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No. 59534-2-I

**FILED**  
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CLERK OF SUPREME COURT  
STATE OF WASHINGTON

IN THE COURT OF APPEALS (DIVISION I)  
OF THE STATE OF WASHINGTON

DOUG AND BETH O'NEILL, individuals,

Plaintiffs/Appellants,

v.

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

Defendants/Respondents.

**RESPONDENTS'  
PETITION FOR DISCRETIONARY REVIEW TO THE SUPREME  
COURT OF A PUBLISHED DECISION FROM THE COURT OF  
APPEALS, DIVISION I**

**CITY OF SHORELINE**

Flannary P. Collins, WSBA No. 32939  
Attorney for Respondent City of Shoreline  
17544 Midvale Avenue North  
Shoreline, WA 98113  
Telephone: (206) 801-2223  
Facsimile: (206) 546-2200

**FOSTER PEPPER PLLC**

Ramsey Ramerman, WSBA No. 30423  
Attorney for Respondent Maggie Fimia  
1111 Third Avenue, Suite 3400  
Seattle, Washington 98101-3299  
Telephone: (206) 447-4400  
Facsimile No.: (206) 447-9700

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**1. IDENTITY OF MOVING PARTY**

City of Shoreline and former Deputy Mayor Maggie Fimia (collectively the “City”) move for the relief identified in this petition, pursuant to RAP 13.4.

**2. DECISION FROM DIVISION I OF THE COURT OF APPEALS**

The City asks this Court to accept review of Division I of the Court of Appeals’ published decision in *O’Neill v. City of Shoreline*, -- Wn. App. --, 187 P.3d 822 (2008), as modified by Division I’s order changing opinion on reconsideration issued September 25, 2008 (Opinion).<sup>1</sup>

**3. INTRODUCTION**

On March 4, 2008, Division I held oral argument in this case. During oral argument, Judge Cox commented that, before reading the briefs in this case, he did not even know what metadata was. The same was true in 1972, when the people enacted the Public Records Act, codified at Chapter 42.56 RCW (“PRA”).

Review by the Supreme Court is warranted because this case represents the first instance in a published case where the issue of metadata and the PRA has arisen.<sup>2</sup> Metadata is data about data – data that

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<sup>1</sup> The Westlaw version of Division I’s opinion is appended as Exhibit 1. Division I’s order changing opinion is appended as Exhibit 2.

<sup>2</sup> In fact, this appears to be one of the first cases in the nation to address whether metadata qualifies as a “public record” under public record laws.

is automatically generated when electronic records are created, documenting among other things, who created the record, when it was created and when it was edited. Opinion, 187 P.3d 822 at 824.

No one is arguing that metadata does not meet the broad definition of “writing” under the PRA or that, under some circumstances metadata, or some portion of it, “relate[s] to the conduct of government” as defined in the PRA. Instead, this case raises issues about exactly what parts of metadata “relate to the conduct of government” and thus qualify as public records, what duty public agencies have to preserve metadata, and when identical e-mails, and their metadata, qualify as separate records based on minor differences in the metadata. It also raises issues related to the interaction between the PRA and records retentions requirements under Chapter 40.14 RCW.

This Court should accept review because this case raises three issues of first impression that are of substantial public interest and the Opinion’s ruling regarding attorney fees conflicts with numerous appellate court opinions. The City believes the Division I Opinion erred on each of the issues set forth in Section 4.

Division I ordered its decision published. Thus, unless corrected by this Court, Division I’s errors will become precedent relied upon in future public records cases.

**4. ISSUES PRESENTED FOR REVIEW**

- 4.1 Should this Court accept review of the Division I finding of a “conflict” between the State Retention Guidelines and the Public Records Act and invalidating local agency reliance on the Guidelines’ blanket authority for document retention? (RAP 13.4 (b)(4))
- 4.2 Should this Court accept review of Division I’s finding that the metadata of all copies of an e-mail must be retained as a public record? (RAP 13.4(b)(4))
- 4.3 Should this Court accept review of Division I’s expansion of the definition of “identifiable public record” to include deleted records that may be recovered from computer hard drives through a forensic search, thereby imposing disruptive and costly new duty on local agencies to search for responsive documents? (RAP 13.4(b)(4))
- 4.4 Should this Court accept review of Division I’s holding that the O’Neills were a prevailing party and attorney fees should be awarded without concluding that the PRA had been violated? (RAP 13.4(b)(1) & (4))

**5. STATEMENT OF THE CASE**

The City adopts and incorporates the statement of facts from Division I’s opinion, except for one omission and one correction. The facts pertinent to the issues of this Petition, as well as the omission and correction, are summarized below.

This case involves a PRA request for metadata information associated with an e-mail. An e-mail critical of the Shoreline City Council was forwarded to Shoreline’s Deputy Mayor at the time, Maggie Fimia, and at least one other member of the Council (Janet Way) by a political supporter, Lisa Thwing. Opinion, 187 P.3d 822 at 828, 832. Deputy Mayor Fimia mentioned the e-mail and questioned its veracity at a City

Council meeting. Opinion, 187 P.3d 822 at 824. Beth O'Neill ("O'Neill"), who was mentioned in the e-mail and by Deputy Mayor Fimia at the meeting, requested a copy of the e-mail under the PRA. Opinion, 187 P.3d 822 at 824. In response to the request, Deputy Mayor Fimia provided a modified version of the e-mail, removing the Lisa Thwing forwarding information. Opinion, 187 P.3d 822 at 825. However, after recognizing that the e-mail in its entirety was requested and qualified as a public record subject to disclosure, Deputy Mayor Fimia forwarded the entire e-mail electronically to the City Attorney for production to O'Neill. Opinion, 187 P.3d 822 at 829; CP 21.

Shortly after receiving a printed copy of the e-mail requested, O'Neill filed an additional records request for the e-mail's metadata. Opinion, 187 P.3d 822 at 829. The City was unable to provide O'Neill the metadata to the e-mail, as the electronic copy of the e-mail, and thus the metadata, had been deleted by Deputy Mayor Fimia after the e-mail was forwarded to the City Attorney. Opinion, 187 P.3d 822 at 829. The Secretary of State's Retention Schedule and Guidelines ("State Retention Guidelines") in existence at the time<sup>3</sup> of O'Neill's 2006 metadata request provided that public record e-mails may be deleted as long as they are printed along with the following information: name of sender, name of

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<sup>3</sup> Revisions to this section of the retention schedule were made in May 2007.

recipient and date and time of transmission and/or receipt. Opinion, 187 P.3d 822 at 831.

The e-mail received by Deputy Mayor Fimia was also received by Councilmember Janet Way. Opinion, 187 P.3d 822 at 832; CP Sub 4 Ex. L at 4. The City did provide O'Neill the metadata of the e-mail from Councilmember Way's copy. *Id.*

Division I's Opinion made one omission and one factual error. The Opinion omits the fact that Deputy Mayor Fimia was a blind carbon copied on the original e-mail she received from Lisa Thwing. CP 19. In sending the e-mail, Ms. Thwing put her own name as the single recipient on the subject line and then blind carbon copied all recipients, including the Deputy Mayor. CP 20, 38-39. Blind carbon copied recipients do not appear on the e-mail itself or in the metadata. CP 24-25.

Division I's description of the facts is in error on one point. The Opinion suggests Deputy Mayor Fimia may have possessed an electronic version of the complete, original e-mail on September 26, after the request for metadata was received. Opinion, 187 P.3d 822 at 830-831. However, a close review of the record reveals this is not the case. Division I refers to the September 26 print-out of the metadata and associated e-mail<sup>4</sup> for their mistaken suggestion; this metadata referred to is the metadata for the

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<sup>4</sup> CP Sub 4 Ex. J at 27.

modified copy of the original e-mail without the Thwing “to” and “from” lines, not the complete, original e-mail. CP 21, ¶10. Thus, at most, this record shows Fimia still possessed that modified version on the 26<sup>th</sup>.

Dissatisfied with the response to the records request, Doug and Beth O’Neill filed a motion to show cause in King County Superior Court asking for a finding that Shoreline had violated the PRA. King County Superior Court Judge Bruce Hilyer ruled in favor of the City, dismissing the cause of action, concluding that the City did not withhold any existing records subject to disclosure and had completely responded in compliance with the PRA. Judge Hilyer denied a motion for reconsideration filed by the O’Neills.

On appeal, Division I of the Court of Appeals affirmed in part and vacated in part. Division I remanded to the trial court the issue of which portions of the metadata were related to the conduct of government, and thus public records, and ordered a search of Deputy Mayor Fimia’s hard drive to ascertain whether the metadata determined to be a public record could be found. Division I also awarded attorney fees to the O’Neills.

## 6. GROUNDINGS FOR REVIEW AND ARGUMENT

### 6.1 Review Is Warranted Because the Opinion's Holding Finding A Conflict Between the Public Records Act and the State Retention Guidelines Is of Substantial Public Interest and Is Contrary to State Law

In this case, Division I erroneously concluded that a "conflict" exists with the State Retention Guidelines and the PRA. Division I first held that metadata associated with the e-mail discussed at the City Council meeting, or some portion of it, is a public record. Opinion, 187 P.3d 822 at 827. Division I specifically identified one portion of metadata as relating to the conduct of government: "e-mail addresses of persons who may have knowledge of alleged government improprieties in dealing with a zoning matter" and thus falling within the definition of a public record. Opinion, 187 P.3d 822 at 826. Division I remanded the issue of whether any other portions of the metadata relate to the conduct of government. Opinion, 187 P.3d 822 at 826.

Division I next found that in printing out and retaining a hard copy of the e-mail, and deleting the electronic version, the City followed the State Retention Guidelines, which explicitly allowed deletion of the electronic version of an e-mail public record as long as a hard copy of the record is printed along with the following information: name of sender, name of recipient, and date and time of transmission and/or receipt. Opinion, 187 P.3d 822 at 831. Despite acknowledging that the City

followed the law by printing the e-mail, retaining the required information and deleting the electronic record, Division I pointed to an undefined “conflict” between the State Retention Guidelines and the PRA, ultimately concluding that Guidelines did not inform the question presented in the case. Opinion, 187 P.3d 822 at 831.

Rather than not “informing” Division I, the State Retention Guidelines should have been integral to Division I’s analysis, as the State Retention Guidelines provide blanket authority to local agencies for the disposition of records. CP 106. No conflict exists between the PRA and the State Retention Guidelines. Instead, as made clear by the PRA itself and by the Attorney General’s model rules, the PRA and State Retention Guidelines must be read together to understand the full extent of the City’s duties to retain and disclose public records.

The State Retention Guidelines are adopted based on Chapter 40.14 RCW, and provide blanket authority on retention and disposal of public records. RCW 42.56.100<sup>5</sup> of the PRA incorporates the State Retention Guidelines by recognizing an agency’s authority to destroy records pursuant to a schedule for destruction, so long as any pending requests are resolved:

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<sup>5</sup> Appended as Exhibit 3.

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

The Attorney General's model rules for the PRA emphasize the close relationship between the State Retention Guidelines and the PRA. Adopted at the direction of the state legislature, the purpose of the model rules is to "provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act." WAC 44-14-00001. Section -03005 of the model rules specifically cites to the State Retention Guidelines and begins with the basic proposition that "An agency is not required to retain every record it ever created or used." The model rules further provide that "Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule." WAC 44-14-04003(8); see also WAC 44-14-00005, -04005 & -04006 (all referencing retention requirements).

Here, although e-mail metadata may be, in part, a public record, the State Retention Guidelines in existence at the time of the request clearly stated that if a printed copy of the e-mail and identifying information is retained, then the electronic e-mail and metadata need not be. Shoreline complied with the law by retaining the e-mail with the name

of sender, name of recipient, and date and time of transmission and/or receipt.

Division I's holding that a conflict exists between the two laws could be taken to an illogical and unprecedented conclusion. Specifically, if an agency cannot rely on the State Retention Guidelines as blanket authority to dispose of and retain records, then an agency would arguably have to produce any non-exempt public record requested, even if it had been properly disposed of pursuant to the State Retention Guidelines. This "conflict" identified by the Opinion is contrary to law and contrary to the public's interest in efficient management of public records .

**6.2 Review Is Warranted Because Division I Categorized Each Copy of Metadata as a Public Record with Independent Retention Value, a Ruling of Substantial Public Interest**

**6.2.1 Metadata had no public record retention value under the State Retention Guidelines in effect at time of requests.**

Division I concludes that metadata, or some portion of it, contains information that "relates to" the conduct of government or the performance of a governmental function. Opinion, 187 P.3d 822 at 827. Although noting that other portions of metadata may meet the definition of a public record, the Opinion identifies just one portion of the metadata in this case that relates to the conduct of government: the e-mail addresses of

persons who may have knowledge of alleged improprieties in dealing with a zoning matter. Opinion, 187 P.3d 822 at 826. Division I suggests but does not hold that information contained in headers, including name, e-mail address and Internet protocol address of the e-mail's recipient, may also relate to the conduct of government, making it a public record. Opinion, 187 P.3d 822 at 826. Division I then concludes that a copy of the metadata of the same e-mail from a different recipient did not provide the requestor access to the exact metadata she requested. Opinion, 187 P.3d at 832.

