JENNIFER SHAW
DEPUTY DIRECTOR

November 29, 2011

The Honorable Barbara Madsen
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504

Dear Chief Justice Madsen,

The American Civil Liberties Union of Washington Foundation (ACLU) welcomes this opportunity to comment on Proposed General Rule 31A (GR 31A). We are a statewide, non-partisan, non-profit organization with over 19,000 members, dedicated to the preservation and defense of constitutional and civil liberties. One of those civil liberties is the right of access to information about our government, necessary to allow public oversight of government workings. Another civil liberty is the right to personal privacy, and the right to control the dissemination of information about one's private life. The ACLU has advanced both of these liberties, participating in numerous cases involving the Public Records Act as *amicus curiae*, as counsel to parties, and as a party itself. In addition to litigation, the ACLU has participated in legislative and rule-making procedures surrounding access to a wide variety of public records, including judicial records.

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We are pleased that the Court is considering adoption of a rule governing access to judicial administrative records. Public access to those records is already guaranteed through the common law, or as a constitutional right, but we believe that both judicial entities and the public will be well served by a clear rule providing for consistent procedures and exemptions across judicial entities. Our state's experience with the Public Records Act (PRA), Chapter 42.56 RCW, demonstrates the value added by codification of the common law right of access. In the nearly four decades since the PRA was enacted by a vote of the people, it has become a central tool used by members of the public (including the media and advocacy organizations) for oversight of the operation of a wide variety of public agencies. We foresee GR 31A providing similar benefits for oversight of the operation of courts and judicial agencies.

There are however, some sections of GR 31A that we urge the Court to modify prior to adoption. The modifications will improve the rule by providing both a greater degree of public access and a greater degree of privacy protection.

Protection of Personal Privacy

Most of the time there is no conflict between privacy and access to public records. Indeed, open access to government documents is necessary to ensure that the government respects the privacy guaranteed to and demanded by its constituents.

When government maintains personal information, however, disclosure of that information may violate individuals' privacy. We are therefore pleased to see that GR 31A specifically cites Article 1, Section 7, and recognizes that some limits on access to judicial administrative records are necessary in order to protect personal privacy. Similarly, we are pleased to see what appear to be substantive general privacy protections in sections (e)(1)(A) (providing for redaction to protect privacy) and (e)(3)(B)(5)(i) (applying common-law balancing test). We fear, however, that those references are a little unclear, and may eventually be interpreted to be procedural in nature, rather than substantive.

A look at the history of the PRA explains both this fear and the harm that could result from such an interpretation. When the PRA was passed by initiative in 1972, the voters specifically stated that the purpose was to assure "full access to information concerning the conduct of government" and that access must be "mindful of the right of individuals to privacy." By this reasoning, personal information that does not advance the oversight of government conduct should not be disclosed to the public.

Twenty-five years ago, this Court properly evaluated those competing interests in the PRA, and established a balancing test for personal information, permitting nondisclosure of public records if the privacy interest in those records outweighs the public interest in disclosure. *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986). Similar tests have been prescribed by this Court for determining whether court proceedings and records should be available to the public. *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981); *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

Regrettably, the Legislature chose to amend the PRA in response to *Rosier*, and eliminated both the generalized privacy exemption and the balancing test used to evaluate privacy interests. Laws of 1987, ch. 403 (now codified as RCW 42.56.050). It is quite possible that this legislative amendment has contributed to the proliferation of exemptions added to the PRA over the past 25 years—since there is no longer a generalized privacy exemption, the Legislature has been forced to regularly add specific exemptions when it becomes aware of new types of personal information maintained in public records.

Protection of personal privacy has thus become a cumbersome and haphazard process. In order for the Legislature to act to protect personal information, it must first learn that such information exists in public records, which typically happens only when some individual, agency, or advocacy organization is successful in catching the Legislature's attention.[1] And, of course, even when the Legislature is aware of the existence of personal information (and the need to protect it), passage of a bill is subject to the vagaries of politics and competing priorities. The result is that it may be years before any particular personal information is protected, quite often long after

[1] There is no proactive mechanism for the Legislature to discover what personal information is held by government agencies and determine whether that information should be protected from public disclosure. The Legislature has so far declined to order a survey of personal information in state-held records, let alone in records held by local governments. *See, e.g.,* Senate Bill 5869 (2007).

such information has been released to a requester and the damage has already been done.

The ACLU urges this Court to avoid the path followed by the PRA and instead ensure that GR 31A contains a clear directive that follows the judicial tradition of balancing privacy interests against the public interest in disclosure. It must be remembered that "the basic purpose and policy of [public access to records] is to allow public scrutiny of government, rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation." *Rosier*, 105 Wn.2d at 611.

