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NO. 61466-5-I

OCT 24 2008

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

HON. MICHAEL F. MORGAN, Individually and in his Official Capacity  
as Presiding Judge of the Municipal Court of Federal Way,

Petitioner/Appellant/Cross-Respondent

v.

CITY OF FEDERAL WAY, a code municipality; and the  
CITY ATTORNEY FOR FEDERAL WAY,

Respondents/Cross-Appellants

and

Intervenor/Respondent

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Kimberly Prochnau)

**BRIEF OF AMICUS CURIAE**  
**THE WASHINGTON COALITION FOR OPEN GOVERNMENT**

Duane M. Swinton, WSBA No. 8354  
Steven J. Dixon, WSBA No. 38101  
WITHERSPOON, KELLEY,  
DAVENPORT & TOOLE  
422 W. Riverside, Suite 1100  
Spokane, WA 99201  
509-624-5265

Attorneys for *Amici Curiae* Washington  
Coalition for Open Government

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## **I. IDENTITY AND INTEREST OF AMICUS**

### **A. THE WASHINGTON COALITION FOR OPEN GOVERNMENT**

The Washington Coalition for Open Government ("WCOG") is a Washington nonprofit, nonpartisan organization that represents a cross-section of the Washington public, press and government and is dedicated to promoting the public's right to know in matters of public interest.

### **B. AMICUS' INTEREST IN THIS CASE**

Amicus has a vested interest in the long-term viability of the Public Records Act to enable the people to evaluate the actions of the agencies and officials who serve them. In the present case, amicus is particularly concerned about ensuring proper construction and treatment of the attorney work product and attorney-client exemptions as they have been incorporated into the Public Records Act, and that a broad "separation of powers" exemption is not written into the statute through common law interpretation.

The Public Records Act ("PRA") is a broadly worded mandate for access whose exceptions and exemptions must be read narrowly. The attorney work product doctrine is meant to be applied to the legal conclusions and advice of attorneys and is not designed to shelter the factual statements gathered by an investigator when that investigation lacks any legal advice. Similarly, the attorney-client privilege does not protect communications simply because they are drafted by an attorney; in order to be protected, an

attorney-client relationship must exist and the communications must be legal in nature. Finally, amicus is concerned about applying a separation of powers doctrine that does not exist in the text of the PRA to preclude public access to each and every document that mentions the judiciary, even where the records are clearly administrative in nature. The PRA contains adequate safeguards for privacy and protection of certain records, but it is not meant to exempt an entire class of records based upon a narrow interpretation of its definitional sections.

Amicus has an interest in each of these areas of statutory interpretation within the PRA because the results impact amicus' members and the public at large. These issues of statutory construction are issues of continued litigation in Washington and must be adjudicated correctly to ensure faithful adherence to the legislative history of the PRA.

## **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

This case involves the requested disclosure of a private investigator's summary report, consisting solely of factual notes and witness statements, regarding an administratively mandated investigation into a hostile workplace complaint in the City of Federal Way's Municipal Court. Appellant, the Honorable Michael F. Morgan ("Judge Morgan"), seeks to prevent disclosure of a completed investigation report issued by the City of Federal Way's ("the City's") hired investigator, Ms. Amy Stephson (the "Stephson Report"). Ms.

Stephson conducted an investigation into working conditions in the City's Municipal Court system.

Upon learning of the report's existence, the *Tacoma News Tribune* filed a public records request under RCW 42.56, *et. seq.*, for the Stephson Report. After reviewing the document, the City agreed to release the requested record, and notified Judge Morgan of its intention to do so. Judge Morgan sought an injunction to permanently preclude release of the record, but the trial court, after an *in camera* review of the report, denied his request. Judge Morgan now appeals to this Court.

