Coates' Canons Blog: Is Metadata a Public Record? Case Law Update

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A city resident forwards an e-mail to Councilwoman Leslie Knope. The e-mail accuses certain other city council members of improper conduct. Councilwoman Knope opens the e-mail on her home computer, which is set up to remotely log in to her public e-mail account. Councilwoman Knope later announces at a public meeting that she has received a copy of the e-mail and that the e-mail purportedly was authored by "Tom Haverford and April Ludgate." The councilwoman also briefly discusses the contents of the e-mail. April, who is in attendance at the meeting, immediately makes an oral request for the e-mail and denies authoring it. The councilwoman subsequently forwards the e-mail to city staff to produce to April, but in so doing she removes the "to" and "from" lines to protect the identity of the citizen who forwarded the e-mail to the councilwoman. City staff produces a printed copy of the e-mail to April. April is not satisfied with the city's response to her request, and she further requests that the city produce an electronic copy of the e-mail with all of its associated metadata. The city subsequently provides April with a hardcopy of the entire original e-mail string, including the "to" and "from" e-mail header information that Councilwoman Knope redacted from the originally forwarded e-mail. April still is not satisfied and demands that the city disclose all the metadata associated with the original e-mail. Councilwoman Knope attempts to find the metadata associated with the original e-mail but cannot find it; she concludes that she must have inadvertently destroyed the original e-mail and its associated metadata. The councilwoman, however, requests that the citizen who originally forwarded her the e-mail re-forward it to her. The citizen complies and the city ultimately produces the re-forwarded e-mail (with all of its associated metadata) to April.

Has the city complied with its public records obligation?

Not necessarily, at least according to the Supreme Court of Washington. In a recent case involving a substantially similar factual scenario to the hypothetical outlined above, the Supreme Court of Washington (in a 5 to 4 vote) affirmed a decision of the Washington Court of Appeals holding that if an e-mail is a public record subject to public access, its associated metadata also is a public record that must be disclosed under Washington's Public Records Act (PRA). *See* O'Neill v. City of Shoreline, __ P.3d __, 2010 WL 3911347 (Wash. Oct. 7, 2010).

What is Metadata?

As I summarized in a previous **post**, metadata, commonly referred to as "data about data" is information describing the history, tracking, or management of an electronic document. The term has come to be understood, at least in the legal community, to describe a variety of information associated with electronic documents or files. Examples of metadata include a document's or file's designation, dates it was created, last accessed, or modified, its author, and its edit history. An e-mail file may have more than 1,200 metadata properties, including sent and receipt dates, reply, forward and copy information, and sender address book information. Metadata also may include information that is recorded by a computer to assist in storing and retrieving a file, or aid in its searchability. Finally, metadata allows the functioning of routines within a document or file, such as cell formulae in spreadsheets. Some metadata is supplied by the creator or author of electronic information; other metadata is created automatically by a computer.

O'Neill v. City of Shoreline (Majority Opinion)

Metadata is a Public Record

The basic facts of *O'Neill* are set forth above. Ms. O'Neill (posing as April in my hypothetical) instituted an action alleging that the city violated Washington's PRA because the city did not produce all of the metadata associated with the initial e-mail that was forwarded to the city councilwoman. Ms. O'Neill argued that it was not legally sufficient that she received a copy of the re-forwarded e-mail with all of its associated metadata because there was no way of knowing if the metadata associated with the original forwarded e-mail was the same as the metadata associated with second forwarded e-mail,

even though the text of both e-mails was identical and even though the two e-mails were forwarded by the same person. Both the Washington Court of Appeals and the Washington Supreme Court agreed with Ms. O'Neill—holding that Ms. O'Neill was entitled to access to the metadata associated with the particular e-mail at issue.

To understand the high court's decision in *O'Neill* it is important to first look at the specific requirements imposed on public entities by Washington's PRA. The PRA defines a "public record" as "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." The PRA further requires that "[e]ach agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within [one or more] specific exemptions…."

In determining that the metadata associated with an e-mail is a public record, the court noted that the term "public record" is defined very broadly under Washington law to encompass almost "any conceivable government record related to the conduct of government" and is to be liberally construed. According to the court majority, "[m]etadata may contain information that relates to the conduct of government and is important for the public to know. It could conceivably include information about whether a document was altered, what time a document was created, or who sent a document to whom." The court clearly was concerned that if it were to hold that metadata was not a public record it could very well "deny our citizenry access to a whole class of possibly important government information."

The court majority rejected the city's contention that the state's records management guidelines allow a government entity to delete certain electronic records once they have been printed. The court acknowledged that there are circumstances where public records can be destroyed, but held that the PRA "does not allow agencies to destroy records that are subject to a pending records request." Thus, the state's retention guidelines could not authorize the deletion of metadata that was subject to a pending records request.

