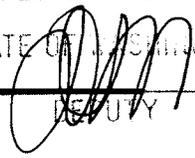


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DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SHAWN D. GREENHALGH,

Appellant,

v.

OFFICE OF THE ATTORNEY GENERAL,

Respondent.

**RESPONSE BRIEF OF THE
OFFICE OF THE ATTORNEY GENERAL**

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ORIGINAL

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I. INTRODUCTION

The Public Records Act (PRA), RCW 42.56.550, provides that a court may award costs, including attorney's fees, and penalties only when an agency has denied the requester an opportunity to inspect or copy a public record. The Office of the Attorney General (AGO) has not denied Mr. Greenhalgh the opportunity to inspect or copy any public record he has requested.

In response to one of the three requests at issue here, the AGO was unable to locate the record or records requested using the information Mr. Greenhalgh selectively provided, after conducting a diligent and comprehensive search of agency-wide databases designed specifically to allow retrieval of such records. Under *Neighborhood Alliance v. Spokane County*, 153 Wn. App. 241, 224 P.3d 775 (2009), *review granted*, 168 Wn.2d 1039 (2010), where an agency has shown by affidavit that it conducted a reasonable search for requested records, the agency has not denied the requester an opportunity to inspect or copy a public record, even though the records were later discovered in a subsequent PRA action.

Mr. Greenhalgh claims he was denied access to metadata. In fact, he never requested metadata. Under *O'Neill v. City of Shoreline*, ___ Wn.2d ___, 240 P.3d 1149 (2010), an agency is obligated to produce metadata only if metadata is specifically requested.

Mr. Greenhalgh refused to pay for records made available to him. He claims the AGO denied access to the records because it required payment. An agency is authorized under RCW 42.56.070 and .120 to charge the cost of copying both paper and electronic records, and both were offered to Mr. Greenhalgh. His dissatisfaction with having to pay the actual cost of copying public records does not give rise to an action under RCW 42.56.550 for attorney's fees and penalties.

II. COUNTERSTATEMENT OF THE ISSUES

A. Where the PRA specifically provides that a trial court may hear a public records case on affidavits, did the trial court err in entering judgment in favor of the AGO where the agency established by affidavits that it had conducted an adequate search for the records described by Mr. Greenhalgh?

B. Where Mr. Greenhalgh did not request metadata from the AGO and the agency produced all requested records in both paper and electronic format, did the AGO deny Mr. Greenhalgh the opportunity to inspect or copy a public record?

C. Where the AGO charged Mr. Greenhalgh the established cost for producing electronic records on a compact diskette (CD) and Mr. Greenhalgh chose to pay the cost for some records and received those

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records, and elected not to pay the cost for other records, is Mr. Greenhalgh entitled to relief under RCW 42.56.550?

D. Where Mr. Greenhalgh has not been denied the opportunity to inspect or copy a public record, is he entitled to costs and penalties under RCW 42.56.550?

III. COUNTERSTATEMENT OF THE CASE¹

A. Overview

Shawn D. Greenhalgh, a prisoner housed at the Monroe Corrections Center (MCC), brought suit under RCW 42.56.550 of the PRA against the AGO. CP. 285, 1. The request, dated January 2008 (PRR 2008-00038), asked for the first page of every “ATTORNEY GENERAL’S OFFICE CERTIFICATE ON PUBLIC RECORDS ACT / CLAIM LITIGATION [SETTLEMENTS]” involving the Department and inmate-petitioners, dated between January 1, 2005 and January 1, 2008.” CP 86. Two other requests, dated December 2007 (PRR 2007-00473) and June 2008 (PRR 2008-00341), were for the same records, namely records relating to legislation to amend the PRA relating to public requests made by offenders. CP 52, 55, 68, 71.

¹ The facts set forth herein are established by the following affidavits: (1) Declaration of Jerome Lord and attached exhibits, CP 42-99; (2) Declaration of K.P. Bodnar and attached exhibits, CP 101-18; (3) Declaration of Dawn Thompson and attached exhibits, CP 120-30; (4) Supplemental Declaration of Jerome Lord and attached exhibits, CP 228-45; and (5) Second Declaration of K.P. Bodnar, CP 269-72.