Absent a valid exemption from the Act, the Stephson Report is a public record subject to disclosure. Neither the attorney work product doctrine nor the attorney client privilege, as relied upon by Judge Morgan, are applicable to the Stephson Report. The attorney work product doctrine is inapplicable where the document is prepared in the ordinary course of business and without the threat of pending litigation. The attorney-client protection cannot be invoked where the person claiming the privilege lacks an attorney-client relationship with the investigator, the report lacks any legal conclusions or advice, and the claimed "attorney" was simply an investigator who happened to be an attorney and not a person who was representing a client in this matter. Because the document in dispute is a public record, and because neither of Judge Morgan's claimed exemptions apply to the record,

this Court should affirm the trial court's determination that the Stephson Report is subject to disclosure under the PRA.

Nor does an asserted blanket "separation of powers" exemption protect the Stephson Report from disclosure. The PRA does not contain a stand-alone exemption for all "court documents" regardless of their content, and the Washington State Supreme Court case law interpreting the PRA on this issue does not support such a broad proposition. Although some specific court documents may be protected from disclosure (i.e., items in a court case file, a judge's notes regarding his or her impressions of a case, or other internal, legal memoranda), there is no outright prohibition against disclosure for all records relating to a court in the statute or common law.

This Court must uphold the trial court's decision because it properly balanced the countervailing priorities of attorney-work product protection, attorney-client communications, and separation of powers: 1) no attorney work product protection attaches to factual summaries that lack legal opinions or advice; 2) no attorney-client privilege attaches to records where the party asserting the privilege fails to establish an attorney-client relationship and the content of the document to be protected is not legal in nature; and 3) the doctrine of separation of powers does not exempt from public access records that relate to a court that are administrative in nature.

Amicus requests that this Court uphold the Superior Court decision and allow release of the requested record.

### III. STATEMENT OF THE CASE

Judge Morgan is an elected judge of the Federal Way Municipal Court. CP 10. In January, 2008, the Municipal Court came under scrutiny for alleged misconduct that took place at an unofficial holiday party attended by several Municipal Court employees. The City hired Amy Plenefisch, a local attorney, to investigate alleged misconduct at the party and to provide legal advice to the City. CP 70. Ms. Plenefisch's legal conclusions and advice were submitted to the City. CP 179-187.

During the term of the investigation, a Municipal Court employee filed a complaint with the City regarding hostile work conditions within the Municipal Court. CP 70-71, ¶ 4. The City became aware of the complaint on January 17, 2008. CP 71, ¶ 5. That same day, pursuant to the City's Anti-Harassment Policy, the City initiated an investigation into the allegations. CP 189. The City offered to hire an investigator to review the facts surrounding the complaint, but did not hear back from Judge Morgan. On January 22, 2008, without having heard from Judge Morgan, the City selected Amy Stephson to conduct the investigation. CP 71, ¶ 5; CP 191. The scope of Ms. Stephson's investigation was limited to discovery of the factual circumstances

underlying the complaint and did not extend to rendering legal advice on the merits. CP 70-71, ¶ 4.

Ms. Stephson encountered pushback from Judge Morgan during the investigation. As part of her investigation, Ms. Stephson interviewed Judge Morgan on February 5, 2008. CP 71, ¶ 7; CP 172. After this meeting, Ms. Stephson received a call from a Municipal Court employee who informed her that Judge Morgan had spoken with this employee about the investigation. CP 71, ¶ 7; CP 172-73. When Ms. Stephson contacted Judge Morgan regarding his conduct, Judge Morgan responded by attempting to terminate Ms. Stephson's investigation altogether. CP 71, ¶ 7; CP 172-173.

Judge Morgan was angered by what he perceived to be "the investigator's" enlarged scope, and wrote directly to Ms. Stephson to tell her so:

I agreed to an independent investigation and the independence of this investigation was compromised when you ... inserted yourself on your own initiative into a workplace matter.

CP 198. Clearly, Judge Morgan did not view Ms. Stephson as his, or the Municipal Court's, attorney.

Under instruction from the City Attorney, Ms. Stephson completed her report summarizing the factual nature of her investigation. Judge Morgan did not approve of the report, nor was he aware it had even been produced until several days later. CP 11.

The *Tacoma News Tribune* filed a public records request for the Stephson Report on February 22, 2008. The City informed Judge Morgan that the City would release the record by March 6, 2008, unless the judge obtained an injunction precluding it from doing so. CP 72, ¶ 10. Judge Morgan obtained an ex parte injunction on March 5, 2008, which prohibited disclosure of the record. CP 49, ¶ 4.9.

