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SUPREME COURT  
OF THE STATE OF WASHINGTON

Court of Appeals No. 61466-5-I

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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

TACOMA NEWS, INC. d/b/a THE NEWS TRIBUNE,

Intervenor/Respondent

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Kimberly Prochnau)

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**APPELLANT'S RESPONSE TO BRIEF OF AMICUS CURIAE  
WASHINGTON COALITION FOR OPEN GOVERNMENT**

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## I. INTRODUCTION

Judge Morgan, individually and in his official capacity as presiding judge of the Federal Way Municipal Court, submits the following response to the brief of Amicus Curiae Washington Coalition for Open Government (“WCOG”). For the most part, WCOG makes the same arguments the Executive Branch of the City of Federal Way and Tacoma News have already made in their briefs. The only significant new argument raised by WCOG—that the PRA applies to courts—cannot be raised by an amicus because it was not put at issue by the parties, and it is also contrary to Washington law. WCOG also misstates both the record and the law with respect to the Stephson Report’s status as an attorney-client privileged communication and work product. Because the Federal Way Municipal Court is not an “agency” under the Public Records Act (“PRA”), the Stephson Report is not a public record and therefore is not subject to the PRA. Moreover, even if the report qualified as a public record, it would be exempt from disclosure as both work product and attorney-client privileged material.

## II. ARGUMENT

### A. **The PRA does not apply to court documents.**

WCOG first asserts that “no blanket separation of powers exemption applies to restrict disclosure of all records maintained by a court.” WCOG Br. at 9. This is not at issue in this case. None of the

three parties in this case—two of which are asking this Court to release the Stephson Report—has asserted that court documents are subject to the PRA. Rather, both the Executive Branch and Tacoma News have argued that the Stephson Report is subject to the PRA as an Executive Branch document. The parties have addressed and made their arguments regarding this dispute in their briefing, but nowhere have the parties disputed that court documents are not subject to the PRA. Consequently, whether court or judicial branch documents are subject to the PRA is simply not an issue in this case, and, as an amicus curiae, WCOG “cannot raise an issue not properly raised by a party to the case.” *State v. Xiong*, 164 Wn.2d 506, 514, 191 P.3d 1278 (2008) (citing *Madison v. State*, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007)).

Even if it were properly raised by a party, WCOG’s assertion that the Court documents may be subject to the PRA is contrary to established Washington law. In *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), this Court explicitly held that, because “[t]he PDA definitions do not specifically include *either* courts *or* case files[, a] reading of the entire public records section of the PDA indicates and we find that they [i.e., *either* courts *or* case files] are not within the realm of the PDA.” *Id.* at 306 (emphasis added). WCOG claims that “Washington Courts have only protected from disclosure those documents that are inherently judicial in nature.” WCOG Br. at 10. This statement flies in the face of the plain

language of *Nast*, which unambiguously states that neither courts nor case files are “within the realm of the” PRA (then called the PDA). *See Nast*, 107 Wn.2d at 306. If the *Nast* court had wanted to limit its holding to case files, it could have stated that “*court case files* are not within the realm of the [PRA].” Instead, this Court stated that neither courts nor case files are within the realm of the PRA.<sup>1</sup>

WCOG’s characterization of *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 621, 150 P.3d 158, *rev. denied* 162 Wn.2d 1004 (2007), is even more misleading than WCOG’s characterization of *Nast*. According to WCOG, *Spokane & Eastern Lawyer* held that “a court’s legal communications that deal directly with attorney conduct and performance” are not subject to the PRA. WCOG’s Br. at 10. In fact, *Spokane & Eastern Lawyer*, following *Nast*, explicitly determined that “the Spokane County Superior Court is not an agency under the PDA.” *Id.* at 622. This is a far broader holding than the narrow result into which WCOG attempts to pigeonhole the Court of Appeals’ decision.

The requestor in *Spokane & Eastern Lawyer* had already attempted to distinguish *Nast* by claiming that *Nast*’s reference to “the judiciary and

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<sup>1</sup> In a footnote, WCOG also expresses its view that this Court should overrule *Nast* because *Nast* supposedly “relied upon a strained reading of the definitional section of the PRA . . . .” WCOG’s Br. at 11 n.1. *Nast*’s straightforward analysis of the PRA is not “strained.” Moreover, it has been more than 22 years since this Court decided *Nast*, and during that time the Legislature and the public have both had the opportunity to legislatively overrule *Nast*. Neither has taken advantage of that opportunity, and there is no sound reason for this Court to overrule its own long-established decision.

its case files” was dicta. *Id.* at 621 (emphasis added). The Court of Appeals properly rejected this argument, explaining as follows: “The *Nast* court could have decided the issue on the narrow grounds that court files are not subject to the PDA because other avenues provide access to the files. But it did not.” *Id.* Instead, *Spokane & Eastern Lawyer* correctly read *Nast* as squarely addressing the question of whether or not courts are agencies subject to the PRA and unambiguously holding that they are not. *See id.* As explained in Judge Morgan’s opening brief, the Stephson Report is a Municipal Court document—not an Executive Branch document—and it is therefore not covered by the PRA under both *Nast* and *Spokane & Eastern Lawyer*. *See* Judge Morgan’s Br. at 20-34; *see also* Judge Morgan’s Reply Br. at 5-16.

**B. The Stephson Report is work product.**

WCOG claims that the Stephson Report is not work product because it was prepared “in the ordinary course of business” and because it is “solely factual.” Both arguments are misplaced. First, WCOG utterly ignores the admissions of both the Executive Branch and Tacoma News that the Stephson Report was a *Faragher-Ellerth* investigation. *See* CP 65, 153, 279; *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). A central purpose of a *Faragher-Ellerth* investigation is preparation for litigation; as

such, the Stephson Report is work product. *See* Judge Morgan's Br. at 38-40; *see also* CP 12-13.

