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SUPREME COURT  
STATE OF WASHINGTON

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Case No. 82288-3

SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF FEDERAL WAY, *Respondent*,

v.

DAVID KOENIG,  
*Appellant.*

---

REPLY BRIEF OF APPELLANT

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## I. REPLY ARGUMENT

**A. The analysis in *Nast v. Michels* is erroneous and should not be extended to other types of records.<sup>1</sup>**

The actual holding in *Nast* is clearly stated twice in *Nast*: the Public Records Act, Chapter 42.56 RCW (“PRA”), does not apply to “court case files.” *Nast v. Michels*, 107 Wn.2d 300, 304, 307, 730 P.2d 54 (1986). This holding was based on three erroneous points of law:

[1] because the common law provides access to court case files, [2] because the [PRA] does not specifically include courts or court case files within its definitions and [3] because to interpret the [PRA] to include court case files undoes all the developed law protecting privacy and governmental interests.

*Id.* at 307. The City focuses on only the second point of *Nast*’s analysis, arguing that *Nast* held “that the statutory definition of ‘agency’ in the [PRA] did not include courts and the definition of ‘public records’ did not include court records.” *Resp. Br.* at 4. The City further argues:

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<sup>1</sup> The City concedes that this case raises purely legal issues, *Resp. Br.* at 3 n.12, 7, which this court reviews *de novo*. *Soter v. Cowles Pub’g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.550(3). The City asserts that Koenig has the burden to prove “that the PRA applies in the first instance to the Federal Way Municipal Court and that the Municipal Court records sought are public records as defined in the PRA.” *Resp. Br.* at 7 n.24. *Dragonslayer, Inc. v. Wash. State Gambling Comm’n*, 139 Wn. App. 433, 161 P.3d 428 (2007), does *not* support this assertion. *Dragonslayer*’s discussion of the burden of proof under RCW 42.56.540 applies only to third parties resisting disclosure of records. *Id.* at 440-41. There is no reference in *Dragonslayer* to a burden of proof that “shifts” as the City suggests. *Resp. Br.* at 7 n.24. Here, the relevant provision is RCW 42.56.550(1) (agency has the burden of proof). Furthermore, it is meaningless to suggest that Koenig has the “burden of proof” when there are no issues of fact before the Court.

- that Koenig initially accepted the City's interpretation of *Nast* but later changed his position;
- that the legislature has acquiesced in *Nast's* interpretation of "agency" and "public record;" and
- that *Nast* is now binding precedent under *stare decisis*.

*Resp. Br.* at 7-16. All of these arguments are erroneous.

**1. *Nast* did not hold that the definitions of "agency" and "public record" exclude all courts and court records.**

The City's argument is entirely based on the erroneous assertion that *Nast* held that the PRA terms "agency" and "public record" did not include courts and court records. *Resp. Br.* at 4, 7-8, 12, 13. If *Nast* had interpreted the terms "agency" and "public record" to exclude all courts and court records it would have said so clearly and concisely. The City is forced to paraphrase *Nast* because its holding is limited to court case files, and the analysis leading to that holding is not entirely clear.

Contrary to the City's argument, *Nast* stopped short of interpreting "agency" and "public record" to *exclude* all courts and court records from the PRA. *Nast* merely stated that the PRA definitions "*do not specifically include* either courts or case files." *Nast*, 107 Wn.2d at 306. After taking this half step, the Court relied on unspecified language in the "entire public records section of [Chapter 42.17 RCW]" to conclude that court

case files were not governed by the PRA. *Nast* 107 Wn.2d at 306.

Furthermore, if *Nast* had conclusively determined that the terms “agency” and “public record” exclude all courts and court records, that determination would have been dispositive of the case. It would have been unnecessary for the *Nast* court to address either the common law or the effect of the PRA on other statutes governing access to court files. But *Nast’s* holding was based on these other two points in combination with the court’s determination that the PDA “does not specifically include courts or court case files within its definitions.” *Nast*, 107 Wn.2d at 307.

A careful reading of *Nast* reveals that the majority chose, for whatever reason, to fudge on the definitions of “agency” and “public record.” The majority could have expressly held that “agency” excludes courts or that “public record” excludes court records. But it did not do so.

