

NO. 82397-9

IN THE SUPREME COURT OF WASHINGTON

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

Appellants,

v.

DOUG AND BETH O'NEILL, individuals,

Respondents

O'NEILLS' REPLY TO CITY OF SHORELINE'S REQUEST
FOR PROSPECTIVE APPLICATION

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TABLE OF CONTENTS

I. LEGAL AUTHORITY AND ARGUMENT 1

 A. Prospective Application is Not Justified Here..... 1

 1. The first *Chevron* factor has not been met..... 1

 2. Retroactive application will not impede policy objectives.....4

 3. Retroactive application will not be inequitable. 6

 B. O’Neill Should Be Entitled to Attorneys’ Fees, Costs and Penalties Even if Rule Applied Purely Prospectively 8

II. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

ACLU of Wash. v. Blaine Sch. Dist. No.503, 95 Wn. App. 106, 975 P.3d 536 (1999)..... 9

Allis-Chalmers Corp. v. City of North Bonneville, 113 Wn.2d 108, 775 P.2d 953 (1989)..... 6

Amren v. City of Kalama, 131 Wn.2d 225, 929 P.2d 389 (1997)..... 7

Baksalary v. Smith, 591 F.Supp. 1279 (D.C. Pa. 1984)..... 3

Barros v. Barros, 34 Wn. App. 266, 660 P.2d 770 (1983)..... 4, 6, 7

Beal v. City of Seattle, 150 Wn. App. 865, 209 P.3d 872 (2009)..... 6

Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991)..... 1

<u>Bradbury v. Aetna Cas. & Sur. Co.,</u> 91 Wn.2d 504, 589 P.2d 785 (1979).....	1
<u>Bradbury v. Aetna Cas. & Sur. Co.,</u> 19 Wn. App. 66, 573 P.2d 395 (1978).....	7
<u>Bullo v. Fife,</u> 50 Wn. App. 602, 749 P.2d 749 (1988).....	2, 6
<u>Carrillo v. City of Ocean Shores,</u> 122 Wn. App. 592, 94 P.3d 961 (2004).....	1, 4
<u>Cascade Sec. Bank v. Butler,</u> 88 Wn.2d 777, 567 P.2d 631 (1977).....	2
<u>Chevron Oil v. Huson,</u> 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).....	1, 4
<u>Citizens for Fair Share v. Dept. of Corrections,</u> 117 Wn. App. 411, 72 P.3d 206 (2003).....	8, 9, 10
<u>DeFrancesco v. Sullivan,</u> 803 F.Supp. 1332 (N.D.Ill. 1992).....	9
<u>Digital Equipt Corp. v. Department of Revenue,</u> 129 Wn.2d 177, 916 P.2d 933 (1996).....	1
<u>Eisenberg v. Hughes,</u> 1 Fed. Appx. 752 (9th Cir. 2001).....	2
<u>Haines v. Anaconda Aluminum Co.,</u> 87 Wn.2d 28, 549 P.2d 13 (1976).....	1
<u>Harper v. Virginia Dept. of Taxation,</u> 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).....	1
<u>Hearst v. Hoppe,</u> 90 Wn.2d 123, 580 P.2d 246 (1978).....	7

