

82397-9

No. 82397-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

DOUG AND BETH O'NEILL, individuals,

Respondents.

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2008 DEC -9 P 4: 36

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SUPREME COURT
STATE OF WASHINGTON

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CLERK OF SUPREME COURT
STATE OF WASHINGTON

**APPELLANTS'
REPLY TO RESPONDENTS' ANSWER TO PETITION FOR
DISCRETIONARY REVIEW**

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**FILED AS
ATTACHMENT TO EMAIL**

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I. SUPPLEMENTAL STATEMENT OF FACTS

In its Petition for Review, the City of Shoreline and former Deputy Mayor Fimia (collectively the "City") adopted the Court of Appeals' facts with one addition and one correction. In their Answer, the O'Neills set forth limited facts that, while not untrue, are selective and abbreviated and therefore provide an incomplete picture. In order to provide this court with a complete picture, the City adds these supplemental facts:

- September 18, 2006. Deputy Mayor Fimia was blind carbon copied on an e-mail sent by Ms. Lisa Thwing, a Shoreline citizen. CP 19. As a blind carbon copied recipient, Ms. Fimia did not appear in the header information and would not appear in the metadata. CP 20; CP 38-39. The blind copy was sent to her personal e-mail account, where she received both personal and business e-mails. CP 19.

The e-mail received by the Deputy Mayor was as follows:

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:dhhettrick@earthlink.net>
Sent: Thursday, September 14, 2006 11:40 PM
Subject: Current city council meeting being broadcast this week

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. Beth and some other folks have been working hard battling certain issues regarding an illegal rental in their neighborhood. What should be a legal and zoning issue has gotten mired into the politics of our 32nd District Democrats and certain City Council folks are playing favorites with their own political supporters.

Anyway, try to watch the latest Council meeting (it airs at noon and 8pm every day on channel 21) and try to attend the next Council meeting at 6:30 next Monday in the Rainier Room at the Shoreline Center. Beth has also asked me to let folks know that if they have any questions to give her a call at: 546-5672 and to pass along the request for lots of people to show up at the next Council meeting.

Judy

Coincidentally, I talked to Beth today and then read the statement she presented to the city council. This is very interesting and highly entertaining and I do suggest that you make an effort to watch the city council meeting this week. (Now if I could just get my channel switched off of Lake Forest Park)

Diane

O'Neill Decl., Exhibit J, p. 21-22.

- September 18, 2006. At the City Council meeting, Deputy Mayor Fimia indicates that she had received an e-mail today "from a Ms. Hettrick and a Ms. O'Neill." *O'Neill v. City of Shoreline*, --Wn. App. --, 187 P.3d 822, 828 (2008) ("Opinion"). Ms. O'Neill requests to "see that email" referred to by the Deputy Mayor. Opinion, 187 P.3d at 828. Deputy Mayor Fimia raised the issue of the e-mail being circulated in order to publicly address the allegations and to have the City Manager confirm that at no time did any of the Councilmembers have inappropriate contact with

staff regarding the alleged code violation. CP 20; O'Neill Decl., Ex. B-1.

- September 19, 2006. Deputy Mayor forwarded the requested e-mail to Carolyn Wurdeman. Opinion, 187 P.3d at 828. In forwarding the e-mail, the Deputy Mayor removed Ms. Thwing's forwarding information since she understood Ms. O'Neill's request to be only for the Diane Hettrick e-mail and since she did not want to expose Ms. Thwing to unnecessary public exposure. CP 21; Opinion, 187 P.3d at 828.
- September 20, 2006. Paper copy of Hettrick e-mail provided to Ms. O'Neill. CP 32.
- September 20, 2006. Ms. O'Neill clarifies that she wants the 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." CP 32; O'Neill Decl., Exhibit F.
- September 25, 2006. In response to Ms. O'Neill's request, the Deputy Mayor electronically forwards to the City Attorney the complete e-mail, which included the information of how it was received, from whom it was received and the forwarding chain (i.e., the Thwing forwarding information). Opinion, 187 P.3d at 829; CP 22, 32; O'Neill Decl., Exhibit J-p.21. Sometime after transmitting the e-mail, the Deputy Mayor deletes the electronic e-mail from her computer consistent with the State Records Retention Guidelines which provided for e-mail deletion once the e-mail had been printed, retained and filed. Opinion, 187 P.3d at 829; CP 22; CP 34-35.
- September 25, 2006. Paper copy of Hettrick e-mail with Thwing forwarding information provided to Ms. O'Neill. Opinion, 187 P.3d at 829. Ms. O'Neill received the complete printed copy of the e-mail within five business days of her initial request to "see that email". Opinion, 187 P.3d at 830.
- September 25, 2006. Subsequent to receiving the paper copy of the e-mail, Ms. O'Neill makes her first request for metadata pertaining to the e-mail. Opinion, 187 P.3d at 829.

