

No. 82397-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DOUG AND BETH O'NEILL, individuals,

Respondents,

v.

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

Petitioners.

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**BRIEF OF PETITIONERS IN ANSWER TO BRIEFS OF AMICI
CURIAE WASHINGTON COALITION FOR OPEN
GOVERNMENT, WASHINGTON NEWSPAPER PUBLISHERS
ASSOCIATION AND ALLIED DAILY NEWSPAPERS OF
WASHINGTON, INC. AND STATE OF WASHINGTON**

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I. INTRODUCTION AND IDENTITY OF RESPONDING PARTIES

The City of Shoreline and former Deputy Mayor Maggie Fimia (collectively the "City") file this joint response to the Briefs of Amici Curiae Washington Coalition for Open Government's ("WCOG"), Washington Newspaper Publishers Association and Allied Daily Newspapers of Washington, Inc. and the State of Washington.

This lawsuit is not about someone looking for information related to the conduct of government. The O'Neills received three different copies of the Thwing-Hettrick email¹ (consisting of a printed copy of the email and two printed copies of the metadata) that provided them with anything in that email that could possibly be related to the conduct of government.

Nor is this case about whether metadata is part of a public record or whether the City can redact a portion of the metadata simply because the metadata does not relate to the conduct of government. If the electronic record is a public record, then the City agrees that its metadata is also a public record.

Instead, this case is about what qualifies as a "copy" and when differences between an original record and a produced copy are

¹ See Supplemental Brief of Fimia at 7-8 for a discussion of what qualifies as the Thwing-Hettrick email.

significant enough to amount to a PRA violation. Amici focus on tangential issues and misconstrue the City's arguments, but fail to address this central question. The copies of the email that the City produced contained all information that related to the conduct of government and the City did not intentionally redact any information. Under these circumstances, the copies of the email the City produced were sufficient to meet the City's duties under the PRA.

II. STATEMENT OF THE CASE

The City relies on its Statement of Case set forth in its Supplementary Brief.

III. ARGUMENT

A. RESPONSE TO AMICUS CURIAE WASHINGTON COALITION FOR OPEN GOVERNMENT

1. O'Neill's request for the email was not a request for either the electronic version or its metadata.

WCOG's entire amicus brief revolves around the erroneous argument that O'Neill's initial oral request to see "that email" triggered a duty to preserve the electronic version of the email, including the metadata.

The Court of Appeals correctly held that O'Neill's various requests for a copy of the email did not amount to a request for the electronic version of the email or a request for its metadata. Stating that the City is

not required to be a mind reader, Division I concluded that O'Neill did not request the metadata record until she actually asked for the metadata. *O'Neill v. City of Shoreline*, 145 Wn. App. 913, 933, 187 P.3d 822 (2008).

While O'Neill was not required to use any magic words in her request, she was required to make the request with sufficient clarity to provide the City with "fair notice" about what record she was seeking. *See Beal v. City of Seattle*, 150 Wn. App. 865, 209 P.3d 872 (2009). The *Beal* court held that a citizen's oral request for information did not give Seattle fair notice of a request for specific documents under the PRA. In *Beal*, several citizens met with Seattle's Fleet and Facilities Department Director to discuss the citizen group's suggested mitigation plan improvements related to Seattle's construction of a facility. At the meeting, the citizen's group orally requested information on the environmental mitigation alternatives considered by Seattle in constructing the facility. The *Beal* court found no violation of the PRA, concluding that the citizens did not make an unambiguous request for identifiable public records. *Beal* at 875.

Here, O'Neill's original request on September 18 was simply to see "that email." She never requested an electronic record² and only requested metadata on September 25 after a hard copy of the email had

² *See O'Neill Declaration, Exs. D, F, G, I.*

been produced. Fimia's version of the electronic email had been deleted in compliance with the records retention guidelines when Fimia was asked for her copy.³ CP 32; CP 35-36.

When these events occurred in 2006, the City properly considered a request for "that email" to mean a printed paper copy of the email. This conclusion is reinforced not only by common usage but by the retention requirements in place in 2006, which treated the official "public record" as the printed copy and directed that the City could treat the electronic copy as a transitory, duplicate copy to be deleted once the paper copy was printed out. CP 36. Once she forwarded it to the City Attorney she no longer had to retain her electronic copy. An agency's ability to rely on the retention schedule to delete records, including deletion of emails, was upheld by Division II in *Building Industry Association of Washington v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009).

