the City Council

meeting where Beth O'Neill had requested a copy of an e-mail mentioned by Deputy Mayor Maggie Fimia, Fimia altered a public record:

**“I removed the “to” and “from” line listing Lisa Thwing as the sender and recipient in order to protect Ms. Thwing from potential public exposure.”**

CP 21; O'Neill Dec., Ex. C p.1) (emphasis added)

- On September 19, 2006, at 10:14 a.m., Fimia forwarded an altered copy of the original email to various City officials, including Robert Ransom, Carolyn Wurdeman, and Ian Sievers. Without disclosing that she had altered the original, Fimia wrote to her colleagues:

Council, Bob, Carolyn and Ian:

Below is the forwarded e-mail that I received yesterday. . . .

(CP 21; O'Neill Dec., Exhibits C and J). But the forwarded email lacked the original metadata, and most conspicuously, the modified email was missing the “To” field:

**From:** Diane Hettrick <mailto:dhettrick@earthlink.net>  
**Sent:** Thursday, September 14, 2006 11:10 PM  
**Subject:** Current city council meeting being broadcast this week

Id.

- On September 19, 2006, at 1:27 p.m., Carolyn Wurdeman wrote to Fimia:

Hi Maggie, I just spoke with Ms. O'Neill. She is requesting information about who the email below was to. Do you have that information for Ms. O'Neill. Thanks. Carolyn

O'Neill Dec., Exhibit C and J).

- On September 19, 2006, at 9:06 p.m. Fimia responded to Wurdeman. Instead of admitting, as she did later in her declaration, that she “removed the ‘to’ and ‘from’ line listing Lisa Thwing as the sender and recipient in order to protect Ms. Thwing from potential public exposure,” Fimia instead wrote:

“Carolyn, That is the original e-mail from Diane Hettrick.  
**There was no “To” line in the e-mail.”**

CP 121 (O'Neill Dec., Ex. C p.1). (emphasis added)

- The City then instructed Fimia to bring her computer into the City so the City could retrieve the metadata and to and from information which was responsive to Plaintiffs' requests. (Taylor Dec. ¶3, O'Neill Dec. ¶ 24 & Ex. J).
- Fimia declared she “inadvertently deleted” the email from her computer after the O'Neill's request and before she brought the computer in to the City. Fimia Dec. ¶16.
- A member of the City's IS Department conducted a search of Fimia's computer limited to the “deleted items folder and the inbox” and “was unable to locate the original September 18, 2006 email. . . .” CP 29-30, ¶4.

In view of the foregoing admissions the Court should have authorized a show cause hearing to allow the plaintiffs the right to present expert and

other evidence and explore the outstanding issues further. Instead the court resolved that “no additional responsive records are available or contained on the computer hard drive of defendant fimia and duplication of the hard drive for further in camera inspection is not warranted.” The court also held, without allowing plaintiffs the opportunity to examine Fimia’s hard drive and against the weight of law as it is developing, that “plaintiffs’ contention that any undisclosed documents are remaining (incl. on computer discs) is based on unfounded speculation.” The court then dismissed the case, depriving the plaintiffs of their statutory right to access public records, and to their right to a hearing or trial on the substantive and unresolved issues before the court.

- c. Plaintiffs in this PRA litigation, like any other litigant, are entitled to conduct discovery, including retention of an expert to perform a forensic evaluation of Fimia’s hard drive

The trial court entertained impermissible and erroneous factual assumptions inconsistent with the evidence when the court dismissed the O’Neill’s case. The court held, for example, that (1) “No additional responsive records are available or contained on the computer hard drive of defendant Fimia and duplication of the hard drive for further in camera inspection is not warranted,” and that “Plaintiffs’ contention that any undisclosed documents are remaining (incl. on computer discs) is based on unfounded speculation.” But the City’s search of Fimia’s hard drive was inadequate by even common-sense standards, and plaintiffs were not given

adequate notice or time to enable them to establish this fact through a neutral forensic examination of the Deputy Mayor's hard drive.

