No. 82397-9

SUPREME COURT OF THE STATE OF WASHINGTON

DOUG AND BETH O'NEILL, individuals,

Plaintiffs/Appellants,

v.

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

Defendants/Respondents.

PETITIONER ~~RESPONDENT~~ MAGGIE FIMIA'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

"The law does not concern itself with trifles."[1]

This case is about a public records request for the header metadata[2] associated with the "Thwing-Hettrick" email.[3] It is also a case about trifles. It is not a case about fulfilling the mandate of the Public Records Act because the City of Shoreline provided the O'Neills with all of the records they requested that related to the conduct of government.

After Beth O'Neill made a public records request for the Thwing-Hettrick email, but before Ms. O'Neill made an additional request for the "metadata" associated with that email, former City of Shoreline Deputy Mayor Maggie Fimia forwarded the Thwing-Hettrick email to the Shoreline City Attorney. Because Ms. Fimia had forwarded what she thought was the complete email to the City, there was no reason for her to retain her copy and at some point her copy was deleted, as was authorized by the retention guidelines in effect at that time.[4]

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[1] *Matzger v. Page*, 62 Wn. 170, 172, 113 P. 254 (1911).

[2] Metadata is generally defined as "data about data." Header metadata is the metadata associated with the header information in an email and is automatically generated by a computer. As the Arizona Court of Appeals recognized in *Lake v. City of Phoenix*, 207 P.3d 725 (Ariz. App. Div. 1), review granted in part (June 1, 2009), most metadata, including header metadata, is a computer-generated "by-product," generated without input from the user. As explained in Section II.A, infra, the term metadata applies to a wide array of generated data, making Division I's use of that term very confusing.

[3] For more about the "Thwing-Hettrick," see Section II.B.1. infra.

[4] At the time of this lawsuit, the Retention Guidelines issued by the Washington State Secretary of State allowed agencies to "print and delete" emails to comply with retention requirements. CP 92. The record is clear that this email was deleted before Ms. Fimia had notice of the request for metadata.

Unbeknownst to Ms. Fimia, the City Attorney or anyone in the City of Shoreline's legal department, when someone forwards an email, it will automatically strip out the "header" metadata associated with the original email and replace it with new header metadata that reflects the header information for the forwarded email.[5] Therefore, the copy of the Thwing-Hettrick email that the City had received from Ms. Fimia did not contain the original header metadata, although it contained all other original metadata. Ms. Fimia and the City of Shoreline did not learn this until it was too late and Ms. Fimia's copy had been deleted.[6]

The O'Neills are now asking this Court to require the taxpayers of the City of Shoreline to pay 10s of thousands of dollars because the City failed to produce basically meaningless information that is not in any way related to the conduct of government.[7]

Everyone agrees that the O'Neills had a right to use the Public Records Act to scrutinize the City of Shoreline's conduct. This right is fundamental to our democratic form of government. But the O'Neills are not seeking information about the conduct of government in this lawsuit. They have already received all information that relates in any way to the

---

[5] Once Ms. Fimia had forwarded it to the City Attorney, Ms. Fimia had no bad-faith reason for deleting her copy, given that she did not know about metadata and believed the City had a complete copy.

[6] Nothing in the record suggested the email was deleted intentionally.

[7] A "public record" is (1) a writing (2) related to the conduct of government (3) created, owned, used or retained by an agency. RCW 42.56.010(2).

conduct of government, including any such metadata. The City provided the O'Neills with:

> 1. A complete printed copy of the Thwing-Hettrick email that Ms. Fimia had forwarded to the Shoreline City Attorney.
>
> 2. A printed copy of the version of Thwing-Hettrick email metadata[8] taken from Councilmember Janet Way's copy of the email. Janet Way, like Maggie Fimia, received this email on September 18, 2009, as one of the BCC recipients.
>
> 3. A printed copy of the version of the Thwing-Hettrick email metadata taken from the copy of the email that Ms. Thwing re-sent to Maggie Fimia on September 30, 2006.

Thus, while the O'Neills were not provided with the version of the header-metadata that was part of Ms. Fimia's copy of the Thwing-Hettrick email that was deleted, through the combination of these three documents, the City did provide the O'Neills with all relevant information that arguably relates to the conduct of government. The only metadata that was not included in Janet Way's versions of the header metadata and the re-sent version of the metadata is the "path" the Thwing-Hettrick email originally took to reach Ms. Fimia. This path does not relate to the conduct of government, as it is basically random. And the PRA only requires agencies to produce copies of public records – not the original public record itself. Therefore, the City fully complied with the PRA, and this Court should reverse Division I and affirm the trial court's ruling.