WCOG's argument is incorrect that the City deleted the electronic record while a request for the electronic record and its metadata was pending. O'Neill has never requested an electronic copy of the email. She only requested metadata on September 25, after the City had satisfied all pending requests for the email by producing the hard copy of the email.

³ Because the copies of the metadata record the City produced were sufficient to meet its obligations, there is no need for a court to determine when the email was deleted precisely.

When Fimia received the request for metadata from staff, the electronic copy (and the metadata) had already been lawfully deleted pursuant to the retention guidelines.

In sum, O'Neill's requests to see "that email" failed to give the City fair notice that she desired either the electronic copy of the email or its metadata. Once O'Neill did give the City fair notice by stating that she was requesting the "metadata" and City staff forwarded this request to Fimia, Fimia had already lawfully deleted the electronic version of the email together with its associated metadata, as authorized by the retention schedule.

2. Production of one copy of metadata is sufficient to meet the obligations under the PRA

WCOG's assertion that the City is arguing that metadata is not a public record or has zero retention value misstates the City's position. Although Division I's opinion does not adequately address how metadata relates to the conduct of government, the City agrees that, under current law, if an agency possesses a public record in electronic format, then a copy of the metadata associated with that copy is also a public record and must be produced if requested so long as no exemption applies. As observed by Division I, buried amid the computer-generated clutter, the

metadata replicates information contained in the email itself that relates to the conduct of government.

However, the PRA only obligates an agency to produce one copy of a record, including the metadata associated with that record. The fact that nearly every version of any electronic record will have at least some unique metadata does not make each copy of metadata a separate public record that must be produced, as long as the only differences between what was produced and what is not produced does not hold back any information related to the conduct of government. Producing one copy of the metadata meets the City's obligations under the PRA; the PRA does not mandate retention of each and every copy of metadata associated with the same underlying public record.

Here, since the retention schedule in existence in 2006⁴ directed agencies to print and delete electronic copies once a hard copy had been retained, there was no obligation for Fimia to retain the electronic copy once it had been provided to the City Attorney and a hard copy produced. Thus, when O'Neill submitted her request for the metadata, and Fimia no longer had the electronic version since it was lawfully deleted, the City did

⁴ Since the retention schedule in existence today no longer allows agencies to print and delete, this case is a historical anomaly. However, agencies still need direction on whether all copies of metadata must be retained, or if one copy suffices. *See* Amicus brief from the Washington State Association of Municipal Attorneys

not violate the PRA because it produced two copies of the metadata for the email - the Way copy and the re-sent copy. There was no obligation that the City also produce the nearly identical copy of the metadata associated with Fimia's version of the email.

The City fully complied with the PRA by providing the hard copy of the email and locating and providing two copies of the metadata: the Way metadata from the same email and the Fimia metadata from the same email that was resent with the cooperation of the citizen (Thwing) who had originally corresponded with Fimia and Way. The City did not rest on the technicality that it did not have the exact version of the metadata requested; indeed, if the City possessed copies of the metadata, such a response would be considered contrary to the PRA. These copies of metadata provided O'Neill with all information related to the conduct of government; any information that differed between these copies and Fimia's deleted copy was inconsequential and unrelated to the conduct of government, thus no PRA violation.

3. The requester has the burden to prove that requested records are public records.

It is both Fimia's and the City's position that the City fully complied with the PRA when it produced three copies of the email; thus, the Court will not need to address the burden issue. However, if the Court

does address the issue, Fimia's position is that, under the facts of this case, the electronic email and its metadata is not a public record, because it was not used by the City for the conduct of government. Under the facts of this case, only the printed email qualifies as a public record.

As Fimia has explained in her Supplemental Brief at pages 14-17, under the facts of this case, the Thwing-Hettrick email did not become a public record until Fimia "used" it at the City Council Meeting on September 18, 2006. Up to that point, the original email Thwing forwarded to Fimia was not a public record. *See* Fimia Supplemental Br. at 14-16. The Court of Appeals agrees by stating that the email became a public record when it was "used" at the public meeting⁵, but concludes too broadly that the electronic version of the email, rather than just the printed version, became a public record at that point. Fimia only used the email by referencing the email at the September 18 City Council meeting; she read directly from the printed copy of the email at the September 26 City Council meeting. Fimia did not "use" the metadata – she did not know what metadata was and only used what she could read on the face of the email. Because the electronic version of the Thwing-Hettrick email was not used on the 18th, the electronic version of the email did not become a public record, and when the printed copy of the email was provided to the

⁵ O'Neill, 145 Wn. App. At 923-24.