The Attorney General does not share the City’s confidence about either the clarity or the scope of *Nast*. The Attorney General’s *Open Government Internet Manual* states that the scope and effect of *Nast* is not clear.<sup>2</sup> *App. Br.* at 16 n.6. The City’s brief ignores the *Internet Manual* but quotes a portion of WAC 44-14-01001, which is also unclear about the scope of *Nast*. *Resp. Br.* at 14, 22. The cited model rule provides:

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<sup>2</sup> *Attorney General, Open Government Internet Manual* §1.3, <http://www.atg.wa.gov/OpenGovernment/InternetManual/Chapter1.aspx> (last visited Feb. 23, 2009)

Court files and judges' files are not subject to the act<sup>1</sup> [citing *Nast*]. Access to these records is governed by court rules and common law. The model rules, therefore, do not address access to court records.

WAC 44-14-01001. The rule does *not* state that courts are not "agencies" under the PRA, or that all court records are beyond the reach of the PRA. Instead, the rule suggests that "court files and judge's files" are not subject to the PRA because access to those records is governed by court rules and common law. *Id.* As Koenig has explained, *Nast* was based, in part, on the common law right to access court case files. *Nast*, 107 Wn.2d at 303; *Resp. Br.* at 13 n. 35. Neither *Nast* nor WAC 44-14-01001 should be extended to records that are not covered by court rules or common law.

The City eventually admits that "*Nast* only addressed case files, not all court records," and that the City is relying on subsequent decisions of the Court of Appeals to extend *Nast* to exclude all court records from the PRA. *Resp. Br.* at 12 (citing *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003); *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 617, 150 P.3d 158 (2007), *review denied*, 162 Wn.2d 1004 (2007)). Whether or not those cases have correctly interpreted or extended *Nast*, the Court must recognize that *Nast* never expressly concluded that courts are not "agencies" or that court records are not "public records."

**2. Koenig has not altered his position on *Nast's* interpretation of “agency” and “public record.”**

The City erroneously argues that Koenig has changed his position on *Nast*. *Resp. Br.* at 9. In fact, Koenig has consistently stated, from the inception of this case, that:

[*Nast's*] determination that the PRA did not specifically include courts or case files was based on a narrow interpretation of the terms “agency” and “public record.”

CP 35; *Statement of Grounds* at 7; *App. Br.* at 12. This statement is *not* inconsistent with Koenig’s further statement that:

[*Nast*] never expressly concluded that courts are not “agencies” or that court records are not “public records.”

*App. Br.* at 13; CP 98. Both statements are accurately based on what *Nast* actually says. To create the illusion of inconsistency, the City simply mischaracterizes Koenig’s position. Koenig has *never* asserted “that *Nast* did not interpret the terms ‘agency’ and ‘public record.’” *Resp. Br.* at 9. Koenig only pointed out that *Nast* stopped short of interpreting “agency” and “public record” to *exclude* all courts and court records from the PRA.

Koenig made the second statement, quoted by the City, in his trial court reply, not for the first time on appeal as the City implies.

**Contrary to the City’s argument, *Nast* did *not* expressly conclude that courts are not “agencies” or that court records are not “public records.”** *Nast* merely determined that (i) the PRA definitions did not “specifically include” courts or case files. *Nast*, 107 Wn.2d at 306.

CP 98 (emphasis added). The highlighted sentence was in response to another mischaracterization by the City: that Koenig had argued that the 1987 legislature “overruled” *Nast*. CP 86. Employing a straw man argument, the City argued that the legislature would have amended the PRA definitions if it wished to overrule *Nast*. CP 87-88. In fact, Koenig had *not* argued the legislature “overruled” *Nast*. Koenig merely pointed out that the legislature obviated *Nast’s* concern that applying the PRA to court case files would undo certain protections for such files. CP 97.<sup>3</sup>

Koenig’s arguments are consistent and based on the actual language in *Nast*, which is not entirely clear. *Nast* did *not* hold that “agency” and “public record” exclude all courts and court records.<sup>4</sup>

**3. The City relies on erroneous extensions of *Nast* in *Beuhler* and *Spokane & Eastern Lawyer*.**

The City relies on *Beuhler* and *Spokane & Eastern Lawyer* to extend *Nast* to exclude all court records from the PRA. *Resp. Br.* at 12. Setting aside the obvious point that the Court of Appeals’ interpretation of *Nast* is not binding on this Court, neither *Beuhler* nor *Spokane & Eastern*

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<sup>3</sup> As explained in Koenig’s opening brief, the 1987 legislature addressed the third point of *Nast* by expressly adding the “other statute” exemption to the PRA. RCW 42.56.070(1) (former RCW 42.17.260(1)); Laws of 1987, ch. 403, § 3. *App. Br.* at 14. After the 1987 legislation, the application of the PRA to court case files would not eliminate existing statutory restrictions but rather incorporate them. *Id.*

<sup>4</sup> The City continues to employ its straw man argument that the 1987 legislature did not intend to “overrule” *Nast*. *Resp. Br.* at 16-19. See section A(6) (below).