As described more fully below, the records responsive to the January 2008 request were not initially located. In this request, Mr. Greenhalgh identified what appeared to be a title to a pleading but without reference to any case or cause number. CP 48, 86, 107. A search was conducted of the agency's electronic Case Management System (CMS) and email vault system, but no such record was located. CP 48-49, 88, 107-08. Later another MCC inmate, Clark George, requested the same records, and the AGO searched again with the same result. CP 49, 108-09, 112, 113. Mr. George then provided the AGO with a sample record, which coincidentally was a document from a case in which Mr. Greenhalgh was a plaintiff. CP 49, 109, 114-15, 269. A review of the sample document revealed that the title provided was not part of the caption of the pleading but instead was a legend that appeared above the court designation. CP 109, 115, 270. The AGO Case Management System tracks pleadings by the information in the caption, and use of a legend above the court designation is unusual. CP 271. Using the sample, the AGO was able to locate responsive records for Mr. George. CP 118, 270. At that point the connection was not made between the two requests, as Mr. Greenhalgh's request from months earlier had been closed. CP 109, 271.

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It was not until February 2009, when Mr. Greenhalgh served his lawsuit on the AGO, that the agency learned that it had records that would have been responsive to Mr. Greenhalgh's January 2008 request: it provided those records on March 13, 2009. CP 49-50, 89-99, 109. Mr. Greenhalgh claims that the AGO's search was not reasonable; therefore, the agency denied him the opportunity to inspect or copy a public record. The trial court found that the search was reasonable and entered judgment in favor of the agency. CP 281-82, 283-84.

As more fully described below, the AGO produced responsive records in both paper and electronic format to Mr. Greenhalgh's redundant requests of December 2007 and June 2008. CP 43-47, 52, 55, 57. Mr. Greenhalgh received 20 paper copies for which he never paid, nor did he pay the quoted price for the rest of the paper copies. CP 44, 57, 58-59, 60. Subsequently, Mr. Greenhalgh asked for the cost to produce the records in an electronic format. CP 63, 68. He did not request metadata. CP 63. Mr. Greenhalgh was quoted the price to have the records copied and produced in .pdf format and copied to a CD. CP 64. The price included a base set-up fee for scanning the documents and burning them to a CD plus a per page charge. CP 45, 47, 230-31, 245. Mr. Greenhalgh chose to purchase one email record in this format. CP 65, 66. Mr. Greenhalgh now claims that he was denied metadata and that the quoted charges for

electronic records violate the PRA. The trial court found that the AGO produced the records that Mr. Greenhalgh requested in accordance with the PRA.

Further factual details regarding the requests are set forth below.

B. January 2008 Request (PRR 2008-00038)

In a letter to the AGO, dated January 14, 2008, Mr. Greenhalgh asked for the first page of every “ATTORNEY GENERAL’S OFFICE CERTIFICATE ON PUBLIC RECORDS ACT / CLAIM LITIGATION [SETTLEMENTS]” involving the Department and inmate-petitioners, dated between January 1, 2005 and January 1, 2008.” CP 48, 86. Mr. Greenhalgh’s letter was received on January 17, 2008, and the matter was assigned to Mr. Jerome Lord, an AGO public records program specialist. CP 48, 102.

Mr. Lord searched the AGO electronic mail vault, using the title Mr. Greenhalgh provided. Finding no responsive documents there, he then searched CMS for the listing of any documents by that title. Again, he found nothing by that title. Mr. Lord then conferred with K. P. Bodnar, his supervisor and assistant director of the AGO public records unit. Together, they again searched the electronic mail vault and CMS using the title provided by Mr. Greenhalgh and again found nothing. CP 48-49, 107-08.

Mr. Lord sent a letter to Mr. Greenhalgh, dated January 25, 2008, stating “[w]e have searched our records and do not have any documents responsive to your request. Because there are no responsive documents, we will consider your request closed.” CP 48, 88, 107-08. Mr. Greenhalgh had no further communication with the AGO regarding this request before filing a lawsuit in November 2008; he waited three more months until February 2009, to serve the AGO with the lawsuit. CP 49, 110.

