Council Meeting Date: September 17, 2012 **Agenda Item:** 9(a)

CITY COUNCIL AGENDA ITEM

CITY OF SHORELINE, WASHINGTON

AGENDA TITLE:	Authorization for Offer of Judgment in O'Neill v. Shoreline and Fimia
DEPARTMENT:	City Attorney's Office
PRESENTED BY:	Ian R. Sievers, City Attorney Flannary P. Collins, Assistant City Attorney
ACTION:	____ Ordinance ____ Resolution __X__ Motion ____ Discussion ____ Public Hearing

PROBLEM/ISSUE STATEMENT:

The *O'Neill v. City of Shoreline* matter has been in active litigation since 2006 and, with a new trial date set for June 2013, this case is not close to being over. The City has been unsuccessful in settling the case and the O'Neills have not responded to the City's request to mediate penalties, costs and attorneys' fees owed. Therefore, to protect the City and taxpayers from any future costs, staff proposes that the City unilaterally make an offer of judgment.

RESOURCE/FINANCIAL IMPACT:

Funds expended to resolve this matter will be drawn from the General Fund budget contingency.

RECOMMENDATION

Staff recommends that Council approve an offer of judgment in the amount determined at the September 17, 2012 Council meeting.

Approved By: City Manager ***JU*** City Attorney ***IS***

INTRODUCTION

Litigation in the *O'Neill v. City of Shoreline* matter commenced in 2006 and is still ongoing. The main issue in *O'Neill* was whether the City provided sufficient metadata in response to Beth O'Neill's Public Records Act ("PRA") request on September 2006 relating to an email received by former Deputy Mayor Maggie Fimia. Although the City was unable to produce metadata for one particular copy of the email (Maggie Fimia's copy), the City was able to produce the metadata for two copies of the same email (former Councilmember Janet Way's copy and a copy of the same email resent to Ms. Fimia). The City could not produce the metadata for Ms. Fimia's copy because (1) Ms Fimia deleted the email after forwarding it to the City Attorney, and (2) when the requested email was forwarded to the City Attorney, the metadata (but not the substance of the email) was automatically altered by computer programs. The City did not realize that this alteration occurred until after the original electronic email had been deleted by Ms. Fimia.

Ultimately, no substantive information from the email or the metadata was withheld from Mr. and Mrs. O'Neill. The entire, unedited email was provided to Beth O'Neill within five business days of her original request for the email. Although the City was unable to provide Ms. Fimia's version of the metadata, the only difference between her copy and the two copies of metadata provided to Beth O'Neill consists of computer generated technical information – for example, which Comcast server the email happened to go through to arrive in Maggie Fimia's inbox.

Despite the allegations by Mr. and Mrs. O'Neill, there was no improper conduct by City officials. No court agreed with the O'Neills' claims that edits made when the email was first provided amounted to a PRA violation. Further, Ms. Fimia's deletion of the electronic copy of the email after forwarding the email (which was printed out by the City) was consistent with the Washington State Secretary of State's retention schedule, which provides blanket authority for retention of records. The retention schedule directed agencies to retain email messages in electronic format only as long as they are being worked on; the schedule then directed agencies to either print out the emails or transfer them to an electronic management system. After the 2006 *O'Neill* decision in Superior Court, the Secretary of State modified the retention schedule removing this "print and delete" direction.

Unsatisfied with the metadata provided in response to her records requests, Beth O'Neill and her husband commenced a lawsuit in King County Superior Court. The City prevailed in Superior Court. Judge Bruce Hilyer dismissed the case after a hearing on written affidavits, finding that the City had produced all responsive records and no further review of the computer was required. On appeal, the Supreme Court ultimately held that the metadata the City produced may not be sufficient under the PRA.

On remand back to the Superior Court, Judge Monica Benton found that the City conducted an inadequate search of Ms. Fimia's personal computer's hard drive because it did not complete a forensic search, resulting in the permanent loss of Ms. Fimia's copy of the metadata. The Court awarded attorneys' fees, costs and penalties to the O'Neills for the City's failure to produce the metadata, the amount of which will be

determined after subsequent briefing and argument. The Court also granted the O'Neills a new trial (scheduled for June 13, 2013) on "any remaining issues."