*Lawyer* establish that the City's broad interpretation of *Nast* is correct. Nor did those cases apply *Nast* to "all court records," as the City suggests. *Resp. Br.* at 14. Both *Beuhler* and *Spokane & Eastern Lawyer* involved requests for records created by a judge (notes and correspondence), not administrative court records. Koenig concedes that those cases may have reached the right result for the wrong reasons. CP 38; *App. Br.* at 17.

*Beuhler* merely paraphrased *Nast*, concluding that access to a judge's notes is governed by the common law, not the PRA. *Beuhler*, 155 Wn. App. at 918. *Beuhler* focused on the central issue of whether the common law provided access to a judge's notes. *Id.* at 918-920. *Beuhler* is merely dicta on the broader questions of whether courts and all court records, including administrative records, are excluded from the PRA.

Unlike *Beuhler*, the court in *Spokane & Eastern Lawyer* actually considered arguments about the scope of *Nast*. In that case, the requester sought correspondence from superior court judges to the WSBA. The trial court ruled that the superior court was not an "agency" under *Nast*. *Spokane & Eastern Lawyer*, 136 Wn. App. at 617, 619. Affirming, the appellate court rejected the requester's argument that *Nast* was limited to court case files. *Id.* at 621.

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. Rather, the court defined the issue more broadly as “whether the judiciary and its court files are under the realm of the PDA.” In addition, the court specifically addressed whether the Department of Judicial Administration (Administration) was an agency within the PDA. And although the court conceded that technically the Administration fell within the PDA’s definition of agency, it characterized the Administration as a “unique institution” because it served the judiciary, suggesting that the judiciary’s immunity from the PDA extended to the Administration. This discussion would have been unnecessary if the court had focused only on whether court files were subject to the PDA.

*Id.* (citations omitted). The City extensively relies on this part of *Spokane & Eastern Lawyer* to support its broad interpretation of *Nast*. *Resp. Br.* at 13-15. This analysis of *Nast*’s dicta is wrong for several reasons.

First, dicta is generally an observation or remark in a judicial opinion that addresses some point of law but which is not necessary to the court’s holding. *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954). Because the *Nast* case was based on three different points (see above), neither the City nor *Spokane & Eastern Lawyer* can safely assume that any one of those points was necessary to *Nast*’s actual holding that the PRA was not applicable to court case files. *Nast* easily could have made the same holding based solely on the common law or the lack of an “other statute” exemption in the PRA (or both).

Second, the holding in *Nast* was limited to *court case files*. “[W]e hold the PDA does not provide access to court case files.” *Nast*, 107

Wn.2d at 304; *id.* at 307. While *Nast* states that the PRA definitions “do not specifically include either courts or case files,” *Nast*, 107 Wn.2d at 306, only a statement that the definitions do not specifically include *court case files* was necessary to *Nast’s* holding. The suggestion that the definitions do not specifically include “courts” or “court files” is dicta.

Third, the conception of dicta in *Spokane & Eastern Lawyer* is backwards. The Court of Appeals in *Spokane & Eastern Lawyer* noted that the discussion of whether the Department of Judicial Administration (DJA) was an agency “would have been unnecessary if the court had focused only on whether court files were subject to the PDA.” *Spokane & Eastern Lawyer*, 136 Wn. App. at 621. Because the holding of *Nast* was limited to court case files, the Court of Appeals should have concluded that the discussion of DJA was dicta. Instead, the court assumed that *Nast* would not say anything “unnecessary,” and thereby fallaciously concluded that the holding in *Nast* must be broader than just court case files. *Id.*

Fourth, *Spokane & Eastern Lawyer* erroneously interpreted an argument rejected in *Nast*. The requester in *Nast* had argued that two statutes, former RCW 2.64.110 (exempting records of the Judicial Qualifications Commission) and RCW 10.29.030 (exempting petitions of a special inquiry judge), “recognized a general applicability of the PDA to

court case files.” *Nast*, 107 Wn.2d at 300. *Nast* rejected this argument, noting that:

[The statutes] do not support his position. The Judicial Qualifications Commission is not a court, but an agency whose job is to investigate judicial officers. The statewide petitions are not court records.