In his Complaint at paragraph 4.2.3, Mr. Greenhalgh alleges that Mr. George (or George P. Clark) received records that would have been responsive to his request. His statement does not tell the whole story. Ms. Bodnar was assigned to Mr. George’s request, and she used the title description he provided to search CMS and the email vault system and found nothing. CP 108, 109. In other words, Ms. Bodnar used the same search method as had been employed in trying to locate the records requested by Mr. Greenhalgh and achieved the same result. On March 27, 2008, Ms. Bodnar told Mr. George by letter that the records he requested could not be located and that his request would be considered closed. CP 109, 112.

Four months later on August 27, 2008, Mr. George sent the AGO a letter attaching a sample document with the legend at the top of the

document indicating: “Attorney General’s Office Certificate on Public Records Act Claim Litigation.” CP 109, 114. Mr. George requested, based on the sample he was providing, that the AGO “take another look at my request and produce all the Certificates that are responsive to my request, including the one filed in said case.” CP 114-15.

The case Mr. George’s sample referenced was *Pounds and Greenhalgh v. Department of Corrections*, Thurston County Superior Court Cause No. 04-2-02472-0, a public records case in which Mr. Greenhalgh was a plaintiff. The sample document was created in that case and was on pleading paper. The title used by Mr. George appeared as a legend at the top of the document. Below the cause number to the right of the caption, where the title of a document on a pleading format is normally found, were the words: “PUBLIC RECORDS ACT LITIGATION SETTLEMENT PAYMENT.” By attaching this sample document, Mr. George provided additional information not provided in his earlier request allowing the requested documents to be located. CP 115, 269-70.

With a more accurate description of the requested records, Ms. Bodnar contacted the divisions of the AGO asking them to use the information from the sample document as a basis to search for records. CP 109, 270-71. Had either Mr. Greenhalgh or Mr. George initially

requested documents entitled: “Public Records Act Litigation Payment,” it is more likely that responsive documents could have been identified during the electronic searches that were conducted. CP 270-71, 272. This search resulted in 16 pages of responsive records. CP 109, 272.

After Mr. Lord received Mr. Greenhalgh’s complaint in February 2009, he conferred with Ms. Bodnar asking if she was familiar with Mr. George’s request. Ms. Bodnar recalled the situation involving Mr. George; however, in September 2008 when she provided him records, Ms. Bodnar did not see a connection between Mr. George’s request and Mr. Greenhalgh’s request that had been closed nine months earlier. CP 49-50, 109, 271. The AGO receives many public records requests, and it was not until after receiving notice of Mr. Greenhalgh’s lawsuit that a connection between the two requests was made. CP 271-72. On March 13, 2009, Ms. Bodnar provided Mr. Greenhalgh records free of charge that were discovered while responding to Mr. George’s request. CP 49-50, 89, 272.

C. December 2007 Request (PRR 2007-00473)

In a letter dated December 6, 2007, and received by the AGO on December 10, 2007, Mr. Greenhalgh requested all records pertaining to the AGO’s efforts to obtain legislation to modify the PRA. Mr. Lord timely responded on December 17, 2007, indicating ten business days

would be necessary to identify and gather responsive records. Mr. Lord sent Mr. Greenhalgh another letter, dated January 2, 2008, indicating an additional ten business days would be required to complete gathering responsive records as records were continuing to be located. CP 43, 52, 53, 54. In a letter, dated January 15, 2008, Mr. Greenhalgh narrowed his request to “[a]ny and all records pertaining to the Washington State Attorney General’s Office currently requesting new legislation pertaining to the Washington State Public Records Act, *as pertains to prisoners only.*” (emphasis added), CP 43, 55. Mr. Greenhalgh’s letter was received by the AGO on January 17, 2008. *Id.* On that same day, Mr. Lord responded by letter to Mr. Greenhalgh, indicating the first batch of records would be available on January 28, 2008. CP 56.