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[8] The O'Neills never asked for the documents in electronic form, so all of the metadata that has been provided has been printed on separate documents.

The PRA is not meant to provide requesters with their "pound of flesh" simply because a City failed to produce a meaningless piece of information that in no way related to the conduct of government. This Court is tasked with interpreting Washington laws so that they make sense and serve their ultimate purpose, not punish taxpayers for trifles.

If the Court disagrees and elects not to affirm the trial court by holding the PRA requires agencies to produce particular electronic copies of the an email, the Court cannot find a violation on this record and must remand for a factual hearing to determine two issues. First, was Ms. Fimia's copy of the Thwing-Hettrick email deleted before or after the City had sufficient notice of the public records request for the metadata to trigger the City's preservation duty under RCW 42.56.100? If it was deleted before, then there was no violation of the PRA. If it was deleted after, then second, the trial court should also determine if the header metadata not provided to the O'Neills was related in any way to the conduct of government. Unless the trial court rules in favor of the O'Neills on both of these issues, then the City did not violate the Public Records Act even if each version email metadata is a separate record.

This Court should also hold that a councilmember's personal computer cannot be searched without the councilmember's authorization absent a search warrant or other procedure that protects the

councilmember's constitutional right to privacy under Article I, Section 7 of the Washington State Constitution and the Fourth Amendment to the U.S. Constitution.

II. STATEMENT OF THE CASE[9]

This case centers around an email from Diane Hettrick, sent at the request of Beth O'Neill. Because it involves the metadata related to that email, some basic information about metadata is necessary.

A. Metadata

Metadata is most often defined as "data about data." There are two broad categories of metadata, "application metadata" that is embedded in documents and "system metadata" that is stored externally and can be used to track documents.[10] While metadata can sometimes be useful, the Sedona Principles recognize: "In most cases, however, metadata will have no material evidentiary value[.]"[11] Moreover, "Much metadata is neither created by nor normally accessible to the computer user."[12]

This case involves the "header" metadata associated with emails. Header metadata will include not only the header information that appears in the email, but may also include the IP addresses of the sender and

[9] Ms. Fimia adopts the City's Statement of the Case, but recites the following facts that directly relate to the arguments in this brief.
[10] The Sedona Principles, 2nd Ed. (Sedona Conference Working Group Series 2007), at 4.
[11] Sedona Principles, at 4.
[12] Sedona Principles, at 3.

recipient, and the path (contained in the "Received" fields) the email takes from the sender to the recipient.[13] What header metadata exists will in part depend on what email programs are being used – for example, emails received on a Yahoo account will have some fields that are not present in emails on an Outlook account.

When an email is forwarded, whatever header metadata that exists will be stripped out and replaced with the new header information. Some of the old header may become part of the body of the email, but the only metadata that will relate to the old header is the same type of metadata for the rest of the body of the email.

Some email programs will record a unique identifier for every email called the "Message ID." When the email is forwarded or replied to, the new email will have a new Message ID, but the old Message ID email will be recorded in the "In-Reply-To" field. If an email is re-sent, however, it will maintain the original Message ID. Metadata reflecting when the email was sent, the path it took and any additional recipients will replace the prior metadata on those topics.

[13] Much of the following details about header-metadata is taken from this article: "Registration of Mail and MIME Header Fields," which is Document 4021 prepared by the Internet Engineering Task Force Document, available at "tools.ietf.org/html/rfc4021." (last visited June 28, 2009).

B. Beth O'Neill Requests "that email"

At the September 18, 2006 Shoreline City Council meeting, Ms. Fimia, then the Deputy Mayor, in an attempt to set the record straight, made reference to an email, stating that she had received it from Diane Hettrick and Beth O'Neill. Ms. O'Neill, who was in the audience, denied that she had sent the email or that the email made accusations against City Councilmembers. CP Sub4 Ex. B-1, p.2.

The first paragraph of the email speaks for itself:

> Hi Folks,
>
> My dear friend, Beth O'Neill has asked me to pass along information about our dysfunctional Shoreline City Council. Beth and some other folks have been working hard battling certain issues regarding an illegal rental in their neighborhood. What should be a legal and zoning issue has gotten mired into the politics of our 32nd District Democrats and certain City Council folks are playing favorites with their own political supporters.