At most, the metadata requested by O'Neill in 2006 was a public record with no retention value. Public records with no retention value are described in the State Retention Guidelines as documents that may be disposed of as soon as they have served their purpose.<sup>6</sup> 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.

Metadata is analogous to an envelope and should be treated accordingly. In most business letters, just like e-mails, the body of the letter will identify the sender and the recipient, and their respective

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<sup>6</sup> E.g., Letters of transmittal and routing slips. LOCAL GOVERNMENTS GENERAL RECORD STATE RETENTION GUIDELINES, Secretary of State – Washington State Archives – <http://198.239.85.150/ReportServer/Pages/ReportViewer.aspx?%2fLRSReport%2fGenSchedule&rs:Command=Render> at 7.

addresses. This information will also be on the envelope. The same is true for e-mails – the body of the e-mail will contain the pertinent name and address information that is effectively duplicated in the metadata header information. Yet no one would suggest that a public agency must save every envelope, unless the postmark meets some need of the agency. And certainly, when identical letters are sent to a single agency, no one would argue that the agency must keep each envelope simply because the name of the recipient on the envelope will differ.

Similar to envelopes, metadata is disposed of, consistent with the State Retention Guidelines, once the e-mail has arrived in the individual's e-mail inbox and a compliant hard copy retained. Categorizing metadata as having “no retention value” is consistent with the Guidelines' direction to delete the electronic version of the e-mail once the hard copy has been printed and retained.

6.2.2 At most, only one copy of metadata must be retained under the current State Retention Guidelines.

Division I's conclusion that a copy of metadata from the same e-mail received by a second recipient failed to provide O'Neill access to the requested record is erroneous, both under the State Retention Guidelines in effect at the time of the requests as well as the revised Guidelines. The

State Retention Guidelines in effect in 2006 and in effect now<sup>7</sup> direct agencies to delete duplicate copies of e-mail. CP 90-91. Every copy of an e-mail sent to multiple recipients will have different metadata header information. Yet, the State Retention Guidelines direct agencies to delete additional copies of e-mails, despite the accompanying loss of metadata header information. CP 90-91.

The 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. This is contrary to the Secretary of State's direction and results in the inappropriate scenario of duplicate copies and redundant information cluttering e-mail systems and burdening electronic storage capabilities, while only providing information that could already be gleaned from any copy of the metadata and the printed e-mail.

The Opinion glosses over the fact that the Way metadata provided O'Neill with the one portion of the metadata Division I considered to be related to the conduct of government in this particular case – “the e-mail addresses of the persons [Diane Hettrick and Lisa Thwing] who may have knowledge of alleged government improprieties in dealing with a zoning

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<sup>7</sup> The Records Management Guidelines – a portion of the State Retention Guidelines identified in this brief - are currently “under review” but the Guidelines have not been modified or repealed to date.

matter”. By providing the Way metadata, the City complied with the State Retention Guidelines in effect in 2006 and the revised Guidelines in effect currently, and provided O’Neill with that portion of the metadata identified by Division I as relating to the conduct of government. Since Deputy Mayor Fimia was blind carbon copied on the e-mail from Ms. Thwing, no other e-mail addresses of persons with knowledge of alleged government improprieties would appear in the Deputy Mayor’s metadata. CP 24-27; CP 38-39.

**6.3 Review Is Warranted Because Division I Imposed a New Duty on Local Agencies to Search Hard Drives, Thereby Expanding the Definition of “Identifiable Public Record” and Creating an Issue of Substantial Public Interest**

Division I’s ruling that, on remand, the trial court, and the City, must search the Deputy Mayor’s hard drive to determine whether it contains the requested metadata, imposes a new, unprecedented duty on local agencies. This search would be particularly onerous since the former Deputy Mayor received the e-mail on her personal computer and personal e-mail account, using an operating system for which the City has no current expertise or software to conduct a search. CP 19, 25.

The PRA requires production of “identifiable public records.” RCW 42.56.080<sup>8</sup>. An “identifiable record” is one that agency staff can

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<sup>8</sup> Appended as Exhibit 3.

“reasonably locate.” WAC 44-14-04002(2) (citing *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998)). A requester has no right to search through agency files to locate records after an agency fails to locate the requested record. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004). Nor should a requester be able to search through agency hard drives – or have a court make such a search. Instead, 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.

Requiring agencies to conduct general hard drive searches in response to every request not only exceeds any prior understanding of the PRA, it would also cause huge delays in agencies’ responses and greatly increase the costs and manpower required to respond to requests. Even if Division I’s ruling is limited to requiring a search of the hard drive only when an agency has deleted documents at close proximity to the time of a request, agencies would still be forced to search hard drives with every request because documents with no retention value are regularly deleted.

**6.4 Review Is Warranted Because Division I Directed Attorney Fees to Be Awarded Without Finding a Violation of the PRA, Contrary to Established Washington Law.**

Division I declaration that the O'Neills are a prevailing party and awarding attorney fees without finding whether the PRA had been violated is a significant and erroneous departure from previous Supreme Court rulings in *Concerned Ratepayers Ass'n v. Pub. Utility Dist. No. 1.*, 138 Wn.2d 950, 964, 983 P.2d 635 (1999) and *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005).

The only basis for awarding attorney fees is when a party prevails in an action seeking the right to inspect or copy a public record or the right to receive a response to a public record request within a reasonable amount of time. RCW 42.56.550(4)<sup>9</sup> states:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

The Supreme Court has repeatedly held that a violation of the PRA must be found prior to declaring that a party has prevailed and that attorney fees are owed. In *Concerned Ratepayers Ass'n v. Pub. Utility Dist. No. 1.*, 138 Wn.2d 950, 964, 983 P.2d 635 (1999), the Court found

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<sup>9</sup> Appended as Exhibit 3.

that, although the document withheld by the City was a public record, the trial court needed to determine whether the document should have been disclosed or whether the document was exempt from public disclosure. Since the Court remanded the issue of whether a PRA violation had occurred, it also remanded the question of attorney fees and statutory penalties. *Id.* In *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005), the court remanded to the trial court the issue of whether attorney fees were owed, stating:

[The appellant] has not yet had a court review all of the documents and determine if they were properly withheld from the outset. If he prevails on that point, he is entitled to fees and penalties even if his action did not cause the disclosure.

The same is true here. Division I did not find the City violated the PRA. Rather, it remanded the issue to the trial court, stating:

[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.

Opinion, 187 P.3d 822 at 832.

Even if this Court sustains the remand, declaring a requester a prevailing party and awarding attorney fees cannot be made until a PRA violation is found.

**7. CONCLUSION**

In recent years, two factors have worked to greatly increase the costs for local governments to comply with the PRA. First, the number of requests has escalated. Second, the ease of e-mail and other technology has resulted in more and more records being created. In today's tight budgetary climate, local governments need clear guidelines on what their responsibilities are in regards to the PRA and electronic records, particularly metadata. The Court of Appeals decision provides uncertainty rather than guidance. Accordingly, there is a substantial public interest in having the Supreme Court address the issues in this suit.

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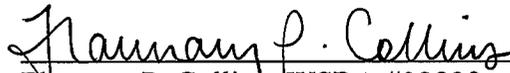
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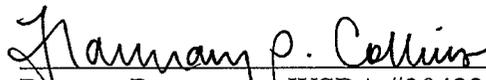
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RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of October, 2008.

CITY OF SHORELINE

  
\_\_\_\_\_  
Flannary P. Collins, WSBA #32939  
Attorney for Respondent City of Shoreline

FOSTER PEPPER PLLC

  
\_\_\_\_\_  
for Ramsey Ramerman, WSBA #30423  
Attorney for Respondent Maggie Fimia

per voice  
AUTHORIZATION

APPENDIX

**EXHIBIT 1**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BETH and DOUG O'NEILL, individuals,	)	No. 59534-2-I
	)	
Appellants,	)	DIVISION ONE
	)	
v.	)	
	)	
THE CITY OF SHORELINE, a municipal	)	
agency; and DEPUTY MAYOR	)	
MAGGIE FIMIA, individually and in her	)	
official capacity,	)	PUBLISHED
	)	
Respondents.	)	FILED: <u>July 21, 2008</u>
	)	

Cox, J.—This is an action under the Public Records Act of the state of Washington (PRA).<sup>1</sup> At issue is whether metadata in the electronic version of an e-mail is subject to disclosure under the PRA.<sup>2</sup>

In November 2006, Beth and Doug O'Neill commenced this action, claiming that the City of Shoreline and its deputy mayor violated the PRA in responding to Ms. O'Neill's multiple requests for public records. They also contend that the trial court abused its discretion by dismissing the case after the show cause hearing, which was held solely on declarations and briefs. They

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<sup>1</sup> We cite to the 2006 version of the PRA that was recodified in chapter 42.56 RCW and became effective on July 1, 2006. We note that portions of the PRA were further amended in 2007. E.g., Laws of 2007, ch. 197, §1.

<sup>2</sup> "Metadata" is not defined in standard English dictionaries. But other sources generally describe the term as "data about data," or more specifically, "information describing the history, tracking, or management of an electronic document." Williams v. Sprint / United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kan. 2005) (discussing the evolving state of the law concerning discovery of electronic documents and associated metadata in litigation).

further claim this procedure violated due process. Finally, they contend that the trial court erroneously awarded costs to the City and its deputy mayor, Maggie Fimia. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

The material facts are not substantially in dispute. At a public meeting of the Shoreline City Council on September 18, 2006, Deputy Mayor Maggie Fimia stated that she had received an e-mail that related to a pending zoning matter. According to her, the e-mail stated serious allegations of improper influence by members of the City Council over that zoning matter. She said the message came to her from “a Ms. Hettrick and a Ms. O’Neill.”<sup>3</sup>

Ms. O’Neill was present at the public meeting and claims that Deputy Mayor Fimia’s remarks “came as a complete shock to [her].”<sup>4</sup> She orally requested “to see that e-mail.”<sup>5</sup> Deputy Mayor Fimia stated that she would be “happy to share” the e-mail with Ms. O’Neill.<sup>6</sup>

Central to the dispute on appeal are actions the deputy mayor took after Ms. O’Neill’s request. The deputy mayor deleted the top four lines of the header on the e-mail when she forwarded it from her personal computer to herself. Sometime thereafter, it appears she deleted the e-mail from her personal

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<sup>3</sup> Clerk’s Papers Sub 4 at 3 (O’Neill declaration).

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Clerk’s Papers at 20 (Fimia declaration).

computer. Whether the editing of the e-mail and the failure to provide the entire e-mail with all metadata violates the PRA are at issue.

Further communication between Ms. O'Neill and the City (including Deputy Mayor Fimia) occurred the following day and thereafter. O'Neill made six more oral or written requests for records following the oral request at the public meeting on September 18. No one argues that any of the City's responses were untimely. We discuss the details of the requests and the responses later in this opinion.

Dissatisfied with the City's responses to the requests, the O'Neills commenced this action pursuant to the PRA, simultaneously moving for an order to appear and show cause directed to the City and Deputy Mayor Fimia. At the same time, they also moved for an order requiring the City and its agents, including the deputy mayor, to lodge public records for in camera review and to prepare a detailed record of documents withheld and exemptions claimed. All parties submitted declarations and briefing on the requests for relief.

The trial court reviewed the briefing, the declarations, and one record submitted for in camera review as exempt from disclosure.<sup>7</sup> In its order, the trial court made several findings, denied the O'Neills' motions, dismissed the action, and awarded costs to the City and the deputy mayor.<sup>8</sup> The trial court also denied the O'Neills' motion for reconsideration.

They appeal.

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<sup>7</sup> Clerk's Papers at 141.

<sup>8</sup> Id.

## PUBLIC RECORDS ACT

O'Neill argues that the City violated the PRA by, among other things, altering and destroying public records following her request.<sup>9</sup>

The PRA was enacted in 1972 by initiative as part of the Public Disclosure Act, formerly chapter 42.17 RCW,<sup>10</sup> The relevant portions were later recodified at chapter 42.56 RCW and renamed the Public Records Act.<sup>11</sup> The PRA states:

Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of . . . this chapter, or other statute which exempts or prohibits disclosure of specific information or records.<sup>[12]</sup>

The supreme court has recognized that the PRA “is a strongly worded mandate for broad disclosure of public records.”<sup>13</sup>

Judicial review of challenged agency actions under the PRA is de novo, and a court may examine the records in camera to determine whether disclosure is proper.<sup>14</sup> In light of the PRA's purpose, we liberally construe its disclosure

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<sup>9</sup> Clerk's Papers at 5-6.

<sup>10</sup> Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 730, 174 P.3d 60 (2007).

<sup>11</sup> Id.

<sup>12</sup> RCW 42.56.070(1).

<sup>13</sup> Soter, 162 Wn.2d at 730 (quoting Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)).