O'Neills, the City had provided a complete copy of what was the public record.⁶

This case is no different than if a private citizen had brought an email to the public meeting. The paper copy of the email might become a public record but the electronic version of the email or drafts of the email would remain as private records outside the reach of the PRA. Because Fimia had only read the email, that is the only portion she used at the meeting. Not every communication received by a public employee or official is a public record.

It was O'Neill's burden to prove the metadata in this case became a public record. The PRA expressly provides when the burden is placed on an agency: it is the agency's burden to prove that an exemption allows it to withhold a "public record." RCW 42.56.550(1). This burden-shifting provision pre-supposes that an actual "public record" is at issue. But the PRA does not address whose burden it is to prove a record is a public record in the first instance. When the PRA is silent on an issue, "normal civil procedures are an appropriate method to prosecute a claim[.]" *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89,

⁶ As noted, Fimia agrees that if the electronic version of a record is a public record, then the metadata is also a public record. The difference here is that the electronic version of the record with its metadata was not "used" when Fimia mentioned the email at the City Council Meeting on September 18, 2006. Thus, under the facts of this case, the printed version of the email was all that qualified as a public record.

105, 117 P.3d 1117 (2005). If records are not “public records,” then they are not subject to the requirements of the PRA. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348 n.3, 217 P.3d 1172 (2009) (holding that city was not required to produce an exemption log for withheld records that did not qualify as “public records”). In any civil case, the burden of proof is on the plaintiff. *See, e.g., Alprin v. City of Tacoma*, 139 Wn. App. 166, 171, 159 P.3d 448 (2007).

When an agency does not produce a record because it is not a public record, the agency is not asserting an exemption. Thus the burden shifting provision in RCW 42.56.550(1) does not apply. If the drafters had intended to place this burden on an agency, the drafters would have done what they did with exemptions – expressly place the burden on agencies.

Amicus’s argument is similar to the argument made in *City of Federal Way v. Koenig*. In that case, the requester argued that the City was required to produce an exemption log for any “court records” the City withheld, arguing that otherwise the City would be allowed to “silently withhold” records. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009), Petitioner’s Br. (No. 82288-3) at 23-26.⁷ The City,

⁷ Available at www.courts.wa.gov/content/Briefs/A08/822883%20appellant%20br.pdf. (Last visited March 1, 2010).

however, had argued that it was not required to produce a log because the court records were not “public records” under the PRA and therefore not subject to the requirements of the PRA. This Court agreed, holding that “[b]ecause the withheld documents are not public records under the PRA, they are not subject to the log requirement.” *City of Federal Way*, 167 Wn.2d at 348 n.3.

Just as the burden of the PRA’s exemption log requirement does not apply if the records are not public records, the burden-shifting provision of the PRA does not apply if a record is not a public record. The O’Neills, as the plaintiffs, must first prove a record is a public record, and only then do the requirements of the PRA, including the burden shifting provision, apply.

4. Prospective application is warranted for this new rule of law/issue of first impression.

This case raises a novel issue of first impression, justifying prospective application. Issues surrounding metadata are so novel that that the majority of states who have addressed the issue have indicated it is unethical to look at the metadata behind correspondence sent by opposing counsel.⁸ This reflects such a lack of understanding of metadata that state

⁸ The American Bar Association has collected the various state bar ethics opinions regarding metadata. Joshua J. Poje, J.D., *Metadata Ethics Opinions Around the U.S.*, last updated on September 29, 2009, <http://www.abanet.org/tech/ltrc/fyidocs/metadachart.html>

bars feel a duty to protect those attorneys who do not understand the implications of releasing electronic records with their metadata. In Washington, the issue of metadata as a public record was only just recently addressed by the archivist and the Local Records Committee. This shows that metadata in the context of public records was not anticipated until after the trial court proceeding in this case.

