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STATE OF WASHINGTON

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Case No. 82288-3

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SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF FEDERAL WAY, *Respondent*,

v.

DAVID KOENIG,  
*Appellant.*

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ANSWER TO BRIEF OF AMICUS CURIAE  
WASHINGTON ATTORNEY GENERAL

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Appellant David Koenig respectfully submits the following arguments in answer to the *Brief of Amicus Curiae Attorney General*. (hereafter “Amicus AG Br.”).

The Attorney General (“AG”) shares Koenig’s concern that a blanket exemption for non-case court records is unacceptable, and that the Court must reject the City of Federal Way’s sweeping interpretation of *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). Amicus AG Br. at 8. The AG recommends that this Court provide access to the public records of the judicial branch and local courts by either (i) recognizing that the Public Records Act, Chapter 42.56 RCW (“PRA”), applies to records at issue in this case, or (ii) providing guidance, in the form of rules, to ensure public access under the common law. Amicus AG at 13.

While the AG’s commitment to government transparency is laudable, and its suggestions are generally constructive, the AG has presented the Court with a false choice between applying the PRA or adopting court rules for access to public records. There is no fundamental conflict between the PRA and the independence of the judicial branch of government, and no legal or practical reason to discard the PRA in favor of a poorly defined common law right of access.

This Court is **not** required to choose between the PRA and the adoption of rules. Rather, the application of the PRA to the administrative

functions, records, or personnel of courts may be limited by the doctrine of separation of powers. This Court should implement such limitations on the PRA by adopting exactly the sort of rules that the AG has suggested.

**A. The analysis in *Nast v. Michels* is erroneous and should not be extended to other types of records.**

The AG agrees with Koenig — and rejects the City’s position — on two fundamental points regarding *Nast*:

- *Nast*’s holding is limited to court case files, and
- *Nast* should **not** be interpreted to exclude all other non-case court records from public disclosure.

Amicus AG Br. at 3, 8. The AG also shares Koenig’s concern that a blanket exemption for non-case records is unacceptable, and acknowledges that the existing common law does not provide adequate public access to such records. *Id.* at 8. Consequently, the only viable option for the Court is to provide public access to the non-case records of the Washington courts under the framework provided by the PRA.

**1. *Nast*’s holding is limited to court case files.**

The AG agrees with Koenig on the correct interpretation of *Nast*. Like Koenig, the AG recognizes that *Nast*’s actual holding was limited to court case files. Amicus AG Br. at 3; App. Reply Br. at 2, 7-9. The AG also recognizes that the analysis in *Nast* is not clear, and that *Nast* did not

clearly decide whether other types of records are subject to the PRA. Amicus AG Br. at 5; App. Reply at 2-3. The AG does not disagree with any of Koenig's arguments explaining the erroneous analysis in *Nast*.

The AG asserts that the legislature has acquiesced in *Nast's* interpretation of the PRA, but even assuming that were true, such acquiesce would be limited to *Nast's* holding that the PRA does not apply to court case files. Amicus AG at 3-4. Koenig does not disagree:

At most, the legislature may be presumed to have acquiesced in *Nast's* narrow holding that the PRA does not apply to court cases files. That is of little concern in this case because Koenig concedes that *Nast* may have reached the right result for the wrong reasons.

App. Reply Br. at 13. As Koenig has explained, the presumption of legislative acquiescence is limited to a clear holding or judicially-crafted definition of a statutory term. *Id.* The legislature cannot acquiesce in an oblique holding or in obscure dicta. And it certainly has not acquiesced in a rule broader than that set forth in *Nast* concerning court case files.

The AG also suggests that stare decisis requires the Court to adhere to the holding in *Nast* that court case files are not governed by the PRA. Amicus AG Br. at 4. Again, Koenig does not necessarily disagree. To the extent the *Nast* is not both incorrect and harmful, stare decisis is limited to *Nast's* narrow holding that the PRA does not apply to court case files. App. Reply Br. at 15 (citing *Riehl v. Foodmaker Inc.*, 152 Wn.2d

138, 146-47, 94 P.3d 930 (2004)); see *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 466 P.2d 508 (1970) (overruling prior cases to the extent those cases held that riparian rights did not attach to state trust lands until they pass into private ownership). Koenig has conceded that *Nast*'s narrow holding — that the PRA is not applicable to court case files — is not particularly harmful. App. Reply Br. at 16.