By letter on January 23, 2008, Mr. Lord identified 181 pages of responsive documents and requested payment in the amount of \$22.70 prior to production of the records, (\$18.10 for paper copies at ten cents per page and \$4.60 for postage).²

In a letter, dated January 25, 2008, Mr. Greenhalgh responded by asking for the first and last pages from the packet and every tenth page in between (e.g. the 10th, the 20th, the 30th, etc.), without enclosing payment

² Mr. Greenhalgh never paid this sum, although his inmate account shows he had sufficient funds to pay this amount. CP 43-45, 57, 120-30. Indeed, at every relevant point in time when we was making these requests, he had sufficient funds to pay the costs authorized by statute. *Id.*

for these pages. The AGO received this letter on January 31, 2008. The next day, Mr. Lord mailed Mr. Greenhalgh the 20 requested pages without first requiring payment. Mr. Lord indicated in his January 31, 2008, letter to Mr. Greenhalgh that the office would consider his request closed. CP 44, 58, 60.

By letter dated February 9, 2008, Mr. Greenhalgh asked Mr. Lord to provide “[a]ll emails in the 181 responsive documents not already produced with your January 31, 2008 letter.” The AGO received this letter on February 13, 2008. CP 44, 61. Two days later, Mr. Lord sent another letter to Mr. Greenhalgh indicating there were an additional 132 pages of emails not already received by Mr. Greenhalgh and instructing Mr. Greenhalgh to pay \$21.11 for copying and postage, including the pages Mr. Greenhalgh had already received. Mr. Greenhalgh never paid this sum to the AGO. CP 44, 62.

By letter dated February 26, 2008, Mr. Greenhalgh asked Mr. Lord to provide the 132 pages on compact disc and a cost letter for doing so. The AGO received this letter on February 28, 2008. Four days later, Mr. Lord sent another letter to Mr. Greenhalgh quoting the price of \$27.90 it would cost to scan copies of documents into .pdf format, burn the records to a CD, and then mail the CD in a sleeve to Mr. Greenhalgh. At that time, the public records unit of the AGO did not have scanning equipment

and did not burn files to compact discs. CP 44-45, 63, 64, 65, 104. For reasons of cost and efficiency, scanning services were provided in the Mail and Document Services (MDS) unit of the AGO and sold to other divisions who had the need for scanning services. The fees quoted to Mr. Greenhalgh in Mr. Lord's letter of March 3, 2008, represented the actual cost of obtaining the scanned documents. CP 43, 103-04.

By letter dated March 24, 2008, Mr. Greenhalgh asked for just one specified page of the records he requested in his December 6, 2007, letter to be burned on to a CD and mailed to him. Mr. Greenhalgh enclosed \$14.82, which covered the \$12.50 flat set-up fee for scanning any number of pages, the per page scanned copy fee for the requested record, the cost of the CD and CD sleeve, and cost of postage; that amount included nothing for the 20 pages of paper records he already received. The AGO received payment on April 1, 2008. Six days later, Mr. Lord mailed Mr. Greenhalgh the CD containing the single requested page and indicated that "this request is now complete and we will consider it closed." CP 45, 65, 66.

D. June 2008 Request (PRR 2008-00341)

On June 5, 2008, Mr. Greenhalgh filed a new public records request asking for the same records he requested in December 2007. In his June 5 letter, he referenced the closed public records request by

number and requested “any and all the e-mails responsive to the above-referenced request, in their original format, not the electronic format you previously offered them in (Scanned).” CP 46, 68.

Mr. Lord responded by letter on June 13, 2008, indicating that twenty additional days would be necessary to respond to the request. Mr. Lord subsequently informed Mr. Greenhalgh that his requested records could be provided to him in the forms that were made available in response to his earlier request. Mr. Lord’s letter included the actual cost to provide the requested records and offered to provide them if paid by August 16, 2008. CP 46, 71, 72, 45, 47, 80. Mr. Greenhalgh did not pay this sum to the AGO. CP 47.

During the three months that followed (August through October 2008), Mr. Greenhalgh and the public records unit exchanged letters in which Mr. Greenhalgh asked for justification for the copying fees and the format of the records. CP 46-47, 74, 76, 77, 80. The last correspondence with Mr. Greenhalgh in this exchange was a letter on October 13, 2008, in which Ms. Bodnar attached copies of citations from the Washington Administrative Code (WAC) and the Revised Code of Washington (RCW) authorizing copying costs, and further explained the costs incurred to produce records in electronic format. CP 47, 80. The

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public records unit never received payment from Mr. Greenhalgh for any records requested under PRR 2008-0341. CP 47.