*Id.* *Spokane & Eastern Lawyer* cited this part of *Nast* for the proposition that a court is not an agency under the PRA. *Spokane & Eastern Lawyer*, 136 Wn. App. at 621. But *Nast* merely observed that the statutes cited by the requester did not indicate whether the PRA applies to courts. Those statutes do not establish the affirmative proposition that the PRA does not apply to courts. They do not inform the question at all. By relying on *Nast*'s rejection of the requester's argument to establish a broader, contrary proposition — that a court is not an agency under the PRA — the Court of Appeals committed the fallacy of denying the antecedent.<sup>5</sup>

More significantly, former RCW 2.64.110 (cited by the requester in *Nast*) actually supports the application of the PRA to at least some parts of the judicial branch. Former RCW 2.64.110 was enacted by Laws 1981, ch. 268, § 12, which enacted all of Chapter 2.64 (Commission on Judicial Conduct). Another part of the same chapter (and bill) states that “The commission shall for all purposes be considered an independent part of the

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<sup>5</sup> See [http://en.wikipedia.org/wiki/Denying\\_the\\_antecedent](http://en.wikipedia.org/wiki/Denying_the_antecedent).

judicial branch of government.” RCW 2.64.120; Laws of 1981 c 268 § 13. Another part of the chapter makes certain records of the Commission subject to the PRA. RCW 2.64.110. Consequently, the legislature has recognized that the PRA applies to at least part of the judicial branch, contrary to the City’s arguments. Far from holding that the entire judicial branch is excluded from the PRA, as the City suggests, *Nast* actually acknowledges the existence of “agencies” subject to the PRA within the judicial branch of government.

Fifth, as the City also points out, *Spokane & Eastern Lawyer* relied on the *dissent* in *Nast* to support its broad interpretation of the majority opinion. *Resp. Br.* at 15, *Spokane & Eastern Lawyer*, 136 Wn.2d at 622. Such analyses are based on the naïve assumption, unsupported by any authority or rationale, that a dissenting opinion fairly and accurately states what a majority opinion has held, and may be relied upon to interpret a majority opinion. Reliance upon the *Nast* dissent to interpret the majority opinion violates the well-established rule that dissenting opinions have no precedential value. *See McKoy v. North Carolina*, 494 U.S. 433, 448 n. 3, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (“the meaning of a majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative.” [Blackmun, J., concurring]). The City’s reliance on the dissenting opinion in *Nast* only

confirms that the *Nast* majority did *not* actually adopt the conclusive interpretations of “agency” and “public record” suggested by the City.

Finally, the *Spokane & Eastern Lawyer* court itself recognized that *Nast* was not “strictly controlling,” and that its decision was based on the court’s own interpretation of the reasoning in *Nast*. *Spokane & Eastern Lawyer*, 136 Wn.2d at 617, 622. These statements contradict the City’s earlier assertion that *Nast* held that the PRA terms “agency” and “public record” did not include courts and court records.

In sum, *Beuhler* and *Spokane & Eastern Lawyer* are merely erroneous extensions of *Nast*. Neither case establishes that the City’s broad interpretation of *Nast* is correct.

**4. The legislature has not acquiesced in new definitions of “agency” or “public record” derived from *Nast*.**

The City argues that the legislature’s failure to amend the definitions of “agency” and “public record” after *Nast* amounts to legislative acquiescence in new definitions adopted in *Nast*. *Resp. Br.* at 4-5, 10-11. The City’s argument is entirely based on the City’s erroneous assumption that *Nast* “exclude[d] courts and court records from the definitions of ‘agency’ and ‘public record.’” *Resp. Br.* at 11. Again, the actual holding in *Nast* was that “the PDA does not provide access to court case files.” *Nast*, 107 Wn.2d at 304. In each of the cases cited by the

City, the court presumed legislative acquiescence in a clear holding or judicially-crafted definition of a statutory term.<sup>6</sup> 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. CP 38; *App. Br.* at 17.

The City's acquiescence argument gets the sequence exactly backwards. *Nast* suggested that the PRA was not intended to apply to court case files because various statutory exemptions for such files could easily have been incorporated into the PRA. *Nast*, 107 Wn.2d at 307. The very next year, the legislature did exactly that. Laws of 1987, ch. 403, § 3; *see* subsection A(6) (below). Far from acquiescing to the notion that court case files inherently fall **outside** the PRA, as the City suggests, the legislature brought the existing statutory exemptions concerning court case files **within** the PRA by incorporating them as "other statutes."

