

Transfer Case

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Washington Court of Appeals Division Three

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No. 357084-0  
~~25015-6-III~~

COURT OF APPEALS OF THE STATE OF WASHINGTON

SPOKANE & EASTERN LAWYER,  
a Washington non-profit corporation,

Appellant,

vs.

HON. LINDA G. TOMPKINS,  
presiding judge, Spokane County Superior Court for  
the State of Washington in and for Spokane County  
(Spokane County Superior Court); DAVID HARDY,  
Administrator, Spokane County Superior Court; and  
the SPOKANE COUNTY SUPERIOR COURT,

Respondents.

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BRIEF OF APPELLANT

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**I. ASSIGNMENT OF ERROR; ISSUE PRESENTED**

**A. Assignment of Error.**

Appellant assigns error to the Order Denying Motion for Inspection and Copying of Public Records Under RCW 42.17.340 of the trial court on March 8, 2006, denying Spokane & Eastern Lawyer's application for disclosure of public records of the Superior Court of the State of Washington. CP 68-70.

**B. ISSUE PRESENTED.**

Are the records sought by Spokane & Eastern Lawyer from the Spokane County Superior Court (Court) consisting of (a) letters, email, and other writings sent to the Washington State Bar Association regarding lawyers practicing in Spokane County, Washington by the court, the presiding judge or any other judge of the Spokane County Superior Court, and (b) letters, email, and other writings directed to the Spokane County Bar Association and or Susan W. Troppmann, its president, by the court, the presiding judge or any

other judge of the Spokane County Superior Court public records of a state agency subject to inspection and copying under the provisions of the Washington Public Disclosure Act, RCW Ch. 42.17?

## II. STATEMENT OF FACTS

On May 30, 2005, Plaintiff made a request of the Court to inspect and copy the following records:

For the period of January 1, 2005 to date, please provide Spokane & Eastern Lawyer with copies of the following public documents.

1. Letters, email, and other writings sent to the Washington State Bar Association regarding lawyers practicing in Spokane County, Washington by the court, the presiding judge or any other judge of the Spokane County Superior Court.

2, Letters, email, and other writings directed to the Spokane County Bar Association and or Susan W. Troppmann, its president, by the court, the presiding judge or any other judge of the Spokane County Superior Court.<sup>1</sup>

Complaint, Verified, CP 3; Appendix A, CP 9; Appendix C, CP 11; and Appendix E, CP 15-16 herein.

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<sup>1</sup> The records so requested are herein referred to as "Records."

CP \_\_\_\_.

The Court, Judge Tompkins and David Hardy, the Court Administrator, have denied the request to inspect and copy the records. Complaint, Appendix B, D and F. CP 10, 13-14, 17-18.

The Superior Court issued an Order to Show Cause. CP 39-40.

The matter was heard by visiting judge Alan Nielson of Stevens County Superior Court on October 20, 2005. An Order was entered on March 6, 2006. CP 68-70. The matter was appealed to the Court of Appeals on March 13, 2006. CP 71-75.

### **III. SUMMARY OF ARGUMENT**

The Records are public records subject to inspection and copying under the Public Disclosure Act. The court is subject to the Public Disclosure Act.

The records are not case or court records, but instead, are records under the PDA.

Spokane & Eastern Lawyer is entitled to have an order allowing for the inspection and copying of

the Records. In addition, Spokane & Eastern Lawyer is entitled to reasonable attorney's fees, costs and penalties.

#### IV. ARGUMENT

##### A. Standard of Review.

A motion for summary judgment presents a question of law reviewed *de novo*. See, e.g., *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003).

##### B. The Washington Public Disclosure Act, RCW Ch. 42.17.

The Public Disclosure Act (or PDA) was passed in 1972 by Washington voters as Initiative 276, now codified in RCW 42.17.<sup>2</sup>

The Public Disclosure Act mandates "disclosure in four areas of government, namely: campaign financing; lobbyist reporting; reporting of elected officials' financial affairs; and public records."<sup>3</sup>

We are concerned only with disclosure of

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<sup>2</sup> Initiative 276, Laws of 1973, ch. 1.