IV. STANDARD OF REVIEW

Public Records Act Cases May Be Decided On Affidavits, And Appellate Review Is *De Novo*

Pursuant to RCW 42.56.550(3) “[t]he court may conduct a hearing based solely on affidavits” in a PRA case. *O’Neill*, 240 P.3d at 1156. The Supreme Court has stated that the PRA contemplates judicial review upon motion and affidavit, for to do otherwise “would make public disclosure act cases so expensive that citizens could not use the act for its intended purpose.” *Id.* (quoting *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 801, 791 P.2d 526 (1990)). In particular, a court may rely on affidavits submitted by the agency to demonstrate the adequacy of a search. *Neighborhood Alliance*, 153 Wn. App. at 257, 224 P.3d at 783. Affidavits are sufficient if they are “relatively detailed, nonconclusory, and not impugned by evidence on the record of bad faith on the part of the agency.” *Id.* The record should set forth the search terms, type of search performed, and that all likely sources were searched. *Id.* The fact that records may later be uncovered does not determine of the adequacy of the search. *Id.*

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The AGO's affidavits establishing the adequacy of its search, reasonableness of its conduct, and continued assistance to Mr. Greenhalgh are uncontroverted. They are in stark contrast to Mr. Greenhalgh's speculative, conclusory, and unsupported assertions. Based upon the law and the facts, which this Court may review *de novo*, judgment was properly entered in favor of the AGO and should be affirmed.

V. ARGUMENT

A. **Where The AGO Conducted A Reasonable Search Under The Facts Of This Case, But Did Not Locate The Records Described In Mr. Greenhalgh's January 2008 Request, The Agency Did Not Deny Him The Opportunity To Inspect Or Copy A Public Record**

In *Neighborhood Alliance*, 153 Wn. App. at 257, 224 P.3d at 783, the Court of Appeals set forth a standard to judge the adequacy of an agency's search for public records:

"The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor." *Citizen's Comm'n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir. 1995). An agency fulfills its obligations under the PRA if it can demonstrate beyond a material doubt that its search was "'reasonably calculated to uncover all relevant documents.'" *Weisberg v. U.S. Dept. of Justice*, 240 U.S. App. D.C. 339, 745 F.2d 1476, 1485 (1984)[parenthetical omitted]. Moreover, the agency must show that it "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dept. of Army*, U.S. App. D.C. 126, 920 F.2d 57, 68 (1990).

The court emphasized that “the adequacy of an agency’s search is separate from the question of whether the requested documents are found.” *Id.* The question is not whether documents responsive to the request might exist, “but rather whether the *search* for those documents was *adequate*.” *Id.*

The circumstances demonstrate that the AGO did not deny Mr. Greenhalgh the “opportunity” under RCW 42.56.550(1) to obtain copies of the first pages of records entitled “ATTORNEY GENERAL’S OFFICE CERTIFICATE ON PUBLIC RECORDS ACT / CLAIM LITIGATION [SETTLEMENTS]”. Mr. Greenhalgh chose very specific language to describe the records he was requesting. The language came directly from a legend at the top of a pleading document, as if Mr. Greenhalgh was copying from one of those records when he drafted his request. Ostensibly there was additional information he could have provided to identify the records he requested, but he provided only what appeared to be the title of the documents. When the AGO informed him that it could not locate any records with the title provided, Mr. Greenhalgh did not respond by providing additional information or inquiring further. Instead, he waited until almost the end of the limitations period to file a lawsuit and then months more to serve that suit.