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<sup>6</sup> *See Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993) (legislature acquiesced in judicial construction that a change in the signature card on a bank account was a "deposit" for purposes of statute that created a right of survivorship in the account); *State v. Ritchie*, 126 Wn.2d 388, 394, 894 P.2d 1308 (1995) (legislature acquiesced in judicially created definition of "clearly excessive" where the term was not defined in the statute and the language was not amended after the court supplied a definition); *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327, n.3, 971 P.2d 500 (1999) (legislature acquiesced in holding that RCW 7.72.030(1) creates strict liability for design defect claim); *State v. Roggenkamp*, 153 Wn.2d 614, 630, 106 P.3d 196 (2005) (legislature acquiesced in judicially-created definition of "in a reckless manner").

Moreover, the 1989 legislature made certain records of the Judicial Conduct Commission subject to the PRA. Laws 1989, ch. 347, § 6 (RCW 2.64.110). This directly rebuts the City's suggestion that the legislature acquiesced to not applying the PRA to the judicial branch.

In addition, the presumption of legislative acquiescence is just a principle of statutory interpretation. In each of the cases cited by the City, legislative acquiescence was only one of several bases given for the court's decision.<sup>7</sup> Given the narrow holding in *Nast*, the Court should give little if any weight to legislative acquiescence in the exclusion of court case files from the PRA.

The City's excessive reliance on legislative acquiescence is not an accident. The City wants this Court to exclude all courts and court records from the PRA without addressing the significant issue of whether *Nast* should be extended that far. Like the City's argument regarding *stare decisis* (below), the City's claim of legislative acquiescence is intended to convince the Court that the issue has already been decided. It has not.

**5. *Stare decisis* does not require the Court to exclude all courts and court records from the PRA.**

The City argues that *Nast* is "binding precedent" under the doctrine of *stare decisis*. *Resp. Br.* at 12. This argument is entirely based on the

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<sup>7</sup> See note 6.

City's erroneous assumption that *Nast* held "that the statutory definition of 'agency' in the [PRA] did not include courts and the definition of 'public records' did not include court records." *Resp. Br.* at 4, 14. Again, the actual holding in *Nast* was that "the PDA does not provide access to court case files." *Nast*, 107 Wn.2d at 304. In all of the *stare decisis* cases cited by the City, the Court was asked to overrule an actual holding that was clearly stated and applied in a prior case.<sup>8</sup>

Even if *Nast* had held that all courts and court records are excluded from the PRA, the City admits that the Court may reject *Nast* upon a showing that *Nast* is incorrect and harmful. *Resp. Br.* at 12 (citing *Riehl v. Foodmaker Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)). But the City's analysis of whether *Nast* was incorrect and harmful is conclusory at best.

On the question of whether *Nast* is incorrect, the City ignores Koenig's arguments about *Nast* in favor of a bland assertion that Koenig's position is "unsupported." *Resp. Br.* at 16. The City's only substantive

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<sup>8</sup> See *In re Mercer*, 108 Wn.2d 714, 721, 741 P.2d 559 (1987) (refusing to abandon rule, set forth in multiple prior cases, that a personal restraint petitioner must show that an instructional error was actually and substantially prejudicial); *Riehl v. Foodmaker Inc.*, 152 Wn.2d 138, 146-47, 94 P.3d 930 (2004) (noting that Court had consistently held that medical necessity was a necessary element of a claim for failure to accommodate a disability); *Walmart, Inc., v Progressive Campaigns, Inc.*, 139 Wn.2d 623, 634, 989 P.2d 524 (1999) (declining to overrule holding in *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wn.2d 230, 635 P.2d 108 (1981), that Const. art. II, § 1(a) allows gathering of initiative signatures at shopping malls); *Brutsche v. Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008) (declining to overrule holding in *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (2003), that the destruction of property by police activity other than collecting evidence pursuant to a warrant is not a taking under Const. art. I, § 16).

argument is an erroneous assertion that Koenig is merely rearguing points that were considered and decided in *Nast*. *Resp. Br.* at 13, 16 (citing *Brutsche v. Kent*, 164 Wn.2d 664, 682, 193 P.3d 110 (2008)). The *Nast* majority never acknowledged that the common law and the PRA could co-exist, or that the common law yields to statutes. *App. Br.* at 12. The *Nast* court assumed that the application of the PRA to court case files would eliminate various statutory restrictions on access to court files, *Nast*, 107 Wn.2d at 307, but that is clearly not the case after the 1987 amendments to the PRA. *App. Br.* at 13-14. Finally, *Nast* did not consider how the doctrine of separation of powers might apply to the PRA. *App. Br.* at 21.