The court seemed to base its foregoing assumptions on the testimony of Joel Taylor, the City's "Computer and Network Specialist for the Information Services Department." But the search Mr. Taylor performed was limited to "the deleted items folder and the inbox of the Deputy Mayor's email system" CP 30. Fimia's hard drive may have contained tens of thousands of folders, any one of which might have contained the missing public record or other responsive public records. Or the record, including metadata that Fimia "inadvertently" have deleted might have been on the hard drive, and might have been recoverable if proper search and recovery methods had been utilized. Two recent cases arising in foreign jurisdictions illustrate anecdotally the volatility of electronic data, the need for agencies and courts to ensure that strict safeguards are in place so that all public records are preserved and protected, and that the plaintiffs' assertion that they were entitled to an in-camera inspection of Fimia's hard drive to discover missing records was not based on "unfounded speculation" that electronic data might be recovered.

In Krunwiede v. Brighton Assocs., LLC, 2006 WL 1308629 (N.D. Ill. May 8, 2006), a wrongful termination lawsuit involving counterclaims of misappropriation of confidential business information, the defendant

demanded the return of the former employee's laptop computer, the purchase of which the plaintiff had been reimbursed by the defendant while employed. Eventually the laptop was turned over to a neutral computer forensics examiner, who determined that the plaintiff had performed several maintenance and copying operations, including defragmentation, after receipt of a data preservation letter from the defendant and a court order requiring surrender of the laptop. While it was not conclusively established that unique, relevant files had been irrevocably destroyed, the actions of the plaintiff in conscious disregard of a court order effectively destroyed metadata in an attempt to "hide the ball" and frustrate discovery. Under these circumstances the court issued default judgment against the plaintiff, plus attorneys fees and costs.

In a second matter, a civil suit stemming from a Freedom of Information Act (FOIA) request, the court issued a preliminary injunction ordering that the EPA refrain from "transporting, removing, or in any way tampering with information responsive" to the plaintiff's FOIA request. Subsequently, the hard drives of several EPA officials were reformatted, backup tapes were erased and reused, and individual e-mails were deleted. The plaintiff filed a motion for contempt. The court held that under the strict standards of Fed. R. Civ. P. 65, the order was sufficiently specific and the data destroyed went "to the heart" of the plaintiff's claims. The court found

the EPA in contempt and ordered it to pay attorneys' fees and costs. The court declined to hold several individuals and the U.S. Attorney's Office in contempt. Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 70 (D.D.C. 2003) (mem.). *But see* Tiberino v. Spokane County, 103 Wn.App. 680, 13 P.3d 1104 (2000), (personal e-mail not related to governmental business is exempt from disclosure under PRA).

- d. Even though Fimia later "found" the record, destruction of the original email and its metadata constitutes destruction of a public record

In her records request Ms. O'Neill sought access to the Thwing email, including "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." Dec. Beth O'Neill, at Exh. F. Ms. O'Neill further clarified when she wrote she was seeking access to:

Any and all correspondence (including memos) relating to this email. Complete transmission/forwarding chain AND ALL metadata pertaining to this document.

Dec. Beth O'Neill, at Exh. G, (double underline in original).

While no Washington state court has ruled (in a published decision), that metadata is or is not part of a public record, the law as it is evolving in other jurisdictions establishes that where metadata exists it is subject to the requirements of the Public Records Act.

A "public record" is defined to include, . . . any writing containing

information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. RCW 42.56.010(2). "Writing" is also defined in the disclosure statutes: "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated. RCW 42.56.010(3); *see also* RCW 40.14.010. Whether private business records can relate to "conduct of government" has not been addressed by Washington courts. *See* Michael R. Kenyon and Stephen R. King, "Government Contractors and the Washington Public Disclosure Act: When Private Documents Become Public Records," Legal Notes Information Bulletin No. 509 (2001) (discussing private records that may become subject to the PDA through use by a public agency). However, the Washington Supreme Court has held that where "records relate to the conduct of . . . [a public agency] . . . and to its governmental function. . . [T]he records are 'public records' within the scope of the public records

act.” Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 748 (1998).