The Court's decision to order a new trial on "any remaining issues" was unanticipated since it allows the O'Neills to expand this case beyond the one issue that has been litigated for the last five years – metadata. The Court's granting of a new trial seems in direct conflict with the Court of Appeals and the Supreme Court decisions, which remanded on the metadata issue but also affirmed the trial court's summary dismissal of the O'Neills' other claims based on the adequacy of the hearing held by Judge Hilyer. In addition, the Court's ruling that the City should have conducted a forensic search of Ms. Fimia's hard drive is not imposed by the PRA and not imposed by the Supreme Court in this case. The PRA only requires agencies to conduct reasonable searches. It does not mandate that agencies take the extraordinary (and extremely expensive) step of purchasing additional resources to conduct a forensic search of the unallocated space on hard drives. Due to these conflicts, the City will appeal the Court's finding of an inadequate search and the Court's ordering of a new trial.

However, in order to avoid any future burden on City resources and to protect the taxpayers from increased costs that additional appeals may bring, the City has made it clear to the O'Neills that it wants to settle the amount of penalties and attorneys' fees accrued to date. Thus far, the City's overtures of settlement have been ignored.

The City cannot force the O'Neills to settle, but it can use an offer of judgment process provided in state law to remove the incentive for the O'Neills to extend the clock on penalties and generate more attorney hours over the course of the new case schedule to build a larger award. If the O'Neills reject the offer and ultimately receive less in final judgment, then the City will owe none of the costs or fees accrued after the date that this offer of judgment is made. Staff requests the Council approve an offer of judgment to the O'Neills for the per-day penalties mandated by the PRA. This offer will not include the attorneys' fees portion, which can be left to the Superior Court to determine after the O'Neills produce documentation to support the attorneys' fees.

DISCUSSION

Background

The facts that gave rise to this lawsuit are straightforward. On September 18, 2006, the City of Shoreline's former deputy mayor, Maggie Fimia, received the following email on her personal email account:

From: "Lisa Thwing"
Date: Mon, 18 Sep 2006 07:55:38 -0700
To: "Lisa Thwing"
Subject: Current city council meeting being broadcast this week

From: Diane Hettrick
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.

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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

As indicated by the header of the email, Lisa Thwing sent the email from Diane Hettrick to herself, blind carbon copying ("bcc") other recipients, including Ms. Fimia and Janet Way, also a councilmember at the time.

At the September 18 City Council meeting, Ms. Fimia mentioned the email and questioned its veracity. Beth O'Neill, who was mentioned in the email and by Ms. Fimia at the meeting, made an oral public records request for the email.

Because Ms. Fimia had only mentioned the underlying Hettrick email and because she did not want to subject the sender, Lisa Thwing, to public exposure, Ms. Fimia removed the forwarding header information when she first produced a copy of the email to the City. But after Ms. O'Neill made it clear she wanted the entire email string, on September 25 Ms. Fimia forwarded the entire unedited email electronically to the City Attorney for production to Ms. O'Neill. At some point after forwarding the email, Ms. Fimia deleted her electronic copy of the email from her personal computer.

After receiving the hard copy of the email from the City on September 25, Ms. O'Neill requested the metadata for that email that same day. The City had never received a request for metadata and Ms. Fimia had never heard of metadata until Ms. O'Neill's request. At the time of Ms. O'Neill's request, there were no public records cases **in the**

nation that dealt with metadata. Further, neither the Washington State Attorney General's Model Rules for public records nor the Washington State Secretary of State's records retention guidelines mentioned metadata. Indeed, the Secretary of State's retention rules allowed electronic email to be deleted after printing; thus, the Secretary of State did not assign any retention value to metadata since it directed agencies to print out the hard copy of the email and delete the electronic version, along with its metadata. Therefore, the City had no guidance from either the courts or state agencies for how to respond to a request for metadata and, in fact, the Secretary of State's guidance given on retention of electronic emails and associated metadata was erroneous. As determined by the Supreme Court in *O'Neill,* since metadata is a public record it needs to be retained with the email it is associated with. Currently, consistent with the *O'Neill* decision, the retention schedule directs agencies to retain emails, and their metadata, based on the content of the email.