The court ultimately remanded the decision to the trial court to give the city one final opportunity to inspect the councilwoman's home computer to see if the city can recover the original e-mail and its metadata.

Metadata Must be Specifically Requested

In a second, related issue addressed by the court the majority ruled that the PRA does not require the city to provide metadata if it is not specifically requested. According to the court, "[w]hile we agree that metadata is included within the PRA's definition of a public record, this does not necessarily mean that a government agency must provide metadata every time a request for a public record is made." The court noted that the PRA only requires a public agency to provide a public record when it is identifiable, and it determined that because Ms. O'Neill's oral request at the public meeting made no mention of the electronic version of the e-mail, or its associated metadata, the city was under no duty to provide the metadata at that point. The city's obligation to provide the metadata was triggered when Ms. O'Neill made the second request for the e-mail and specifically referenced its associated metadata.

O'Neill v. City of Shoreline (Dissent)

As noted above, *O'Neill* was a 5 to 4 decision. The dissenting opinion warrants discussion for two reasons. The first is simply to highlight that the application of public records laws to metadata is an emerging issue about which there is not universal consensus. The second (and related) reason is that, although the dissenting justices took issue with a relatively minor issue—the majority's direction to the city to search the councilwoman's personal computer for the e-mail and associated metadata–the justices also appeared to be uncomfortable with the majority's central holding that metadata constitutes a public record.

The dissent asserted that the information contained on a public employee's personal home computer is not a public record as it is defined under the PRA because a public record must be a writing that is "retained by any state or local agency." In a footnote, however, the dissent appears to express further concern with the conclusion that metadata is a public record. The dissenting justices analogized the metadata associated with an e-mail with the envelope in which a printed letter is delivered. The justices expressed their discomfort with the majority's conclusion that the city must search for and produce "discarded" metadata associated with an electronic public record when the city likely would not have to search for and produce a "discarded" envelope. For a number of reasons the analogy is misplaced. In most instances, there really is no counterpart to metadata in hardcopy records. That said the dissenting judges are not alone in their struggle to reconcile

the application of public records laws to electronic media. Jurists likely will continue to wrestle with this issue, particularly in the absence of legislative guidance.

Implications for Public Agencies in North Carolina

What are the implications of *O'Neill* for public agencies in North Carolina? First, it is important to stress that the decision in *O'Neill* has no direct precedential value in North Carolina. It was decided by the Supreme Court of Washington and involves an interpretation of Washington's, not North Carolina's, public records laws. To date, no North Carolina court has directly addressed the application of North Carolina's public records laws to metadata. In fact, very few courts across the country have ruled on this issue.

North Carolina's public records laws, however, likely are at least as broad as those in Washington, both with respect to the definition of "public record" and to the public's general right of access. It is likely that a North Carolina court faced with this issue would look to the *O'Neill* opinion (as well as that of the Arizona Supreme Court—summarized **here**) for guidance.

And, as discussed in a previous **post**, it also is likely that at least some metadata constitutes a public record under North Carolina law. The devil is in the details (or rather in the data about data), though. The court's holding in *O'Neill*—that if an e-mail is a public record subject to public disclosure, the metadata associated with that e-mail also is subject to public disclosure—has superficial appeal as a bright-line rule, but it actually could be very difficult to implement in practice. As stated above, e-mail may have up to 1,200 metadata properties. And metadata often is not static. At least some of the metadata associated with a particular e-mail may be modified multiple times and even deleted unbeknownst to the record's custodian. For example, some metadata is modified simply by moving an e-mail from one file folder to another. It would be very difficult (if not impossible) for a public agency to preserve all metadata associated with a particular e-mail in the exact form it existed when the e-mail was made or received.

Furthermore, even if it is technically feasible to preserve and produce all the metadata associated with a particular record, it is not at all clear that North Carolina's public records laws require that all of the metadata associated with a particular public record be considered part of that record for public access purposes. A better approach may be for a court to look to the value of the metadata to the record with which it is associated to determine whether or not it should be considered part of the public record. Some metadata, such as spreadsheet cell formulae, is required to comprehend the underlying record. Other metadata, such as e-mail header information, is important to understanding the context of the underlying record. But some metadata simply provides no useful information about the underlying record as a public record. (Click **here** for a broader discussion of potential approaches North Carolina courts may take in addressing this issue.)

Note that the issue raised by the dissenting justices in *O'Neill* of whether or not an e-mail that resides on a public employee's or official's personal computer is a public record is unlikely to arise under North Carolina law. Although no North Carolina courts have addressed this issue, the definition of a public record in North Carolina does not include the same potentially limiting language as that cited to in Washington's PRA. Under North Carolina law, if a record is "made or received pursuant to law or ordinance in connection with the transaction of official business by any agency" it is a public record, regardless of its location. That does not mean, however, that North Carolina courts will not struggle with the broader issue of how to apply public records laws in the digital age.