At the time of O'Neill's requests and the City's responses in 2006, the retention schedule stated:

Email messages with public record content should be retained in E-mail format only as long as they are being worked on or distributed. Upon completion, E-mail messages containing public record information should be printed out or transferred to an electronic document managing system, filed with the appropriate records series, and retained for the minimum retention period, assigned by the Local Government General Records Retention Schedule, or a records retention schedule approved specifically for the agency by the Local Records Committee.

CP 36. However, in May 2007, over seven months after the metadata request from O'Neill, the Local Records Committee indirectly addressed the issue of metadata and public records by removing from the retention schedule the language allowing an agency to print and delete electronic copies. For its part, the state

archivist did not directly address the issue of archiving electronic records until October 2008, when it filed Chapter 434-662 WAC, which requires electronic records be kept in electronic format for archiving purposes. Finally, at the time of O'Neill's September 2006 request for metadata, no published court opinion from Washington state, or any other state, had addressed the issue of metadata in the context of state public records law.⁹

Moreover, as noted in the Amicus brief from the Washington State Association of Municipal Attorneys ("WSAMA"), even in civil discovery, parties are only required to preserve and produce metadata when there has been some showing of relevance. *See* Brief of Amicus Curiae WSAMA at 6. The City has not been able to locate a single court decision issued before September 2006, in any context, that holds a producing party had violated its discovery obligations based on irrelevant differences in metadata between an original copy of a record and a produced copy. Thus, it is simply not credible for Amicus WCOG to infer that, in 2006, the PRA clearly mandated that metadata is a public record subject to retention. This inference is directly contradicted by the lack of guidance by case law and the failure of the state archivist, and the Local Records

⁹ The issue has now been addressed in Arizona. *Lake v. City of Phoenix*, 222 Ariz. 547, 218 P. 3d 1004 (Ariz. 2009).

Committee to provide clear guidance on the issues until after the trial court decision in this case.

5. The PRA Only Allows for Attorney Fees When an Agency Has Wrongfully Withheld a Record

Amicus WCOG cites to *Spokane Research*, 155 Wn.2d at 102-04 to argue that the O'Neills are entitled to attorney fees if the trial court is reversed, even if there is no finding on appeal that the City wrongfully withheld records. The *Spokane Research* case itself, however, refutes Amicus's argument. In that case, this Court reversed the trial court order and remanded for a hearing on the merits – the relief the O'Neills seek. In making that ruling, the Court rejected a line of cases that held attorney fees could only be awarded if the lawsuit causes the disclosure of the records. *Spokane Research*, 155 Wn.2d at 102-04. But the Court did not award fees in *Spokane Research*, because there had been no finding that any records had been wrongfully withheld. Instead, the Court remanded the case for determination by the trial court on whether records had actually been wrongfully withheld, which would justify fees. *Spokane Research*, 155 Wn.2d at 106.

Thus, *Spokane Research* stands for the proposition that fees cannot be awarded until there is a finding that records were wrongfully withheld. The Court of Appeals did not make any such finding, nor can this Court

on the record before it. Therefore, even if this Court were to reverse, it would be premature to award fees.

B. RESPONSE TO AMICUS CURIAE WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION AND ALLIED DAILY NEWSPAPERS OF WASHINGTON, INC.

Amicus Curiae Washington Newspaper Publishers Association and Allied Daily Newspapers of Washington, Inc. (hereafter "Allied") made significant factual errors in its briefing. Allied asserts that, after O'Neill's request for the email, Fimia deleted the top four header lines, forwarded the altered email from her personal computer to her governmental email address, and subsequently deleted the email from her personal computer. Brief of Amicus Curiae Allied at 2. Allied accurately states that Fimia initially removed the top four header lines from the email (consisting of the Thwing forwarding information), as she understood O'Neill's request to be only for the Diane Hettrick email and not for the Thwing forwarding information. CP 21. However, Allied omits the fact that, after understanding the request was for the complete email with the Thwing information, Fimia electronically forwarded the complete, unaltered email with the Thwing forwarding information to the City Attorney for preservation and production. CP 22. Only after Fimia had forwarded the complete, unaltered email to the City Attorney did she delete the

electronic copy from her personal computer. *Id.* At no time did Fimia forward the email to her City email account.