On the question of whether *Nast* is harmful, the parties agree that *Nast's* narrow holding — that the PRA is not applicable to *court case files* — is not particularly harmful. Koenig concedes that *Nast* may have reached the right result for the wrong reasons. *App. Br.* at 17.

But the City ignores Koenig's extensive explanation of why the City's broad extension of *Nast* is extremely harmful. Koenig has shown that the City's expansion of *Nast* creates a category of public records, including administrative records that have nothing to do with the judicial functions of courts, for which there is no public right of access under either the PRA or the common law. *App. Br.* at 16-17. Koenig has also shown that the application of *Nast* to such records allows agencies to

refuse to identify withheld records, or admit that such records exist, based upon an argument that the entire PRA, with all of its procedural safeguards and provisions for judicial review, is inapplicable to “courts” or “court records.”

*Statement of Grounds* at 2. By ignoring these problems, the City concedes, *sub silentio*, that an expansion of *Nast* is extremely harmful.

The PRA mandates broad disclosure of public records. *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995). An extension of the erroneous analysis in *Nast* to records other than court case files is harmful to that central policy of the PRA. To the extent necessary to provide the open government demanded by the PRA, the Court should take this opportunity to overrule *Nast*.

**6. The City’s assertion that the 1987 legislature did not “overrule” *Nast* is a straw man argument.**

The City argues that the 1987 legislature did not intend to “overrule” *Nast*, and that if it had such an intent it would have amended the definitions of “agency” and “public record.” *Resp. Br.* at 16. The City recycles this straw man argument from its trial court response even though it is not responsive to anything in Koenig’s brief. CP 86-88. As explained in section A(2), Koenig has *not* argued the 1987 legislature “overruled” *Nast*. Koenig merely pointed out that the 1987 legislature obviated *Nast*’s concern that application of the PRA to court case files would undo certain protections for such files. CP 97; *see Nast*, 107 Wn.2d at 307.

The City's extensive discussion of *Friends of Snoqualmie Valley v. Boundary Review Board*, 118 Wn.2d 488, 825 P.2d 300 (1992), is the same as its argument in the trial court. CP 87-88; *Resp. Br.* at 16-18. This is a straw man argument because Koenig has *not* argued that the 1987 legislature overruled *Nast*.<sup>9</sup> *Friends* rejected the argument that an amendment to RCW 36.93.100 affected an "implied amendment" to another statute, RCW 36.93.160(5), which the court had interpreted in a prior case. *Friends*, 118 Wn.2d at 496. In this case, it is undisputed that the 1987 legislature amended RCW 42.56.070(1) (former RCW 42.17.260(1)) to expressly include other exemption statutes within the PRA, which resolved one of the *Nast* court's concerns about applying the PRA to court case files. *Nast*, 107 Wn.2d at 307.

The City points out that the 1987 legislature also amended the PRA in response to *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986). *Resp. Br.* at 18-19; CP 88. The City notes that the express intent of the legislation was to address *Rosier*, and argues, therefore, that the legislation was not intended to overrule *Nast*. *Id.* Again, Koenig has *not* argued that the 1987 legislature "overruled" *Nast*. The City ignores the relevant and undisputed point that the 1987 legislature also amended the PRA such that

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<sup>9</sup> "The straw man is, in short, a misrepresentation of your opponent's position, created by you for the express purpose of being knocked down." Madsen Pirie, *The Book of the Fallacy* 160 (1985); see also [http://en.wikipedia.org/wiki/Straw\\_man\\_argument](http://en.wikipedia.org/wiki/Straw_man_argument).

application of the PRA to court cases files would not have the negative consequences suggested in *Nast*. *App. Br.* at 14.

For all these reasons, the analysis of the PRA in *Nast* is erroneous and should not be extended to other types of records.

**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.**

The City's brief does not address the doctrine of separation of powers in any meaningful way.<sup>10</sup> The City points out that King County's brief in *Nast* argued, *inter alia*, that application of the PRA to courts would violate the separation of powers. CP 89; *Resp. Br.* at 19 n37. But the bare fact that King County made this argument in its brief does not contradict Koenig's assertion that the *Nast* opinion failed to consider the doctrine of separation of powers. Nor has the City responded to Koenig's assertion that *Nast* should have considered the doctrine.