The AGO conducted an adequate search for the records Mr. Greenhalgh described. Mr. Greenhalgh provided very specific information in his request, information that logically appeared to be a title or other descriptor of a litigation document. Mr. Lord and Ms. Bodnar diligently searched through the database of all litigation cases and the titles of all pleadings recorded in the AGO Case Management System (CMS). CP 49, 107-08. They searched all AGO files likely to contain the requested records. CP 110, 271. CMS is used by all of the divisions of the AGO to track case activity and contains a searchable field where the names of pleadings created and received are documented by staff. CP 271. A pleading is identified by the name given in the caption, which is typically found on the upper right side of the first page of the document. CP 270. The title provided by Mr. Greenhalgh and later by Mr. George was found in a legend above the court designation, which is not typical for pleadings, and was therefore not entered into the system as the title of a pleading. CP 270.

In addition to searching CMS, Mr. Lord and Ms. Bodnar searched the agency's email system for any reference to the title. The searches were conducted twice, once by Mr. Lord alone and then together with Ms. Bodnar. Months later, in response to Mr. George's request, Ms. Bodnar independently conducted the same search, with the same result. Using the

title provided by Mr. Greenhalgh and later by Mr. George—the only information ever provided to the AGO by Mr. Greenhalgh—no records were located. CP 48-50, 107-10

Mr. Greenhalgh suggests it was not reasonable for the AGO to rely on the specific descriptor that he provided to search CMS—a database system that is designed for the very purpose of tracking case activity and pleading titles. Because his request was for records that could have appeared in any public records litigation file involving any parties, and because he provided no case name, cause number, or other case-specific information, the most reasonable method of searching was to query the CMS database. Nothing in *Neighborhood Alliance* prevents an agency from using and relying on its electronic systems for searching filings, especially where the agency has information regarding hundreds of thousands of records stored in an electronic system and where that system is used routinely by all agency divisions to locate case information and documents. CP 270-71.

None of the cases cited by Mr. Greenhalgh prevent an agency from relying on a document title provided by the requestor to formulate its search for records. None of the cases cited by Mr. Greenhalgh hold the agency responsible for its reliance on a title provided by the requester where, in fact, the title provided turns out not to be part of the information

routinely and reasonably used by the agency to describe, index, and store its records.

Because records were eventually located in the Corrections Division of the AGO after Mr. George provided a sample record, Mr. Greenhalgh assumes that the AGO must not have searched the Corrections Division records and that the original search in response to his request therefore was not adequate. However, the Corrections Division uses the same agency email and case management systems that Mr. Lord and Ms. Bodnar searched. CP 271. When they searched the email and case management systems for the entire agency, their search included all email and case management records for the Corrections Division. CP 270-71. Moreover, Mr. Greenhalgh's request was not limited to cases involving the Corrections Division. Had the AGO searched only the Corrections Division in response to his request, it is conceivable Mr. Greenhalgh would now argue that such a limited search was unreasonable.

The AGO made a reasonable and comprehensive search of its records in response to Mr. Greenhalgh's very specific request. Mr. Lord and Ms. Bodnar searched the case management system—the agency's most extensive indexing system that was most likely to find a reference to the document title provided by Mr. Greenhalgh. In addition, they searched

the agency's email records looking for any reference to the document title provided by Mr. Greenhalgh.

As this Court recognized in *Neighborhood Alliance*, the mere fact that a record is not located is not a violation of the Public Records Act. *Id.* at 257, 224 P.3d at 783. The issue is whether a reasonable search was conducted. A test of "reasonableness" takes into account the circumstances of the request. In this case it is undisputed that Mr. Greenhalgh provided a very specific title, in quotation marks, that appeared to be the title of a pleading that might exist in unidentified case files. As explained above, the AGO made a diligent and comprehensive search for responsive records, using systems specifically designed and used to allow such records to be filed, indexed, and located. The search produced no records, and the public records unit timely reported that result to Mr. Greenhalgh. Although Mr. Greenhalgh apparently had actual knowledge of the existence of such records, additional information that could have been provided to assist in locating them, and the opportunity to share information that would have led to the production of records, he chose not to do so. He simply waited several months and then filed a lawsuit.

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Under the facts of this case, the AGO's search and conduct in response to Mr. Greenhalgh's January 2008 request were reasonable. The agency did not deny Mr. Greenhalgh the opportunity to receive copies of public records, and Mr. Greenhalgh is not entitled to and should not be rewarded with penalties and costs.