Against this backdrop, it cannot be gainsaid that metadata, like footnotes in a document, are subject to 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 had requested the 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 cells, 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 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>4</sup> In effect putting litigants on notice for the future, the court concluded that sanctions were not appropriate in this instance because the production of metadata is a new and largely undeveloped area of the law. *Id.* at 656.

Similarly, in his article, *E-mail Metadata In A Post-Armstrong World*,

Jason R. Baron, U.S. Dept. of Justice, wrote:

Based on a series of landmark judicial decisions over the past decade involving the federal government’s recordkeeping policies and practices, the Archivist of the United States and the Executive Office of the President (EOP) have confronted the issue of how best to maintain and preserve on a long-term basis office automation records, including e-mail and word processing documents, in an electronic format. In substantial part, the case law in this area fundamentally involves a set of assumptions concerning the nature of what constitutes a “complete” record under the U.S. federal records laws, including consideration of the importance of contextual elements of electronic records (such as transmission and receipt data) which may be considered “metadata.” Most federal agencies continue to operate recordkeeping programs which place primary reliance on paper-based recordkeeping systems for the long-term preservation of office automation records such as generated on e-mail and word processing systems. However, the coming emergence over the next

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<sup>4</sup> See also [http://www.thesedonaconference.org/publications\\_html](http://www.thesedonaconference.org/publications_html).

several years of document management programs in the marketplace which have been certified as meeting federal recordkeeping requirements, including legally required metadata elements, will allow agencies that have a legitimate business need to do so to elect to retain electronic versions of e-mail and other office automation records, without having to devote substantial resources to customization of existing in-house, proprietary e-mail systems.

- e. The Trial Court Committed Reversible Error When It Dismissed sua sponte without oral argument, etc.

The PDA enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government's action. RCW 42.17.010, .251. Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2005). RCW 42.56.550(1) authorizes citizens to bring a motion in the superior court requiring the agency to show cause why it has denied inspection of the public record(s) sought. Show cause hearings are a common means of resolving litigation under the auspices of the PRA. *See e.g.* Lindberg v. Kitsap County, 133 Wn.2d 729, 948 P.2d 805 (1997); Wood v. Thurston County, 117 Wn.App. 22, 27, 68 P.3d 1084 (2003).

In the instant case, however, the trial did not even allow the matter to proceed to a show cause hearing, where the parties could present evidence and argument relating to the issues. Under the civil rules, the plaintiffs were at least allowed the opportunity of discovery. "When a statute is silent on a particular issue, the civil rules govern the procedure." Spokane Research &

Defense Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005);  
King County Water Dist. v. City of Renton, 88 Wn.App. 214, 227, 944 P.2d  
1067 (1997). Thus, normal civil procedures, including discovery, summary  
judgment proceedings and trial, were the appropriate method to prosecute a  
claim under the liberally construed PDA. *Id.*

Because the trial court did not state the procedural grounds upon  
which its decision was based, characterizing the courts decision legally is  
difficult. The court did not treat the matter as a motion for summary  
judgment (CR 56), as the matter was heard on relatively short notice and no  
oral argument was allowed. Nor did it dismiss under CR 12(c), which did not  
apply because the defendants had not answered the complaint, or CR  
12(b)(6). Under CR 12(b)(6), the court must presume a plaintiff's factual  
allegations are true, and may consider hypothetical facts not part of the  
formal record if those hypothetical facts constitute an indication that the law  
could provide the plaintiff relief. 3A Orland and Tegland, Wash. Prac., at  
237, *citing* Davis v. Turner, 197 F.2d 847 (5<sup>th</sup> Cir.1952). Lien v. Barnett, 58  
Wn. App. 680, 683; 794 P.2d 865 (1990) (*citing* Hoffer v. State, 110 Wn.2d  
415, 420, 755 P.2d 781 (1988)).