Next, WCOG argues that a report that "consists solely of facts of the investigation and contains no legal conclusions, opinions or advice" cannot be work product. *See* WCOG's Br. at 14. Remarkably, to support this statement, WCOG cites the *dissent* in *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 174 P.2d 60 (2007). *Soter's* dissent would have declined to extend work product protection to the factual investigation of a non-attorney investigator hired by an attorney in anticipation of litigation. *See Soter*, 162 Wn.2d at 760 (C. Johnson, J., dissenting). This Court's decision in *Soter*, however, held that these materials were protected as work product. *See id.* at 739-42. Indeed, this Court held that "[t]he work product rule protects *documents* and tangible things prepared in anticipation of litigation . . . ." *Id.* at 742. As such, even if it were strictly factual, and even if it were not prepared by a licensed attorney, the Stephson Report constitutes work product and is exempt from PRA disclosure.

**C. The Stephson Report is protected by attorney-client privilege.**

WCOG argues that the Stephson Report is not protected by attorney-client privilege because, in WCOG's view, Stephson was not the Municipal Court's attorney, and the report is factual rather than legal. This Court should reject both arguments. City Attorney Richardson

represented the Municipal Court in connection with court employment issues. Richardson “subcontracted” a legal task regarding Municipal Court employment issues to Stephson, also an attorney. The fact that Stephson was not directly retained by Judge Morgan (acting in his official capacity as presiding judge) is immaterial to her status as the Municipal Court’s attorney—she was hired as an attorney to perform work in connection with a Municipal Court employment issue and was therefore the Municipal Court’s attorney.<sup>2</sup>

WCOG also argues that attorney-client privilege does not apply because Stephson was an investigator rather than an attorney. Indeed, WCOG goes so far as to argue that “Ms. Stephson’s occupation as an attorney was incidental to her role as an investigator. She could just [as] easily [have] been an architect, engineer, school teacher, or custodial employee: her job as a fact-finder was the same regardless of her outside vocation.” WCOG’s Br. at 17. This is a gross distortion of both the facts and logic. If Stephson’s status as a licensed attorney and years of legal experience were “incidental to her role as an investigator,” there would have been no reason for City Attorney Richardson to have hired Stephson

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<sup>2</sup> The Executive Branch has argued that Richardson was also acting as attorney for the Executive Branch in connection with Municipal Court employment issues. Judge Morgan disputes this, *see generally* Judge Morgan’s Br. at 20-34, but whether Richardson represented the Executive Branch in addition to the Municipal Court is irrelevant for purposes of attorney-client privilege. Even if both the Municipal Court and the Executive Branch were Richardson’s clients in connection with court employment issues, attorney-client privilege attaches. *See id.* at 43-45.

to conduct her investigation and prepare her report. A non-attorney investigator (who in WCOG's view, "could just [as] easily [have] been an architect, engineer, school teacher, or custodial employee") would almost certainly have been less expensive than Stephson, and it would likely have been a misuse of taxpayer dollars for City Attorney Richardson to pay an attorney to do a job if that job could "just as easily" have been done by a non-attorney.<sup>3</sup>

Finally, WCOG claims that Judge Morgan's email references to Stephson as an "investigator" preclude Stephson from acting as an attorney. This argument is not consistent with the practical workings of attorney-client relationships. Judge Morgan's word choices do not strip Stephson of her status as the Municipal Court's attorney. WCOG quotes two portions of the record where Judge Morgan criticizes Stephson for overstepping what he perceived to be the scope of her representation, *see* WCOG Br. at 6, 16 (quoting CP 195, 197, 198), even going so far as to posit that "[c]learly, Judge Morgan did not view Ms. Stephson as his, or the Municipal Court's attorney." WCOG's Br. at 6. But Judge Morgan's statements show nothing of the sort. The fact that a client criticizes his or her attorney for overstepping what the client perceives to be the scope of

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<sup>3</sup> WCOG also claims that the Stephson Report "lacks legal conclusions, advice or opinions" and that it "is barren of legal recommendations for how to proceed and contains simple factual accounts of her investigation." WCOG's Br. at 17. It is surprising that WCOG would make such bold, decisive statements regarding a report that is filed under seal and that WCOG has not seen.

the attorney's representation in no way impugns the fact of an attorney-client relationship. Even though the scope of her representation was limited and even the subject of disagreement between her and Judge Morgan, Stephson was the Municipal Court's attorney, and the report she prepared is privileged.

### III. CONCLUSION

WCOG distorts both the factual record and Washington law. The Stephson Report is a Municipal Court document and as such is not subject to the PRA. Independently, the record shows that the report was prepared in anticipation of possible litigation *and* is an attorney-client communication; under either doctrine, it is exempt from disclosure. This Court should reverse the trial court and hold that the Stephson Report may not be disclosed in response to a public records request.

RESPECTFULLY SUBMITTED, this 28th day of January, 2009.

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**DECLARATION OF SERVICE**

BY RONALD N. CARFENTE

I declare that on January 28, 2009, I caused true and correct copies  
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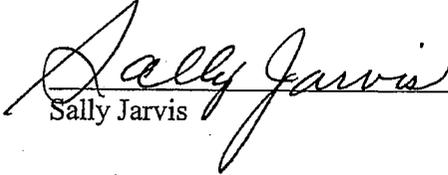
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I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

Dated this 28<sup>th</sup> day of January, 2009.

  
Sally Jarvis