Amicus Allied also infers that the City redacted the metadata from the email. Again, this is inaccurate. No redaction occurred. The City produced two copies of the metadata from the same email; it just did not provide a third copy of the metadata from Fimia's version of the email, as the electronic copy had been deleted in compliance with the law.

C. RESPONSE TO AMICUS CURIAE STATE OF WASHINGTON

Amicus Curiae State of Washington stated in its briefing: "Given the facts of this case, it appears that only the 'header metadata' in one e-mail is at issue, and the court of appeals correctly assessed whether it contained information that was related to the conduct of government in determining whether it should be disclosed under the Act." Brief of Amicus Curiae State of Washington at 12. The City disagrees with this statement to the extent it implies the City violated the PRA when it failed to produce a particular copy of metadata.

The Court of Appeals identified the "email addresses of persons who may have knowledge of alleged improprieties in dealing with a zoning matter" as "related to the conduct of government" that

would appear in the metadata. *O'Neill v. Shoreline* at 925. But that is factually inaccurate.

The Court of Appeals is making the same mistake that Fimia made when she forwarded the complete, unaltered email to the City Attorney – the Court of Appeals is assuming that Hettrick's email address would have been in the header metadata, even though Hettrick's email had been forwarded by someone to Thwing, who then forwarded it to Fimia (and Way). Once Hettrick's email was forwarded the first time, her email information was stripped out of the header metadata, just as Thwing's information was stripped out when Fimia forwarded the email to the City Attorney.¹⁰

Moreover, the City has never argued that those portions of metadata not relating to the conduct of government may be redacted. *See Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009) (holding that information not related to the conduct of government cannot be redacted absent express exemption). All information identified by Division I as "relating to the conduct of government" was provided in the hard copy of the email (showing Fimia's email address, the forwarding sender – Ms. Thwing's email

¹⁰ Nothing in the record suggests that Thwing would have any information about any alleged improprieties. Regardless, both Thwing's and Hettrick's email addresses appeared in the hard copy of the email itself, provided to O'Neill.

address, and the original author of the email, Diane Hettrick's email address), as well as in the Way metadata and the metadata for the re-sent email. CP Sub 4 Exhibit J at 21 and Exhibit L. These facts beg the question of what additional information in Fimia's version of the metadata relates to the conduct of government and why it was not sufficient to simply provide the hard copy of the email and two copies of its metadata. Thus, the City urges the Court to reject that portion of the State's brief.

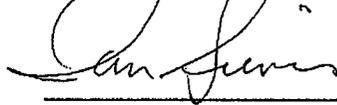
IV. CONCLUSION

For the reasons set forth above, the City respectfully requests the Court to rule that the City fully complied with the PRA when it provided requested copies of the Thwing-Hettrick email and email metadata that gave the O'Neills all of the information related to the conduct of government and it did not intentionally hold back any metadata.¹¹ The Amici's arguments are based on misconceptions about the facts of the case and do not support reversal of the trial court's ruling. Accordingly, the City asks the Court to affirm the trial court and dismiss the O'Neill's case.

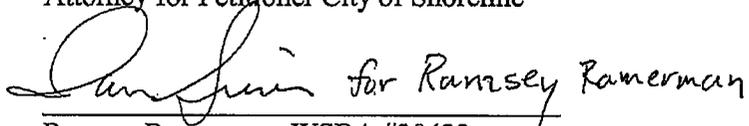
¹¹ Even if a court found that Fimia intentionally deleted the Thwing-Hettrick email, there cannot be any finding that she was trying to delete metadata for two reasons. First, she did not know about metadata. Second, she believed the City possessed a complete copy of the email once she forwarded it to the City.

RESPECTFULLY SUBMITTED this 5th day of March, 2010.

CITY OF SHORELINE



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CERTIFICATE OF SERVICE

I, Darcy Greenleaf, certify that on March 5, 2010 I caused a copy of Petitioners' Response to Amicus Curiae Washington Coalition for Open Government, to be served on the following parties via regular U.S. mail and e-mail, pursuant to prior agreement:

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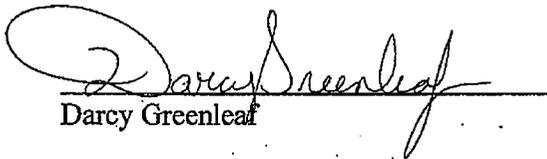
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