The City's assertion that "*Nast rejects* the claim that this dispute should be decided on the separation of powers doctrine" is patently frivolous. *Resp. Br.* at 19 (emphasis added). *Nast* does not mention the doctrine even once. *Nast* is silent on that issue, and there is no legal basis for the City or the Court to give any weight to such silence. Even if *Nast*

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<sup>10</sup> *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005), and *Graffell v. Honeysuckle*, 30 Wn.2d 390, 191 P.2d 858 (1948), do not address the doctrine of separation of powers. Those cases address only the interpretation of statutes.

had actually mentioned the doctrine of separation of powers, that would have no precedential value unless *Nast* considered the issue directly. *See Kish v. Insurance Company N.A.*, 125 Wn.2d 164, 172, 883 P.2d 308 (1994); *In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996).

1. **There is no *per se* prohibition against the application of the PRA to the administrative functions, records, or personnel of courts.**

The City has not briefed this issue.

Moreover, there can be no *per se* prohibition against the application of the PRA to the judicial branch of government given that RCW 2.64.111 expressly applies the PRA to the Commission on Judicial Conduct (CJC), which is part of the *judicial branch*. RCW 2.64.120. *See also* WAC Chap. 292-10 (PRA regulations for CJC).

2. **A remand is necessary to determine whether particular requests or records implicate separation of powers.**

Even though the City refuses to brief the issue in this Court, the City should be given an opportunity to present an argument that the separation of powers limits the reach of the PRA with respect to one or more of Koenig's requests for records. A remand is necessary.

- C. **The City must identify all records that it has withheld and disclose the particular person(s) in possession of the records that the City has withheld.**

The City contends it has no obligation to provide a log of withheld records because the PRA is not applicable to the withheld records under

*Nast. Resp. Br.* at 20. If the Court rejects the City's interpretation of *Nast*, then the City must provide a log of withheld records.

The City's argument highlights the problems created by extending *Nast* to more than just court case files. As this Court recently stated:

The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means of identifying any individual records which are being withheld in their entirety.

*Rental Housing Ass'n v Des Moines*, \_\_ Wn.2d \_\_, 199 P.3d 393 (2009) (citing *PAWS II*, 125 Wn.2d at 271). The City's argument would not only exclude an entire class of records from public disclosure, it would prevent the requester and any reviewing court from challenging an agency's self-serving determination that requested records are exempt as court records. The City does not deny that Koenig has no way of knowing what records the City has withheld. *See App. Br.* at 25.

**D. Koenig is entitled to attorney's fees and penalties pursuant to RCW 42.56.550(4).**

The City does not deny that the PRA requires an award of attorney's fees (and penalties) to a prevailing requester. RCW 42.56.550(4). Nevertheless, the City argues that an award of fees to Koenig would be "inequitable," and asks the Court to deny fees based on

either (i) prospective application of any ruling in Koenig's favor, or (ii) the Court's "equitable authority." *Resp. Br.* at 20-25. The City's arguments directly violate the PRA, and have no basis in law or equity.

**1. Prospective application of a ruling in favor of Koenig would violate the PRA.**

The Court considers three factors in determining whether an appellate decision should apply prospectively or retroactively:

- (1) whether the decision establishes a new rule of law by overruling clear past precedent or deciding an issue of first impression whose resolution was not clearly foreshadowed;
- (2) whether retroactive application would further or retard the purposes of the rule; and
- (3) whether retroactive application would be inequitable.

*State v. Atsbeha*, 142 Wn.2d 904, 916, 16 P.3d 626 (2001).<sup>11</sup> None of these *Chevron Oil* factors weigh in favor of prospective application.

On the first factor, the City erroneously assumes that *Nast* is clear precedent, and that the Court would have to overrule *Nast* with a new rule of law. *Resp. Br.* at 22. But *Nast* did not interpret "agency" and "public record" to *exclude* all courts and court records from the PRA. *Nast* only held that the PRA does not apply to court case files.

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<sup>11</sup> This test, often referred to as the "*Chevron Oil*" test, was derived from *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The current validity of the test in Washington is unclear. See *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004). The Court can safely avoid that thorny issue in this case because the City's analysis of the *Chevron Oil* factors is self-serving and meritless.