The City immediately informed Ms. Fimia via email about the new request for metadata and Ms. Fimia promptly attempted to find the email on her computer. She spent over three hours looking in all possible locations where the email might be located and did term-searching of her entire hard drive, but could not locate the email.

The City was surprised to find that, in forwarding the email to the City Attorney, the metadata associated with Ms. Fimia's copy of the email was replaced with the forwarded action. The act of forwarding, as with other interactions with the email, changes the metadata. Since Ms. Fimia had received the email on her personal email account, the City could not retrieve the email from the City server. However, realizing that Ms. Way had received the same email, the City provided the metadata from Ms. Way's copy. In addition, the City provided the metadata from a second copy of the same email forwarded by Ms. Thwing on September 30 at Ms. Fimia's request.

After the City responded to the O'Neills that Ms. Fimia no longer had the electronic version of the email, and that the City could not produce the specific metadata for Ms. Fimia's original copy of the email, the O'Neills filed a PRA lawsuit against the City.

After the trial court dismissed the O'Neills' suit, the O'Neills appealed the decision, and the Court of Appeals found that the City did not comply with Ms. O'Neill's request for one particular record: the metadata for Maggie Fimia's copy of the September 18, 2006 e-mail. Concluding that Ms. Way's metadata was not the specific record requested, the Court directed the trial court to consider whether Ms. Fimia's hard drive contained the metadata and whether the forwarded email to the City Attorney or the Ms. Thwing resent email contained the requested metadata. After finding that metadata contains information related to the conduct of government (i.e., the email addresses of persons who may have knowledge of government improprieties), the Court also directed the trial court to determine which *other* portions of metadata fall within the scope of the PRA. The Court of Appeals declared the O'Neills a partially prevailing party and awarded attorney fees to the O'Neills, remanding to the trial court to determine the award amount. The Court of Appeals found in the City's favor that the trial court could decide the PRA matter at the show cause hearing on the written affidavits (without oral argument and without discovery), the City had properly exempted one record and Ms. O'Neill's request for the email was not a request for metadata.

The City appealed to the Supreme Court. The issues before the court were: (1) is email metadata a public record that must be disclosed under the PRA; (2) does a request to see an email inherenty include a request to see metadata; (3) did the Court of Appeals err by granting attorney's fees; and (4) can a public record request be decided on the affidavits alone?

In a 5-4 decision, the O'Neills obtained a remand on one out of the four issues:

- An electronic version of a record, including its embedded metadata, is a public record subject to disclosure. The court further held that in its response to Ms. O'Neill's request for e-mail's metadata, the City "may not have provided all public records to the O'Neills," and directed the trial court to determine whether the metadata provided was identical to Ms. Fimia's deleted metadata.

    - It is important to note here that the City did not argue that metadata was not a public record; the City always agreed that metadata was a public record. Rather, the City argued that it had produced the metadata when it produced the Way metadata and the resent Thwing metadata. The City's position was that the only differences between the produced metadata and Fimia's copy were non-substantive differences (i.e., the path the email took to reach the recipient's inbox) that were not related to the conduct of government.

    - The City also argued that the retention schedule, which provides blanket authority for retention of records, directed agencies to print out emails, retain the hard copy of the email, and delete the electronic version (which would include deletion of the metadata).

The City prevailed on the other three issues:

- An agency does not need to provide metadata every time a request for a public record is made.
- Attorney's fees are only awarded if a PRA violation is found. The Supreme Court did not find a PRA violation but remanded back to the trial court to determine whether the PRA has been violated.
- A Public Records case can be decided on affidavits alone as was done by Judge Hilyer in this case; oral argument is not required.