<sup>14</sup> RCW 42.56.550(3).

provisions and narrowly construe its exemptions.<sup>15</sup> In interpreting the PRA, we “shall take into account” the following policy:

. . . that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.<sup>[16]</sup>

### *Public Records*

A threshold issue under the PRA is whether the requested documents are public records.<sup>17</sup> O’Neill argues that the e-mail to which Deputy Mayor Fimia referred at the September 18 public meeting of the Shoreline City Council and its associated metadata are public records. The City does not dispute that the e-mail is a public record, but argues that the electronic version of the e-mail was properly deleted under its then-existing records retention policy. Deputy Mayor Fimia contends that the electronic version of the e-mail and its metadata are not public records.

The PRA specifies that a “public record” is:

any **writing** containing information **relating to** the conduct of government or the performance of any governmental or proprietary function prepared, **owned, used, or retained** by any state or **local agency** regardless of physical form or characteristics.<sup>[18]</sup>

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<sup>15</sup> Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS), 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (citing RCW 42.17.010(11), recodified in the PRA at RCW 42.56.030).

<sup>16</sup> RCW 42.56.550(3).

<sup>17</sup> See Tiberino v. Spokane County, 103 Wn. App. 680, 687, 13 P.3d 1104 (2000).

<sup>18</sup> Former RCW 42.17.020(41) (2006) (emphasis added). The 2006 version of the PRA incorporated the definitions from RCW 42.17.020. See former RCW 42.56.010 (2006). The PRA was amended in 2007, and the identical definition of “public record” now appears in the PRA. See RCW

A "writing" is defined as:

handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.<sup>[19]</sup>

It is undisputed that the City is a "local agency" under the PRA.<sup>20</sup>

Moreover, there can be no serious dispute that the e-mail to which Deputy Mayor Fimia referred at the September 18 public meeting is a public record. It is: (a) a "writing" that (b) "relat[es] to the conduct of government or the performance of [a] governmental . . . function" that the deputy mayor (c) "used" during the public meeting. She stated that the message commented on alleged improprieties in dealing with a zoning matter before the City Council, making it a subject for

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42.56.010(2). RCW 42.17.020 was also amended in 2007. Those amendments likewise did not change the definition of "public record." See Laws of 2007, ch. 358, §1.

<sup>19</sup> Former RCW 42.17.020(48) (2006). The 2007 amendments to RCW 42.17.020 and to RCW 42.56.010 did not affect the definition of "writing." See Laws of 2007, ch. 358, §1; Laws of 2007, ch. 197, §1.

<sup>20</sup> The PRA provides that an agency includes local agencies. A local agency includes, among other things, every city and office, department, division, bureau, board, commission, or agency thereof. RCW 42.17.020(2). The 2007 amendments to RCW 42.17.020 and to RCW 42.56.010 did not change the definition of "agency." See Laws of 2007, ch. 358, §1; Laws of 2007, ch. 197, §1.

discussion at the meeting.<sup>21</sup> The e-mail fulfills the plain meaning of the statutory definition of a public record.

Deputy Mayor Fimia argues that the electronic version of the e-mail is not a public record because it was not “used” by the City. She argues that it was created and transmitted by a private citizen, not the City. Her argument fails to acknowledge that Deputy Mayor Fimia used the e-mail when she made it the subject of public comment at the city council meeting. And she cites no authority for the proposition that a private citizen’s creation and transmission of an e-mail is relevant to the question whether the e-mail is a public record. We conclude that the electronic version of the e-mail is a public record.

We next turn to the question of whether the metadata associated with the foregoing e-mail is also a public record. As we previously indicated, the definitions section of the PRA provides the answer. A “public record” is:

any **writing** containing information **relating to** the conduct of government or the performance of any governmental or proprietary function prepared, **owned**, used, or retained by any state or local agency regardless of physical form or characteristics.<sup>[22]</sup>

A “writing” is:

Handwriting . . . and every other means of recording any form of communication or representation, including, but not limited to . . . magnetic or punched cards, discs, drums, diskettes, . . . and other documents including existing data compilations from which information may be obtained or translated.<sup>[23]</sup>

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<sup>21</sup> See Concerned Ratepayers Ass’n v. Pub. Utility Dist. No. 1, 138 Wn.2d 950, 961, 983 P.2d 635 (1999) (technical document was used when PUD officials attended a meeting and reviewed the document during negotiations).

<sup>22</sup> Former RCW 42.17.020(41) (2006) (emphasis added).

<sup>23</sup> Former RCW 42.17.020(48) (2006).

The metadata associated with the e-mail, or some portion of it, falls within the broad definition of a writing. It is sufficiently similar to the examples of the types of documents in the definition to qualify as a "writing." Accordingly, the information falls within that broad definition in the statute, as we must liberally interpret the PRA.

Moreover, on this record, the metadata contains information that "relates to" the conduct of government or the performance of a governmental function. It shows the e-mail addresses of persons who may have knowledge of alleged government improprieties in dealing with a zoning matter. This too falls squarely within the statute's definition of "public record," as we must liberally construe the PRA.

Finally, no one argues that anyone other than the deputy mayor, an agent of the City, "owns" the metadata from the e-mail she received on her personal e-mail account that she uses, in part, for the City's business.<sup>24</sup> The PRA does not define "own." Thus, reference to a dictionary is permissible to determine legislative intent.<sup>25</sup> The dictionary definition of own is, "To have or possess as property."<sup>26</sup> Using that definition here, it is clear that the City owns the metadata associated with the requested e-mail.

We conclude that, on this record, the metadata associated with the e-mail Deputy Mayor Fimia discussed at the meeting, or some portion of it, is also a

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<sup>24</sup> See Clerk's Papers at 19 (Fimia declaration).

<sup>25</sup> See Concerned Ratepayers, 138 Wn.2d at 959 (defining the term "use" with reference to the dictionary definition).

<sup>26</sup> THE AMERICAN HERITAGE DICTIONARY 1294 (3d ed. 1992).

public record. We do not rule on the more general question whether e-mail or metadata that is transmitted to personal e-mail accounts, without more, is subject to the PRA. Here, the materials at issue fall within the statutory definitions subjecting those materials to disclosure under the PRA. Moreover, the metadata was specifically requested in this case.

The City does not dispute in its brief that the metadata associated with the e-mail is a public record. Moreover, we find nothing in the record indicating that the City ever took the position, either before or during this litigation, that the metadata at issue here is not a public record. While the City appears to have taken a different position at oral argument before this court, we conclude that its position at oral argument does not address, in a persuasive way, the analysis we set forth above.

#### *Requests for Public Records and Responses*

As in most public records cases, the other basic issues here are whether all public records that O'Neill requested were provided and whether the City bore its burden to show that any requested records are exempt. Here, O'Neill specifically argues that the City altered and deleted an e-mail after her request for that e-mail and failed to protect public records from damage or destruction.<sup>27</sup> O'Neill also directly attacks the trial court's ruling that "no additional responsive records are available or contained on the computer hard drive of [Deputy Mayor

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<sup>27</sup> Brief of Appellants at 30-31.

Fimia] and duplication of the hard drive for further in camera inspection is not warranted.”<sup>28</sup>

The PRA requires agency rules to “provide for the fullest assistance to inquirers.”<sup>29</sup> Agencies shall refrain from destroying public records that are subject to a pending public record request.<sup>30</sup> The PRA requires disclosure only when there has been a request for an “identifiable” public record.<sup>31</sup> This requires ‘a reasonable description enabling the government employee to locate the requested records.’<sup>32</sup>

We first examine O’Neill’s claim that the City failed to provide the e-mail in response to her oral request of September 18, 2006, at the city council meeting on that date. Doing so requires a close reading of the record.

This matter originated when Deputy Mayor Maggie Fimia received on September 18, 2006, an e-mail from Lisa Thwing. That message forwarded an e-mail that was from Diane Hettrick. The header in the e-mail to the deputy mayor from Thwing reads:

**From:** “Lisa Thwing” <tootrd@comcast.net>  
**Date:** Mon, 18 Sep 2006 07:55:38 -0700  
**To:** “Lisa Thwing” <tootrd@comcast.net>  
**Subject:** Current city council meeting being broadcast this week

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<sup>28</sup> Id. at 34 (quoting trial court’s order, Clerk’s Papers at 141).

<sup>29</sup> RCW 42.56.100.

<sup>30</sup> Id.

<sup>31</sup> RCW 42.56.080.

<sup>32</sup> Bonamy v. City of Seattle, 92 Wn. App. 403, 410, 960 P.2d 447 (1998).

**From:** Diane Hettrick <mailto:dhettrick@earthlink.net>  
**Sent:** Thursday, September 14, 2006 11:40 PM  
**Subject:** Current city council meeting being broadcast this week

The body of the message begins as follows:

From my friend Judy:

Hi Folks,  
My dear friend, Beth O'Neill has asked me to pass along  
information about our dysfunctional Shoreline City Council.<sup>[33]</sup>

The e-mail goes on to state that city council members are "playing favorites" in zoning decisions in favor of their political supporters.

That night, a Monday, the Shoreline City Council held a public meeting.<sup>34</sup> At that meeting, Deputy Mayor Fimia publicly stated that she had received an e-mail from "a Ms. Hettrick and a Ms. O'Neill" containing serious allegations that city council members were using their influence to affect zoning decisions.

During the public comment portion of this meeting that followed, Ms. O'Neill denied knowledge of the message that the deputy mayor described and orally requested to "see that e-mail." Deputy Mayor Fimia responded that she did not have the document with her but would be happy to share it with O'Neill.

Following the public meeting, the deputy mayor reviewed the e-mail from Thwing and forwarded that e-mail from her personal e-mail account to herself. Before forwarding this e-mail, the deputy mayor deleted the first four lines of the header, which includes the "to" and "from" lines listing Thwing as the sender and

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<sup>33</sup> Clerk's Papers Sub 4 Exhibit J at 21.

<sup>34</sup> The record indicates that September 18, 2006, was a Monday. See Clerk's Papers Sub 4 Exhibit J at 1.

recipient. She did this “in order to protect Ms. Thwing from potential public exposure.”<sup>35</sup> The deputy mayor did not otherwise modify the e-mail from Thwing. The next day, September 19, she forwarded the altered e-mail to Carolyn Wurdeman, Executive Assistant to the City Manager.

That same day, a Tuesday, O’Neill called the City of Shoreline and left a voicemail message “*again requesting a copy of the e-mail.*”<sup>36</sup> When she was told later that day that the e-mail was missing the “To” header, O’Neill orally requested the entire e-mail string. She also said that she would come down to pick up the material.

In response, Carolyn Wurdeman sent an e-mail to Deputy Mayor Fimia requesting “information about who the e-mail [was] sent to.” The deputy mayor responded that “there was no ‘To’ line in the e-mail.”

On Wednesday, September 20, O’Neill went to the City Clerk’s office to pick up the requested record. There, she submitted her first written request, PD 06-135, for the “E-mail mentioned by Deputy Mayor Fimia at the 9-18 Council meeting.” In response, the clerk’s office gave O’Neill a hard copy of the e-mail from Hettrick, without the forwarding header from Thwing.

Dissatisfied with the record she received, O’Neill immediately submitted another written request, PD 06-134. She requested:

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<sup>35</sup> Clerk’s Papers at 21 (Fimia declaration).

<sup>36</sup> Clerk’s Papers Sub 4 Exhibit J at 4 (emphasis added).

[A]ll information relating to this e-mail: how it was received by Maggie Fimia, from whom it was received, and the forwarding chain of the e-mail.<sup>[37]</sup>

On Monday, September 25, Deputy Mayor Fimia located the original September 18 e-mail from Thwing on her computer and forwarded the complete e-mail, including the forwarding information from Thwing, to the Shoreline City Attorney.<sup>38</sup> The same day, the City gave O'Neill a hard copy of that complete e-mail.<sup>39</sup> This copy included both headers, each of which in turn included the date and time of the message. Significantly, O'Neill does not dispute having received a complete copy of this e-mail on September 25.

The deputy mayor deleted the original e-mail from her computer sometime after forwarding the message to the city attorney. The record is unclear on when this deletion occurred.<sup>40</sup>

That same day, Monday, September 25, O'Neill submitted a third written request, PD 06-138. It expanded on the prior requests by seeking:

Any and all correspondence (including memos) relating to this [e-mail] and a COMPLETE transmission / forwarding chain AND ALL ***metadata*** pertaining to this document.<sup>[41]</sup>

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<sup>37</sup> Clerk's Papers Sub 4 Exhibit F.

<sup>38</sup> Clerk's Papers at 22 (Fimia declaration).

<sup>39</sup> Clerk's Papers at 34 (Shenk declaration).

<sup>40</sup> Compare Clerk's Papers at 21-22, with Clerk's Papers Sub 4 Exhibit J at 27 (showing a date stamp of September 26).

<sup>41</sup> Clerk's Papers Sub 4 Exhibit G (bold and italics added).

That evening, there was another city council meeting. At the meeting, Deputy Mayor Fimia publicly corrected the error she made in the September 18 meeting by explaining that Hettrick had sent the original e-mail quoting her friend “Judy,” but that O’Neill had not sent the e-mail.