On the second factor, the City erroneously asserts that prospective application would not harm the purposes of the PRA. *Resp. Br.* at 23. Not surprisingly, the City makes no reference to RCW 42.56.550(4), which states that the Court “*shall*” award fees. “This provision, like the rest of the PDA, is to be liberally construed to promote full access to public records.” *Yousoufian v. Sims*, 114 Wn. App. 836, 855, 60 P.3d 667 (2003), *overruled on other grounds*, 152 Wn.2d 421 (2005). Denying fees to Koenig would encourage agencies to argue for prospective application of rulings in other PRA cases, contrary to the underlying policy.<sup>12</sup>

Furthermore, the City erroneously assumes that Koenig would not be a prevailing party if he did not cause the disclosure of records (if a ruling in Koenig’s favor were applied prospectively and Koenig had to make an identical request). *Resp. Br.* at 23, 24. That theory was flatly rejected in *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 102-03, 117 P.3d 1117 (2005), which held that causing the disclosure of records is *not* necessary for a requester to prevail under the PRA.

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<sup>12</sup> *Lau v. Nelson*, 92 Wn.2d 823, 825, 601 P.2d 527 (1979), cited by the City, states that “It is the general practice to afford the benefits of a rule change to the party whose efforts have convinced the court that the change should take place, even though the decision may otherwise operate only prospectively.” Setting aside this Court’s subsequent rejection of selective prospectivity, see *Robinson v. City of Seattle*, 119 Wn.2d 34, 77, 830 P.2d 318 (1992), *Lau’s* recognition of the efforts of the prevailing party is entirely consistent with the policy of mandatory attorney’s fees under the PRA.

On the third factor, the City complains that retroactive application would be inequitable to the City and its taxpayers. *Resp. Br.* at 23. Once again, the City completely ignores both the applicable law and the underlying policy of the PRA. The City's assertion that it relied "in good faith" on *Beuhler* and *Spokane & Eastern Lawyer* is irrelevant. Awards of attorney's fees are mandatory even where an agency acts in good faith. *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 751, 174 P.3d 60 (2007).

The City suggests that fees should be denied because Koenig has filed (and won) other PRA cases. *Resp. Br.* at 23. This transparent attempt to personally punish Koenig violates the well-established principle that agencies may not consider either the identity of the requester or the purpose of a request. *See* RCW 42.56.080; *Livingston v. Cedeno*, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008). The Cowles Publishing Company and other media organizations have also filed a number of PRA cases. Should those parties be denied fees simply because the defeated agencies feel that an award of fees would be inequitable?

**2. The City's "equitable authority" argument is frivolous.**

The City asks the Court to use its "equitable authority" to deny Koenig the award of fees to which he is entitled under the PRA. *Resp. Br.* at 24. The City's plea to arbitrarily deprive Koenig of his rights under the PRA has no legal basis whatsoever. The cases cited by the City merely

provide that the Court has the authority to fix the *amount* of attorney's fees, and that a party must comply with RAP 18.1 on to request fees on appeal.<sup>13</sup> Those cases do not give the Court "equitable authority" to ignore the PRA's express directive to award fees to a prevailing requester.

Finally, the City suggests that the Court should invoke RAP 1.2(a) to "promote justice" by depriving Koenig of fees under RCW 42.56.550(4). *Resp. Br.* at 25. RAP 1.2(a) allows the Court to interpret its own rules; it does not authorize the Court to disregard statutes.

## II. CONCLUSION

The Court should reverse the trial court's order. This matter should be remanded to the trial court with instructions to order the City to (i) provide the requested records to Koenig, (ii) explain why the records are exempt (or subject to redaction) under the PRA, or (iii) explain why the City is excused from compliance with the PRA by virtue of the doctrine of separation of powers. Additionally, the City must identify any records it has withheld and disclose to the Court and to Koenig the particular person(s) possessing any records that the City has withheld.

Koenig should be awarded fees on appeal pursuant to RAP 18.1.

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<sup>13</sup> *Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 144, 542 P.2d 756 (1975); *Brandt v. Impero*, 1 Wn. App. 678, 463 P.2d 197 (1969); *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998); *Industrial Coatings Co. v. Fidelity and Deposit Co.*, 117 Wn.2d 511, 520, 817 P.2d 393 (1991).

RESPECTFULLY SUBMITTED this 2nd day of March, 2009.

By:

  
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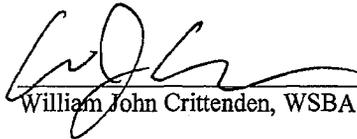
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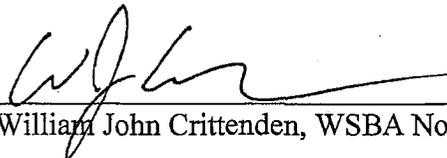
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