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SUPREME COURT OF THE STATE OF WASHINGTON

DOUG AND BETH O'NEILL, *Respondents*,

v.

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

MEMORANDUM OF AMICUS CURIAE  
WASHINGTON COALITION FOR OPEN GOVERNMENT  
IN OPPOSITION TO PETITION FOR REVIEW

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## I. IDENTITY AND INTEREST OF AMICUS

The mission, membership, and interest of the Washington Coalition for Open Government (“WCOG”) in this case are set forth more fully in WCOG’s *Motion for Leave to File Brief of Amicus Curiae* filed herewith. WCOG has a legitimate interest in assuring that the Court is adequately informed about whether the Court of Appeals’ decision in *O’Neill v. City of Shoreline*, 145 Wn. App. 913, 187 P.3d 822 (2008), warrants further review by this Court.

Although the subject matter of the *O’Neill* case is email and its “metadata” under the Public Records Act,<sup>1</sup> the dispositive issues are largely factual.<sup>2</sup> The complex, disputed facts of the case are ill-suited to this Court’s analysis of any significant legal issues that are, at most, obliquely presented in this case. WCOG believes the Court should wait for an appropriate case to address any unresolved legal issues relating to email, metadata, and the PRA.

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<sup>1</sup> Public Records Act, Chapter 42.56 RCW (“PRA”).

<sup>2</sup> Respondent O’Neill raises one issue relating to email metadata, challenging the Court of Appeals’ determination that O’Neill’s initial oral request to “see that email” was not a sufficient request for an electronic copy of the email message. See *O’Neill v. City of Shoreline*, 145 Wn. App. 913, 933, 187 P.3d 822 (2008). That issue is addressed in section B (below). O’Neill raises two other issues unrelated to metadata: (i) dismissal after a “show cause” hearing, and (ii) the trial court’s award of costs to the City (which has been vacated). *Answer* at 14-20. O’Neill does not seek review on these issues, and this memorandum will not address those issues.

## II. STATEMENT OF THE CASE

WCOG relies on the facts set forth in the Court of Appeals' opinion, the parties' briefs, [*Shoreline/Fimia's*] *Petition for Discretionary Review* ("Petition"), and [*O'Neill's*] *Answer to Petition for Discretionary Review* ("Answer").

## III. ARGUMENT

### A. The alleged "conflict" between the PRA and the record retention guidelines does not warrant review.

The City asserts that the Court of Appeals "erroneously concluded that a 'conflict' exists with the State Retention Guidelines and the PRA." *Petition* at 7. In fact, the Court of Appeals correctly stated and applied the law. The City's characterization of the Court of Appeals' decision is misleading, and there is no issue that warrants review.

The PRA unambiguously forbids the destruction of records while a request for such records is pending, even if the record is scheduled for destruction. RCW 42.56.100. The City argues, *inter alia*, that Deputy Mayor Fimia's conduct in deleting the requested email was consistent with the general records retention guidelines promulgated by the Secretary of State under Chapter 40.14 RCW. *Brief of Respondent City of Shoreline* at 18-19. Despite the plain language of RCW 42.56.100, the City suggests that the records retention guidelines authorized the City to destroy a

requested record whether or not the record is the subject of a pending request. The Court of Appeals correctly rejected this argument, noting that the record retention guidelines do not inform the question of whether the City violated the PRA by destroying requested records. *O'Neill*, 145 Wn. App. at 934.

Contrary to the City's argument, the Court of Appeals did not find a "conflict" between the PRA and the record retention guidelines. The word "conflict" appears only once in the opinion, in a sentence within a paragraph of general rules. There, the court merely noted that the PRA controls in the event of a conflict with another law. *Id.* That statement, while not actually necessary to the rejection of the City's meritless argument, is entirely correct. RCW 42.56.030 ("In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.")

The alleged "conflict" between the PRA and the record retention guidelines does not warrant review.

**B. The fact-specific issues relating to email metadata do not warrant review.**

The City correctly notes that the Court of Appeals' opinion in *O'Neill* is the first published case in Washington in which the issue of metadata has arisen. *Petition* at 1. However, the City's *Petition* does not

raise any significant legal issues relating to either the concept of “metadata” or the interpretation of the PRA. The *Petition* raises only fact-specific issues that do not warrant review.

The City does not dispute the general legal propositions (i) that the requested email and its metadata is a public record, or (ii) that the PRA applies to email and other types of electronic records. The disputed issues in this case are essentially factual. This is shown by the lengthy discussion of the facts in the Court of Appeals’ opinion, the City’s assertion that the opinion contains “one omission and one correction,” and O’Neill’s detailed discussion of the underlying facts in the *Answer*. *Petition* at 3; *Answer* at 2-4. The fact-specific issues relating to email metadata do not warrant this Court’s review.

**1. The Court of Appeals did not adopt any significant legal conclusions relating to metadata or “retention value.”**

In an effort to present a legal issue that warrants review, the City variously argues that the Court of Appeals “categorized each copy of metadata as a public record with independent retention value,” and “require[d] an agency to retain all duplicate copies of e-mails so that, if requested, the metadata from all recipients can be produced.” *Petition* at 10, 13. These alleged conclusions of law do not appear anywhere in the *O’Neill* opinion. Instead, the City derives these conclusions from the fact-

specific analysis in the *O'Neill* opinion, based on the City's unstated and erroneous assumption that records retention policies inform the question of whether agencies may destroy records that have been requested under the PRA. The City's argument on pages 10-14 contains no citations to the PRA or any case that interprets the PRA.