On Wednesday, September 27, O’Neill submitted a fourth written records request, PD 06-139. Specifically, she sought a copy of the e-mail Deputy Mayor Fimia mentioned during the September 25 council meeting, including all “*metadata*, memos, and any other correspondence relating to this document.”<sup>42</sup>

The City responded to O’Neill’s third and fourth written requests on September 29. It provided numerous records and also indicated that further records would likely be available by October 5.

The City’s letter stated that it was declining to disclose one document that was covered by the attorney-client privilege. That document was later accidentally released to O’Neill.

The records provided included, among other documents, metadata from a copy of the e-mail that Deputy Mayor Fimia had apparently sent to herself on September 26.<sup>43</sup>

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<sup>42</sup> Clerk’s Papers Sub 4 Exhibit I (emphasis added).

<sup>43</sup> See Clerk’s Papers Sub 4 Exhibit J at 27. Deputy Mayor Fimia did not state in her declaration that she sent a copy of the e-mail to herself on September 26, a day after she sent it to the city attorney. Nevertheless, the record contains the metadata from such an e-mail with a date stamp of September 26. O’Neill received a copy of this metadata.

The letter also informed O'Neill that the City would search Deputy Mayor Fimia's computer for any additional responsive records. We describe later in this opinion the City's efforts in this respect.

In the meantime, Deputy Mayor Fimia was unable to locate the original e-mail on her computer, so she asked Thwing to re-send it to her. On September 30, Thwing complied with that request.<sup>44</sup>

The City provided a second installment of records to O'Neill on October 3. The second installment included a paper copy of the original e-mail that Thwing re-sent to Deputy Mayor Fimia on September 30 and metadata from that e-mail. It also included metadata from the September 18 e-mail Thwing had sent to Janet Way, a city council member. The City declined to release one additional document based on attorney-client privilege.

On October 16, O'Neill submitted her fifth and final written records request, PD 06-154. Her request essentially reiterated her past requests and also requested any and all documents of any kind relating to the incident or the City's treatment of the incident.

The City responded on either October 23 or 24. Included in its response were several e-mail messages. On October 25, the City supplemented its response to O'Neill's fourth written request.

O'Neill first argues that the City did not comply with her oral request of September 18 at the public meeting because the deputy mayor intentionally altered the e-mail by deleting the forwarding header after the request. O'Neill

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<sup>44</sup> Clerk's Papers at 34.

also claims the deputy mayor's later deletion of the entire e-mail violated the PRA.

The record shows that O'Neill made an oral request at the September 18, 2006 public meeting to "see that e-mail" to which the deputy mayor referred at that meeting. A fair reading of that request is that O'Neill sought to see the entire e-mail, not an altered version of it. It is undisputed that the deputy mayor altered the e-mail after the oral request and before forwarding it by removing the header information showing who sent it to her. Nothing in the PRA supports alteration of the record "in order to protect Ms. Thwing from potential public exposure," the deputy mayor's stated rationale for altering the document.

O'Neill argues that Deputy Mayor Fimia's "alteration" of the original e-mail could support a criminal charge under Chapter 40.16 RCW. That statute renders the destruction of a public record a class C felony.<sup>45</sup> But this is a civil case, not a criminal prosecution. Whether anyone is liable for violation of Chapter 40.16 RCW is not presently before us. There has been no charging decision by a prosecutor and no determination of guilt beyond a reasonable doubt by a jury.

O'Neill does not dispute that on September 25, 2006, she received a hard copy of the original e-mail, which contained the header and body of the September 18 e-mail.<sup>46</sup> This was within five business days of September 18, 2006, the date of her original request, as RCW 42.56.520 expressly requires.<sup>47</sup>

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<sup>45</sup> RCW 40.16.010.

<sup>46</sup> Clerk's Papers at 34 (Shenk declaration).

<sup>47</sup> RCW 42.56.520 provides:

In short, O'Neill received a timely and complete response to the records request to see the e-mail from Thwing.

O'Neill argues that her September 18 request fairly identified that she sought the electronic version of the e-mail. A careful reading of the record shows that she did not make that request on that date.

The City is not required to be a mind reader when responding to public records requests.<sup>48</sup> The PRA only requires providing a public record when it is identifiable.<sup>49</sup> Here, the oral request on September 18 makes no mention of either the electronic version of the e-mail or its associated metadata. Rather, the O'Neill declaration in this case states that her voicemail to the City the following morning clarified that she sought a "**copy of the e-mail.**"<sup>50</sup> We conclude from our review of her own words that she did not request an electronic copy of the e-mail or its metadata on September 18.

Deputy Mayor Fimia argues that requiring her to identify Thwing as the sender of the e-mail violates her First Amendment right to freedom of association. We disagree.

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Within five business days of receiving a public record request, an agency . . . must respond by either (1) providing the record; (2) acknowledging that the agency . . . has received the request and providing a reasonable estimate of the time the agency . . . will require to respond to the request; or (3) denying the public record request.

<sup>48</sup> Bonamy, 92 Wn. App. at 409.

<sup>49</sup> Id. at 410 (citing RCW 42.17.270).

<sup>50</sup> Clerk's Papers Sub 4 at 4.

Washington's First Amendment jurisprudence requires an initial showing that there is "some probability that the requested disclosure will infringe upon [the person's] First Amendment rights."<sup>51</sup> For example, requiring a group to disclose all membership lists, meeting notes, and financial records would have a chilling effect on the members' First Amendment rights.<sup>52</sup> After such a showing, the burden shifts to the party seeking discovery to show the relevance and materiality of the information and that reasonable efforts to obtain the information another way have been unsuccessful.<sup>53</sup> Here, Deputy Mayor Fimia has failed to produce any evidence or reasoned argument to make the required initial showing that there is some probability the disclosure of one sender of one e-mail would burden her right to association.

Next, we must determine whether the City complied with O'Neill's request for the e-mail's metadata, which she first requested on September 25.

Deputy Mayor Fimia describes the deletion of e-mail as accidental. She also testified that she was not familiar with the term metadata until O'Neill requested that information. This latter statement could be read to suggest that the deputy mayor did not intentionally delete any metadata before O'Neill specifically requested that information. The City defends on the basis that the

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<sup>51</sup> Right-Price Rec., LLC v. Connells Prairie Comty. Council, 105 Wn. App. 813, 822, 21 P.3d 1157 (2001), aff'd in part and remanded on other grounds, 146 Wn.2d 370, 46 P.3d 789 (2002).

<sup>52</sup> Id. at 825.

<sup>53</sup> Id. at 822.

deletion of e-mail and associated metadata was consistent with its records retention policy.

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.<sup>54</sup> The City's actions in this case appear to have complied with these guidelines. O'Neill does not argue otherwise.

However, the PRA directs courts to review agency actions de novo, giving them no deference in determining whether a record is subject to disclosure under the PRA.<sup>55</sup> And when there is a conflict between the PRA and another law, the PRA controls.<sup>56</sup> Thus, the records retention guidelines then in effect do not inform the questions presented in this case, which we review de novo.

Here, the City admits that it did not provide the exact metadata from the original e-mail. Rather, the City argues that O'Neill received metadata "associated with" the e-mail.<sup>57</sup> Specifically, it argues that it provided to O'Neill metadata from a copy of the e-mail to the deputy mayor that Thwing sent to Janet Way on the same date.

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<sup>54</sup> Clerk's Papers at 92; see also Clerk's Papers at 36 (retention schedule).

<sup>55</sup> Hearst Corp., 90 Wn.2d at 129-31; Zink v. City of Mesa, 140 Wn. App. 328, 335-37, 166 P.3d 738 (2007).

<sup>56</sup> PAWS, 125 Wn.2d at 262 (citing RCW 42.17.920, which was recodified in the PRA at RCW 42.56.030).

<sup>57</sup> Brief of Respondent City of Shoreline at 22.

Without having the metadata associated with the September 18 e-mail to the deputy mayor before us, we cannot tell the extent to which it differs from the metadata from the e-mail that went to Way, which was provided to O'Neill. In any event, the metadata from the e-mail to Way is not the specific record O'Neill requested. At the very least, the information contained in the headers of the respective e-mails would likely be different. This header information includes, among other things, the name, e-mail address, and Internet protocol address of the e-mail's recipient.<sup>58</sup> In short, the City has not yet proven that it provided to O'Neill access to the metadata she requested. She is entitled to this public record.

Our conclusion on this point addresses O'Neill's challenge to the trial court's ruling that "[n]o additional responsive records are available or contained on the computer hard drive of [Deputy Mayor Fimia] and duplication of the hard drive for further in camera inspection is not warranted."<sup>59</sup> In response, the City contends that it conducted a thorough search for the deleted e-mail on that hard drive. But the record in this case does not fully support the City's contention.

Joel Taylor, a computer and network specialist for the City, stated only that he searched Deputy Mayor Fimia's e-mail program for the missing e-mail.<sup>60</sup>

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<sup>58</sup> Clerk's Papers Sub 4 Exhibit L at 4.

<sup>59</sup> Brief of Appellant at 34 (quoting the trial court's order).

<sup>60</sup> Clerk's Papers at 29-30.

A search of the City's backup drive would not have helped because the deputy mayor did not receive the e-mail on her City e-mail account.<sup>61</sup>

Tho Dao, the City's manager of information services, stated that the City did **not** search Deputy Mayor Fimia's hard drive:

The City only has software capable of copying the hard drives of personal computers ("PC"), not macintosh computers ("MAC"). The Deputy Mayor has a MAC. I estimate the cost to purchase the software capable of copying a MAC hard drive at somewhere between \$500 - \$1,000.<sup>[62]</sup>

On this record, we cannot tell whether the hard drive of the deputy mayor's computer contains metadata associated with the September 18 e-mail that would be responsive to the request. The trial court shall determine the answer to that question on remand.

We also note that the deputy mayor forwarded to the city attorney the September 18 e-mail to which she referred at the September 18 meeting. This record does not tell us whether that forwarded e-mail had with it the same metadata that O'Neill sought or whether the City could provide the metadata from the forwarded e-mail to her in response to her request. Whether the metadata is the same or different is a question this court cannot answer. We leave it for decision by the trial court on remand.

The trial court should also consider on remand whether the e-mail Thwing resent to the deputy mayor contains the requested metadata. Again, we cannot tell on this record whether it does.

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<sup>61</sup> Clerk's Papers at 30.

<sup>62</sup> Clerk's Papers at 25.

If the metadata exists from any of these sources, it is subject to O'Neill's pending record request, and the City is required under the PRA to provide it to her. If it does not exist, the trial court must determine, consistent with this opinion, whether the City's deletion of the metadata violated the PRA.<sup>63</sup> Where appropriate, the trial court should determine the appropriate monetary penalty under the PRA.<sup>64</sup>

O'Neill also challenges the trial court's conclusion regarding the record the City withheld as attorney-client privileged.<sup>65</sup> The evidence in the record describes in detail the nature of this document.<sup>66</sup> The trial court was vested with the discretion to review the evidence and the document claimed exempt and conclude that the City met its burden in proving that this document was privileged. Nothing in the PRA requires anything more. The trial court's decision was proper with regard to the exempt document.

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<sup>63</sup> O'Neill appears to rely on RCW 42.56.100 as a basis for claiming the City violated the PRA. Reply of Appellants to Brief of City of Shoreline at 2-3. Because the record is unclear on when an electronic version of the September 18 e-mail was destroyed, we cannot address whether the PRA was violated in this respect.

<sup>64</sup> See Yacobellis v. City of Bellingham, 64 Wn. App. 295, 298, 299 n.3, 825 P.2d 324 (1992) (imposing a monetary penalty for the city's failure to disclose a destroyed record for each day the record was withheld from the date of the request through the date the supreme court denied review of the matter), abrogated in part on other grounds by Amren v. City of Kalama, 131 Wn.2d 25, 929 P.2d 389 (1997).

<sup>65</sup> Another record was withheld until it was accidentally released to O'Neill.

<sup>66</sup> See Clerk's Papers at 32-34 (Shenk declaration).

Finally, O'Neill cites an unpublished case from another jurisdiction regarding electronic information to support her argument concerning the computer's hard drive. We note that our court rules prohibit the citation of unpublished cases under the circumstances here because the rules of the other jurisdiction do not allow such citation.<sup>67</sup> We also note that in the past we have imposed sanctions for unauthorized citation of unpublished cases.<sup>68</sup> Because no party has sought sanctions, we limit our comments to directing all counsel to the relevant Rules of Appellate Procedure.

*Dismissal at Show Cause Hearing*

O'Neill argues that the trial court abused its discretion in dismissing her complaint without a hearing or trial on the merits. Specifically, she asserts that the decision to dismiss was contrary to the requirements of the PRA and violated due process.

RCW 42.56.550 sets forth the procedure to be followed when a litigant wishes to challenge an agency's actions surrounding a public records request. The statute provides for the superior court in the relevant county to conduct a show cause hearing at which the agency may be required to justify its response

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<sup>67</sup> See Appellant's Brief at 35 (citing Krumwiede v. Brighton Assocs., No. 05 C 3003, 2006 WL 1308629 (N.D. Ill. 2006)); Wash. RAP 10.4(h); Wash. GR 14.1 (whether unpublished case may be cited depends upon the rule in that jurisdiction); Fed. R. App. Pro. 32.1(a) (cases published before Jan. 1, 2007 are subject to local rules regarding publication); U.S. Ct. App. 7th Cir. R. 32.1 (unpublished cases may not be cited as precedent).

