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THE WASHINGTON PUBLIC RECORDS ACT -NEW DEVELOPMENTS

EXPANSION OF DUTIES FOR PUBLIC HOSPITAL DISTRICTS TO MAINTAIN

October 8, 2010

Our Supreme Court Decides *O'Neill v. City of Shoreline*

On October 7, 2010, the Washington Supreme Court issued a ruling that we would like to bring to your attention, because this new decision has important implications for public agencies, including public hospital districts. The case is entitled *O'Neill v. City of Shoreline*, No. 82397-9, slip op. (Wash. Oct. 7, 2010).

In this case, the court held that metadata is part of the public record that is subject to disclosure under the Public Records Act (PRA). The Court also addressed a state agency's duty to retain public records — including metadata — when there is a pending records request.

The Court Holds that Metadata is a Public Record under the Public Records Act

As you are aware, agencies subject to the PRA are required to make requested public records available, unless the record falls within a statutory exemption. See RCW 42.56.070(1). The issue in *O'Neill* is whether metadata is a public record. A second issue is whether a request for an email is deemed to include a request for the metadata associated with the email.

What is "Metadata"?

Metadata is "data about data, or hidden statistical information about a document that is generated by a software program[1]." It consists of "information describing the history, tracking, or management of an electronic document" (e.g., dates that email was sent, received, replied to or forwarded, blind carbon copy information, etc.).[2]

Metadata is Subject to Disclosure under the PRA

The Court held that because metadata may contain information that relates to the conduct of the government, the metadata data — just like an email itself — is a public record that is subject to disclosure under the PRA.

However, the *O'Neill* court held that a request simply for an email is not a request for the metadata. Thus, unless a PRA request demands metadata, agencies are **not** obligated to provide the metadata. (Note, however, that the time period at issue in the case pre-dated the changes to WAC 434-662-150, which address archival storage of emails and associated metadata.)

The court also ruled that when an employee forwarded office emails to her home computer so that the employee could work from home, the agency had an obligation to search the employee's home (personal) computer when looking for metadata that was deleted from the agency's office computers. The court did not comment on a state agency's duties and or rights to search an employee's computer over the employee's objection.

Suggested Action

Appropriate members of your staff should be advised of this new court decision. In addition, your employee policies concerning the forwarding of agency electronic data (and any attendant obligation of the employee to allow agency access to personal computers) should be reviewed and modified based on the advice of counsel.

[1] *O'Neill v. City of Shoreline*, No. 82397-9, slip op., 4 (Wash. Oct. 7, 2010) (quoting Jembaa Cole, *When Invisible Electronic Ink Leaves Red Faces: Tactical, Legal and Ethical Consequences of the Failure to Remove Metadata*, 1 Shidler J. L. Com. & Tech. 7 (Feb. 2, 2005), available at www.lctjournal.washington.edu).

[2] *Id.* at 6 (quoting *Lake v. City of Phoenix*, 222 Ariz. 547, 548 n.1, 218 P.3d 1004 (2009)).