At a show cause hearing on March 19, 2008, the Honorable Kimberly Prochnau denied Judge Morgan's request for injunctive relief. CP 101. Judge Prochnau ruled that the Stephson Report was not subject to protection under either the attorney work product or attorney-client doctrines. An Order memorializing Judge Prochnau's oral ruling was entered on March 26, 2008. CP 101-103. Judge Morgan appealed the March 26, 2008 Order. CP 106.

#### IV. STATEMENT OF ISSUES

1. Is a public record that relates to conduct of a judicial official exempt from disclosure under a separation of powers doctrine simply because the subject of the document is a judicial employee where the document was prepared pursuant to a mandatory administrative policy, and the document contains a factual summary of events and statements gathered in an independent investigation by non-court personnel?
2. Does the attorney work product doctrine under RCW 42.56.290 exempt disclosure of an otherwise public record where the document is prepared in the ordinary course of business, consists solely of factual statements and contains no legal conclusions, advice or analysis?

3. Does the attorney-client privilege exempt disclosure of an otherwise public record where the privilege is claimed by a person who was not the client of the attorney who drafted the document, where the putative client lacked a subjective belief that he was represented by that attorney, where the document lacks any legal conclusions, and where the attorney investigator was acting solely in a fact-gathering role?

## V. ARGUMENT

### A. **THE PUBLIC RECORDS ACT MANIFESTS THE LEGISLATURE'S INTENT TO PROMOTE ACCESS AND OPEN GOVERNMENT.**

The Court has repeatedly recognized the important government accountability function that the PRA serves. Among the Court's many decisions is *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243 (1994), in which the Court said:

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests.

*PAWS II*, 125 Wn.2d at 251. Furthermore, the Court noted, "In the famous words of James Madison, 'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.'" *Id.*

It is from these open government and representative democracy principles that statutory interpretation of the PRA flows. *See Daines v.*

*Spokane County*, 111 Wn. App. 342, 347 (2002) (“The purpose of the [PRA] is to keep public officials and accountable to the people.”) The Act itself states three times that courts should interpret the PRA liberally to effectuate disclosure. *See King County v. Sheehan*, 114 Wn. App. 325, 338 (2002). The PRA presumes disclosure and withholding documents is the exception. *See Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 793 (1990). Accordingly, courts are required to construe the PRA’s provisions liberally and to interpret the exemptions narrowly. RCW 42.56.030.

In short, the PRA is a clearly worded mandate for public access. At issue in this case is a requestor's fundamental right to access and the struggles against bureaucratic obstacles and ongoing agency refusal to properly comply with statutory requirements. Based upon the history of the statute and the unequivocal preferences for disclosure built into the Act's text, it is this Court's role to safeguard the legislative intent of the drafters and the clear will of the people.

**B. NO BLANKET SEPARATION OF POWERS EXEMPTION APPLIES TO RESTRICT DISCLOSURE OF ALL RECORDS MAINTAINED BY A COURT.**

Judge Morgan asserts that the Stephson Report is exempt from disclosure because it is maintained exclusively for the benefit of the Municipal Court, and, because the Municipal Court is not an "agency" under the Act, the Report should be privileged. Because there is no such blanket

exemption and no good cause exists to deny disclosure, the Stephson Report should be released to the *Tacoma News Tribune*.

In interpreting the PRA in the context of judicial officers, Washington courts have only protected from disclosure those documents that are inherently judicial in nature. See, e.g., *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), (court case files); *Beuhler v. Small*, 115 Wn. App. 914 (2003) (a judge's internal notes about past cases); and *Spokane & Eastern Lawyers v. Tompkins*, 136 Wn. App. 616, 150 P.3d 158 (2007) (a court's legal communications that deal directly with attorney conduct and performance). These documents are inherently judicial and deal directly with the legal and judicial performance of the court and court officials.