CR 12(b)(6) further provides that the court may dismiss a claim only  
if "it appears beyond doubt that the plaintiff can prove *no* set of facts,  
consistent with the complaint, which would entitle the plaintiff to relief."

Orwick v. Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (*quoting* Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 961, 577 P.2d 580 (1978)) (emphasis added). A motion to dismiss must be denied “if *any* set of facts could exist that would justify recovery.” Hoffer, 110 Wn.2d at 420 (emphasis added). As discussed above, the actual facts were more than sufficient to allow the matter to proceed to trial to determine the existence and extent of Fimia’s knowledge of PRA requirements, whether she acted in bad faith, whether other electronic public records existed on her hard drive for plaintiffs to discover, and so on.

The court does have the authority to act on its own motion and dismiss for failure to state a claim pursuant to CR 12(b)(6), but it must give notice of its *sua sponte* intention to invoke Rule 12(b)(6) and afford plaintiffs an opportunity to at least submit a written memorandum in opposition to such motion. *See* Crawford v. Bell, 599 F.2d 890, 893 (9th Cir. 1979); Potter v. McCall, 433 F.2d 1087, 1088 (9th Cir. 1970); Wong v. Bell, 642 F.2d 359, 361-62 (9th Cir. 1981).<sup>5</sup> Moreover, the court may enter a *sua sponte* dismissal only if the claimant cannot possibly win relief. *Id.* at 362. In a word, the plaintiffs’ loss of their entire case on a motion seeking an order to show cause cannot be understood or justified as the defendants’ win on a

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<sup>5</sup> Where federal and state court rules are substantially the same, as they are with CR 12(b)(6), Washington courts may look to federal decisions for guidance. American Discount Corp. v. Saratoga West, Inc., 81 Wn.2d 34, 37 (1972); Gillett v. Conner, 132 Wn.App. 818, 823 (2006).

motion under CR 56 or CR 12.

The O'Neills were entitled to due process of law, notice that summary judgment or other dispositive ruling regarding their claim was being sought, and appropriate time to respond. The *sua sponte* granting of judgment against the O'Neills – without any such motion and with less than 24 hours to respond – is atypical in PRA cases, contrary to the Court Rules and constitutional requirements of due process and an abuse of the trial court's discretion.

3. The Trial Court Committed Reversible Error When It Ordered Plaintiffs' To Pay The Agency's Costs

The trial court ordered the plaintiffs to pay the agencies 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.” While the City later clarified and rescinded its requests for costs, the court failed to vacate or otherwise amend its original order.

Enforcement of the PRA – and indeed, meaningful democratic discourse – depends upon private citizens. Accordingly the PRA provides that any person who prevails against an agency “shall be awarded all costs, including reasonable attorney fees, [and penalties] for each day that he was denied the right to inspect or copy said public record.” RCW 42.56.550.

Penalties and attorney's fees under the statute are in essence a codification of the ancient common law 'qui tam' procedure or

doctrine. Essentially a Qui tam action is brought by an 'informer' or volunteer for violation of a particular civil or criminal statute which generally provides that the informer, if successful, may recover his costs and attorney fees, as well as a share of the penalty. It is called a "qui tam action" because the plaintiff states that he sues for the state as well as himself. Black's Law Dictionary 1414 (rev. 4th ed. 1968).

Fritz v. Gorton, 83 Wn.2d 275, 312, 517 P.2d 911 (1974). As this Court of Appeals confirmed in A.C.L.U. v. Blaine School Dist. No. 503, 95 Wn.App. 106, 115, 975 P.2d 536 (1999), "permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access public records." It cannot be gainsaid that permitting an agency to recover its costs and fees represents a step in the opposite direction of that intended by the PRA.

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.