<sup>3</sup> *In re Rosier*, 105 Wn.2d 606, 618, 717 P.2d 1353 (1986) (Andersen, J., dissenting in part, concurring in part).

public records in this case.

"The Washington public disclosure act is a strongly worded mandate for broad disclosure of public records."<sup>4</sup> The PDA declaration of policy includes the statement:

That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

RCW 42.17.010(11).

The declaration of policy also requires that provisions of the act be "liberally construed to promote complete disclosure of all information. . . and full access to public records. . . to assure continuing public confidence of fairness of. . . governmental processes, and. . . to assure that the public interest will be fully protected. . . ." RCW 42.17.010(11).

Declarations of policy in an act, although

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<sup>4</sup> *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

without operative force in and of themselves, serve as an important guide in determining the intended effect of the operative sections. *Hartman v. State Game Comm'n*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975).

Declarations of policy requiring liberal construction are a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined. *Mead School Dist. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 140, 145, 530 P.2d 302 (1975); see also, *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127-28, 580 P.2d 246 (1978).

A liberal construction in this case is made even more compelling because of the voters' intent in passing this initiative. The citizens of this state directly enacted the PDA by adopting Initiative 276 in a 1972 election. Initiative 276 had an "extraordinarily broad range of citizen support". *In re Rosier*, 105 Wn.2d 606, 618-19, 717 P.2d 1353 (1986) (Andersen, J., dissenting in part, concurring in part).

Agencies must make prompt response to requests for public records. RCW 42.17.320. In addition, if the request for public disclosure is denied, "[d]enials of requests must be accompanied by a written statement of the specific reasons" for denial. RCW 42.17.320.

The requesting party may move under RCW 42.17.340(1) for an order requiring the agency to show cause why it has denied this opportunity. The agency has the burden of proof to establish that it relied upon a statutory exemption as a basis for denying public inspection and copying of the record. RCW 42.17.340(1).

**C. The Records Are Subject to Inspection and Copying under the Public Disclosure Act.**

The Court is subject to the Public Disclosure Act. The Records requested in this case are public records under the Act because they are writings relating to conduct and performance of governmental or proprietary functions of the Spokane County Superior Court and they were used by the court in the pursuit of such governmental or proprietary

functions. RCW 42.17.020.

The Court argues that under *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) and *Beuhler v. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003), the Public Disclosure Act does not apply to the Court and to the Records sought to be inspected and copied.

*Nast v. Michels* is not apposite. It does not hold that the Public Disclosure Act does not apply a County Superior Court.

*Beuhler v. Small* is not apposite. It too fails to support the proposition that the PDA does not apply.

*Nast* dealt with the issue whether the PDA applied to "court case files." The court held that it did not.

The court did not hold that the PDA did not apply to the court generally. It said "we hold the PDA does not provide access to court case files." *Id.* at 304.

The Supreme Court explained its holding in

*Nast* in the case of *O'Connor v. Washington State Dept. of Social and Health Services*, 143 Wn.2d 895, 907 - 08, 25 P.3d 426 (2001). There, the court was asked to follow the suggestion in *Nast v. Michels* that the decision on access to public records rests in the sound discretion of the trial court under common law unless it is specifically governed by the Public Disclosure Act, RCW 42.17.020.<sup>5</sup>

The court said:

In that case [*Nast v. Michels*] this court held the Public Disclosure Act did not provide access to court case files even though the Act did not provide an exemption prohibiting their disclosure.

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<sup>5</sup> *Nast v. Michels*, 107 Wn.2d 300, 303-04, 730 P.2d 54 (1986). Presumably, the Respondent was referring to this language in the *Nast* opinion:

Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court. *Nat'l Broadcasting*, at 613 [*Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 1311, 55 L. Ed. 2d 570 (1978)]; see *Nixon*, 435 U.S. at 599, 98 S. Ct. at 1312; *Cowles*, 96 Wash. at 589, 637 P.2d 966 [*Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981)]." [Footnotes omitted.]

The court reasoned the common law provided access to court case files; the Public Disclosure Act (which includes the Public Records Act) did not specifically include courts or court case files in its definitions; and that to interpret the Act to allow access to court case files would undo developed case law protecting privacy and government interests. *Nast* does not aid the position argued by Respondent.