- The metadata associated with the Thwing-Fimia e-mail did not forward with the electronic e-mail sent and retained by the City Attorney. O’Neill Decl., Exhibit J, p.21 and Exhibit L.
- The Court of Appeals, in discussing the metadata attached to the e-mail, suggests that the metadata would disclose “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 matter.” Opinion, 187 P.3d at 827. As the e-mail demonstrates, it was authored by Diane Hettrick and Thwing’s involvement was limited to forwarding it to Fimia and others. Because Thwing was not an original author and merely forwarded the e-mail to others, only Hettrick, not Thwing, would have knowledge of the “alleged government improprieties.”

II. ARGUMENT

The O’Neills propose three new issues for review:

1. Whether a public records request for an e-mail should automatically be interpreted as a request for the electronic copy of the e-mail and a request for the metadata?
2. Whether a public records case may be dismissed at a show cause hearing, decided on the affidavits?
3. Whether the Court should clarify whether costs and fees may be awarded to an agency in a Public Records Act case, despite both the City and the Court of Appeals declaring the issue to be moot?

The Court should not accept review of any of these issues as they do not rise to the threshold required for review under 13.4(b).

- A. No Review Is Warranted Under RAP 13.4(b) As the Case Law Is Clear That An Agency Is Not Required to Be a Minder Reader.

The Court should reject the O'Neills' request for review of the Court of Appeals' decision that Ms. O'Neill's request to "see that email" and her request for a "copy of the email" did not amount to requests for the electronic version of the e-mail or for the associated metadata. Holding that the City is not required to be a mind reader, the Court of Appeals indicated that if the electronic record of an e-mail is desired or if the metadata associated with an e-mail is desired, then those records must be requested using words to that effect. ("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." Opinion, 187 P.3d at 831.)¹ There is no basis under RAP 13.4(b) for this Court to accept review of the Court of Appeals' purely factual ruling that a requestor must specifically request a record in electronic format and request metadata before an agency is required to produce records in that format with that additional information.

¹ Even in federal civil discovery, where the issues related to metadata have been heavily litigated, courts require parties to expressly request documents in electronic format. For example, in *D'onofrio v. SFX Sports Groups, Inc.*, 2008 U.S. Dist LEXIS 4252 (D.D.C. 2008), the court rejected a party's claim that she had requested the electronic format when she asked for "documents that are stored or maintained in files in the normal course of business, such documents shall be produced in such files, or in such a manner as to preserve and identify the file from which such documents were taken." *Id.* at 10. The court noted that, "[i]t is apparent that this language, when first written, was not meant to encompass electronic data. Instead it addresses a common concern of paper discovery: the identification of a document's custodian and origination." *Id.* at 10-11. The court denied the motion to compel production of the original electronic form with accompanying metadata since the appropriate request had not been made.

The O'Neills assert that the City should have known that a request to "see that email" is a request not only for the electronic version of the e-mail but also a request for the metadata associated with the e-mail. Ms. O'Neill never requested an electronic copy of the e-mail. Indeed, the word "electronic" did not appear in any of Ms. O'Neill's public records request. The O'Neills' argument that the request to "see that email" was an implicit request for the electronic version of the e-mail is contrary to well-established Washington case law. The PRA does not expect nor require the City to be a mind reader. Opinion, 187 P.3d at 831, citing *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998). A request to "see that email" and a request for a "copy of the email" are different requests than requesting the "electronic copy of the email and associated metadata." If Ms. O'Neill desired the electronic version of the e-mail and the metadata, then she needed to request the electronic version and the metadata rather than expect the City to read her mind.

To support their proposition that a request for an e-mail is a request both for the electronic version and the metadata, the O'Neills cite two federal cases, *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640 (D. Kansas 2005) and *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993). Both cases are distinguishable from the case at hand.