<sup>68</sup> See Dwyer v. J.I. Kislak Mortgage Corp., 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000).

to a request for public records.<sup>69</sup> At such a hearing, the agency bears the burden of proving that any public record not provided is exempted from disclosure.<sup>70</sup> The PRA explicitly states, "The court may conduct a hearing based solely on affidavits."<sup>71</sup> "[S]how cause hearings are the usual method of resolving litigation under" the PRA.<sup>72</sup> Our supreme court has stated that trial court rulings under the PRA are trial "management decisions" that are designed to avoid making "public disclosure act cases so expensive that citizens could not use the act for its intended purpose."<sup>73</sup> Dismissal of an action is subject to review for abuse of discretion.<sup>74</sup>

Here, O'Neill did not request oral argument on her motion to show cause. The court was permitted by statute to resolve, without oral argument, the basic issues before it: whether all requested public records were produced and whether the City had fulfilled its burden justifying any exemptions from disclosure under the PRA.

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<sup>69</sup> RCW 42.56.550(1).

<sup>70</sup> Id.

<sup>71</sup> RCW 42.56.550(3); see also WAC 44-14-08004(1) ("To speed up the court process, a public records case may be decided merely on the 'motion' of a requestor and 'solely on affidavits.'" (quoting RCW 42.56.550(1), (3)).

<sup>72</sup> Wood v. Thurston County, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).

<sup>73</sup> Brouillet v. Cowles Publ'g Co., 114 Wn.2d 788, 801, 791 P.2d 526 (1990).

<sup>74</sup> Quality Rock Prods., Inc. v. Thurston County, 126 Wn. App. 250, 260, 108 P.3d 805 (2005), review denied, 163 Wn.2d 1018 (2008).

Although we disagree with the trial court's ruling to the extent that it held that no further records were subject to disclosure, that does not mean that a hearing with oral argument or a trial must follow. The PRA outlines the procedure to be followed in cases of this type, and nothing in that act requires either a hearing with oral argument or a trial.

The argument that the procedure here violated other, inapplicable rules is unpersuasive. This was neither a CR 56 matter nor a CR 12(b)(6) matter, despite O'Neill's attempt to characterize it in that manner.

Moreover, O'Neill's reference to the general right of discovery in civil cases does not convincingly advance the argument. The discovery rules have nothing to do with the statutory show cause proceeding that the trial court utilized in this case. In short, for a proper resolution of the issues then before it, there was nothing to prohibit the court from dismissing the case at the show causing hearing pursuant to RCW 42.56.550(1).

The due process argument is also unavailing. O'Neill fails to cite to any authority that supports a constitutional right to a hearing with oral argument under the circumstances of this case. There was no due process violation.

O'Neill assigns error to the trial court's denial of the motion for reconsideration, but does not separately argue this point. Accordingly, we do not address this specific argument.

*Costs*

O'Neill next argues that the trial court improperly awarded costs in favor of the City and Deputy Mayor Fimia. This claim is now moot, and we conclude there is no reason to address it.

The reviewing court should award attorney fees and costs to a party "prevail[ing] against an agency."<sup>75</sup> The court should also award the prevailing party between five and one hundred dollars, in its discretion, for each day the record was unlawfully withheld.<sup>76</sup>

In its order addressing the PRA issues and dismissing the case, the trial court awarded costs "to Defendants." The court denied O'Neill's motion for reconsideration of this order. Significantly, in response to that motion below, the City rescinded its request for costs.

On appeal, the City expressly states that it does not object to this court "striking this portion of the order since it is consistent with the City's position in the trial court proceeding."<sup>77</sup> We accept the City's proposal. Accordingly, we vacate the portion of the order granting costs to the City and Deputy Mayor Fimia.

Finally, O'Neill also seeks attorney fees on appeal based on the PRA. An award is proper because she has partially prevailed. The trial court shall determine the amount of fees, as provided in RAP 18.1(i).

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<sup>75</sup> RCW 42.56.550(4).

<sup>76</sup> *Id.*

<sup>77</sup> Brief of Respondent City of Shoreline at 27.

We affirm the trial court's order to the extent of the request for e-mails and the ruling on the exempt record. We vacate the portion of the order to the extent of the request for metadata, the decision that "defendants have established that no additional responsive records are available or contained on the computer hard drive," and the award of costs "to Defendants." We remand for further proceedings consistent with this opinion.

Cox, J.

WE CONCUR:

Jau, J.

Appelwick, J.

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**C**

Court of Appeals of Washington, Division I.  
Beth and Doug O'NEILL, individuals, Appellants,  
v.

The CITY OF SHORELINE, a municipal agency;  
and Deputy Mayor Maggie Fimia, individually and  
in her official capacity, Respondents.  
No. 59534-2-I.

July 21, 2008.

**Background:** Citizen brought Public Records Act (PRA) action against city for disclosure of e-mail sent to city's deputy mayor alleging improprieties in city zoning decisions, metadata associated with the e-mail, and other records. After a show cause hearing, the Superior Court, King County, Bruce W. Hilyer, J., dismissed the action. Citizen appealed.

**Holdings:** The Court of Appeals, Cox, J., held that:  
(1) city was not required to produce the electronic version of e-mail, along with e-mail's associated metadata in response to citizen's initial oral request, but  
(2) city failed to comply with citizen's later request for metadata.

Affirmed in part, vacated in part, and remanded.

West Headnotes

**[1] Records 326 ↪54**

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k53 Matters Subject to Disclosure; Exemptions  
326k54 k. In General. Most Cited Cases  
In light of the purpose of the Public Records Act

(PRA), courts liberally construe its disclosure provisions and narrowly construe its exemptions. West's RCWA 42.56.001 et seq.

**[2] Records 326 ↪54**

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k53 Matters Subject to Disclosure; Exemptions  
326k54 k. In General. Most Cited Cases  
Electronic version of e-mail sent by private citizen to deputy mayor, alleging improper influence by members of city council over a zoning matter and referred to by deputy mayor in city council meeting, was a "public record" that came within scope of the Public Records Act (PRA); e-mail was "used" for public purpose when deputy mayor referred to it in meeting. West's RCWA 42.17.020.

**[3] Records 326 ↪57**

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k53 Matters Subject to Disclosure; Exemptions  
326k57 k. Internal Memoranda or Letters; Executive Privilege. Most Cited Cases  
Metadata, describing e-mail's history, tracking, and management, associated with e-mail sent by private citizen to deputy mayor alleging improper influence by members of the city council over a zoning matter, was a "public record" that came within scope of the Public Records Act (PRA); metadata contained information that related to the conduct of government or the performance of a governmental function by showing the e-mail addresses of persons who may have had knowledge of alleged government improprieties in dealing with zoning matter.

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West's RCWA 42.17.020.

**[4] Records 326 ↪62**

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k61 Proceedings for Disclosure  
326k62 k. In General; Request and Compliance. Most Cited Cases  
Citizen's oral request did not make sufficiently clear that she sought electronic version and metadata in requesting e-mail sent to deputy mayor concerning alleged improprieties in city zoning decisions, and thus city was not required under the Public Records Act (PRA) to produce the electronic version of e-mail, along with e-mail's associated metadata disclosing e-mail's history, tracking, and management; citizen had made oral request at city council meeting to "see that e-mail" and clarified by voicemail the next morning that she sought a "copy of the e-mail". West's RCWA 42.56.080.

**[5] Records 326 ↪62**

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k61 Proceedings for Disclosure  
326k62 k. In General; Request and Compliance. Most Cited Cases  
Under section of the Public Records Act (PRA) requiring disclosure of a public record only when there has been a request for an "identifiable" public record, a request for a record must include a reasonable description enabling the government employee to locate the requested records. West's RCWA 42.56.080.

**[6] Constitutional Law 92 ↪1446**

92 Constitutional Law  
92XVI Freedom of Association  
92k1446 k. Public Employees and Officials.

Most Cited Cases

**Records 326 ↪54**

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k53 Matters Subject to Disclosure; Exemptions  
326k54 k. In General. Most Cited Cases  
City's deputy mayor failed to make the required initial showing that there was some probability that the disclosure of one sender of one e-mail would burden her right to association under the First Amendment, and thus deputy mayor could be required to disclose the information, in citizen's action pursuant to Public Records Act (PRA) seeking disclosure of e-mail alleging zoning improprieties sent to deputy mayor. U.S.C.A. Const.Amend. 1; West's RCWA 42.56.001 et seq.

**[7] Constitutional Law 92 ↪1036**

92 Constitutional Law  
92VI Enforcement of Constitutional Provisions  
92VI(C) Determination of Constitutional Questions  
92VI(C)4 Burden of Proof  
92k1032 Particular Issues and Applications  
92k1036 k. First Amendment in General, Most Cited Cases

**Constitutional Law 92 ↪1454**

92 Constitutional Law  
92XVI Freedom of Association  
92k1454 k. Discovery Requests and Subpoenas. Most Cited Cases  
A person seeking to assert the associational privilege under the First Amendment is required to make an initial showing that there is some probability that a requested disclosure will infringe upon the person's First Amendment rights; after such a show-

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ing, the burden shifts to the party seeking discovery to show the relevance and materiality of the information and that reasonable efforts to obtain the information another way have been unsuccessful. U.S.C.A. Const.Amend. 1.

#### [8] Records 326 62

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k61 Proceedings for Disclosure  
326k62 k. In General; Request and Compliance. Most Cited Cases  
City failed to comply with citizen's request, pursuant to the Public Records Act (PRA), for metadata disclosing the history, tracking, and management of an e-mail sent to city's deputy mayor alleging improprieties in city's zoning decisions, by sending metadata from a copy of the e-mail to the deputy mayor that the sender sent to a different recipient on the same date; metadata from the e-mail to different recipient was not the specific record that citizen requested, and may have contained different information. West's RCWA 42.56.080.

#### [9] Records 326 63

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k61 Proceedings for Disclosure  
326k63 k. Judicial Enforcement in General. Most Cited Cases  
Under the Public Records Act (PRA), courts review agency actions de novo, giving them no deference in determining whether a record is subject to disclosure under the PRA. West's RCWA 42.56.001 et seq.

#### [10] Records 326 55

326 Records  
326II Public Access

326II(B) General Statutory Disclosure Requirements

326k53 Matters Subject to Disclosure; Exemptions

326k55 k. Exemptions or Prohibitions Under Other Laws. Most Cited Cases

When there is a conflict between the Public Records Act (PRA) and another law in determining whether a record is subject to disclosure under the PRA, the PRA controls. West's RCWA 42.56.001 et seq.

#### [11] Records 326 65

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k61 Proceedings for Disclosure  
326k65 k. Evidence and Burden of Proof. Most Cited Cases  
Trial court did not abuse its discretion, in action against city for disclosure of document pursuant to the Public Records Act (PRA), by reviewing the evidence and the document claimed exempt and concluding that city met its burden in proving that the document was protected from disclosure by attorney-client privilege. West's RCWA 42.56.001 et seq.

#### [12] Records 326 63

326 Records  
326II Public Access  
326II(B) General Statutory Disclosure Requirements  
326k61 Proceedings for Disclosure  
326k63 k. Judicial Enforcement in General. Most Cited Cases  
Citizen was not entitled to a hearing with oral argument, or a trial on the merits, in her action against city seeking disclosure of documents pursuant to Public Records Act (PRA); citizen did not request oral argument on her motion to show cause, and court was permitted by statute to resolve, without oral argument, the basic issues before it, whether all

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requested public records were produced and whether the city had fulfilled its burden justifying any exemptions from disclosure under the PRA. West's RCWA 42.56.550.

### [13] Appeal and Error 30 ↪962

#### 30 Appeal and Error

##### 30XVI Review

##### 30XVI(H) Discretion of Lower Court

30k962 k. Dismissal or Nonsuit Before Trial. Most Cited Cases  
Dismissal of an action is subject to appellate review for abuse of discretion.

\*824 Michele Lynn Earl-Hubbard, Allied Law Group, LLC, Michael G. Brannan, Law Office of Michael G. Brannan, Seattle, WA, for Appellants. Flannary Pasioka Collins, City of Shoreline, Shoreline, WA, Ramsey E. Ramerman, Foster Pepper PLLC, Seattle, WA, for Respondents.

COX, J.

¶ 1 This is an action under the Public Records Act of the state of Washington (PRA).<sup>FN1</sup> At issue is whether metadata in the electronic version of an e-mail is subject to disclosure under the PRA.<sup>FN2</sup>

FN1. We cite to the 2006 version of the PRA that was recodified in chapter 42.56 RCW and became effective on July 1, 2006. We note that portions of the PRA were further amended in 2007. *E.g.*, Laws of 2007, ch. 197, § 1.

