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No. 82397-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
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DOUG AND BETH O'NEILL, individuals,

Plaintiffs/Respondents,

v.

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

Defendants/Petitioners.

**PETITIONERS'
RESPONSE TO MEMORANDUM OF AMICUS CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT IN
OPPOSITION TO PETITION FOR REVIEW**

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I. IDENTITY OF MOVING PARTY

The City of Shoreline and former Deputy Mayor Maggie Fimia (collectively the "City") file this joint response to the Amicus Curiae Washington Coalition for Open Government's ("WCOG") Memorandum in Opposition of Petition for Review ("Memorandum in Opposition").

II. STATEMENT OF THE CASE

The City relies on its Statement of Case set forth in its Petition for Discretionary Review ("Petition"). In making its arguments, WCOG relies on one significant factual assumption: that the Deputy Mayor deleted the electronic version of the e-mail while the request for metadata was pending. This assumption is inaccurate and unsupported by both Division I's Opinion and the record.

Division I concluded that O'Neill did not request a copy of the metadata until September 25, 2006. *O'Neill v. City of Shoreline*, 145 Wn. App. 913, 933, 187 P.3d (2008). Thus, any assertion that the metadata was requested prior to September 25, 2006 is unsupported by the *O'Neill* decision. Division I further concluded that the record is unclear on when the Deputy Mayor deleted the original, electronic e-mail;¹ however, the

¹ Division I suggests that the Deputy Mayor *may* have possessed the electronic version of the original e-mail after Ms. O'Neill submitted her request for metadata on September 25, 2006. *Id.* However, as detailed in the City's Petition, in making this suggestion, Division

record does show that the Deputy Mayor inadvertently deleted the e-mail after she had electronically forwarded it to the City and before she learned that the metadata had been requested. *O'Neill* at 932; CP 22.

In addition, WCOG's assertion that Division I decided only fact-specific issues and made no legal conclusions is incorrect. Division I made several significant, and erroneous, legal conclusions: (1) a conflict exists between the Secretary of State's Retention Schedule and Guidelines ("State Retention Guidelines") and the Public Records Act ("PRA"); (2) metadata in its entirety relates to the conduct of government; (3) each copy of metadata associated with the same e-mail is a separate public record; (4) if an e-mail is inadvertently deleted an agency must conduct a specialized search of the computer's hard drive to reconstruct the deleted e-mail; and (5) attorney fees are owed if a PRA case is remanded, even if no PRA violation is found and the requestor is not declared a prevailing party. Rather than dismissing the *O'Neill* opinion as a fact-specific dispute, agencies reading the opinion will redirect significant public resources to comply with Division I's legal conclusions.

I points to a portion of the record that shows, at most, that the Deputy Mayor possessed the *modified* version of the e-mail on September 26, 2006.

III. ARGUMENT

WCOG's repeated assertion that the Deputy Mayor deleted a record while a request for that record was pending is wrong and negates all arguments that rely on that assertion.

A. **Division I Erred When It Found a Purported "Conflict" Between the State Retention Guidelines and the Public Records Act.**

WCOG's erroneous assumption that the electronic version of the e-mail was deleted while a request for the metadata was pending provides the basis for WCOG's argument that the purported "conflict" between the PRA and the State Retention Guidelines does not warrant review.

WCOG first argues that the City's position is that a record can be destroyed pursuant to the State Retention Guidelines even if a request for that record is pending. This is not the City's legal position. Nowhere in its Petition did the City argue that the State Retention Guidelines permit destruction of a record while a request is pending. On the contrary, the City specifically noted in its Petition that the State Retention Guidelines only allow for destruction of records once pending requests are resolved. Petition at 8.