In *Williams*, in response to the court's order to produce spreadsheets in a native format, the defendant produced the spreadsheets in electronic format but scrubbed the metadata and locked cells. Citing the Sedona Principles, the *Williams* court stated: "it is likely to remain the exceptional situation in which metadata must be produced," and that "there should be a modest legal presumption in most cases that the producing party need not take special efforts to preserve or produce metadata". *Williams*, 230 F.R.D. at 651. This principle was also cited in *Autotech Technologies Limited Partnership v. AutomationDirect.com, Inc, et.al.*, 2008 U.S. Dist. LEXIS 27962 (2008). In *Autotech*, AutomationDirect.com ("ADC") sought to compel production of a document in its native electronic format because it desired the metadata associated with the document. In its original request for document production, ADC did not specify that it desired the electronic form; thus, Autotech produced the document in .PDF format and paper format. Noting the late request for metadata and that "ADC was the master of its production request," the court refused to compel production of the electronic copy with metadata. *Id.* at 13.

Not once did Ms. O'Neill request the e-mail in electronic form, and she did not request metadata until after a paper hard copy had been appropriately filed, retained and produced pursuant to the PRA. *See*

O'Neill Decl., Exs. B-1, D, F, G, I, N. If she had requested an electronic copy and the metadata, and in response the City produced the electronic version without the metadata it had in its possession, *Williams* might be applicable. However, the City did not scrub metadata and did not withhold metadata from Ms. O'Neill. Thus, *Williams* is inapplicable to the case at hand.

In *Armstrong*, Freedom of Information Act ("FOIA") requests were made for *all* material stored on the e-mail systems from the mid-1980s to January 1989. Applying the Federal Records Act ("FRA"), the *Armstrong* court held that original electronic e-mail records are not considered "extra copies" of the paper print-outs because the paper print-outs may not include integral, fundamental parts of the electronic e-mail, such as identity of the sender and/or recipient and the time of receipt. The court quoted the National Archive and Record Administration guidelines, *Managing Electronic Records*, to support its holding that hard copy print-outs are only sufficient if all public record information is retained in the printed version:

Most agencies have decided to meet their recordkeeping requirements for documents that are created using word processing or electronic mail or messaging by printing those documents in hard copy. The success of this approach depends upon a clear understanding by all employees of the obligation to print and file all record material.

Armstrong at 30.

The *Armstrong* court disfavored the federal government's defense that the agency heads have sweeping discretion to decide which documents are 'appropriate for preservation'. *Id.* at 29. However, in the case at hand, in printing out the e-mail with all the public record information and deleting the electronic version, the City was relying not on its own discretion but on the authority granted by state law. The retention schedule, which is part and parcel of the PRA, authorized the City to delete the electronic version of an e-mail so long as the e-mail was 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 at 831. The paper copy of the complete e-mail provided to Ms. O'Neill on September 25 included all fundamental, integral parts of the electronic e-mail as identified by the PRA: name of sender (Lisa Thwing), name of recipient (Maggie Fimia), and date and time of transmission and/or receipt (Monday, 18 Sep 2006 at 07:55:38), making the electronic copy an extra copy that could be deleted. O'Neill Decl., Exhibit J, p. 21. Thus, contrary to the O'Neills' assertion that the City was "duty-bound to preserve the entire electronic record, inviolate," the City was only "duty-

bound” to preserve the *public record*, inviolate, which it did by preserving the hard copy of the e-mail with all fundamental information.

The City analogized metadata and e-mail with envelopes and letters. In their attempt to argue that metadata and e-mail are one, inseparable record, the O’Neills use a footnote and law review article analogy. The O’Neills’ analogy is misleading; metadata is nothing like footnotes. If footnotes are redacted, then the redactions are made to one single record, the same as removing a parenthetical insertion or appendix page serving the same function as a footnote. It alters the record’s original content. If metadata to an e-mail is redacted, then redactions are not made to one single record but rather to a second, separate and distinct record. As demonstrated in this case, an electronic e-mail can be forwarded by e-mail and metadata will not be included in that record. O’Neill Decl, Exhibit J, p.21 (original electronic version of e-mail forwarded by the Deputy Mayor to City Attorney) and Exhibit L (City provided all records responsive to public records request for metadata, and metadata for original e-mail not provided as it was no longer available).

When the O’Neills apply their extended preservation argument to envelopes, they highlight the argument’s flaw.² The PRA does not

² “Certainly at the point a request is made for the letter, the law immediately executes and protects the integrity of the letter, along with the accompanying envelope not yet been

protect the envelope when only the letter is requested. If the envelope contains information valuable to the requestor, a request must be made for that record in addition to the letter it carried. Public agencies are not charged with guessing the record needs of the requestor.

B. No Review Is Warranted Under RAP 13.4(b) As the Statute Is Clear That a Show Cause Hearing May Decide the Case In Toto, On the Affidavits.