FN2. "Metadata" is not defined in standard English dictionaries. But other sources generally describe the term as "data about data," or more specifically, "information describing the history, tracking, or management of an electronic document." *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D.Kan.2005) (discussing the evolving state of the law concerning discovery of electronic documents and associated metadata in litigation).

¶ 2 In November 2006, Beth and Doug O'Neill commenced this action, claiming that the City of Shoreline and its deputy mayor violated the PRA in responding to Ms. O'Neill's multiple requests for public records. They also contend that the trial court abused its discretion by dismissing the case after the show cause hearing, which was held solely on declarations and briefs. They further claim this procedure violated due process. Finally, they contend that the trial court erroneously awarded costs to the City and its deputy mayor, Maggie Fimia. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

¶ 3 The material facts are not substantially in dispute. At a public meeting of the Shoreline City Council on September 18, 2006, Deputy Mayor Maggie Fimia stated that she had received an e-mail that related to a pending zoning matter. According to her, the e-mail stated serious allegations of improper influence by members of the City Council over that zoning matter. She said the message came to her from "a Ms. Hettrick and a Ms. O'Neill."<sup>FN3</sup>

FN3. Clerk's Papers Sub 4 at 3 (O'Neill declaration).

¶ 4 Ms. O'Neill was present at the public meeting and claims that Deputy Mayor Fimia's remarks "came as a complete shock to [her]."<sup>FN4</sup> She orally requested "to see that e-mail."<sup>FN5</sup> Deputy Mayor Fimia stated that she would be "happy to share" the e-mail with Ms. O'Neill.<sup>FN6</sup>

FN4. *Id.*

FN5. *Id.*

FN6. Clerk's Papers at 20 (Fimia declaration).

\*825 ¶ 5 Central to the dispute on appeal are actions the deputy mayor took after Ms. O'Neill's request. The deputy mayor deleted the top four lines of the header on the e-mail when she forwarded it from her personal computer to herself. Sometime

thereafter, it appears she deleted the e-mail from her personal computer. Whether the editing of the e-mail and the failure to provide the entire e-mail with all metadata violates the PRA are at issue.

¶ 6 Further communication between Ms. O'Neill and the City (including Deputy Mayor Fimia) occurred the following day and thereafter. O'Neill made six more oral or written requests for records following the oral request at the public meeting on September 18. No one argues that any of the City's responses were untimely. We discuss the details of the requests and the responses later in this opinion.

¶ 7 Dissatisfied with the City's responses to the requests, the O'Neills commenced this action pursuant to the PRA, simultaneously moving for an order to appear and show cause directed to the City and Deputy Mayor Fimia. At the same time, they also moved for an order requiring the City and its agents, including the deputy mayor, to lodge public records for in camera review and to prepare a detailed record of documents withheld and exemptions claimed. All parties submitted declarations and briefing on the requests for relief.

¶ 8 The trial court reviewed the briefing, the declarations, and one record submitted for in camera review as exempt from disclosure.<sup>FN7</sup> In its order, the trial court made several findings, denied the O'Neills' motions, dismissed the action, and awarded costs to the City and the deputy mayor.<sup>FN8</sup> The trial court also denied the O'Neills' motion for reconsideration.

FN7. Clerk's Papers at 141.

FN8. *Id.*

¶ 9 They appeal.

#### PUBLIC RECORDS ACT

¶ 10 O'Neill argues that the City violated the PRA by, among other things, altering and destroying public records following her request.<sup>FN9</sup>

FN9. Clerk's Papers at 5-6.

¶ 11 The PRA was enacted in 1972 by initiative as part of the Public Disclosure Act, formerly chapter 42.17 RCW.<sup>FN10</sup> The relevant portions were later recodified at chapter 42.56 RCW and renamed the Public Records Act.<sup>FN11</sup> The PRA states:

FN10. *Soter v. Cowles Publ'g Co.*, 162 Wash.2d 716, 730, 174 P.3d 60 (2007).

FN11. *Id.*

Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of ... this chapter, or other statute which exempts or prohibits disclosure of specific information or records.<sup>FN12</sup>

FN12. RCW 42.56.070(1).

The supreme court has recognized that the PRA "is a strongly worded mandate for broad disclosure of public records." <sup>FN13</sup>

FN13. *Soter*, 162 Wash.2d at 730, 174 P.3d 60 (quoting *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 127, 580 P.2d 246 (1978)).

[1] ¶ 12 Judicial review of challenged agency actions under the PRA is de novo, and a court may examine the records in camera to determine whether disclosure is proper.<sup>FN14</sup> In light of the PRA's purpose, we liberally construe its disclosure provisions and narrowly construe its exemptions.<sup>FN15</sup> In interpreting the PRA, we "shall take into account" the following policy:

FN14. RCW 42.56.550(3).

FN15. *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS)*, 125 Wash.2d 243, 251, 884 P.2d 592 (1994) (citing RCW 42.17.010(11), recodified in the PRA at RCW 42.56.030).

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... that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.<sup>[FN16]</sup>

FN16. RCW 42.56.550(3).

**\*826 Public Records**

[2] ¶ 13 A threshold issue under the PRA is whether the requested documents are public records.<sup>FN17</sup> O'Neill argues that the e-mail to which Deputy Mayor Fimia referred at the September 18 public meeting of the Shoreline City Council and its associated metadata are public records. The City does not dispute that the e-mail is a public record, but argues that the electronic version of the e-mail was properly deleted under its then-existing records retention policy. Deputy Mayor Fimia contends that the electronic version of the e-mail and its metadata are not public records.

FN17. See *Tiberino v. Spokane County*, 103 Wash.App. 680, 687, 13 P.3d 1104 (2000).

¶ 14 The PRA specifies that a "public record" is:

any *writing* containing information *relating to* the conduct of government or the performance of any governmental or proprietary function prepared, *owned, used, or retained* by any state or *local agency* regardless of physical form or characteristics.<sup>[FN18]</sup>

FN18. Former RCW 42.17.020(41) (2006) (emphasis added). The 2006 version of the PRA incorporated the definitions from RCW 42.17.020. See former RCW 42.56.010 (2006). The PRA was amended in 2007, and the identical definition of "public record" now appears in the PRA. See RCW 42.56.010(2). RCW 42.17.020 was also amended in 2007. Those amendments likewise did not change the definition of "public record." See Laws of

2007, ch. 358, § 1.

A "writing" is defined as:

handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.<sup>[FN19]</sup>

FN19. Former RCW 42.17.020(48) (2006). The 2007 amendments to RCW 42.17.020 and to RCW 42.56.010 did not affect the definition of "writing." See Laws of 2007, ch. 358, § 1; Laws of 2007, ch. 197, § 1.

¶ 15 It is undisputed that the City is a "local agency" under the PRA.<sup>FN20</sup> Moreover, there can be no serious dispute that the e-mail to which Deputy Mayor Fimia referred at the September 18 public meeting is a public record. It is: (a) a "writing" that (b) "relat[es] to the conduct of government or the performance of [a] governmental ... function" that the deputy mayor (c) "used" during the public meeting. She stated that the message commented on alleged improprieties in dealing with a zoning matter before the City Council, making it a subject for discussion at the meeting.<sup>FN21</sup> The e-mail fulfills the plain meaning of the statutory definition of a public record.

FN20. The PRA provides that an agency includes local agencies. A local agency includes, among other things, every city and office, department, division, bureau, board, commission, or agency thereof. RCW 42.17.020(2). The 2007 amendments to

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RCW 42.17.020 and to RCW 42.56.010 did not change the definition of "agency." See Laws of 2007, ch. 358, § 1; Laws of 2007, ch. 197, § 1.

FN21. See *Concerned Ratepayers Ass'n v. Pub. Utility Dist. No. 1*, 138 Wash.2d 950, 961, 983 P.2d 635 (1999) (technical document was used when PUD officials attended a meeting and reviewed the document during negotiations).

¶ 16 Deputy Mayor Fimia argues that the electronic version of the e-mail is not a public record because it was not "used" by the City. She argues that it was created and transmitted by a private citizen, not the City. Her argument fails to acknowledge that Deputy Mayor Fimia used the e-mail when she made it the subject of public comment at the city council meeting. And she cites no authority for the proposition that a private citizen's creation and transmission of an e-mail is relevant to the question whether the e-mail is a public record. We conclude that the electronic version of the e-mail is a public record.

[3] ¶ 17 We next turn to the question of whether the metadata associated with the foregoing e-mail is also a public record. As \*827 we previously indicated, the definitions section of the PRA provides the answer. A "public record" is:

any *writing* containing information *relating to* the conduct of government or the performance of any governmental or proprietary function prepared, *owned*, used, or retained by any state or local agency regardless of physical form or characteristics.<sup>[FN22]</sup>

FN22. Former RCW 42.17.020(41) (2006) (emphasis added).

A "writing" is:

Handwriting ... and every other means of recording any form of communication or representation,

including, but not limited to ... magnetic or punched cards, discs, drums, diskettes, ... and other documents including existing data compilations from which information may be obtained or translated.<sup>[FN23]</sup>

FN23. Former RCW 42.17.020(48) (2006).

¶ 18 The metadata associated with the e-mail, or some portion of it, falls within the broad definition of a writing. It is sufficiently similar to the examples of the types of documents in the definition to qualify as a "writing." Accordingly, the information falls within that broad definition in the statute, as we must liberally interpret the PRA.

¶ 19 Moreover, on this record, the metadata contains information that "relates to" the conduct of government or the performance of a governmental function. It shows the e-mail addresses of persons who may have knowledge of alleged government improprieties in dealing with a zoning matter. This too falls squarely within the statute's definition of "public record," as we must liberally construe the PRA.

¶ 20 Finally, no one argues that anyone other than the deputy mayor, an agent of the City, "owns" the metadata from the e-mail she received on her personal e-mail account that she uses, in part, for the City's business.<sup>FN24</sup> The PRA does not define "own." Thus, reference to a dictionary is permissible to determine legislative intent.<sup>FN25</sup> The dictionary definition of own is, "To have or possess as property."<sup>FN26</sup> Using that definition here, it is clear that the City owns the metadata associated with the requested e-mail.

FN24. See Clerk's Papers at 19 (Fimia declaration).

FN25. See *Concerned Ratepayers*, 138 Wash.2d at 959, 983 P.2d 635 (defining the term "use" with reference to the dictionary definition).

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FN26. THE AMERICAN HERITAGE  
DICTIONARY 1294 (3d ed. 1992).

¶ 21 We conclude that, on this record, the metadata associated with the e-mail Deputy Mayor Fimia discussed at the meeting, or some portion of it, is also a public record. We do not rule on the more general question whether e-mail or metadata that is transmitted to personal e-mail accounts, without more, is subject to the PRA. Here, the materials at issue fall within the statutory definitions subjecting those materials to disclosure under the PRA. Moreover, the metadata was specifically requested in this case.

¶ 22 The City does not dispute in its brief that the metadata associated with the e-mail is a public record. Moreover, we find nothing in the record indicating that the City ever took the position, either before or during this litigation, that the metadata at issue here is not a public record. While the City appears to have taken a different position at oral argument before this court, we conclude that its position at oral argument does not address, in a persuasive way, the analysis we set forth above.

*Requests for Public Records and Responses*

[4] ¶ 23 As in most public records cases, the other basic issues here are whether all public records that O'Neill requested were provided and whether the City bore its burden to show that any requested records are exempt. Here, O'Neill specifically argues that the City altered and deleted an e-mail after her request for that e-mail and failed to protect public records from damage or destruction.<sup>FN27</sup> O'Neill also directly attacks the trial court's ruling that "no additional responsive records are available or contained on the computer hard drive of [Deputy Mayor Fimia] and duplication of the hard drive \*828 for further in camera inspection is not warranted." <sup>FN28</sup>

FN27. Brief of Appellants at 30-31.

FN28. *Id.* at 34 (quoting trial court's order, Clerk's Papers at 141).

[5] ¶ 24 The PRA requires agency rules to "provide for the fullest assistance to inquirers." <sup>FN29</sup> Agencies shall refrain from destroying public records that are subject to a pending public record request.<sup>FN30</sup> The PRA requires disclosure only when there has been a request for an "identifiable" public record.<sup>FN31</sup> This requires "a reasonable description enabling the government employee to locate the requested records." <sup>FN32</sup>

FN29. RCW 42.56.100.

FN30. *Id.*

FN31. RCW 42.56.080.

FN32. *Bonamy v. City of Seattle*, 92 Wash.App. 403, 410, 960 P.2d 447 (1998).

¶ 25 We first examine O'Neill's claim that the City failed to provide the e-mail in response to her oral request of September 18, 2006, at the city council meeting on that date. Doing so requires a close reading of the record.