*O'Connor v. Washington State Dept. of Social and Health Services, supra*, 143 Wn.2d 907 - 908.

The Court will focus on the language in the opinion that "the Public Disclosure Act (which includes the Public Records Act), did not specifically include courts or court case files in its definitions."

This language is merely dictum and does not state a rule of any kind. It merely says the Public Disclosure Act does not "specifically include courts" or "court case files."

It does not follow that because courts were not specifically included, they are not covered by the Public Disclosure Act.

In fact, the Public Disclosure Act does not

itemize the public agencies to which the Act applies.

This is quite unlike the Washington Open Public Meetings Act which specifically excludes courts from its application.

The term agency in the PDA is defined in RCW 42.17.020(2) as follows:

"Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

If the legislature wanted to exclude courts from this definition, it would have.

The view has been followed that where the legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and that it is a general rule of construction that the courts have no authority to create, and will not create,

exceptions to the provisions of a statute not made by the act itself. AM JUR STATUTES § 214 citing *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308, 15 I.E.R. Cas. (BNA) 1098, 1999 WL 799882 (1999) *reh'g denied*, *Sara Lee Corp. v. Carter*, 351 N.C. 191, 541 S.E.2d 716, 1999 WL 1325834 (1999).

In the Open Public Meetings Act in definition of "public agency," the legislature specifically exempts courts. RCW 42.30.020 provides:

(1) "Public agency" means:

a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature; [Emphasis added.]

In *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003), the court held that an attorney had no right to a judge's computer files, they were not properly part of the case files of the court.

All *Beuller* does is to extend the notion that the Act does not extend to case files including those parts of case files which to not become a part of the case file and that as to the common law

of case files, a judge's notes as to a case are not part of the case file which is to be made public. *Id.*

In conclusion, the term agency under the PDA includes the Court, the Court Administration and the Presiding Department of the Court.

Thus, the issue is whether the Records in question are subject to disclosure under the Public Disclosure Act.

**D. The Records Sought to be Inspected and Copied are subject to Inspection and Copying under the Public Disclosure Act.**

The Records here do not fall under some common law court records disclosure limitations nor are they court case file records.

They are records regarding the public, non-judicial functioning of the court. They are public records subject to inspection and copying.

The Records in question must be allowed to be inspected and copied. They are not case files and they are not a part of case files.

In fact, the Records have nothing to do with

the judicial functions of the court. They have everything to do with the court as a public agency not acting in a judicial capacity.

The PDA requires that "[e]ach agency, in accordance with published rules, shall make available for public inspection and copying all public records." RCW 42.17.260(1).

Both the terms "agency" and "public records" are defined in the act. RCW 42.17.020(1), (26). If these definitions are satisfied, then the Act applies absent a specific exemption under the PDA, RCW 42.17.310, and absent an unreasonable invasion of personal privacy. *In re Request of Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986).

Therefore, if the definitions of "agency" and "public records" are met, the PDA applies. Here, the PDA applies. The records must be disclosed.

**E. Attorney's Fees and Penalties.**

Plaintiff is entitled to its reasonable attorney's fees and penalties as a result of the failure of the Court to make the records available

for inspection and copying. RCW 42.17.340(4).

**V. CONCLUSION**

The inspection and copying of the records requested should be ordered by the court. The records sought are public records. They are not case records or court records.

Spokane & Eastern Lawyer should also be awarded a reasonable attorney's fee and penalties for of the Spokane County Superior Court to disclose the records.

Respectfully submitted this 26<sup>th</sup> day of May, 2006.

EUGSTER LAW OFFICE PSC

By Stephen K. Eugster  
Stephen K. Eugster, WSBA#2003  
Attorney for Plaintiff

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I, the undersigned, certify that on the 26<sup>th</sup> day of May, 2006, I caused a true and correct copy of the foregoing to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following persons:

James Emacio  
Spokane County Prosecuting Attorney  
Civil Division  
1115 W. Broadway  
Spokane, WA 99260  
By Hand Delivery

  
\_\_\_\_\_  
Cynthia A. Lawson