This Court should not accept review of the Court of Appeals' decision that the trial court was not required to hold a trial after the O'Neills sought to have the dispute resolved in a show cause hearing. As recognized by the Court of Appeals, the trial court's management of this case fully complied with the statutory requirements of the PRA as well as the policy of prompt resolution of PRA matters, repeatedly recognized by courts handling PRA cases. In fact, if this Court were to reverse the Court of Appeals' decision on this issue, it would do damage to the PRA by allowing requestors or agencies to insist on discovery and a trial, quickly making PRA cases so expensive that citizens could not use the PRA for its intended purpose. Accordingly, there is no basis pursuant to RAP 13.4(b) for this Court to accept review of the Court of Appeals' ruling regarding the trial procedures.

[sic] destroyed, and which may contain valuable (to the requestor) routing or other information about the source of the letter." O'Neills Answer p. 10.

The PRA establishes a “show cause” procedure for resolving PRA disputes, and expressly provides that the trial court “may conduct a hearing based solely on affidavits.” RCW 42.56.550(3). “[T]he statute contemplates judicial review upon motion and affidavit.” *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 801, 791 P.2d 526 (1990). The show cause procedures are designed to provide a “speedy remedy” to resolve PRA disputes. WAC 44-14-08004(1). Thus, “most cases are decided on a motion to show cause.” WAC 44-14-08004(3); *Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003) (“show cause hearings are the usual method of resolving litigation” under the PRA); *see also, e.g., Brouillet*, 114 Wn.2d 788 (court upheld trial court decision to bar oral testimony and decide the public disclosure case solely on motion and affidavits); *Limstron v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998) (case decided solely upon the documentary evidence, affidavits and memoranda of law); *Lindeman v. Kelso School Dist. No. 458*, 127 Wn. App. 526, 111 P.3d 1235 (2005) (motion to show cause denied and Public Disclosure Act claim dismissed), *rev’d on other grounds*, 162 Wn.2d 196, 172 P.3d 329 (2007); *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998) (case decided on documentary evidence only, not testimonial evidence).

To insure a speedy resolution, this Court has stated that it will not “interfere with trial courts’ litigation management decisions” because mandatory procedures issued from this Court “would make public disclosure act cases so expensive that citizens could not use the act for its intended purpose.” *Brouillet*, 114 Wn.2d at 801 (rejecting party’s claim that it had a right to depose witness who submitted a declaration).

Here, the O’Neills filed a motion to show cause, presumably to obtain a quick resolution of their dispute. But now that the trial court ruled against them, the O’Neills are insisting on a right to full-blown civil discovery and a trial. The PRA contains no such right.

The O’Neills bases their claim on RCW 2.28.150 and this Court’s ruling in *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005) (“*SRDF II*”). Neither of these authorities required the trial court to allow for discovery or a trial.

First, RCW 2.28.150 is a legislative grant to the trial court to adopt procedures where the legislature has been silent – it does not create any affirmative right for litigants like the O’Neills that contradicts the PRA itself. “Superior courts have the procedural authority [under RCW 2.28.150] to adopt rules to carry out a statutory directive where a mode of proceeding is not specifically pointed out and jurisdiction is otherwise conferred upon the court.” *Mabe v. White*, 105 Wn. App. 827, 829, 15

P.3d 681 (2001). Those procedures “cannot conflict with court rules or statutes.” *Mabe*, 105 Wn. App. at 829.

The O’Neills’ claim that the statute creates a “right to trial on disputed facts” turns the PRA on its head. O’Neills Answer at 16. RCW 42.56.550(3) expressly provides that the trial court may resolve disputes “solely on affidavits.” Thus, if this Court were to mandate a right to trial, based on RCW 2.28.150, it would directly conflict with the PRA. In *Wood*, the court relied on plain language of the PRA to reject the requestor’s claim that he had a right to trial based on RCW 2.28.150. *Wood*, 117 Wn. App. at 27-29.³ Likewise, in *Brouillet*, this Court rejected a party’s claim that it had a right to depose a declarant because “the statute contemplates judicial review upon motion and affidavit.” *Brouillet*, 114 Wn.2d at 801. The O’Neills cannot rely on RCW 2.28.150 to claim a right that contradicts the PRA itself.⁴

Second, the O’Neills’ reliance on *SRDF II* is equally misplaced. In that case, this Court merely held that a trial court has the discretion to employ any of the procedures in the Civil Rules, including summary

³ *Wood* was not implicitly overruled by *SRDF II*. First, the *Wood* court did not even cite to the Court of Appeals decision in *SRDF*. Second, the *Wood* holding – that the PRA does not mandate a trial – is consistent with the PRA’s own mandate that disputes may be resolved on affidavits. Third, *SRDF II* only held the show cause hearing was optional, it did not mandate other procedures when a party exercises this option by asking the court to resolve a dispute on a show cause motion. See *infra*.