CP Sub4 Ex. J-p.24.

1. The "Hettrick" email and the "Thwing-Hettrick" email.

The Hettrick Email. When Diane Hettrick sent her email on September 14, 2006 (the "Hettrick" email), it was meant to be a "**private** email sent between 2 Shoreline residents." CP Sub4, Ex. K-p.1 (emphasis original). Other than Ms. O'Neill's description, the record does not reflect who actually received the email. This is because someone edited out the "to" line from Ms. Hettrick's email before Ms. Thwing forwarded it to Ms. Fimia and Councilmember Way. But as Ms. O'Neill's statement that it was a "private email sent between 2 Shoreline residents" implies, it was

not created for, meant for, or sent to anyone at the City of Shoreline. Thus, it would not qualify as a public record.

The Thwing-Hettrick Email. Someone who received the Hettrick email, however, forwarded a copy to Lisa Thwing. CP Sub4 Ex. J-p.23. This would have stripped out any of the original Hettrick header metadata. On the morning of September 18, 2009, Ms. Thwing forwarded the Hettrick email to an undisclosed number of people, blind carbon copying those recipients. This forwarded version of the email is the "Thwing-Hettrick" email. When Ms. Thwing forwarded this email, it would have stripped out any header metadata that might have shown who had sent the email to Ms. Thwing. Ms. Fimia and Councilmember Way were both recipients of the Thwing-Hettrick email.

2. Ms. O'Neill seems to request the Hettrick email, not the Thwing-Hettrick email.

At the September 18 meeting, Ms. O'Neill demanded "to see that email." CP Sub4 Ex. B-1 p.2. She submitted this same request in writing on September 20. CP Sub4 ¶¶13-18 & Ex.F.

At the council meeting, Ms. Fimia had only referred to the original Hettrick email and had made no reference to Ms. Thwing. CP Sub4 Ex. B-1. Thus, when Ms. O'Neill denied that she made the allegations in the Hettrick email and then requested "that email," it was reasonable for

Ms. Fimia to assume that Ms. O'Neill was referring to the Hettrick email. There was no reason for Ms. Fimia to think Ms. O'Neill was referring to the Thwing-Hettrick header information that she had not mentioned at all. Thus, Ms. Fimia provided a printed copy of the email that only showed the Hettrick email and provided it to the City who gave it to Ms. O'Neill on September 20. CP Sub4 Ex. J-p.1.

C. Ms. O'Neill Makes Additional Records Requests

1. Ms. O'Neill requests the Thwing-Hettrick email.

After receiving the email on September 20, Ms. O'Neill made another request, this time for "information relating to this email: how it was received, by Maggie Fimia, from whom it was received, and the forwarding chain." CP Sub4 Ex. F. Although this was an information request,[14] the City nevertheless asked Ms. Fimia to forward the entire Thwing-Hettrick email to the City Attorney, which Ms. Fimia promptly did on September 25. CP Sub4 Ex. J-p.21. The City provided a printed copy of the email to Ms. O'Neill that same day – five business days after the first oral request at the September 18 council meeting.

[14] "An important distinction must be drawn between a request for information about public records and a request for the records themselves. The act does not require agencies to research or explain public records ... Nor does the act require public agencies to be mind readers." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 450-51, 960 P.2d 447 (1998).

2. Ms. O'Neill did not request the metadata until the afternoon of September 25.

Once Ms. Fimia had forwarded the complete email to the City Attorney, she believed that the City now had the entire Thwing-Hettrick email. At that point in time, there no legal reason to retain a copy, and at some point it was unintentionally deleted. It is not clear from the record exactly how or when it was deleted, but it had already been deleted when Ms. Fimia was informed about Ms. O'Neill's next public records request.

After reviewing the complete printed version of the email, Ms. O'Neill made a request that day to see the metadata for the Thwing-Hettrick email. *See* CP Sub4 Ex. G (second page). By the time Ms. Fimia was informed about this latest request on the 25th, her copy of the Thwing-Hettrick email had already been deleted.

D. The City Responds to Ms. O'Neill's Request for Metadata

1. The City learns that header metadata is transient and automatically removed and replaced when an email is forwarded.

It was at this point that the City and Ms. Fimia first learned about metadata and about how email header metadata is stripped out when you forward an email. Therefore, the City's electronic version of the Thwing-Hettrick email that Ms. Fimia had forwarded to the City no longer had the original header information.