Contrary to the City's arguments, neither the presumption of legislative acquiescence nor the doctrine of stare decisis requires this Court to exclude all courts and court records from the PRA. App. Reply Br. at 12-17. The AG does not argue otherwise.

**2. The common law right of access is not adequate for records other than court case files.**

*Nast* was based, in part, on the availability of a common law right to access court case files. *Nast*, 107 Wn.2d at 303. The AG suggests that the Court has the option to extend *Nast*'s use of common law to records other than court case files. Amicus AG Br. at 7. But the AG also concedes that the existing common law right of access is largely limited to court case files:

Although there is considerable common law establishing the right of public access to case files, and the exceptions to that right, there is no well-established body of case law concerning access to the various categories of records developed and maintained by the judicial branch of

government that do not directly relate to litigation or the adjudication process.

Amicus AG Br. at 8. With the exception of one federal case dealing with the records of a sentencing advisory committee,<sup>1</sup> the cases cited by the AG deal with access to court case files,<sup>2</sup> the closely-related question of sealing court case files,<sup>3</sup> and the confidentiality of judges' notes.<sup>4</sup> This limited body of case law provides no guidance on, and no meaningful right of public access to, the enormous variety of non-case records that the City would exclude from the PRA under *Nast*.

The AG also acknowledges that the common law does not address how the public may access non-case records under the common law, or "how the courts are to process and decide questions relating to public access to these records." Amicus AG Br. at 7. While the PRA provides a

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<sup>1</sup> *Wash. Legal Found. v. US Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994) (remanding question of common law access to records of sentencing advisory committee for the trial court to apply a fact-specific balancing test to determine whether records would be disclosed).

<sup>2</sup> *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) (and cases cited therein); *Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (common law right of access did not compel release of presidential tapes obtained under subpoena).

<sup>3</sup> *Rufer v. Abbott Lab.*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005); *Dreiling v. Jain*, 151 Wn.2d 900, 909, 93 P.3d. 861 (2004).

<sup>4</sup> *Beuhler v Small*, 115 Wn. App. 914, 64 P.3d 78 (2003) (and cases cited therein). Although *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 150 P.3d 158 (2007) dealt with a request for judicial correspondence, that case considered (and rejected) only the application of the PRA, and did not cite any cases addressing the common law (other than *Nast* and *Beuhler*).

well-developed structure for providing records, applying exemptions, and resolving disputes, there are no comparable provisions in the common law. The AG acknowledges the difficulties presented by discarding the PRA in favor of the common law. “If the PRA is inapplicable, there also appear to be no established procedures stating how such records might be requested, who is responsible to respond to disclosure requests, or how disputes will be resolved.” Amicus AG Br. at 10.

There is no reason for this Court to wander into such “uncharted waters.” *Id.* The PRA already provides both the structure for access to public records, and well-defined substantive exemptions both in the PRA itself and by operation of the “other statute” exemption. App. Br. at 14; *see* RCW 42.56.070(1). The Court should recognize that the common law right of access is not adequate for public records other than court case files and reject a common approach to such records.

**3. The decisions of the Court of Appeals in *Beuhler* and *Spokane & Eastern Lawyer* are erroneous extensions of *Nast*.**

The AG’s discussion of *Beuhler v. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003), and *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 150 P.3d 158 (2007), adds nothing to the analysis in this case. Amicus AG Br. at 5-7. Koenig has already explained that (i) *Beuhler* merely paraphrased *Nast*, (ii) the analysis in *Spokane & Eastern Lawyer*

was erroneous for several reasons, and (iii) both cases may have reached the correct end result based on an incorrect analysis. App. Reply Br. at 6-12. The AG does not disagree with Koenig on any of these points.<sup>5</sup>

**B. The application of the PRA to the administrative functions, records, or personnel of courts may be limited by the doctrine of separation of powers. This Court should implement such limitations by adopting rules.**

The AG generally agrees with Koenig that the existing common law does not provide an adequate framework for public access to court records (other than court case files). Amicus AG Br. at 8. The AG also agrees that the Court could apply the PRA “with its established substantive and procedural standards relating to public access” to the courts of this state. *Id.* The AG also suggests that the Court could adopt rules governing public access to court records. Amicus AG Br. at 10-11.