The City relies on a concept of "retention value" which does not appear anywhere in the *O'Neill* opinion and which is meaningless under the PRA. *Petition* at 10-12. As explained in section (A), the PRA requires agencies to preserve records once they are requested even if the otherwise applicable retention policies would allow the agency to destroy the same records. RCW 42.56.100. There is no issue of "retention value" in this case.

The City's analogy to the envelopes from paper letters demonstrates the fundamental difference between the PRA and records retention policies. The City states that "For example, envelopes, a public record under the PRA, are disposed of once the envelope has served its purpose of delivering the letter to the City." *Petition* at 11. It is undoubtedly true that agencies are permitted to discard envelopes as soon as they have been opened. Nevertheless, if a person asked to inspect or copy envelopes under the PRA, and those envelopes had not been

discarded when the request was made, the agency would be required to preserve the requested envelopes under RCW 42.56.100.

The City argues that “only one copy of the metadata must be retained under the current State Retention Guidelines.” *Petition* at 12. That may be a correct statement of the City’s obligations under the applicable retention policies, but it is irrelevant to the question of whether the City violated the PRA by destroying requested records. That is a question of fact, which the Court of Appeals properly remanded to the trial court. *O’Neill*, 145 Wn. App. at 936.

Finally, the City argues that the Court of Appeals’ opinion “sets precedent that requires an agency to retain all duplicate copies of e-mails so that, if requested, the metadata from all recipients can be produced.” *Petition* at 13. That is simply false. Once again, the City fails to distinguish between the City’s obligations under the PRA to preserve specific records once they have been requested and the records retention policies that might otherwise generically apply to records that have not been requested.

**2. The fact-specific order to search the Deputy Mayor’s hard drive does not warrant review.**

The City argues that the Court of Appeals “imposed a new duty on local agencies to search hard drives” and that this expanded the definition

of identifiable public record. *Petition* at 14. This argument grossly overstates the Court of Appeals' actual ruling. The Court of Appeals' order to search the hard drive on remand is the direct result of the Deputy Mayor's conduct in deleting the requested email. This order was based on the peculiar facts of this case. The Court of Appeals did *not* announce some broad new "duty" to search hard drives in response to any given request for public records.

The relative difficulty in retrieving deleted email records is a disputed question of fact. The City asserts that this would be an expensive burden on the agency. *Petition* at 15. O'Neill disagrees. *Answer* at 10-11. That issue should be addressed by a trial court, not this Court.

**3. The fact-specific question of whether O'Neill orally requested an electronic copy of the email does not warrant review.**

In the *Answer*, O'Neill challenges the Court of Appeals' determination that O'Neill's initial oral request to "see that e-mail" was not a sufficient request for an electronic copy of the email message. *O'Neill*, 145 Wn. App. at 933. Like the City's arguments, this argument is based upon the particular facts of this case. Assuming, *arguendo*, that the Court of Appeals' opinion accurately states the underlying facts, it amounts to only a narrow factual determination that O'Neill "did not request an electronic copy of the e-mail or its metadata on September 18."

*Id.* This factual determination was not supported by any legal analysis other than a citation to *Bonamy v. Seattle*, 97 Wn. App. 403, 409-410, 960 P.2d 447 (1998), for the irrelevant proposition that a requested record must be “identifiable.”

The Court of Appeals’ ruling is erroneous. The email message mentioned by the Deputy Mayor at the public hearing was an identifiable public record. Upon receiving any written or oral request for that email the Deputy Mayor, and the City as a whole, were obligated to preserve the original electronic record until O’Neill’s request was fully resolved. RCW 42.56.100. If the City had any question as to whether O’Neill wanted the electronic original with its metadata it should have preserved that record intact until it received clarification from O’Neill. Although the Court of Appeals’ ruling on this point should be corrected if review is granted, this fact-specific issue does not warrant review.

**C. The Court of Appeals’ award of fees was based on a factual determination that the City had violated the PRA.**

The City argues that “a violation of the PRA must be found prior to declaring that a party has prevailed and that attorney’s fees are owed.” *Petition* at 16. The Court of Appeals did not hold otherwise. Contrary to the City’s argument, the Court of Appeals’ decision is entirely consistent with the rulings of this Court in *Concerned Ratepayers Ass’n v. PUD No.*

*I*, 138 Wn.2d 950, 983 P.2d 635 (1999), and *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

The City erroneously assumes that the Court of Appeals did not find any violation of the PRA. In fact it did. Although the opinion could be more clearly drafted on this point, the Court of Appeals clearly found that the City violated the PRA at least with respect to O’Neill’s request for the email metadata on September 25th. *O’Neill*, 145 Wn. App. at 935, 940 (¶¶ 60, 83). Although the City may disagree with the Court of Appeals on this point, that fact-specific allegation of error does not warrant review.

#### IV. CONCLUSION

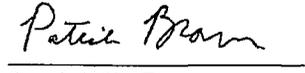
For all these reasons, WCOG urges the Court to deny the petition for review.

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RESPECTFULLY SUBMITTED this 23rd day of December, 2008.

  
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The undersigned certifies that on the 23rd day of December, 2008, a true and correct copy of this document was served on each of the parties below as follows:

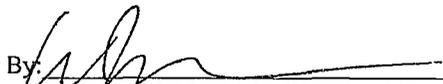
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Dear Clerk-

Enclosed please find (i) WCOG's motion for leave to file memorandum of amicus curiae, and (ii) WCOG's memorandum in opposition to review. Hard copies are in the mail.

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