¶ 26 This matter originated when Deputy Mayor Maggie Fimia received on September 18, 2006, an e-mail from Lisa Thwing. That message forwarded an e-mail that was from Diane Hettrick. The header in the e-mail to the deputy mayor from Thwing reads:

**From:** "Lisa Thwing" <tootrd@comcast.net>

**Date:** Mon, 18 Sep 2006 07:55:38 -0700

**To:** "Lisa Thwing" <tootrd@comcast.net>

**Subject:** Current city council meeting being broadcast this week

**From:** Diane Hettrick <mailto:dhettrick@earthlink.net>

**Sent:** Thursday, September 14, 2006 11:40 PM

**Subject:** Current city council meeting being broadcast this week

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The body of the message begins as follows:  
From my friend Judy:

Hi Folks,

My dear friend, Beth O'Neill has asked me to pass along information about our dysfunctional Shoreline City Council.<sup>[FN33]</sup>

FN33. Clerk's Papers Sub 4 Exhibit J at 21.

The e-mail goes on to state that city council members are "playing favorites" in zoning decisions in favor of their political supporters.

¶ 27 That night, a Monday, the Shoreline City Council held a public meeting.<sup>FN34</sup> At that meeting, Deputy Mayor Fimia publicly stated that she had received an e-mail from "a Ms. Hettrick and a Ms. O'Neill" containing serious allegations that city council members were using their influence to affect zoning decisions.

FN34. The record indicates that September 18, 2006, was a Monday. See Clerk's Papers Sub 4 Exhibit J at 1.

¶ 28 During the public comment portion of this meeting that followed, Ms. O'Neill denied knowledge of the message that the deputy mayor described and orally requested to "see that e-mail." Deputy Mayor Fimia responded that she did not have the document with her but would be happy to share it with O'Neill.

¶ 29 Following the public meeting, the deputy mayor reviewed the e-mail from Thwing and forwarded that e-mail from her personal e-mail account to herself. Before forwarding this e-mail, the deputy mayor deleted the first four lines of the header, which includes the "to" and "from" lines listing Thwing as the sender and recipient. She did this "in order to protect Ms. Thwing from potential public exposure."<sup>FN35</sup> The deputy mayor did not otherwise modify the e-mail from Thwing. The next day, September 19, she forwarded the altered e-mail to

Carolyn Wurdeman, Executive Assistant to the City Manager.

FN35. Clerk's Papers at 21 (Fimia declaration).

¶ 30 That same day, a Tuesday, O'Neill called the City of Shoreline and left a voicemail message "*again requesting a copy of \*829 the e-mail.*" FN36 When she was told later that day that the e-mail was missing the "To" header, O'Neill orally requested the entire e-mail string. She also said that she would come down to pick up the material.

FN36. Clerk's Papers Sub 4 Exhibit J at 4 (emphasis added).

¶ 31 In response, Carolyn Wurdeman sent an e-mail to Deputy Mayor Fimia requesting "information about who the e-mail [was] sent to." The deputy mayor responded that "there was no 'To' line in the e-mail."

¶ 32 On Wednesday, September 20, O'Neill went to the City Clerk's office to pick up the requested record. There, she submitted her first written request, PD 06-135, for the "E-mail mentioned by Deputy Mayor Fimia at the 9-18 Council meeting." In response, the clerk's office gave O'Neill a hard copy of the e-mail from Hettrick, without the forwarding header from Thwing.

¶ 33 Dissatisfied with the record she received, O'Neill immediately submitted another written request, PD 06-134. She requested:

[A]ll information relating to this e-mail: how it was received by Maggie Fimia, from whom it was received, and the forwarding chain of the e-mail.<sup>[FN37]</sup>

FN37. Clerk's Papers Sub 4 Exhibit F.

¶ 34 On Monday, September 25, Deputy Mayor Fimia located the original September 18 e-mail from Thwing on her computer and forwarded the

complete e-mail, including the forwarding information from Thwing, to the Shoreline City Attorney.<sup>FN38</sup> The same day, the City gave O'Neill a hard copy of that complete e-mail.<sup>FN39</sup> This copy included both headers, each of which in turn included the date and time of the message. Significantly, O'Neill does not dispute having received a complete copy of this e-mail on September 25.

FN38. Clerk's Papers at 22 (Fimia declaration).

FN39. Clerk's Papers at 34 (Shenk declaration).

¶ 35 The deputy mayor deleted the original e-mail from her computer sometime after forwarding the message to the city attorney. The record is unclear on when this deletion occurred.<sup>FN40</sup>

FN40. *Compare* Clerk's Papers at 21-22, with Clerk's Papers Sub 4 Exhibit J at 27 (showing a date stamp of September 26).

¶ 36 That same day, Monday, September 25, O'Neill submitted a third written request, PD 06-138. It expanded on the prior requests by seeking:

Any and all correspondence (including memos) relating to this [e-mail] and a COMPLETE transmission / forwarding chain *AND ALL metadata* pertaining to this document.<sup>FN41</sup>

FN41. Clerk's Papers Sub 4 Exhibit G (bold and italics added).

¶ 37 That evening, there was another city council meeting. At the meeting, Deputy Mayor Fimia publicly corrected the error she made in the September 18 meeting by explaining that Hettrick had sent the original e-mail quoting her friend "Judy," but that O'Neill had not sent the e-mail.

¶ 38 On Wednesday, September 27, O'Neill submitted a fourth written records request, PD 06-139.

Specifically, she sought a copy of the e-mail Deputy Mayor Fimia mentioned during the September 25 council meeting, including all "*metadata*, memos, and any other correspondence relating to this document."<sup>FN42</sup>

FN42. Clerk's Papers Sub 4 Exhibit I (emphasis added).

¶ 39 The City responded to O'Neill's third and fourth written requests on September 29. It provided numerous records and also indicated that further records would likely be available by October 5.

¶ 40 The City's letter stated that it was declining to disclose one document that was covered by the attorney-client privilege. That document was later accidentally released to O'Neill.

¶ 41 The records provided included, among other documents, metadata from a copy of the e-mail that Deputy Mayor Fimia had apparently sent to herself on September 26.<sup>FN43</sup>

FN43. *See* Clerk's Papers Sub 4 Exhibit J at 27. Deputy Mayor Fimia did not state in her declaration that she sent a copy of the e-mail to herself on September 26, a day after she sent it to the city attorney. Nevertheless, the record contains the metadata from such an e-mail with a date stamp of September 26. O'Neill received a copy of this metadata.

\*830 ¶ 42 The letter also informed O'Neill that the City would search Deputy Mayor Fimia's computer for any additional responsive records. We describe later in this opinion the City's efforts in this respect.

¶ 43 In the meantime, Deputy Mayor Fimia was unable to locate the original e-mail on her computer, so she asked Thwing to re-send it to her. On September 30, Thwing complied with that request.<sup>FN44</sup>

FN44. Clerk's Papers at 34.

¶ 44 The City provided a second installment of records to O'Neill on October 3. The second installment included a paper copy of the original e-mail that Thwing re-sent to Deputy Mayor Fimia on September 30 and metadata from that e-mail. It also included metadata from the September 18 e-mail Thwing had sent to Janet Way, a city council member. The City declined to release one additional document based on attorney-client privilege.

¶ 45 On October 16, O'Neill submitted her fifth and final written records request, PD 06-154. Her request essentially reiterated her past requests and also requested any and all documents of any kind relating to the incident or the City's treatment of the incident.

¶ 46 The City responded on either October 23 or 24. Included in its response were several e-mail messages. On October 25, the City supplemented its response to O'Neill's fourth written request.

¶ 47 O'Neill first argues that the City did not comply with her oral request of September 18 at the public meeting because the deputy mayor intentionally altered the e-mail by deleting the forwarding header after the request. O'Neill also claims the deputy mayor's later deletion of the entire e-mail violated the PRA.

¶ 48 The record shows that O'Neill made an oral request at the September 18, 2006 public meeting to "see that e-mail" to which the deputy mayor referred at that meeting. A fair reading of that request is that O'Neill sought to see the entire e-mail, not an altered version of it. It is undisputed that the deputy mayor altered the e-mail after the oral request and before forwarding it by removing the header information showing who sent it to her. Nothing in the PRA supports alteration of the record "in order to protect Ms. Thwing from potential public exposure," the deputy mayor's stated rationale for altering the document.

¶ 49 O'Neill argues that Deputy Mayor Fimia's "alteration" of the original e-mail could support a

criminal charge under Chapter 40.16 RCW. That statute renders the destruction of a public record a class C felony.<sup>FN45</sup> But this is a civil case, not a criminal prosecution. Whether anyone is liable for violation of Chapter 40.16 RCW is not presently before us. There has been no charging decision by a prosecutor and no determination of guilt beyond a reasonable doubt by a jury.

FN45. RCW 40.16.010.

¶ 50 O'Neill does not dispute that on September 25, 2006, she received a hard copy of the original e-mail, which contained the header and body of the September 18 e-mail.<sup>FN46</sup> This was within five business days of September 18, 2006, the date of her original request, as RCW 42.56.520 expressly requires.<sup>FN47</sup> In short, O'Neill received a timely and complete response to the records request to see the e-mail from Thwing.

FN46. Clerk's Papers at 34 (Shenk declaration).

FN47. RCW 42.56.520 provides:

Within five business days of receiving a public record request, an agency ... must respond by either (1) providing the record; (2) acknowledging that the agency ... has received the request and providing a reasonable estimate of the time the agency ... will require to respond to the request; or (3) denying the public record request.

¶ 51 O'Neill argues that her September 18 request fairly identified that she sought the electronic version of the e-mail. A careful reading of the record shows that she did not make that request on that date.

\*831 ¶ 52 The City is not required to be a mind reader when responding to public records requests.<sup>FN48</sup> The PRA only requires providing a public record when it is identifiable.<sup>FN49</sup> Here, the oral request on September 18 makes no mention

of either the electronic version of the e-mail or its associated metadata. Rather, the O'Neill declaration in this case states that her voicemail to the City the following morning clarified that she sought a "*copy of the e-mail*." <sup>FN50</sup> We conclude from our review of her own words that she did not request an electronic copy of the e-mail or its metadata on September 18.

FN48. *Bonamy*, 92 Wash.App. at 409, 960 P.2d 447.

FN49. *Id.* at 410, 960 P.2d 447 (citing RCW 42.17.270).

FN50. Clerk's Papers Sub 4 at 4.

[6] ¶ 53 Deputy Mayor Fimia argues that requiring her to identify Thwing as the sender of the e-mail violates her First Amendment right to freedom of association. We disagree.

[7] ¶ 54 Washington's First Amendment jurisprudence requires an initial showing that there is "some probability that the requested disclosure will infringe upon [the person's] First Amendment rights." <sup>FN51</sup> For example, requiring a group to disclose all membership lists, meeting notes, and financial records would have a chilling effect on the members' First Amendment rights.<sup>FN52</sup> After such a showing, the burden shifts to the party seeking discovery to show the relevance and materiality of the information and that reasonable efforts to obtain the information another way have been unsuccessful.<sup>FN53</sup> Here, Deputy Mayor Fimia has failed to produce any evidence or reasoned argument to make the required initial showing that there is some probability the disclosure of one sender of one e-mail would burden her right to association.

FN51. *Right-Price Rec., LLC v. Connells Prairie Comty. Council*, 105 Wash.App. 813, 822, 21 P.3d 1157 (2001), *aff'd in part and remanded on other grounds*, 146 Wash.2d 370, 46 P.3d 789 (2002).

FN52. *Id.* at 825, 21 P.3d 1157.

FN53. *Id.* at 822, 21 P.3d 1157.

[8] ¶ 55 Next, we must determine whether the City complied with O'Neill's request for the e-mail's metadata, which she first requested on September 25.

¶ 56 Deputy Mayor Fimia describes the deletion of e-mail as accidental. She also testified that she was not familiar with the term metadata until O'Neill requested that information. This latter statement could be read to suggest that the deputy mayor did not intentionally delete any metadata before O'Neill specifically requested that information. The City defends on the basis that the deletion of e-mail and associated metadata was consistent with its records retention policy.

¶ 57 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.<sup>FN54</sup> The City's actions in this case appear to have complied with these guidelines. O'Neill does not argue otherwise.

FN54. Clerk's Papers at 92; *see also* Clerk's Papers at 36 (retention schedule).

[9][10] ¶ 58 However, the PRA directs courts to review agency actions de novo, giving them no deference in determining whether a record is subject to disclosure under the PRA.<sup>FN55</sup> And when there is a conflict between the PRA and another law, the PRA controls.<sup>FN56</sup> Thus, the records retention guidelines then in effect do not inform the questions presented in this case, which we review de novo.

FN55. *Hearst Corp.*, 90 Wash.2d at 129-31, 580 P.2d 246; *Zink v. City of Mesa*, 140 Wash.App. 328, 335-37, 166 P.3d 738 (2007).

FN56. *PAWS*, 125 Wash.2d at 262, 884

P.2d 592 (citing RCW 42.17.920, which was recodified in the PRA at RCW 42.56.030).

¶ 59 Here, the City admits that it did not provide the exact metadata from the original e-mail. Rather, the City argues that O'Neill \*832 received metadata "associated with" the e-mail.<sup>FN57</sup> Specifically, it argues that it provided to O'Neill metadata from a copy of the e-mail to the deputy mayor that Thwing sent to Janet Way on the same date.

FN57. Brief of Respondent City of Shoreline at 22.