On remand, the Superior Court ruled on partial summary judgment that the City completed an inadequate search of the hard drive because it did not conduct a forensic search, resulting in permanent loss of the requested metadata, and ordered a new trial on any remaining issues.

Nothing of substance was lost when Ms. Fimia deleted the electronic copy of the email. The City's technical experts both agreed that the "bcc" information would not appear in any copy of the metadata, and the only thing lost when Ms. Fimia deleted her email (and metadata) was non-substantive "path" information that varies between different copies of metadata associated with the same email. One may wonder why Mr. and Mrs. O'Neill would find this data of any use, and, indeed, this was a question posed by

the Supreme Court in oral argument to O'Neills' attorney. She responded that she did not have to disclose motive or need for the record. Indeed, this case may seek to make a statement about the reach of the PRA and the level of resources Washington State agencies must devote to record retention. In fact, the outcome of this case may result in significant rewards from the Act's penalty and attorney fee structure for claims that are not made in the spirit of scrutinizing agency performance and waste. For example, the O'Neills' most recent settlement offer was approximately $500,000, with the threat of seeking double the penalty amount in this offer for the period of Beth O'Neill's entire life expectancy. The O'Neill settlement demand would be a diversion of taxpayer dollars from other City needs; for example, 14 blocks of sidewalks on school routes, bringing the School Resource Officer back for three years, or funding all municipal court prosecutions for three years[1].

Settlement Attempts

The City has attempted to settle this case several times:

- In May 2010, the City offered the following in settlement (subject to City Council approval), requiring acceptance prior to the Supreme Court issuance of its decision:
    - o $20,000 if the Supreme Court rules in the City's favor on all issues; or
    - o $40,000 if the Supreme Court remands to the Superior Court for any legal issue, or
    - o $60,000, if the Supreme Court rules in the O'Neills' favor on all issues or remands only to calculate fees and penalties.

- After the Supreme Court ruling, $60,000 was offered, subject to City Council approval.

The O'Neills did not respond to either of the City's settlement offers.

Finally, after the City's repeated urging for a settlement response, in June 2012, the O'Neills provided the City with a settlement demand in an amount significantly higher than any of the City's previous offers. The O'Neills demanded $472,874 in settlement. 75% of this settlement demand consisted of attorneys' fees ($369,018). The remainder consisted of per-day penalties ($95,940 – which is $45/day from the date of the request for metadata to the date of the Superior Court's anticipated ruling on summary judgment). Giving the City three business days to accept the offer, the O'Neills threatened to sue for the full $100/day in penalties, calculated from the date of the request to the remainder of Ms. O'Neill's lifetime (based on actuarial tables).

In response, the City made a counter-settlement offer of $100,000. This counter offer went unanswered by the O'Neills.

After the summary judgment ruling, the City requested the O'Neills enter into mediation, agreeing that it would mediate under the assumption that the City owed penalties and attorney fees. In response, the O'Neills demanded confirmation that the City had

[1] Neither the cost of defense or award in a records case is covered by the City's risk pool agreement for insurance coverage. See WCIA letter declining coverage, Attachment A.

settlement authority to pay at least $369,018. In response, the City refused to disclose its settlement authority, but noted it would settle for significantly more than its last offer of $100,000. The O'Neills never responded to this clarification – instead, they insisted the City respond to their extensive discovery requests under the new case schedule in Superior Court.

Notice of Appeal

The City plans to file a motion for discretionary review to the court of appeals seeking review of the trial court's summary judgment ruling as being contrary to the law. A notice of discretionary review must be filed by September 20, 2012. Any appeal at this stage is discretionary, so this will not stop trial court proceedings unless the court agrees to accept review. We expect a ruling on the motion within six months. Unless the summary judgment ruling is reversed and the City ultimately prevails in its position that it provided the portions of metadata that is a public record, the City will be responsible for the O'Neills' attorney fees. This would include continuing fees and costs through the scheduled June 2013 trial date absent the successful use of the offer of judgment procedure.