B. Mr. Greenhalgh Was Not Denied The Opportunity To Inspect Or Copy A Public Record Where He Did Not Request Metadata And The Agency Produced Records In Both Paper And Electronic Formats

1. Mr. Greenhalgh Did Not Request Metadata

The Supreme Court in a recent case of first impression held that metadata may be a public record. *O'Neill v. The City of Shoreline*, ___ Wn.2d ___, 240 P.3d 1149, 1153 (2010). However, "[m]etadata is a new topic that has never before been dealt with in PRA litigation," and the court concluded that "a request for metadata was not made until Ms. O'Neill specifically asked for it." *Id.* at 1156. In other words, the AGO could not have denied Mr. Greenhalgh metadata when he never specifically requested it.

"Metadata" is a popular and convenient term that has no fixed meaning and does not refer to any specific information. In its simplest definition, it is "data about data, or hidden statistical information about a document that is generated by a software program." *O'Neill*, 240 P.3d at

1152 (2009). In none of his requests did Mr. Greenhalgh request metadata, and he admits this fact. Appellant's Brief at 23. He argues, however, that even though he did not request metadata, his request should be interpreted after the fact as having done so. This argument is contrary to the holding in *O'Neill*. *Id.* at 1156. The AGO cannot be held responsible to produce records that were not requested.

2. The AGO Made Public Records Available To Mr. Greenhalgh In Paper And Electronic Formats

The Public Records Act does not require an agency to provide a requested record in any specific format. *Mechling v. City of Monroe*, 152 Wn. App. 830, 849-50, 222 P.3d 808, 818 (2009) (an agency "has no express obligation to provide the requested e-mail records in an electronic format"), *review denied*, 169 Wn.2d 1007 (2010). Rather, the Act permits an agency to determine how to provide requested records consistent with the PRA and the agency's duties to (1) delete information that is statutorily exempt from disclosure before producing the records, (2) protect public records from damage or disorganization, and (3) prevent excessive interference with other essential functions of the agency. RCW 42.56.070(1) and .100. In this case, the AGO timely offered records to Mr. Greenhalgh in both paper and electronic formats. The AGO did not deny Mr. Greenhalgh a public record; rather, he made the decision not to

pay for any paper copies, even though he received 20 photocopy pages, and to pay for only one record in electronic format burned to a CD.

The electronic copies were produced in .pdf format and copied to a CD. The AGO's electronic public records process uses .pdf format because the software used by the AGO, Adobe Pro, allows the agency to number, track, and redact records, all electronically. CP 105-07. A clear record is made when documents are numbered and can be referred to with ease. Having an organized system for identifying and handling records is important where an agency has employees statewide, such as the AGO with 1200 staff in sixteen locations. CP 102-06. In addition, because the AGO employs Adobe Pro and the .pdf format, requesters can open the records using "Adobe Reader, which is the software used to read documents in .PDF format, [which] is commonly available and can be downloaded for free from the internet." CP 105.

Mr. Greenhalgh makes a passing argument that he wanted records in a particular format so that he could see the identities of the email correspondents. Appellant's Brief at 23. However, the copies of the emails that were made available to him include the identities of the parties to the correspondence. Indeed, these same records in the same .pdf format were made available to Mr. Greenhalgh on multiple occasions, including in response to an unrelated 2009 request (PRR 2009-0233). CP 228-31.

Mr. Greenhalgh has not identified any record that he actually requested that was denied to him by the AGO.

C. Mr. Greenhalgh Was Not Denied The Opportunity To Inspect And Copy Public Records Where He Was Given The Option To Purchase Paper Copies For Ten Cents A Page Or Electronic Copies At The Actual Cost Of Scanning And Burning The Records To A CD

RCW 42.56.120 authorizes an agency to impose a reasonable charge for providing copies of public records in an amount necessary to reimburse the agency for its actual costs. While the PRA sets a default amount of fifteen cents per page for photocopies, it sets no default amount for electronic copies, including scanning and burning records to a CD. Consistent with RCW 42.56.120, the AGO had an established price list for such services. Mr. Greenhalgh disagrees about the appropriateness of the set up fee for scanning, which is a cost for the service and the use of agency equipment regardless of the number of records copied. However, he chose to purchase one record in that electronic format rather than paying tens cents for a photocopy of the same record.