<u>Holt v. Shalala,</u> 35 F.3d 376 (9th Cir. 1994)	9
<u>In re Audett,</u> 158 Wn.2d 712, 147 P.3d 982 (2006).....	5, 6
<u>Knight v. Food & Drug Admin.,</u> 938 F. Supp. 710 (D. Kan. 1996).....	3
<u>Koenig v. City of Des Moines,</u> 158 Wn.2d 173, 142 P.3d 162 (2006).....	10
<u>Lake v. City of Phoenix,</u> __ P.3d __, 2009 WL 3461304 (Ariz. Oct. 29, 2009).....	5
<u>Lunsford v. Saberhagen Holdings, Inc.,</u> 139 Wn. App. 334, 160 P.3d 1089 (2007).....	2
<u>Lunsford v. Saberhagen Holdings, Inc.,</u> 166 Wn.2d 264, 208 P.3d 1092 (2009).....	1, 2
<u>Mechling v. Monroe,</u> __ Wn. App __, 2009 WL 3430173 (Oct. 26, 2009)	2, 6
<u>Progressive Animal Welfare Soc’y v. Univ. of Wash.,</u> 125 Wn.2d 243, 885 P.2d 592 (1994).....	5, 7
<u>Rental Housing Ass’n of Puget Sound v. City of Des Moines,</u> 165 Wn.2d 525, 199 P.3d 393 (2009).....	5, 6, 10
<u>Reuter v. The Borough Counsel of The Borough of Fort Lee,</u> 768 A.2d 769 (N.J. 2001).....	3
<u>Santiago v. Sullivan,</u> 783 F.Supp. 223 (E.D.Pa. 1992).....	9
<u>Smith v. Okanogan County,</u> 100 Wn. App. 7, 994 P.2d 857 (2000).....	8
<u>Spokane Research & Defense Fund v. City of Spokane,</u> 96 Wn. App. 568, 983 P.2d 676 (1999).....	8

<u>Taskett v. KING Broad. Co.</u> , 86 Wn.2d 439, 546 P.2d 81 (1976).....	7
<u>Tellinghuisen v. King County Council</u> , 103 Wn.2d 221, 691 P.2d 575 (1984).....	2
<u>Tiberino v. Spokane County</u> , 103 Wn. App. 680, 13 P.3d 1104 (2000).....	3, 7, 8
<u>United States v. Johnson</u> , 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).....	2
<u>Yacbellis v. City of Bellingham</u> , 55 Wn. App. 706, 780 P.2d 272 (1989).....	4

Statutes

RCW 4.84.350(1).....	10
RCW 42.56.030	5
RCW 42.56.100	4, 8
RCW 42.56.110(2).....	3
RCW 42.56.550(4).....	7, 8

Other Authorities

Attorney General's Office, Open Government Internet Manual (2007)	5,6
Shapiro, S.L., "Prospective or Retroactive Operation of Overruling Decicion," 10 A.L.R.3d 1371 (2008)	2
WAC 44-14-03001(1).....	3
WAC 44-14-03005.....	6

WAC 434-662-040..... 5

WSBA, *Public Records Act Deskbook* (2006) 3, 8

I. LEGAL AUTHORITY AND ARGUMENT

A. Prospective Application is Not Justified Here.

Generally, appellate decisions announcing new legal principles apply retroactively. *See Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270-71, 208 P.3d 1092 (2009).¹ To deviate from the general rule, this Court has adopted the three-part test from *Chevron Oil Co. v. Huson*.² *Id.* at 272. When all three parts of the test are met, a court “may,” but is not required to, apply the new rule purely prospectively. *Id.* The test requires that “(1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed; (2) retroactive application would tend to impede the policy objectives of the new rule; and (3) retroactive application would produce a substantially inequitable result.” *Id.*

1. The first *Chevron* factor has not been met.

A rule that the metadata of an electronic public record can itself be a public record does not overrule any Washington authority, let alone “clear

¹ *See also Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991); *Digital Equip. Corp. v. Dept. of Revenue*, 129 Wn.2d 177, 188, 916 P.2d 933 (1996); *Bradbury v. Aetna Cas. & Sur. Co.*, 91 Wn.2d 504, 507-08, 589 P.2d 785 (1979); *Haines v. Anaconda Aluminum Co.*, 87 Wn.2d 28, 34, 549 P.2d 13 (1976), *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 94-96, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). A ruling is applied retroactively unless expressly reserved by the deciding court. *Digital Equip. Corp.*, 129 Wn.2d at 187-88; *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 613-14, 94 P.3d 961 (2004).