WCOG next asserts that Division I did not find a conflict between the State Retention Guidelines and the PRA. This assertion is inaccurate. Division I found that the City complied with the State Retention

Guidelines when it deleted the electronic version of the e-mail and printed out the hard copy along with all required information:

The records retention guidelines promulgated by the Secretary of State provide that certain e-mails are public records. Those that are public records may be deleted as long as they are printed along with the following information: name of sender, name of recipient, and date and time of transmission and/or receipt. The City's actions in this case appear to have complied with these guidelines. O'Neill does not argue otherwise.

O'Neill at 934.

Despite finding compliance with the State Retention Guidelines, Division I noted a conflict with the PRA and concluded that the PRA controlled over the Guidelines. *Id.*

The State Retention Guidelines are part and parcel of the PRA and the two laws must be read together. Having found that the City complied with the State Retention Guidelines, Division I erred in not upholding the trial court's ruling. Instead, it found a conflict between the PRA and the State Retention Guidelines and resolved the conflict by invalidating the Guidelines. This error creates significant uncertainty on the ability of agencies to rely on the State Retention Guidelines as blanket authority to retain and dispose of records, due to the potential trumping by the PRA.

B. Division I Erred in Concluding That Metadata Is a Public Record That Relates to the Conduct of Government and Erred in Concluding That Each Copy of Metadata Is a Public Record.

Division I made two significant legal conclusions with regard to metadata: (1) that metadata relates to the conduct of government; and (2) that each copy of metadata is a separate public record.

1. Division I failed to provide sufficient guidance on how metadata relates to the conduct of government or the performance of a governmental function.

Division I held that metadata, or some portion of it, is a public record because metadata contains information that “relates to” the conduct of government or the performance of a governmental function. *O’Neill* at 925. In making this conclusion, Division I does not provide sufficient guidance on *how* metadata “relates to” the conduct of government or the performance of a governmental function. Without more guidance from this Court, agencies will have to retain each and every copy of metadata due to Division I’s unclear direction on metadata’s relation to the conduct of government. As discussed below, this means agencies will be forced to retain each e-mail received by multiple recipients since, under Division I’s ruling, each copy of metadata associated with duplicate e-mails could potentially relate to the conduct of government.

Without more guidance from this Court, and in light of a 2009 Arizona case declaring that metadata is *not* a public record, it is difficult to grasp how metadata, a record created automatically by a computer, “relates to” the conduct of government or the performance of a governmental function.

In *Lake v. City of Phoenix*, -- P.3d --, 2009 WL 73256 (Ariz. App. 2009), the Arizona Court of Appeals held that metadata is not a public record. The requestor in *Lake* asked for:

[T]he ‘metadata’ or ‘specific file information contained inside the file’ relating to Conrad’s notes, including the ‘[t]rue creation date, the access date, the dates for each time [the file] was accessed, including who accessed the file as well as print dates etc.’

Lake, at *2.

The *Lake* court distinguished the *O’Neill* case based on Washington PRA’s inclusion of the words “regardless of the physical form or characteristics” in its definition of public records. *Lake*, at *6. These words do not appear in Arizona’s definition of public records.

Nonetheless, the *Lake* analysis of why metadata is not considered a public record illustrates why Division I erred in finding that the metadata was a public record that should have been retained. The *Lake* court found that a public employee’s notes on a City-related issue, and not the associated metadata, disseminate information to the public and serve as a

memorial of an official transaction. The 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.

Similarly, the e-mail in question here, and not the metadata, relate to the conduct of government or relate to a governmental function. The metadata is nothing more than a by-product of the Deputy Mayor’s computer. As detailed in the Petition, it is the City’s position that, at most, metadata is a public record with no retention value, similar to envelopes.