Unfortunately, the AG presents the Court with a false choice between applying the PRA *or* adopting court rules on public records access. Amicus AG Br. at 13. But that misstep is easily corrected.

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<sup>5</sup> As the AG points out, an earlier decision of the Court of Appeals in *Smith v. Okanogan County*, 100 Wn. App. 7, 994 P.2d 857 (2000) addressed several requests for public records that were directed to the superior court administrator of Okanogan County. Amicus AG Br. at 6-7 n.2. With the exception of a request for judge’s oaths, the requests at issue in *Smith* either sought information (as opposed to records) or requested records that did not exist. *Smith*, 100 Wn. App. at 15-16, 18-22. In addressing each of these requests the appellate court simply assumed that the PRA was applicable. There is no discussion of whether the superior court was an “agency,” and no citation to *Nast*.

Contrary to the AG's otherwise helpful suggestions, this Court is **not** required to choose between the PRA and the adoption of rules. It can and should do **both**. The preferred solution to the dilemma presented by the AG, which is entirely consistent with Koenig's arguments in this case, is to recognize that the PRA applies to the judicial branch and adopt any necessary modifications and exemptions to the PRA by court rule.

By ignoring Koenig's discussion of the doctrine of separation of powers, the AG appears to erroneously assume that the application of the PRA to the court system would prevent the Court from adopting limitations on the PRA that are necessary to preserve the independence of the judicial branch. A similar erroneous assumption was, in part, the basis for the decision in *Nast*. See App. Br. at 12.

This Court has rule-making authority precisely because the judiciary is an independent branch of government. See *Wash. State Council of County and City Employees v. Hahn*, 151 Wn.2d 163, 167-69, 86 P.3d 774 (2004). That authority includes the power to adopt rules for the administration of the court system even where such rules conflict with otherwise generally applicable statutes. "It is a well-established principle that the Supreme Court has implied authority to dictate its own rules, 'even if they contradict rules established by the Legislature.'" *Sackett v. Santilli*, 146 Wn.2d 498, 504, 47 P.3d 948 (2002) (quoting *Marine Power*

*& Equip. Co. v. Dep't of Transp.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984)). Consequently this Court is free to adopt rules modifying the application of the PRA to the court system.<sup>6</sup> There is no legal or practical reason to discard the PRA entirely.

As Koenig has repeatedly explained, applying the PRA's requirements to "the administrative aspect of court-related functions" does not "clearly contravene" the doctrine of separation of powers, nor does it "directly and unavoidably conflict" with "the fundamental functions" of the judiciary. App. Br. at 20 (citing *Spokane County v. State*, 136 Wn.2d 663, 672, 966 P.2d 314 (1998)). Neither the AG nor the City argues otherwise. Furthermore, this Court has recognized that the branches of government are not "hermetically sealed off from one another." *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Instead, the "branches must remain partially intertwined ... to maintain an effective

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<sup>6</sup> Koenig does not suggest any departure from the well established rule that an agency must disclose a public record unless a specific statutory exemption applies. *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008). The legislature has clearly stated that there are no exemptions under the PRA other than specific exemptions narrowly construed. *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 260, 884 P.2d 592 (1995). The 1987 legislature's response to *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986) "makes clear that it does not want judges any more than agencies to be wielding broad and malleable exemptions." *Id.*, 125 Wn.2d at 259-60. The strict statutory requirements of the PRA must apply with full force and without modification outside the judicial branch. But the PRA is only a statute, and nothing in that statute limits this Court's constitutional authority to modify the application of the PRA to the courts.

system of checks and balances, as well as an effective government.” *Id.*

This Court has expressly noted that

the responsibility over the administrative aspects of court-related functions is shared between the legislative and judicial branches... Therefore, “[w]here a court rule and a statute conflict, we will attempt to read the two enactments in such a way that they can be harmonized.’ However, when the court rule concerns a matter related to the court’s inherent power and we are unable to harmonize the court rule and the statute, ‘the court rule will prevail.’