² 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

precedent.”³ Moreover, the City admitted that the requested electronic email was destroyed “inadvertently” and only afterward attempted to justify the destruction. See CP 22. The City did not destroy the requested record and attendant metadata relying on any existing statutory or long-standing case authority.⁴ See *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 785, 567 P.2d 631 (1977). Second, even if “metadata as a public record”

³ It has also not been shown that Division I’s rule is actually a “new” principle of law. “The *Chevron Oil* test by its own terms only applies in a case in which a new rule is being adopted, not when a relatively new rule from another decision is being applied.” *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 345, 160 P.3d 1089 (2007); see also *Eisenberg v. Hughes*, 1 Fed. Appx. 752, 755 (9th Cir. 2001); *United States v. Johnson*, 457 U.S. 537, 551, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). The City has the burden to show this factor weighs in favor of prospective application, and Washington courts will reject such an argument without the threshold showing that the rule announced is actually “new.” See *Carrillo*, 122 Wn. App. at 614 (rejecting City’s prospective argument because it failed to meet threshold of showing principle was “new”); see also *Tellinghuisen v. King County Council*, 103 Wn.2d 221, 224, 691 P.2d 575 (1984) (same); *Bullo v. Fife*, 50 Wn. App. 602, 608, 749 P.2d 749 (1988) (same). There is no question that emails, along with all kinds of electronic records, can be public records. See *Mechling v. Monroe*, ___ Wn. App. ___, 2009 WL 3430173 *5 (Oct. 26, 2009) (“An email message is a ‘writing’ under the [PRA].”) The conclusion that metadata of an electronic email can be a public record is not ground-breaking or novel; it is a simple application of a statute with extraordinarily broad definitions and is consistent with prior case law with similar holdings.

⁴ The requirement that a party relied in good faith to its detriment on a past rule or statute is the primary focus of the *Chevron* test, as well as the other prospective application contexts in which *Chevron* was not applied. As *Lunsford* illustrates by citing three other decisions of this Court, “[i]n areas such as property, contracts, and taxation where parties had vested interests, we continued to look to whether the parties justifiably and reasonably relied on our prior decisions when entering the transaction.” 166 Wn.2d at 273 (citations omitted); see generally S.R. Shapiro, “Prospective or Retroactive Operation of Overruling Decision”, 10 A.L.R.3d 1371 (2008) (“Although the courts have given attention to various factors in determining whether or not to apply an overruling decision retroactively, it appears that the factor of reliance has received the most attention.”). The fact that the City cannot show it was relying on any prior ruling or statute in “inadvertently” destroying the original electronic version of the requested email is fatal to its prospective application argument. Further, if the City truly believed that the metadata was not a “public record,” it seems odd that it failed to object to the specific request for the metadata on those grounds, and also that it actually provided the metadata for various other emails. These inconsistencies are likewise fatal to the City’s prospective application argument.

can be construed as an issue of “first impression,” the City cannot show that the ruling was not “clearly foreshadowed” by earlier precedent. *See Baksalary v. Smith*, 591 F.Supp. 1279, 1281 (D.C.Pa. 1984) (describing *Chevron Oil*’s first factor as requiring the new rule be “so novel as to be unpredictable”).⁵

The definition of “public record” under the PRA is extraordinarily broad. RCW 42.56.110(2). Moreover, prior to Division I’s Opinion, it was already well established, confirmed in *Mechling, supra*, that an email could constitute a public record. *See Tiberino v. Spokane County*, 103 Wn. App. 680, 688, 13 P.3d 1104 (2000); *see also* WAC 44-14-03001(1).⁶

A conclusion that the *electronic version* of an email is a public record cannot be feasibly seen as “not foreshadowed.” Nor is it plausible to argue that it was not foreshadowed that the “metadata” of that public record email, which Division I interpreted to include the “to”, “from”, “bcc”, and subject lines of an email, was necessarily a public record subject to the PRA—especially in light of the broad definition of “public record.”

According to the Secretary of State’s Retention Guidelines in place at the time of the records requests and deletion: “For purposes of satisfying

⁵ *See also Reuter v. The Borough Counsel of The Borough of Fort Lee*, 768 A.2d 769, 772 (N.J. 2001) (interpreting *Chevron*’s first factor as requiring “a sudden and generally unanticipated repudiation of long-standing practice”).

