

## NEWS

# UPDATE | Court of Appeals rejects city's request for review on city's loss in public record lawsuit

by [BRIAN KELLY](#), Bainbridge Island Review Editor  
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A Washington state Court of Appeals has rejected the city of Bainbridge Island's request to step in and review a judge's decision that said the city violated the state Public Records Act when it refused to turn over council member emails and other public records that were sought by two Bainbridge residents.

In an Oct. 21 decision by Court Commissioner Eric B. Schmidt, the court said the city's attorney failed to show that Kitsap County Superior Court Judge Jeanette Dalton had "committed obvious or probable error" when she ruled in May that the city had violated the law and must pay the attorney fees for Althea Paulson and Robert Fortner.

The public records lawsuit has wound its way through court for more than a year.

The city has spent more than \$225,300 on the lawsuit so far, an amount that won't be covered by Bainbridge's insurer but instead will be paid out of the city's general fund.

The next hearing on the lawsuit is scheduled for Friday in Kitsap County Superior Court.

City officials met Tuesday in a closed-door session to talk about litigation matters.

"Although we're disappointed that the appellate court did not accept review of our case, we feel that the commissioner's decision was helpful in correcting some of the factual information related to city staff's responsiveness," said City Manager Doug Schulze.

## Secrecy prompts suit

Paulson and Fortner filed a lawsuit against the city of Bainbridge Island in September 2013 that claimed the city and Councilman Steve Bonkowski, Councilman David Ward and then-councilwoman Debbi Lester failed to turn over public records that had been requested under the state's Public Records Act.

Paulson and Fortner, a pair of "good government" activists, had sought emails that the council members had sent and received on their personal email accounts to fellow council members and others, which Paulson and Fortner noted was also a violation of the city's Governance Manual. The manual requires council members to use their city provided email accounts, and to forward any city related emails sent to them privately to the city for retention.

In last week's decision, Schmidt said the request by the city's attorney for a discretionary review of the public records lawsuit was denied.

The city announced in June it would appeal the loss on the public records lawsuit in Kitsap County Superior Court to the Court of Appeals, Division II.

In her ruling, Judge Dalton had ordered the city to search the hard drives of the computers of councilmen Bonkowski and Ward — Lester was no longer on the council and had been dropped from the lawsuit — and also said Paulson and Fortner should be awarded attorney fees because the city had not provided the records that they had requested almost a year earlier.

Paulson's lawyer, her husband Dan Mallove, had sought \$130,000 in legal fees from the city after winning the case.

In a letter to the Review that announced the appeal, three council members — Val Tollefson, Wayne Roth and Roger Townsend — criticized Dalton's ruling and said it contained "clear mistakes" and had "drawn some unfair and unwarranted conclusions."

City officials maintained they did not violate the state's Public Records Act (PRA), and said that an extensive search for public records had been conducted.

Lawyers representing the council members also claimed inspection of the council members' computers and email accounts via a search of their computer hard drives would be an unconstitutional invasion of privacy.

#### **No evidence of error**

In the decision last week, Schmidt said the city did not prove that the trial court was wrong when it said an adequate search for records had not been conducted, however.

"The court's ruling was not based on the fact that the public records officer failed to conduct the [Public Records Act] searches. Rather, the trial court's Memorandum Opinion makes clear that it believed the search was inadequate because Bonkowski's and Ward's deleted folders on their personal email accounts were never searched or were searched too late to preserve pertinent emails," Schmidt wrote.

"The trial court's Memorandum Opinion also makes clear that it did not apply the incorrect standard to determine the adequacy of the search," Schmidt continued. "The court believed the deleted folders would likely turn up the information requested because Bonkowski and Ward admitted using their personal account for work and deleted emails dealing with city business. The trial court also believed the city failed to follow obvious leads uncovered four days after Paulson submitted her first PRA request. This language demonstrates that the trial court used the 'reasonably likely' standard set forth in [the court case] Neighborhood Alliance for determining the adequacy of the search."

The decision also noted Dalton's ruling that said Ward "never checked his deleted email folder on his personal computer, nor attempted to contact his webmail provider, Comcast, nor the city manager, city attorney, or the IT staff to ask if his deleted items may be responsive" [to the records request].

In the city's request for a review, Bonkowski and Ward also said Dalton was wrong to rely on the city's Governance Manual for guidance on preserving emails.

#### **City must follow rules**

Schmidt, however, said the city was obliged to follow the rules it had set out in its Governance Manual for preserving emails.

"The Governance Manual included a retention policy requiring council members to forward city

related emails to the city's email system and to refrain from using their personal email accounts," Schmidt said in his decision.

He also underscored the trial court's decision that Bonkowski and Ward had violated state law by destroying emails that should have been sent to the city and saved.

"Bonkowski and Ward undisputedly violated the Governance Manual by using their personal accounts for city business, by failing to forward emails received on their personal accounts to the city's servers, and by deleting emails which constituted public records, thus making it impossible for the city to adequately respond to Paulson's and Fortner's PRA requests," Schmidt wrote, recalling the findings in the trial court's ruling.

"Because the deletion of these emails was not done in accordance with the city's retention schedule and resulted in the destruction of public records, the trial court concluded that Bonkowski's and Ward's actions violated the PRA."

Schmidt also noted the Washington State Supreme Court case of O'Neill vs. the City of Shoreline: "If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined." Similarly, public officials cannot evade the PRA by violating retention policies to ensure compliance with public records requests."

Schmidt also said the city's attempt to have the Court of Appeals prevent the release of Ward and Bonkowski's computer hard drives for inspection was premature, as the trial court had not yet approved a "writ of mandamus" that would require Ward and Bonkowski to turn over their computers.

Schmidt noted the issue of the writ was still pending in the trial court.

A hearing on sanctions against the city has been set for Nov. 10.

A hearing on a request to postpone the sanctions hearing — called at the request of the city's attorney — is set for Oct. 31.

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