2. Division I erred in concluding all copies of metadata are a public record.

In the alternative, if this Court deems that metadata is a public record, then a single copy of the metadata should suffice. Division I erroneously held that since each copy of metadata may have unique properties, each copy is considered a separate public record. *O’Neil*, 145 Wn. App. at 935. Division I found that if a copy of an e-mail’s metadata is requested from one recipient of the e-mail, a copy of the e-mail’s metadata provided from a second recipient of the same e-mail is not responsive to the request. *Id.* This holding requires agencies to retain each copy of an e-mail received by multiple recipients, burdening agency e-mail systems with duplicative e-mails and metadata. Division I’s

conclusion that a second copy of the metadata (in this case, Councilmember Janet Way's metadata of the same e-mail) does not suffice is like arguing that because one piece of paper has fingerprints on it, producing a copy of the paper is not responsive to a request "for the paper" because the copy will not indicate who has touched the original piece of paper.

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

WCOG's argument regarding Division I's order requiring the City to search the hard drive of the Deputy Mayor's personal computer, like its other arguments, is based on the faulty factual assumption that the Deputy Mayor deleted the e-mail after O'Neill requested the metadata.

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 e-mail 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.²

D. Division I Erred in Awarding Attorney Fees When It Failed to Identify a Violation of the PRA.

In its direction to the trial court on remand, Division I stated:

[T]he trial court must determine, consistent with this opinion, **whether the City’s deletion of the metadata violated the PRA.** Where appropriate, the trial court should determine the appropriate monetary penalty under the PRA.

O’Neill at 936.

Division I remanded the issue of whether deletion of the metadata violated the PRA. The O’Neills were provided with every document requested, except for the exact copy of the metadata associated with the Deputy Mayor’s e-mail. Since Division I did not

² Division I’s order to search the hard drive of the former Deputy Mayor’s personal computer also raises constitutional concerns because it includes no safeguards to protect her legitimate expectations of privacy. See *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.”); *State v. Miles*, 160 Wn.2d 236, 247, 156 P.3d 864 (2007) (holding search of private records obtained violated Article I, sec. 7, even though they were obtained by a statutorily authorized subpoena because the statute did not offer sufficient protections for privacy).

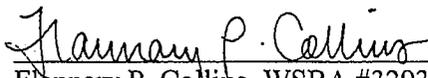
find that deletion of the metadata violated the PRA, the Court erred in awarding attorney fees to the O'Neills because attorney fees can only be assessed if a violation of the PRA is found. *Concerned Ratepayers Ass'n v. Pub. Utility Dist. No. 1.*, 138 Wn.2d 950, 964, 983 P.2d 635 (1999); *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). This error is not fact-specific; it is new precedent allowing for the awarding of attorney fees in a PRA case without finding a violation of the PRA,

IV. CONCLUSION

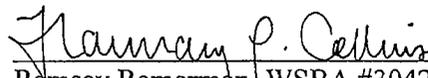
For the foregoing reasons and the reasons set forth in the Petition, the City respectfully requests the Court deny WCOG's Memorandum in Opposition and accept the City's Petition for Review.

RESPECTFULLY SUBMITTED this 2nd day of February, 2009.

CITY OF SHORELINE


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per voice
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for

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BY RONALD R. CARPENTER

CERTIFICATE OF SERVICE

I, Flannary P. Collins, certify that on February 2, 2009 I caused a copy of Petitioners' Response to Memorandum of Amicus Curiae CLERK Washington Coalition for Open Government in Opposition to Petition for Review to be served on the following parties via regular U.S. mail and e-mail, pursuant to prior agreement:

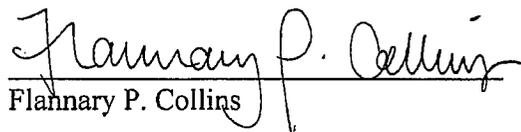
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Signed at Shoreline, Washington on February 2, 2009.


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Filed by: Flannary P. Collins, WSBA #32939

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Dear Clerk of the Supreme Court,

Attached please find Petitioners' Response to Memorandum of Amicus Curiae Washington Coalition for Open Government in Opposition to Petition for Review.

<<Petitioners' Response to Memorandum of WCOG Opposition to Petition for Review.pdf>>