*Wash. State Council*, 151 Wn.2d at 168-69 (citing *Wash. State Bar Ass’n v. State*, 125 Wn.2d 901, 908-09, 890 P.2d 1047 (1995)). The AG’s suggestion that the Court must choose between the PRA and the adoption of rules is directly contrary to these statements about the correct relationship between statutes and the Court’s own authority.<sup>7</sup>

The Alaska administrative rules cited by the AG provide a good example of how this Court could adopt rules to apply the PRA to the Washington courts. *See* Alaska R. Admin 37.5 to 37.8. The AG mistakenly assumes that these rules were adopted in the absence of

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<sup>7</sup> The AG asserts that there is a “certain attractiveness” to holding that all court records are outside the PRA, and that the Court might “draw a bright line between records maintained by the courts (including case files) and records maintained by the other branches of state and local government.” Amicus AG Br. at 10. In fact, there are no discernable advantages to discarding the PRA in its entirety. The AG’s “bright line” alternative is directly contrary to numerous recent decisions of this Court. *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994); *Washington State Bar Ass’n v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995); *Spokane County v. State*, 136 Wn.2d 663, 966 P.2d 314 (1998); *Wash. State Council of County and City Employees v. Hahn*, 151 Wn.2d 163, 167-69, 86 P.3d 774 (2004). Furthermore, this alternative would directly conflict with RCW 2.64.111, which expressly applies the PRA to the Commission on Judicial Conduct (CJC), which is part of the **judicial branch**. RCW 2.64.120.

otherwise applicable Alaska statute relating to public records. In fact, the Alaska Public Records Act (Alaska Stat. ch. 40.25) expressly applies to the judicial branch of the Alaska government and directs the Alaska Supreme Court<sup>8</sup> to “adopt procedures for the operation and implementation of AS 40.25.110 - 40.25.140 by public agencies in the judicial branch.” AS § 40.25.123; *see Johnson v. State*, 50 P.3d 404 (Alaska 2002) (applying Alaska Public Records Act and Alaska Admin. Rules to question of whether access to court record of felony conviction may be restricted).

Koenig agrees with the AG that the adoption of rules by this Court would be preferable to litigating the question of access to court records on a case-by-case basis. Amicus AG Br. at 12. Indeed, Koenig has always recognized that there may be a need for exemptions from public disclosure of court records that are not adequately addressed by the exemptions in the PRA. *See App. Reply Br. at 7* (noting that *Beuhler* and *Spokane & Eastern Lawyer* may have reached the correct result for the wrong reasons). For example, the Court might wish to clarify by rule that internal memoranda, research, notes, and draft decisions are exempt from public disclosure. *See Alaska Admin. R. 37.5(e)(1)*. For another example,

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<sup>8</sup> The chief justice of the Alaska Supreme Court is responsible for court administration. By rule this responsibility is delegated to an administrative director of courts. <http://www.state.ak.us/courts/ctinfo.htm#admin>; *see Alaska Admin. Rules 1-2*.

the Court might wish to avoid *ex parte* contacts by requiring requests for records to be made to the clerk of a court and not to the judges directly. *See Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.2d 1022 (2008) (upholding Department of Corrections rule requiring PRA request to be made to designated person).

In sum, the Court is not forced to choose between the PRA and the adoption of rules. Consistent with this Court's recent decisions, the Court should recognize that there is no fundamental conflict between the PRA and the independence of the judicial branch of government. Rather, the application of the PRA to the administrative functions, records, or personnel of courts may be limited by the doctrine of separation of powers. This Court should implement such limitations by adopting rules.

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RESPECTFULLY SUBMITTED this 29th day of May, 2009.

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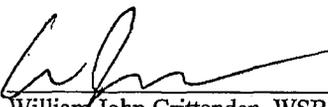
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