¶ 60 Without having the metadata associated with the September 18 e-mail to the deputy mayor before us, we cannot tell the extent to which it differs from the metadata from the e-mail that went to Way, which was provided to O'Neill. In any event, the metadata from the e-mail to Way is not the specific record O'Neill requested. At the very least, the information contained in the headers of the respective e-mails would likely be different. This header information includes, among other things, the name, e-mail address, and Internet protocol address of the e-mail's recipient.<sup>FN58</sup> In short, the City has not yet proven that it provided to O'Neill access to the metadata she requested. She is entitled to this public record.

FN58. Clerk's Papers Sub 4 Exhibit L at 4.

¶ 61 Our conclusion on this point addresses O'Neill's challenge to the trial court's ruling that "[n]o additional responsive records are available or contained on the computer hard drive of [Deputy Mayor Fimia] and duplication of the hard drive for further in camera inspection is not warranted." FN59 In response, the City contends that it conducted a thorough search for the deleted e-mail on that hard drive. But the record in this case does not fully support the City's contention.

FN59. Brief of Appellant at 34 (quoting the trial court's order).

¶ 62 Joel Taylor, a computer and network specialist for the City, stated only that he searched Deputy Mayor Fimia's e-mail program for the missing e-mail.<sup>FN60</sup> A search of the City's backup drive would not have helped because the deputy mayor did not receive the e-mail on her City e-mail account.<sup>FN61</sup>

FN60. Clerk's Papers at 29-30.

FN61. Clerk's Papers at 30.

¶ 63 Tho Dao, the City's manager of information services, stated that the City did *not* search Deputy Mayor Fimia's hard drive:

The City only has software capable of copying the hard drives of personal computers ("PC"), not macintosh computers ("MAC"). The Deputy Mayor has a MAC. I estimate the cost to purchase the software capable of copying a MAC hard drive at somewhere between \$500-\$1,000.<sup>FN62</sup>

FN62. Clerk's Papers at 25.

¶ 64 On this record, we cannot tell whether the hard drive of the deputy mayor's computer contains metadata associated with the September 18 e-mail that would be responsive to the request. The trial court shall determine the answer to that question on remand.

¶ 65 We also note that the deputy mayor forwarded to the city attorney the September 18 e-mail to which she referred at the September 18 meeting. This record does not tell us whether that forwarded e-mail had with it the same metadata that O'Neill sought or whether the City could provide the metadata from the forwarded e-mail to her in response to her request. Whether the metadata is the same or different is a question this court cannot answer. We leave it for decision by the trial court on remand.

¶ 66 The trial court should also consider on remand

whether the e-mail Thwing resent to the deputy mayor contains the requested metadata. Again, we cannot tell on this record whether it does.

¶ 67 If the metadata exists from any of these sources, it is subject to O'Neill's pending record request, and the City is required under the PRA to provide it to her. If it does not exist, the trial court must determine, consistent with this opinion, whether the City's deletion of the metadata violated the PRA.<sup>FN63</sup> Where appropriate, the trial court \*833 should determine the appropriate monetary penalty under the PRA.<sup>FN64</sup>

FN63. O'Neill appears to rely on RCW 42.56.100 as a basis for claiming the City violated the PRA. Reply of Appellants to Brief of City of Shoreline at 2-3. Because the record is unclear on when an electronic version of the September 18 e-mail was destroyed, we cannot address whether the PRA was violated in this respect.

FN64. See *Yacobellis v. City of Bellingham*, 64 Wash.App. 295, 298, 299 n. 3, 825 P.2d 324 (1992) (imposing a monetary penalty for the city's failure to disclose a destroyed record for each day the record was withheld from the date of the request through the date the supreme court denied review of the matter), *abrogated in part on other grounds by Amren v. City of Kalama*, 131 Wash.2d 25, 929 P.2d 389 (1997).

[11] ¶ 68 O'Neill also challenges the trial court's conclusion regarding the record the City withheld as attorney-client privileged.<sup>FN65</sup> The evidence in the record describes in detail the nature of this document.<sup>FN66</sup> The trial court was vested with the discretion to review the evidence and the document claimed exempt and conclude that the City met its burden in proving that this document was privileged. Nothing in the PRA requires anything more. The trial court's decision was proper with regard to the exempt document.

FN65. Another record was withheld until it was accidentally released to O'Neill.

FN66. See Clerk's Papers at 32-34 (Shenk declaration).

¶ 69 Finally, O'Neill cites an unpublished case from another jurisdiction regarding electronic information to support her argument concerning the computer's hard drive. We note that our court rules prohibit the citation of unpublished cases under the circumstances here because the rules of the other jurisdiction do not allow such citation.<sup>FN67</sup> We also note that in the past we have imposed sanctions for unauthorized citation of unpublished cases.<sup>FN68</sup> Because no party has sought sanctions, we limit our comments to directing all counsel to the relevant Rules of Appellate Procedure.

FN67. See Appellant's Brief at 35 (citing *Krumwiede v. Brighton Assocs.*, No. 05 C 3003, 2006 WL 1308629 (N.D.Ill.2006)); Wash. RAP 10.4(h); Wash. GR 14.1 (whether unpublished case may be cited depends upon the rule in that jurisdiction); Fed. R.App. Pro. 32.1(a) (cases published before Jan. 1, 2007 are subject to local rules regarding publication); U.S.Ct.App. 7th Cir. R. 32.1 (unpublished cases may not be cited as precedent).

FN68. See *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wash.App. 542, 548-49, 13 P.3d 240 (2000).

#### *Dismissal at Show Cause Hearing*

[12] ¶ 70 O'Neill argues that the trial court abused its discretion in dismissing her complaint without a hearing or trial on the merits. Specifically, she asserts that the decision to dismiss was contrary to the requirements of the PRA and violated due process.

[13] ¶ 71 RCW 42.56.550 sets forth the procedure to be followed when a litigant wishes to challenge an agency's actions surrounding a public records request. The statute provides for the superior court in

the relevant county to conduct a show cause hearing at which the agency may be required to justify its response to a request for public records.<sup>FN69</sup> At such a hearing, the agency bears the burden of proving that any public record not provided is exempted from disclosure.<sup>FN70</sup> The PRA explicitly states, "The court may conduct a hearing based solely on affidavits."<sup>FN71</sup> "[S]how cause hearings are the usual method of resolving litigation under" the PRA.<sup>FN72</sup> Our supreme court has stated that trial court rulings under the PRA are trial "management decisions" that are designed to avoid making "public disclosure act cases so expensive that citizens could not use the act for its intended purpose."<sup>FN73</sup> Dismissal of an action is subject to review for abuse of discretion.<sup>FN74</sup>

FN69. RCW 42.56.550(1).

FN70. *Id.*

FN71. RCW 42.56.550(3); *see also* WAC 44-14-08004(1) ("To speed up the court process, a public records case may be decided merely on the 'motion' of a requestor and 'solely on affidavits.' ") (quoting RCW 42.56.550(1), (3)).

FN72. *Wood v. Thurston County*, 117 Wash.App. 22, 27, 68 P.3d 1084 (2003).

FN73. *Brouillet v. Cowles Publ'g Co.*, 114 Wash.2d 788, 801, 791 P.2d 526 (1990).

FN74. *Quality Rock Prods., Inc. v. Thurston County*, 126 Wash.App. 250, 260, 108 P.3d 805 (2005), *review denied*, 163 Wash.2d 1018, 180 P.3d 1292 (2008).

\*834 ¶ 72 Here, O'Neill did not request oral argument on her motion to show cause. The court was permitted by statute to resolve, without oral argument, the basic issues before it: whether all requested public records were produced and whether the City had fulfilled its burden justifying any exemptions from disclosure under the PRA.

¶ 73 Although we disagree with the trial court's ruling to the extent that it held that no further records were subject to disclosure, that does not mean that a hearing with oral argument or a trial must follow. The PRA outlines the procedure to be followed in cases of this type, and nothing in that act requires either a hearing with oral argument or a trial.

¶ 74 The argument that the procedure here violated other, inapplicable rules is unpersuasive. This was neither a CR 56 matter nor a CR 12(b)(6) matter, despite O'Neill's attempt to characterize it in that manner.

¶ 75 Moreover, O'Neill's reference to the general right of discovery in civil cases does not convincingly advance the argument. The discovery rules have nothing to do with the statutory show cause proceeding that the trial court utilized in this case. In short, for a proper resolution of the issues then before it, there was nothing to prohibit the court from dismissing the case at the show causing hearing pursuant to RCW 42.56.550(1).

¶ 76 The due process argument is also unavailing. O'Neill fails to cite to any authority that supports a constitutional right to a hearing with oral argument under the circumstances of this case. There was no due process violation.

¶ 77 O'Neill assigns error to the trial court's denial of the motion for reconsideration, but does not separately argue this point. Accordingly, we do not address this specific argument.

#### Costs

¶ 78 O'Neill next argues that the trial court improperly awarded costs in favor of the City and Deputy Mayor Fimia. This claim is now moot, and we conclude there is no reason to address it.

¶ 79 The reviewing court should award attorney fees and costs to a party "prevail[ing] against an agency."<sup>FN75</sup> The court should also award the prevailing party between five and one hundred dol-

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lars, in its discretion, for each day the record was unlawfully withheld.<sup>FN76</sup>

FN75. RCW 42.56.550(4).

FN76. *Id.*

¶ 80 In its order addressing the PRA issues and dismissing the case, the trial court awarded costs “to Defendants.” The court denied O’Neill’s motion for reconsideration of this order. Significantly, in response to that motion below, the City rescinded its request for costs.

¶ 81 On appeal, the City expressly states that it does not object to this court “striking this portion of the order since it is consistent with the City’s position in the trial court proceeding.”<sup>FN77</sup> We accept the City’s proposal. Accordingly, we vacate the portion of the order granting costs to the City and Deputy Mayor Fimia.

FN77. Brief of Respondent City of Shoreline at 27.

¶ 82 Finally, O’Neill also seeks attorney fees on appeal based on the PRA. An award is proper because she has partially prevailed. The trial court shall determine the amount of fees, as provided in RAP 18.1(i).

¶ 83 We affirm the trial court’s order to the extent of the request for e-mails and the ruling on the exempt record. We vacate the portion of the order to the extent of the request for metadata, the decision that “defendants have established that no additional responsive records are available or contained on the computer hard drive,” and the award of costs “to Defendants.” We remand for further proceedings consistent with this opinion.

WE CONCUR: LAU, and APPELWICK, JJ.  
Wash.App. Div. 1,2008.  
O’Neill v. City of Shoreline  
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## **EXHIBIT 2**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

BETH and DOUG O'NEILL, individuals,	)	No. 59534-2-1
	)	
Appellants,	)	ORDER CHANGING
	)	OPINION
v.	)	
	)	
THE CITY OF SHORELINE, a municipal agency; and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity,	)	
	)	
Respondents.	)	
	)	
	)	

Respondents, the City of Shoreline and Deputy Mayor Maggie Fimia, have moved for reconsideration of the opinion filed in this case on July 21, 2008. The panel hearing the case has called for an answer from Appellants, Beth and Doug O'Neill. The panel hearing the case has determined that the opinion should be changed. The court hereby

ORDERS that the opinion in the above case be changed as follows:

On page eight of the slip opinion, delete the second full paragraph, which states:

Moreover, on this record, the metadata contains information that "relates to" the conduct of government or the performance of a governmental function. It shows the e-mail addresses of persons who may have knowledge of alleged government improprieties in dealing with a zoning matter. This too falls squarely within the statute's definition of "public record," as we must liberally construe the PRA.

Replace the paragraph with the following paragraph:

Moreover, on this record, the metadata contains information that "relates to" the conduct of government or the performance of a

governmental function. For example, it shows the e-mail addresses of persons who may have knowledge of alleged government improprieties in dealing with a zoning matter. This falls squarely within the statute's definition of "public record," as we must liberally construe the PRA. On remand, the trial court should determine which of the other portions of the metadata in the e-mail fall within the scope of the PRA.

The motion for reconsideration is otherwise denied.

Dated this 25<sup>th</sup> day of September 2008.

Cox, J.

Jaw, J.

Appelwick, J.

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**EXHIBIT 3**

**RCW 42.56.080****Facilities for copying -- Availability of public records.**

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter.

[2005 c 483 § 1; 2005 c 274 § 285; 1987 c 403 § 4; 1975 1st ex.s. c 294 § 15; 1973 c 1 § 27 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.270.]

**NOTES:**

**Reviser's note:** This section was amended by 2005 c 274 § 285 and by 2005 c 483 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Intent -- Severability -- 1987 c 403:** See notes following RCW 42.56.050.

**RCW 42.56.100****Protection of public records -- Public access.**

Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records.

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

[1995 c 397 § 13; 1992 c 139 § 4; 1975 1st ex.s. c 294 § 16; 1973 c 1 § 29 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.290.]

**RCW 42.56.550****Judicial review of agency actions.**

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

[2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.340.]

**NOTES:**

**Reviser's note:** This section was amended by 2005 c 274 § 288 and by 2005 c 483 § 5, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Intent -- Severability -- 1987 c 403:** See notes following RCW 42.56.050.