Offer of Judgment

Despite this appeal, in order to avoid a continued burden on City departments and any increased cost to the taxpayers, City staff recommends making an offer of judgment. . The purpose of an offer of judgment is to put an end to continued litigation, or, if the offer is not accepted, to bar the recovery of costs, including attorney fees, incurred by the O'Neills after the offer (in the event final judgment is less than the amount offered).

The amount and structuring of the offer of judgment is discussed in the confidential memo accompanying this staff report.

Current Practice

Subsequent to the *O'Neill* matter, the City changed its practices in responding to requests for emails so that it does not either (1) overlook an email or (2) fail to provide metadata. The City has purchased software that allows for centralized storage of emails and centralized searches for emails. This is a significant change from the City's practice in 2006 or the practice of any other city surveyed at that time. In 2006, the City relied on employees to produce responsive emails to PRA requests and did not have the ability to complete a centralized search. Policies have been adopted requiring all City electronic communication be linked to this archive system, even those received by Counclmembers on personal computers or private email addresses. The central archiving automatically saves each email sent or received in the City email system making it impossible for any employee or official to delete an email before its time.

RECOMMENDATION

Staff recommends that Council approve an offer of judgment in the amount determined at the September 17, 2012 Council meeting.

Attachments:

A. 2006 WCIA letter declining coverage
B. Janet Way Email Metadata

Associated Document:

A. Confidential Attorney Memo

WA cities Insurance Authority
P.O. Box 88030
Tukwila, WA 98138
Phone: 206-575-6046
Fax: 206-575-7426

December 1, 2006

RECEIVED
DEC 14 2006
SHORELINE CITY ATTORNEY

Debbie Tarry
Finance Director
City of Shoreline
17544 Midvale Avenue N.
Shoreline, WA 98133

RE: Beth & Doug O'Neill v. City of Shoreline & Maggie Fimia
King County Superior Court Cause No. 06-2-36983-1SEA

Dear Ms. Tarry:

At the time a Summons and Complaint is filed, a coverage determination is necessary based on the allegations of the Plaintiff in that complaint.

Because you are the delegate for the City of Shoreline, we are addressing our comments concerning coverage to you.

Our review of these documents finds no tort allegations or prayer for compensatory damages. Therefore, we are returning this suit to your office for resolution.

Further, the coverage document excludes fines, penalties, punitive or exemplary damages as a form of personal injury damage.

An appeal process is provided by the Authority By-laws, Article VII, Section 2, Subsection (a) which states in part: "Any member city or person aggrieved by the Executive Director's written determination to deny them coverage... may appeal the decision of the Executive Director to the Board. The appeal must be initiated by the aggrieved member city or person within thirty (30) days following receipt of the Executive Director's written determination...". The written request for appeal must be served upon the Executive Director or President of the Board.

I would be pleased to review this decision, if the complaint is amended, for other coverage possibilities.

Sincerely,

Lewis E. Leigh
Executive Director

lel/sh
cc: Ian Sievers, City Attorney

X-Apparently-To: janetway@yahoo.com via 206.190.36.126; Mon, 18 Sep 2006 07:55:31 -0700
X-Originating-IP: [204.127.225.92]
Authentication-Results: mta182.mail.re2.yahoo.com
from=comcast.net; domainkeys=neutral (no sig)
Received: from 204.127.225.92 (EHLO alnrmhc12.comcast.net) (204.127.225.92)
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From: "Lisa Thwing" <tootrd@comcast.net>
To: "Lisa Thwing" <tootrd@comcast.net>
Subject: Current city council meeting being broadcast this week
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boundary="----=_NextPart_000_001E_01C6DAF7.D46601B0"
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X-MSMail-Priority: Normal
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Importance: Normal
Content-Length: 1760

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charset="Windows-1252"
Content-Transfer-Encoding: 8bit

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Content-Transfer-Encoding: quoted-printable

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normal; FONT-FAMILY: Verdana; BORDER-RIGHT-STYLE: none; =
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href=3D"mailto:dhettrick@earthlink.net">Diane Hettrick</A> </DIV>
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