Rather than precluding access to public records, the purpose of the separation of powers doctrine "is to prevent one branch of government from aggrandizing itself or encroaching upon the fundamental functions of another." *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002), quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). A violation of the separation of powers occurs when "the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *State v. David*, 134 Wn. App. 470, 479, 141 P.3d 646 (2006) (quoting *Moreno*, 147 Wn.2d at 505-06). The City's planned disclosure of the Stephson Report does not threaten to violate the separation of powers; no one branch of government

is aggrandizing itself over another or invading the integrity of a separate branch. The City is properly exercising discretion over a record it created, relied upon and possesses; there is simply no factual predicate to implicate the separation of powers doctrine in the Stephson Report's release. The Stephson report was not created by or for Judge Morgan or the Federal Way Municipal Court.

Because there is no factual basis for Judge Morgan's argument regarding the separation of powers, this is not an appropriate case to address either the application of the PRA to the judicial branch or the continuing validity of *Nast*.<sup>1</sup>

Courts, like governmental bodies, perform administrative functions as well as their judicial duties. These administrative procedures have nothing to

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<sup>1</sup> By citing *Nast* for the proposition that judicial case files are exempt from disclosure under the PRA, WCOG does not intend to comment on the accuracy or correctness of *Nast's* holding. Because the *Nast* Court relied upon a strained reading of the definitional section of the PRA, as opposed to separation of powers principles, to reach its conclusion, the current validity of that holding is suspect. Nevertheless, even if the separation of powers doctrine acted to abrogate access to public records under the PRA, the doctrine would preclude access only to records that are judicial in nature and not the type of administrative records that are involved in the case at bar. Amicus is also aware of a direct challenge to *Nast's* continuing viability in a related case, *City of Federal Way v. Koenig*, King County Superior Court Cause No. 08-2-21328-5 KNT, in which the appellant in that case has filed a Notice of Appeal for direct review to the Washington Supreme Court to directly overturn the *Nast* decision. In light of these challenges to *Nast*, WCOG wants to be specific in that it takes no position at this time as to the validity of the *Nast* opinion and cites it only as a current statement of the law.

do with the adjudication of legal proceedings or the participation in the judicial process of the lawyers and litigants who appear before the judges. Instead, these routine, administrative processes occur independent of the courts' judicial function and are not entitled to any statutory or common-law exemption from disclosure.

In the present case, the Stephson Report is an example of a document created pursuant to an administrative procedure whose disclosure must be allowed under the PRA. The document is not inherently judicial; it does not involve documents contained in court litigation files (such as a case file in *Nast*), the personal thoughts and notes of an elected judge on a particular case (such as a computer record in *Buehler*), or the necessary legal communication about the conduct of lawyers (such as a letter to the Bar Association in *Spokane & Eastern*). In short, no justification exists to withhold release of the Stephson Report under some overarching "separation of powers" or "judicial document" privilege. The Stephson Report should be disclosed as requested to the *Tacoma News Tribune*.

**C. THE STEPHSON REPORT IS NOT ATTORNEY WORK-PRODUCT PREPARED IN ANTICIPATION OF LITIGATION.**

1. *Where a Document is Created in the Ordinary Course of Business Without Regard to Potential Litigation, that Document is Not Protected from Disclosure by the Attorney Work Product Doctrine.*

The scope of the PRA's protection of attorney work product material mirrors that of Washington's Civil Rule 26(b), which governs pre-trial discovery in general civil litigation. RCW 42.56.290; *Limstrom v. Ladenburg*, 136 Wn.2d 595, 608-09, 963 P.2d 869 (1998). In order to be protected by the work product doctrine, the document must be created in reasonable anticipation of litigation. *Soter v. Cowles Publ'g Co.*, 131 Wn.App. 882, 893, 130 P.3d 840 (2006) ("*Soter I*"), aff'd 162 Wn.2d 716, 174 P.3d 60 (2007). Factual matters contained within an otherwise "privileged" or "exempt" document are still subject to disclosure under the PRA. Where the documents sought are prepared in the ordinary course of business, without the threat of litigation, those documents are not protected by the attorney work product doctrine. *Soter I*, 131 Wn.App. at 896.