⁶ Also, counter to the City’s position, agencies are already required to interpret public records requests broadly. *See* WSBA, *Public Records Act Deskbook* (“Deskbook”) at 4-3 (“An agency has a duty to liberally construe the scope of a records request.”).

public record laws, e-mail is defined as not only the messages sent and received by e-mail systems, but all transmission and receipt data as well.” Secretary of State, Records Management Guidelines, 27 (2001). This definition includes what Division I interpreted as “metadata.”

PRA case law coupled with the many cases revolving around the discoverability of metadata in a non-PRA context, illustrate that the conclusion that “metadata” can be a public record subjecting agencies to the PRA when requested was a legal principle that clearly was foreshadowed by earlier judicial precedent.⁷ *Carrillo*, 122 Wn. App. at 614; *Barros v. Barros*, 34 Wn. App. 266, 272-73, 660 P.2d 770 (1983). The City thus cannot show that the first *Chevron* factor has been met.

2. Retroactive application will not impede policy objectives.

Applying Division I’s ruling retroactively will not impede the policy objective of the rule that metadata is a public record. In considering this second factor, a court must “weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect.” *Chevron*, 404 U.S. at 107-08. This Court examines the overall policy of a statute in deciding whether to apply a new rule retroactively or

⁷ This also applies to the principle that it is a violation of the PRA for an agency to destroy a public record that is the subject of an outstanding request, which is exactly what happened in the immediate case. See RCW 42.56.100; see *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 715-16, 780 P.2d 272 (1989) (reversing trial court’s conclusion that the requested—and then destroyed—public records were not public records and remanding to trial to assess mandatory attorney fees, costs and penalties against agency).

prospectively. *See In re Audett*, 158 Wn.2d 712, 721-22, 147 P.3d 982 (2006) (considering overall purpose of sexually-violent predator statute in applying rule retroactively). The explicit purpose and policy of the PRA is to require the broadest possible disclosure of public records from agencies. *See* RCW 42.56.030. This Court has repeatedly cited the unusually powerful policy language contained within the PRA in ruling in favor of requesters, and against agencies for acting with anything less than “strict compliance” with the PRA. *See Rental Housing Ass’n of Puget Sound v. City of Des Moines* (“RHA”), 165 Wn.2d 525, 535, 199 P.3d 393 (2009); *see also Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 885 P.2d 592 (1994) (*PAWS II*).⁸

Further, requiring an agency to retain and produce the metadata from its public records, specifically emails, is a duty already imposed on agencies in WAC 434-662-040. The City has failed to show that it was entitled to destroy the *requested* metadata pursuant to the then-existing Retention Schedule, which Fimia admitted she was not relying on when she “inadvertently” deleted the original email. *See* CP 22, para 16.⁹

⁸ *See also Lake v. City of Phoenix*, ___ P.3d ___, 2009 WL 3461304 *3 (Ariz. Oct. 29, 2009) (“It would be illogical, and contrary to the policy of openness underlying the public records laws, to conclude that public entities can withhold information embedded in an electronic document, such as the date of creation, while they would be required to produce the same information if it were written manually on a paper public record.”).

⁹ Moreover, if the agency “keeps a record longer than required—that is if the agency still possesses a record that it could have lawfully destroyed under a retention schedule—the record is still a ‘public record’ subject to disclosure.” Attorney General’s Office, Open

The rule that metadata of a public record can be a public record is in accord with the policy of facilitating the broadest disclosure of public records for citizens, and the retention requirements already imposed on the City. *See In re Audett*, 158 Wn.2d at 722 (refusing to apply new rule prospectively because retroactive application “will further the purpose of the statute.”). This factor clearly favors retroactive application. *See Allis-Chalmers Corp. v. City of North Bonneville*, 113 Wn.2d 108, 117-18, 775 P.2d 953 (1989); *see also Bullo*, 50 Wn. App. at 608-09.

