

O'Neill v. City of Shoreline
Dissent by Alexander, J.

No. 82397-9

ALEXANDER, J. (dissenting)—The majority remands this case to the trial court with instructions to give the city of Shoreline (City) “the opportunity to inspect” the hard drive on Shoreline Deputy Mayor Maggie Fimia’s home computer so that the City can provide assurance that all of the records requested by Beth O’Neill have been received by her. Majority at 18. I dissent because I do not believe that what is contained on the hard drive of a public employee’s personal home computer, whether it is deemed “metadata” or something else, is a public record. That seems obvious since what is on the hard drive of an employee’s computer is not a writing that is “retained by any state or local agency.” Former RCW 42.56.010 (2005) (codified as former RCW 47.12.020(41) (2005)). More significantly, the majority provides no authority of law for the proposition that a city employee’s home computer is subject to such a search or inspection by the employing city. In my opinion, the home computer hard drive is not subject to search or inspection by the City without permission of the employee.

My views on this subject are prompted to a great extent by the fact that the hard

drive on an individual's home computer very likely contains personal information. That information is not public, and the private nature of it would necessarily be compromised by an "inspection" or "search" of the sort the majority orders.¹ Even if by some stretch it can be said that an employee's computer hard drive is a public record, the disclosure of it should be precluded pursuant to RCW 42.56.050, which prohibits a records requester from obtaining such a record if it "[w]ould be highly offensive to a reasonable person." See also RCW 42.56.230, which exempts disclosure of public records when the disclosure would violate the privacy rights of employees, including elected officials.

Because a public employee, including an elected official like Fimia, would be well within his or her rights to refuse an inspection or a search by the employer of his or her home computer, the employee's privacy right trumps any direction to the public employer to examine the hard drive of the employee's home computer. Therefore, the City should not, as the majority holds, be held to have violated the Public Records Act (PRA), chapter 42.56 RCW, by failing to conduct an impermissible search or inspection.

Finally, I feel compelled to point out that it seems fairly obvious that this long running dispute over what is on Deputy Mayor Fimia's computer hard drive has grown all out of proportion.² The undisputed fact is that Fimia received a totally unsolicited e-

¹Article I, section 7 of the state constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Authority of law is a search warrant.

²In endeavoring to come up with an analogy that might be helpful to persons, like me, who do not possess a high degree of technical knowledge about computers, it

mail message at her home on her personal computer. The majority apparently believes that Fimia's act of receiving the message was a use of her home computer for city business. Although I entirely disagree with that proposition, the e-mail message may have become a public record by virtue of the fact that Fimia called attention to it at a city council meeting. That e-mail was, however, disclosed to the records requester, Beth O'Neill, in response to O'Neill's request. Apparently unsatisfied with receipt of a hard copy of the unaltered e-mail replete with forwarding information, O'Neill sought to examine the "metadata" associated with the e-mail. Fimia could not find it and concluded that she must have inadvertently destroyed it. Still unsatisfied, O'Neill commenced this suit and eventually obtained a ruling from the Court of Appeals to the effect that the trial court must determine on remand whether Fimia's computer hard drive contains the requested metadata. As noted above, the majority puts the onus on the City to inspect Fimia's computer hard drive on the basis that "the City may not have provided all public records to the O'Neills in accordance with the PRA." Majority at 18. For reasons I have stated above, it is my view that the City has fully met its obligation under the PRA by disgorging every relevant record it has in its possession and it may not engage in a nonconsensual inspection of Fimia's computer. That being the case, the City should not be penalized if the employee asserts her right to privacy. I dissent.

occurred to me that the quest for Fimia's metadata is akin to a search for an envelope that once contained a previously disclosed letter. If Fimia had received Lisa Thwing's message by regular United States mail and later indicated that she had discarded it, would this court seriously consider ordering her employer to search or inspect Fimia's home recycle container so that it could provide assurance that Fimia had, indeed, discarded the envelope? I think not.

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AUTHOR:

Justice Gerry L. Alexander

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Charles W. Johnson

Justice James M. Johnson