In the present case, the Stephson Report was prepared according to an existing Anti-Harassment Policy. The record shows that Patricia Richardson, Federal Way City Attorney, ordered Ms. Stephson to compile her report pursuant to the Anti-Harassment Policy. CP 70-71, ¶ 4. The City did not exercise discretion in instigating the investigation into the hostile workplace claim; the investigation and subsequent report were required by the terms of the Anti-Harassment Policy. Where an agency would have created a report pursuant to its own administrative procedures, regardless of the threat of litigation, "then the document is not work product." *Soter I*, 131 Wn.App. at

896. In the present case, the City hired Ms. Stephson pursuant to its ordinary and established course of business; Ms. Stephson would have been hired regardless of the threat of litigation.

2. *The Work Product Doctrine Does Not Prohibit Disclosure of Factual Material.*

The Stephson Report consists solely of facts of the investigation and contains no legal conclusions, opinions or advice. The work product doctrine is aimed at preventing access to a lawyer's legal thoughts and conclusions and does not apply to the underlying factual matter of the case. The four dissenters in *Soter* properly analyzed the boundaries of the work product exemption:

[T]he [work product] exemption is intended to protect either communications between an attorney and client or materials that reveal an attorney's thoughts, strategies, or mental impressions, relevant to representing or communicating with an agency. **We did not hold the exemption was intended to protect materials containing factual information of public interest and mandated for disclosure under the act [referring to *Limstrom*, 136 Wn.2d at 610].** Work product is not an absolute protection from disclosure, particularly in the context of the broad mandate for public access to agency documents.

*Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 760, 174 P.3d 60 (2007) ("*Soter II*"). Although written about the private investigator's notes in *Soter*, the dissent's statements can be applied with equal force to Ms. Stephson's report at issue here:

The documents in this case were created by an outside investigator hired to objectively uncover the facts surrounding the incident. Because materials were created prior to threat of litigation, the interview and witness [sic] in no way reflect an attorney's inner mental impressions and thoughts...Responses to questions about "who are you?" and "what do you know about the incident?" in no way reflect the type of matter the exemption was intended to protect.

*Id.* at 760-761.

The attorney work product exemption is not meant to exclude factual material from the general public. The statute's broadly worded mandate for access is frustrated by an expansive view of the exemptions to the Act as opposed to the narrow construction found within the statute's text.

**D. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT PROHIBIT RELEASE OF THE STEPHSON REPORT.**

*1. Ms. Stephson Was Not Judge Morgan's Attorney for Purposes of Her Investigation.*

Judge Morgan cannot meet Washington's threshold test for the establishment of an attorney-client relationship. "The essence of the attorney-client relationship is whether the attorney's advice or assistance is sought and received on legal matters." *Bohn v. Cody*, 119 Wn.2d 357, 363 (1992). In the present case, Judge Morgan neither sought nor received legal advice or assistance. It is beyond dispute that Judge Morgan did not initially authorize Ms. Stephson's investigation of the Municipal Court. It is also undisputed that Judge Morgan himself was the focus of Ms. Stephson's investigation. Finally,

Judge Morgan consistently referred to Ms. Stephson as "the investigator" and rebuked her for providing unsolicited advice outside the scope of her purely investigatory role. CP 71, ¶ 7; CP 172-173; CP 198.

Moreover, the existence of an attorney-client relationship often turns on the reasonable belief of the party asserting the relationship. *In re McGlothen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). Whether or not an attorney-client relationship was formed "may be implied by the parties' conduct." *Bohn*, 119 Wn.2d at 363, *citing McGlothen*, 99 Wn.2d at 522. Judge Morgan's clear conduct manifests his belief that Ms. Stephson was merely an "investigator" and not his attorney. Judge Morgan took offense to actions he believed Ms. Stephson took that were above and beyond the scope of an investigatory role, drafting an e-mail to his bailiff which stated that "from my perspective, investigators are empowered to investigate but are not in the position of offering unsolicited directives to managers." CP 195. Judge Morgan further explained that, "i [sic] believe the investigator overstepped her authority and this is one of the reasons I am directing this particular investigation to end." CP 197. Judge Morgan's contemporaneous e-mails reflect his true beliefs as to Ms. Stephson and her role: she was an investigator whose job it was to report the facts, not an attorney, whose job it would have been to marshal those facts and render legal advice. Because Ms. Stephson

did not act as Judge Morgan's attorney, the Stephson Report is not protected by attorney-client privilege.