3. Retroactive application will not be inequitable.

Lastly, enforcing the rule that metadata from a public record is itself a public record would not be “inequitable” to the City. The City was not relying on any authority in destroying a requested record—again, the primary focus of any court finding this factor in favor of purely prospective application. *See Barros*, 34 Wn. App. at 273 (not inequitable to apply rule retroactively because party never relied to her detriment); *see*

Government Internet Manual, Chapter 1, § 1.4 (citing how the PRA includes writings “retained” by the agency in its definition of “public record”). The PRA Model Rules are also instructive. *See* WAC 44-14-03005 (“An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record... The agency is required to retain the record until the record request has been resolved.”). Although non-binding, the Model Rules and their comments have been cited and relied upon by Washington courts, including this Court. *See RHA*, 165 Wn.2d at 539 (looking to the comments to the Model Rules to articulate the brief explanation of withholding necessary for a valid claim of exemption by an agency); *see also Beal v. City of Seattle*, 150 Wn. App. 865, 874-75, 209 P.3d 872 (2009) (citing Model Rule related to the dangers of making oral PRA requests, and concluding that “[w]hile the model rules are not binding on the City, we agree that they contain persuasive reasoning”); *Mechling*, 2009 WL 3430173 **8-9.

also *Bradbury v. Aetna Cas. & Sur. Co.*, 19 Wn. App. 66, 70, 573 P.2d 395 (1978). The City's current predicament is one of its own making. Denying retrospective application would only be inequitable to the O'Neills, as it conceivably precludes or limits recovery of the mandatory attorney fees, costs and daily penalties entitled to a prevailing requestor under the PRA's fee-shifting statute. *See* RCW 42.56.550(4). This Court has explicitly rejected prospective application when to do so would be inequitable to the party seeking retroactive application. *See Taskett v. KING Broad. Co.*, 86 Wn.2d 439, 449-50, 546 P.2d 81 (1976) (concluding that equity "compels" retroactive application).¹⁰ A purely prospective ruling would contradict this Court's previous interpretation of the PRA's penalty provisions, and the statute itself. *See Hearst v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978); *see also PAWS II*, 125 Wn.2d at 271; *Amren v. City of Kalama*, 131 Wn.2d 25, 36, 929 P.2d 389 (1997).

The City cannot show a single PRA case where an appellate court chose to apply its rule purely prospectively. This is understandable, as Washington courts apply new rules establishing that a record is public retroactively. *See Tiberino*, 103 Wn. App. at 687-88 (rejecting agency's argument that personal emails are not public records); *see also Smith v.*

¹⁰ To be clear, the party seeking prospective application needs to show that it would be inequitable to apply the new rule retroactively; the burden in no way falls on the other party to show inequity from prospective application or the absence of inequity if applied retroactively.

Okanogan County, 100 Wn. App. 7, 16-17, 994 P.2d 857 (2000) (rejecting agency’s argument that judge’s oaths are not “public records”); *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 574-75, 983 P.2d 676 (1999) (rejecting agency argument that records were not public, but ultimately concluding records exempt); Deskbook, §3.2(2)(a), 3-6-3-7. Not one factor from *Chevron Oil*, therefore, weighs in favor of deviating from the default of retroactive application.

B. O’Neill Should Be Entitled to Attorneys’ Fees, Costs and Penalties Even if Rule Applied Purely Prospectively

If this Court chooses to deviate from the general rule that appellate decisions announcing new rules are applied retroactively, that determination should not deprive the O’Neills of their attorneys’ fees, costs and penalties. First, the “metadata as a public record” issue is not the only issue for which the O’Neills will be the “prevailing party” against the City. PRA case law holds that a party is the prevailing party in the context of RCW 42.56.550(4) if it prevails on any part of the action against the agency.¹¹ *See Citizens for Fair Share v. Dept. of Corrections*, 117 Wn. App. 411, 437, 72 P.3d 206 (2003) (party entitled to attorneys fees under PRA when prevailing only on one minor issue). Second, if the Court