2. The City produces additional two versions of the Thwing-Hettrick email metadata.

Despite this setback, the City made its best efforts to provide Ms. O'Neill with the metadata. It produced the version of the metadata from the exact same Thwing-Hettrick email that had been sent to Councilmember Janet Way. CP Sub4 Ex. L p.4-6. And it produced the version of the metadata from the Thwing-Hettrick email that was re-sent to Ms. Fimia on September 30, 2009.[15] CP Sub4 Ex. L p.1-3. IT staff also searched Ms. Fimia's deleted emails for the email. CP 25, 30.

The two versions of the Thwing-Hettrick metadata that the City provided to Ms. O'Neill had all of the metadata that would have been on the original Fimia version, with the exception of the path through the internet that the email took – this path is almost random and in no way relates to any governmental or proprietary conduct of the City.

E. The Trial Court Finds the City Complied with the PRA Requirements, but Division I Reverses

Despite the thorough nature of the City's response, the O'Neills sued the City for not producing the exact version of the metadata associated with Ms. Fimia's copy of the Thwing-Hettrick email. The trial

[15] Because this metadata has the same "Message ID," it is clear that this is the exact same email. Compare CP Sub4 Ex. J. p.1 ("Message ID" field) with Ex. J-p.27 (metadata from the edited email that contains the same identifier in the "In-Reply-To" field, which would reflect the original email's "Message ID field). This same identifier would also appear in "In-Reply-To" field in the metadata associated with the email forwarded to the City Attorney, but that metadata is not in the record.

court found that the City had complied with the request and dismissed the suit. The O'Neills appealed, and Division I reversed. *O'Neill v. City of Shoreline*, 145 Wn. App. 913, 187 P.3d 822 (2008).

After finding that the O'Neills' first several requests were not for "metadata," Division I first found that metadata qualified as a public record because, at the very least, the email addresses in the header metadata "related to the conduct of government" because they were "email addresses of persons who may have knowledge of alleged government improprieties in dealing with a zoning matter." O'Neill at 925.[16] Presumably, the Court was referring to Ms. Hettrick's email address, as nothing suggests Ms. Thwing would have any such knowledge.

Division I was wrong. In making this statement, Division I made the same error that the City of Shoreline made – it presumed that Hettrick's email address would still be in the header metadata. But that header metadata would have been stripped out of the Hettrick email when it was first forwarded, long before Ms. Fimia and Ms. Way received it.[17]

Moreover, given that all of the email addresses were printed in the email itself, the Court was also wrong to suggest that the City had failed to

[16] While not relevant to this appeal, beyond Ms. O'Neill's bare accusation, there is no evidence to suggest that there was any improper conduct. Ms. O'Neill herself said it was "an absolute falsehood" to say she had accused councilmembers of pressuring the "zoning board." CP Sub4 Ex. B-1 p.2.

[17] As indicated by the record, Ms. Hettrick's email address did appear in the body of the email, but that was apparent in the printed version and all versions of the metadata provided by the City. CP Sub4 Ex. J-p.1; J-p.21; J-p.27; L p.1; L p.4.

provide the information to the O'Neills. Because Ms. Thwing sent the emails BCC, none of the other recipients' addresses would have appeared in Ms. Fimia's version of the email. Division I was not able to cite any other metadata that related to the conduct of government.

Division I also held that because the version of the metadata associated with the Way copy of the Thwing-Hettrick email and the re-sent copy were not identical to the metadata associated with Ms. Fimia's original copy, the City did not comply with O'Neill's request. Division I did not, however, identify any "missing" metadata that would have related in any way to the conduct of government.

III. ARGUMENT

A. The City Complied with the PRA When It Produced a Printed Copy of the Thwing-Hettrick Email Because Under These Facts, the Email's Metadata Was Not a Public Record

1. The burden was on the O'Neills to prove the metadata was a public record subject to the Public Records Act.

Under the Public Records Act, the burden is on the requester to prove the requested record is a "public record" subject to the PRA in the first place. *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 441, 161 P.3d 428 (2007) ("Once the threshold inquiry of whether a document is a 'public record' is met, then the burden to prove that an exemption applies is properly placed on the party seeking to prevent disclosure.").