2. *When an Attorney Acts Simply as a Factual Investigator, no Attorney-Client Privilege Attaches to her Communications.*

Assuming for the sake of argument that Judge Morgan could claim Ms. Stephson was representing him or the Municipal Court during her investigation, the attorney-client privilege still does not attach to her report. For an attorney-client relationship to exist, the attorney must be discharging his or her duties as a legal counselor. When the attorney is simply employed as an investigator or fact-finder, no attorney-client privilege exists to protect those communications: "Communications between an attorney and client are not privileged if the attorney is simply giving business or financial advice, as opposed to legal advice." Karl Tegland, *5A Washington Practice, Evidence Law and Practice*, § 501.15 (2007).

Ms. Stephson's occupation as an attorney was incidental to her role as an investigator. She could just have easily been an architect, engineer, school teacher or custodial employee: her job as a fact-finder was the same regardless of her outside vocation. As a result, her report lacks legal conclusions, advice or opinions. The Stephson Report is barren of legal recommendations for how to proceed and contains simple factual accounts of her investigation. Because Ms. Stephson's role as investigator in this case was wholly removed from her

occupation as an attorney, her report is similarly removed from the scope of privileged and protected attorney-client communications.

## VI. CONCLUSION

Amicus respectfully submits that this Court should uphold the Superior Court's dismissal of Judge Morgan's temporary injunction and allow the City of Federal Way to release the Stephson Report as it has intended to do since February, 2008. The PRA's broadly worded mandate for access demands consistent application in the face of challenge. Judge Morgan's cited exemptions fail as a matter of law: 1) no blanket protection places administratively created documents beyond the scope of the PRA merely because they relate to the judiciary; 2) the attorney work product doctrine does not protect documents prepared in the ordinary course of business and without the threat of litigation; and 3) the attorney-client protection does not attach to documents that provide no legal advice and where the attorney-author was not working in her capacity as a lawyer at the time the document was created.

For the reasons stated herein, the Court should DENY Judge Morgan's Appeal and allow release of the Stephson Report to the *Tacoma News Tribune*.

RESPECTFULLY SUBMITTED this ~~23<sup>rd</sup>~~ day of October, 2008.

WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.

By 

Duane M. Swinton, WSBA No. 8354  
Steven J. Dixon, WSBA No. 38101  
Attorneys for Washington Coalition for  
Open Government

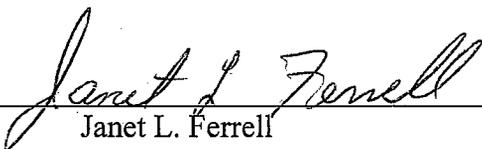
**DECLARATION OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 23<sup>rd</sup> day of October, 2008, I caused a true and correct copy of the foregoing document, "Brief of Amicus Curiae The Washington Coalition for Open Government," to be delivered by U.S. mail to the following counsel of record:

John B. Sochochet  
DORSEY & WHITNEY LLP  
1420 Fifth Avenue, Suite 3400  
Seattle, WA 98101  
*Attorneys for Petitioner/Appellant  
Michael F. Morgan*

P. Stephen DiJulio  
Ramsey Ramerman  
FOSTER PEPPER PLLC  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101-3299  
*Attorneys for Respondents The City of  
Federal Way and the City Attorney of  
Federal Way*

James Beck  
GORDON, THOMAS,  
HONEYWELL, MALANCA,  
PETERSON & DAHEIM LLP  
Wells Fargo Plaza  
1201 Pacific Avenue, Suite 2100  
Tacoma, WA 98402  
*Attorneys for Intervenor Tacoma  
News, Inc. d/b/a/ The News Tribune*

  
\_\_\_\_\_  
Janet L. Ferrell