Even if the court determines the issue is moot, given the defendants' rescission of their request, 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 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, 793 P.2d 962, 804 P.2d 1 (1990) (quoting Dunner v. McLaughlin, 100 Wash.2d 832, 838, 676 P.2d 444 (1984)). The instant case meets both tests. The PRA arguably is a cornerstone statute enabling and even promoting democratic discourse. Yet the sole means by which an aggrieved private citizen may find relief from violations of the PRA is to hire an attorney and litigate. Given the number importance of the statute, and given the lack of a clear ruling on agency liability under the act, the appellants respectfully request the court review the issue of fee shifting and consistent with RCW 42.56.550(4), determine in a published decision that the PRA 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.

D. Relief Requested

In light of the foregoing argument and authority, the O’Neills respectfully request this Court grant them the following relief: (1) reverse the trial court’s orders and remand to for further proceedings including discovery and trial; (2) issue a ruling clarifying the unilateral fee shifting nature of the PRA, (3) award appellants the full allotment of all attorney’s fees incurred. Appellants requests attorney fees under RAP 18.1 and RCW 42.56.550(4),

which holds in salient part:

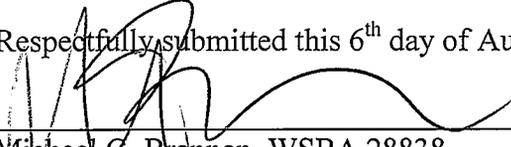
Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

“The statute’s ‘mandate for liberal construction includes a liberal construction of the statute’s provision for award of reasonable attorneys’ fees.’” Coalition on Government Spying v. King County Dept. of Public Safety, 59 Wn.App. 856, 862, (1990), quoting Progressive Animal Welfare Soc’y v. University of Wash., 114 Wn.2d 677, 683 (1990). The rationale behind shifting the burden of fees to public agencies is sound. First, few people have the financial incentive necessary to take the risk that they will be required to pay a lawyer to challenge an agency’s action on public records. Similarly, few attorneys in the private marketplace are inclined to forego more certain (and more lucrative) hourly or contingent fee matters when faced with the prospect of battling a heavily armed agency when payment for services rendered is, at best, uncertain. Fully compensating attorneys for time spent in furthering the public interest through PDA litigation closely aligns with the attorney’s interest in being paid a fair fee and the enforcement provisions of the PRA. Accordingly the O’Neills should be awarded all costs and reasonable attorneys fees incurred thus far in this litigation.

E. Conclusion

For the foregoing reasons the O'Neills respectfully request relief.

Respectfully submitted this 6<sup>th</sup> day of August, 2007



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Michael G. Brannan, WSBA 28838  
Of Attorneys for the O'Neills

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

BETH AND DOUG O'NEILL,	)	
individuals,	)	
	)	No. 59534-2-1
Appellants,	)	
	)	DECLARATION OF
v.	)	SERVICE
	)	
THE CITY OF SHORELINE a	)	
Municipal Agency and DEPUTY	)	
MAYOR MAGGIE FIMIA,	)	
individually and in her official	)	
capacity,	)	
Respondents.	)	

I, David Meide, declare as follows:

1) I am over 18 years of age and a U.S. citizen.

2) On August 6th, 2007, I caused to be delivered true and accurate copies of the following documents to the following parties as indicated below:

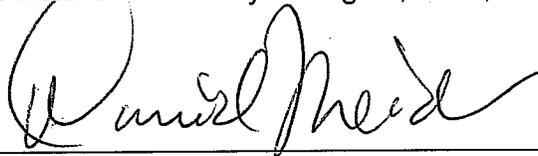
- a. Appellant's Appeal Brief, and;
- b. This Declaration of Service.

Service List

Flannary Collins, Esq. City of Shoreline 17544 Midvale Ave. N. Shoreline, WA 98133-4921  Email: fcollins@ci.shoreline.wa.us	<input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Mailed <input checked="" type="checkbox"/> Faxed (206-546-2200) <input checked="" type="checkbox"/> Emailed
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th<sup>th</sup> day of August, 2007, at Seattle Washington.



\_\_\_\_\_  
David Meide