To be a public record, a document must be (1) a writing; (2) containing information relating to the conduct of government or performance of any government function or proprietary function; and (3) prepared, owned, used or retained by any state or local agency. *Tiberino v. Spokane County*, 103 Wn.App. 680, 687, 13 P.3d 1104 (2000).

A showing that an agency possesses the record, without more, is insufficient. *Dragonslayer*, 139 Wn. App. at 445 (citing *Concerned Ratepayers Ass'n v. PUD No. 1*, 138 Wn.2d 950, 960-91, 983 P.2d 635 (1999). Instead, there must be a nexus between the record and the agency's decision making. *Dragonslayer*, 139 Wn. App. 445 (citing *Concerned Ratepayers*, 138 Wn.2d at 961. The requester's evidence must provide a specific showing of use and cannot be a mere conclusory statement. *Dragonslayer*, 139 Wn. App. at 445-46 (statement that third-party records were used for monitoring and compliance was too conclusory and insufficient to prove records were "public records").

2. The metadata associated with the Thwing-Hettrick email was not a public record.

As Ms. O'Neill has noted, the Hettrick email was a "**private** email between 2 Shoreline residents." CP Sub4, Ex K-1 (emphasis original). It was not ever intended to be sent to the City or used by the City.

The fact that an email mentions or criticizes government does not mean it is automatically a public record. In determining whether a record contains "information relating to the conduct of government or performance of any government function or proprietary function" the Court must look to "the role the document plays in the system." *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 711-12, 780 P.2d 272 (1989). For this analysis, the Court should look at factors such as whether the agency controls the document and whether the document was generated within the agency. *Yacobellis*, 55 Wn. App. at 712.

Personal notes, calendars and emails controlled by public servants are not *per se* public records. The contents may be unrelated to the function of government. See *Tiberino*, 103 Wn. App. at 691 (holding content of personal emails not subject to disclosure because "the content of Ms. Tiberino's e-mails is personal and is unrelated to governmental operations"). Or they may be created or maintained for a private purpose not intended for distribution or circulation within the agency. *Yacobellis*, 55 Wn. App. at 712 (noting personal calendars and phone messages were not public records subject to disclosure); *see also Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993) (holding verification-request information for applicants "relate neither to the conduct of government nor the performance of any government function").

As Division I recognized, once Ms. Fimia as a member of the Shoreline City Council discussed the email at a public meeting, she used the email for a City purpose, making that email "relate" to a City purpose. At this point the email became a "public record." This is similar to the use of the private emails in *Tiberino*, which transformed those emails into public records. *Tiberino*, 103 Wn. App. at 688. But prior to this use, the email was never intended to be even seen by the City and had only been forwarded to Ms. Fimia at her personal email address for political reasons, not for government use.

Because the Thwing-Hettrick email's status as a public record is based on Ms. Fimia's use of the email at the public meeting, the version of the metadata associated with that email did not become a public record. Ms. Fimia did not even know what metadata was when she referenced the email, and therefore, she did not and could not have used the metadata for any City purpose. Accordingly, the City was not required to produce the version of the metadata associated with Ms. Fimia's copy of the email.

The Arizona Court's analysis on metadata in *Lake v. City of Phoenix*[18] is instructive on this point. The *Lake* court found that a public officer's notes on a city-related issue, and not the associated metadata, disseminate information to the public and serve as a memorial of an

[18] *Lake v. City of Phoenix,* 207 P.3d 725 (Ariz. App. Div. 1), review granted in part (June 1, 2009).

official transaction. Any metadata was not created by the public employee and was not created to memorialize any official transaction – instead "it was generated only as a by-product of [the employee's] use of a computer." *Lake*, at *4.

Arizona's public records law does not define writing and the *Lake* Court rejected Washington's broad definition of writing, so the *Lake* court's ultimate conclusion, that no metadata is a public record, is of limited value to this Court. But this Court does not need to reach a conclusion about all metadata under the facts of this case.

The recognition that metadata is only a computer by-product, however, is instructive because the only reason the Thwing-Hettrick email is a public record is because it was mentioned in a public meeting. And the email's automatically generated by-product, specifically the header metadata – that Ms. Fimia did not know even existed – was not mentioned at the meeting and does not add anything to Ms. Fimia's use of that email. Thus this particular metadata by-product does not relate to the conduct of government and was not a public record.