¹¹ For instance, even if the Court determines that prospective application is appropriate for the rule that metadata is a public record, the City still failed to provide the electronic version of the requested email—which it has admitted that it destroyed before actually complying with the request. That alone is a violation of the PRA (*see* RCW 42.56.100) and would thus entitle the O’Neills to mandatory attorney fees, costs and penalties.

correctly concludes that the metadata of a public record is necessarily also a public record, but applies that rule purely prospectively, this could allow a directive that the City need not now provide the metadata from the electronic version of the requested email, but *not* that the O'Neills are not entitled to the mandatory fees, costs and penalties under the PRA.

Although no PRA case has apparently dealt with this issue, a ruling denying a requestor their fees and costs, when a court agrees with his or her legal interpretation of the statute, would without a doubt frustrate the explicit purpose of the PRA in allowing a private citizen to seek redress in the courts for violations of the PRA by agencies. *See ACLU of Wash. v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.3d 536 (1999) (“[P]ermitting a liberal recovery of costs” for a requestor “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.”).¹²

To hold that a requestor was correct in asserting that a record was subject to the PRA, apply that rule only prospectively, and deny that requestor the fees, costs and penalties mandated by the PRA would result in an unjust Pyrrhic victory for the very people the PRA was designed to

¹² Ironically, courts from other jurisdictions have applied new case rulings prospectively under *Chevron Oil* to expressly prevent a plaintiff from being denied the opportunity to file a petition for attorney’s fees under a similar fee-shifting statute. *See Holt v. Shalala*, 35 F.3d 376, 380-81 (9th Cir. 1994); *see also Santiago v. Sullivan*, 783 F.Supp. 223, 225-26 (E.D.Pa. 1992); *DeFrancesco v. Sullivan*, 803 F.Supp. 1332, 1335-36 (N.D.Ill. 1992).

give incentive to prosecute its provisions. *See RHA*, 165 Wn.2d at 536 (“In construing the PRA, we look at the Act in its entirety, in order to enforce the law’s overall purpose.”). It is inconceivable for the City to argue, and for this Court to accept, that that result is what the people contemplated when passing the PRA as an initiative, and what the Legislature has since contemplated in enacting multiple amendments to the PRA. *See Koenig v. City of Des Moines*, 158 Wn.2d 173, 181-82, 142 P.3d 162 (2006) (“When interpreting any statute our primary objective is to ‘ascertain and give effect to the intent of the Legislature.’”).¹³

II. CONCLUSION

For the foregoing reasons, the Court should deny the City’s request to have any rule affirming Division I’s conclusion that metadata can be a public record applied on a purely prospective basis.

Respectfully submitted this 4th day of December, 2009.

By: 
Michele Earl-Hubbard, WSBA #26454
David Norman, WSBA #40564
Allied Law Group, LLC

¹³ Conceivably, Plaintiffs are also entitled to attorney’s fees and costs if the court determines it is the prevailing party under RCW 4.84.350(1), which allows for recovery of those fees in challenges to an agency’s actions. This more limited provision has been discussed within the PRA context. *See Citizen’s for Fair Share*, 117 Wn. App. at 436-37. However, this provision would obviously only be applicable if this Court determines that the PRA’s prevailing party statute does not apply. Plaintiffs only raise this argument in the context of responding to the City’s untimely prospective application “remedial” argument.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 4, 2009, I caused the delivery of a copy of the foregoing Reply to City of Shoreline's Request for Prospective Application to the following by the method indicated:

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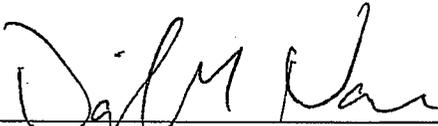
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Dated this 4th day of December, 2009 at Seattle, Washington.



David M. Norman

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Dear Clerk,

Please accept for filing the O'Neill's Reply to City of Shoreline's Request for Prospective Application for the above cause number.

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Thank you,

David Norman, WSBA #40564

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