⁴ Even in a standard civil case, there is no guarantee of a trial or even discovery – cases are routinely resolved on summary judgment, sometimes without discovery.

judgment and intervention. *SRDF II*, 155 Wn.2d at 104-05. In making this ruling, it noted that the “show cause” procedures are discretionary, not mandatory. *SRDF II*, 155 Wn.2d at 104. What this Court did not rule, however, is that the trial court must disregard the show cause procedure in favor of discovery and trial, particularly when the requestor elects to employ the show cause procedure as the O’Neills did in this case.

Such a ruling would undermine the purpose of the show cause procedure – to obtain a speedy result. The procedure in this case demonstrates why. The O’Neills first sought an expeditious resolution by seeking a show case hearing. It was only after they lost that they sought discovery and a trial. So what the O’Neills want is a ruling that a party dissatisfied with the show cause ruling has a right to then seek trial and discovery. This argument proves too much. If the mere existence of the Civil Rules and RCW 2.28.150 create a right for the requestor to have a trial and full-blown discovery, it would also allow agencies to insist on discovery and a trial.⁵ This would allow agencies to delay any PRA suit where there is a question of fact by demanding a trial, rather resolving the

⁵ O’Neill’s citation to other statutory procedures such as unlawful detainer and replevin actions are misplaced because those statutes expressly provide for a trial if there are factual disputes. *See, e.g.*, RCW 59.18.410 (in unlawful detainer, tenant has right to have factual disputes resolved by a jury); RCW 7.64.035 (providing for trial of disputed factual issues). Here, rather than expressly provide for a trial of disputed issues, the PRA expressly allows a judge to resolve disputed factual issues on affidavits, as an alternative to the fact finding of the trial. RCW 42.56.550(3). If anything, the difference between these statutes supports the trial court’s and Court of Appeals’ conclusion that no trial was required.

dispute with an expeditious and dispositive show cause hearing or other dispositive motion that obviates the need for trial. This result upsets the goal recognized in *Brouillet* of an inexpensive resolution of PRA disputes. Here, the trial court granted judgment to the City upon the O'Neills' show cause motion where judgment could be awarded as a matter of law to avoid a useless trial, just as the court has discretion to award summary judgment to a nonmoving party for the same reason. *Health Ins. Pool v. Health Care Authority*, 129 Wn.2d 504, 919 P.2d 63 (1996).

The trial court followed the mandates of the PRA and resolved this case on the O'Neills' show cause motion. Now, what the O'Neills really want is a second bite at the apple. But the PRA does not mandate such a second bite for requestors or agencies. Thus, the Court of Appeals properly ruled that no mandatory right to trial exists and this Court should not accept review of that ruling. The ruling does not conflict with any decision of any appellate court, nor does it involve an issue of substantial public interest and is therefore inappropriate for this Court's review.

C. The Issue of the Cost Award is Moot and is Not Appropriate for Review Under RAP 13.4(b).

The Court of Appeals properly determined that the issue of the cost award to the City of Shoreline under RCW 4.84.010 was moot. The City explicitly abandoned its right to these fees early in the litigation, in its

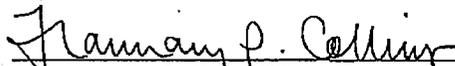
response to the motion for reconsideration in the Superior Court. CP 330-331. The City reiterated its abandonment of the request in its Court of Appeals briefing in lieu of briefing the application of RCW 4.84.080. The Court of Appeals accepted the City's rescission of the request for a cost award. Opinion, 187 P.3d at 834. Thus, this Court should not review this issue.

III. CONCLUSION

The O'Neills have failed to show that the three new issues raised in their Answer meet the criteria for review set forth in RAP 13.4(b). Due to this failure, the City requests this court to accept review only of those issues raised in the Petition for Review.

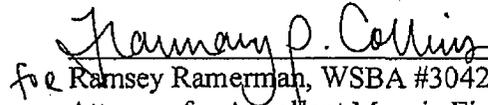
RESPECTFULLY SUBMITTED this 9th day of December, 2008.

CITY OF SHORELINE



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per e-mail
authorization