B. Division I Erred When It Held that the City Failed to Produce Metadata that Related to the Conduct of Government

Even if Ms. Fimia's mention of the Thwing-Hettrick email transformed not only the email, but also the metadata associated with the

email into a public record, the City complied with its obligation to produce the metadata associated with the Thwing-Hettrick email when it produced the metadata associated with the Way copy and the re-sent copy.

The PRA does not allow much less require an agency to produce the actual public record requested. Instead, an agency must only produce a copy. Here, the City fully complied with O'Neills' request when it produced the printed version of the email and two versions of the associated metadata. Ms. Fimia adopts the City's arguments on this issue.

C. Division I Erred by Ordering the City to Search the Deputy Mayor's Hard Drive

The PRA does not require agencies to search hard drives for deleted records. The PRA requires production of "identifiable public records." RCW 42.56.080. An "identifiable record" is one that agency staff can "reasonably locate." WAC 44-14-04002 (2) (citing *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998). The Attorney General has made it extremely clear what records are considered "reasonably locatable" – they are records that "can be located with typical search features and organizing methods contained in the agency's current software." WAC 44-14-05002. A deleted document that may somehow still be locatable through a forensic search of a hard drive is not a "reasonably locatable" record. Thus, if the Deputy Mayor deleted the

email before O'Neill requested the metadata, then it would be unreasonable – and beyond the requirements of the PRA – to require the City to search her hard drive for responsive records.

Moreover, to the extent that Division I' opinion mandates a search of Ms. Fimia's hard drive without her consent, that order would violate Ms. Fimia's right to privacy under both the Fourth Amendment to the U.S. Constitution and Article I, Section 7 of the Washington State Constitution.

Under the Fourth Amendment, Ms. Fimia has a legitimate expectation of privacy in her personal computer. *See, e.g.*, *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir 2007) (holding that an individual has "a legitimate, objectively reasonable expectation of privacy in his [or her] personal computer."). Under Article I, Section 7, Ms. Fimia also has a reasonable expectation of privacy in her personal papers. *See, e.g.*, *State v. Miles*, 160 Wn.2d 236, 247, 156 P.3d 864 (2007) (holding search of private records obtained violated Article I, Section. 7, even though they were obtained by a statutorily authorized subpoena because the statute did not offer sufficient protections for privacy).[19] Thus, absent a recognized exception – and none exists here – a warrant is required

[19] As an elected official, Ms. Fimia also has heightened First Amendment rights that would be threatened if the City was able to review all of her records that may identify her political supporters. *See Rangra v. Brown*, 566 F.3d 515, 524 (5th Cir. 2009) (recognizing elected officials' First Amendment rights differ and are greater than public employees' rights); *Snendigar v. Hoddersen*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990) (discussing First Amendment right to anonymously associate).

before the court or the City can mandate that Ms. Fimia's personal computer be subject to a search. This Court should avoid this constitutional issue by interpreting the Public Records Act to not mandate a search of a personal computer. *See State v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972) (holds courts should interpret a statute to "sustain its constitutionality if at all possible to do so.").

D. Ms. Fimia Cannot Be Held Liable for Attorney Fees

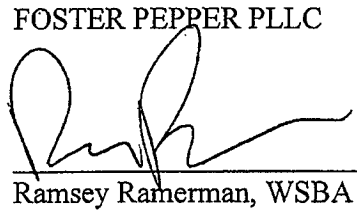
Ms. Fimia adopts the City's arguments regarding attorney fees. But even if the City could be held liable, under no circumstances would Deputy Mayor Fimia be liable for fees. As an individual, Deputy Mayor Fimia is not a proper defendant in this suit. *See* RCW 42.56.550(1) (noting an "agency" may be sued). Because Deputy Mayor Fimia is named in the document at issue, she has standing to object to its disclosure. *See* RCW 42.56.540. But under that statute, Ms. Fimia cannot be held liable for fees. *See Confederated Tribes v. Johnson*, 135 Wn.2d 734, 758, 958 P.2d 260 (1998) (holding only agency can be liable).

IV. CONCLUSION

This Court should interpret the Public Records Act to allow for the scrutiny of government, not to allow requesters to play "gotcha" because of a meaningless line of metadata. Accordingly, this Court should reverse Division I and re-instate the trial court's ruling dismissing the case.

RESPECTFULLY SUBMITTED this 29th day of June, 2009.

FOSTER PEPPER PLLC



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CERTIFICATE OF SERVICE

I, Terri Quale, certify under penalty of perjury that true and correct copies of the above attached document were delivered as follows:

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