There is no cause of action under RCW 42.56.550 to dispute charges. The only two bases for court action under RCW 42.56.550 are for alleged denial of access to public records under RCW 42.56.550(1), or alleged unreasonable time estimations given by the agency under RCW 42.56.550(2). *See* RCW 42.56.550(4). Neither of those claims is at issue

here. Even if the PRA permitted suit under RCW 42.56.550 where a requester refused to pay for copies of records requested, Mr. Greenhalgh cannot demonstrate that the AGO denied him access to the records he requested. Mr. Lord made the requested records available to Mr. Greenhalgh in paper copy form as early as January 23, 2008, at the rate of ten cents a page and postage for a total of \$18.10. CP 44-45, 52. Those charges are specifically authorized in RCW 42.56.070 and .120. Mr. Greenhalgh does not dispute the availability of those records on January 23, 2008. Nor can he contend that he was unable to pay \$18.10. At that time, Mr. Greenhalgh had over \$400.00 of spendable funds in his inmate account. CP 120-30.

In addition, the AGO acted appropriately in quoting Mr. Greenhalgh the charges for providing the records on a CD. When Mr. Greenhalgh requested copies on CD, the public records unit quoted Mr. Greenhalgh the agency's actual cost of document scanning and CD burning, along with the cost of the CD and the CD sleeve. CP 45, 103-04, 230, 245. Actual costs may properly be charged to Mr. Greenhalgh under RCW 42.56.120. The AGO had no legal obligation to waive those charges. See *Gronquist v. Department of Corrections*, __ P.3d __, 2011 WL 175370 (COA Div. 2, January 19, 2011) (affirming Department's

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requirement that offender in prison pay for copies of records requested under the PRA).

The AGO did not deny access to the requested records. It made them available to Mr. Greenhalgh on multiple occasions and in multiple formats at charges authorized under the PRA. There is no cause of action under RCW 42.56.550 based on dissatisfaction with legitimate per page charges imposed by an agency under RCW 42.56.070 and .120.

D. Mr. Greenhalgh Is Not A Prevailing Party And, Therefore, Is Not Entitled To Costs, Attorney's Fees, or Penalties.

RCW 42.56.550(4) permits a court to award costs, including attorney's fees, and penalties only to a prevailing party. In order to prevail in a PRA action, a court must first find that an agency has denied a requester the opportunity to inspect or copy a public record. Unless, the requester has vindicated the "right to inspect or copy," he is not entitled to costs and penalties. *Sanders v. State of Washington*, ___ Wn.2d ___, 240 P.3d 120,137, fn. 18 (2010). Furthermore, the court action must result in documents being disclosed to the prevailing party in order for the court to make an award pursuant to RCW 42.56.550(4). *O'Neill*, 240 P.3d at 1149.

The AGO did not deny Mr. Greenhalgh the opportunity to inspect or copy a public record. He is not a prevailing party and is not entitled to
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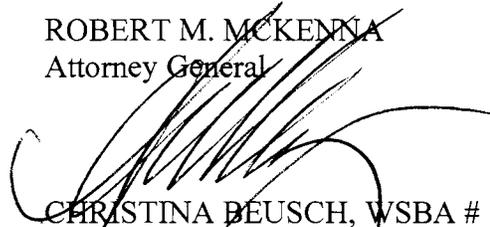
costs, attorney fees, or penalties. Rather, the AGO should be awarded costs and fees allowed under law for prevailing on this appeal.

VI. CONCLUSION

For the reasons stated herein, the Attorney General's Office respectfully requests that this Court affirm the decision of the Superior Court for Thurston County entering judgment in favor of the AGO.

RESPECTFULLY SUBMITTED this 10th day of February, 2011.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
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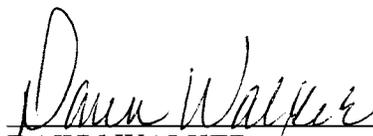
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TO:

CHARLES S. HAMILTON, III
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SEATTLE, WA 98101-2509

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 16th day of February, 2011 at Olympia, WA.



DAWN WALKER
Legal Assistant