We suggest the creation of a new subsection (C) in section (e)(1):

> PROTECTION OF PERSONAL PRIVACY. The basic purpose and policy of public access to court and judicial agency administrative records is to allow public scrutiny of government, rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation. Consistent with Article 1, Section 7 of the Washington State Constitution, and in order to protect personal privacy, a court or judicial agency need not allow access to information in administrative records when the personal privacy interest in that information outweighs the public interest in disclosure, whether or not the information is explicitly covered by an exemption in paragraphs (A) and (B) above. Consistent with paragraph (A), access must be provided to the remaining portions of the administrative records, with only as much information deleted as is necessary to protect personal privacy.

Adoption of such a provision would ensure that personal privacy remains protected even when the need arises for new personal information to be collected or maintained by a court or judicial agency. And it would avoid the need for frequent updating of the court rule, which involves a process even more cumbersome than legislative amendments to the PRA.

Ability for Record Subjects to Assert Privacy Rights

When public records, including judicial administrative records, contain personal information about individuals, there are three parties with potential interests in those records: a member of the public who requests the records, the governmental entity that controls the records, and the subject of the records. In some instances the interests of two or more parties may be allied, but in other instances each party has its own distinct interests.

Both the PRA and GR 31A recognize the substantive interests of all three entities. They are, of course, focused on the interests of a requester, since the entire purpose is to effectuate a right of public access to public records. They recognize the interests of the governmental entity both by ensuring that access procedures do not impede the efficient operations of the entity, and by exempting certain types of information when disclosure of that information would interfere with the entity's work. The interests of

record subjects are most clearly recognized in the variety of exemptions from public disclosure for various types of personal information.

Similarly, the procedures for requesters and judicial entities to enforce their rights are much the same under GR 31A as the PRA, including the initial entity determination, an intra-entity appeal, an arbitration process ("alternative review"), and review by the courts. (Arbitration is a new feature of GR 31A; the PRA does not currently provide for arbitration, but there have been legislative proposals to add arbitration to the PRA as well.)

There is one area, however, in which GR 31A falls short: providing a procedure for subjects of records to enforce their rights. There is no procedure for a subject to find out whether his or her records have been requested, and no opportunity for a subject to present his or her interests even if the subject does discover a request has occurred. The PRA, in contrast, allows agencies to notify subjects, RCW 42.56.520 and .540, and allows a subject to move for an injunction against disclosure, RCW 42.56.540.

The ACLU believes that similar procedures should be incorporated into GR 31A. Without those procedures, record subjects can only hope that judicial entities will defend their interests. Considering that those entities face potential liability (in the form of attorney fees and costs) for nondisclosure, and face no penalty whatever for disclosing records, it may be a slim hope indeed. This is especially true when the personal information requested falls into a grey area, where reasonable people may disagree about whether the information is covered by one of the exemptions from disclosure.

We therefore suggest the following additions to the proposed rule:

> Sec. (e)(3)(A)(8) NOTICE TO RECORD SUBJECTS. Unless otherwise required or prohibited by law, a court or judicial agency has the option of notifying persons named in the record or to whom a record specifically pertains, that access to a record has been requested.
>
> Sec. (e)(3)(B)(7) RIGHTS OF RECORD SUBJECTS. If a court or judicial agency decides to allow access to a requested record, a person who is named in that record, or to whom the record specifically pertains, has a right, but not an obligation, to initiate review under sections (e)(3)(B)(3)-(5), or to participate as a party in any review initiated by a requester under sections (e)(3)(B)(3)-(5). If either the record subject or the record requester objects to alternative review under section (e)(3)(B)(4), such alternative review shall not be available.

Fees

One of the largest differences between the PRA and GR 31A regards the cost of fulfilling requests. The PRA strictly limits fees to copying costs only. RCW 42.56.120. In contrast, section (g)(4) of GR 31A would allow charging requesters up

to $30/hour to fulfill requests (with the first hour free). This charge could be a serious deterrent to member of the public attempting to fulfill their oversight role.

It is undoubtedly true that fulfilling many, perhaps most, requests will not exceed an hour's time, so no charge will apply. But those requests that are most likely to have a useful oversight purpose, uncovering instances of improper or wasteful government actions, often involve more complex records searches and production. This Court should not adopt a rule that creates a barrier to those requests.

At a minimum, if fees are to be charged at all, there must be a robust waiver mechanism to allow the media, public interest organizations, scholars, and researchers to pursue investigations of government activity. This is the approach taken by the federal Freedom of Information Act (FOIA). 5 U.S.C. 552(a)(4)(A)(ii). Experience with FOIA shows, however, that this is a deeply flawed approach to the problem, and leads to a significant number of disputes. Effort in applying for, evaluating, and settling disputes about the applicability of fee waivers may well exceed the amount of funds recovered through such fees—and it turns agencies and the public into adversaries, rather than joint participants in improving our government.

It should be noted that GR 31A already provides a mechanism for courts and judicial agencies to handle complicated requests without using fees to discourage such requests. Section (e)(3)(A)(6) allows an entity to prioritize requests, and negotiate narrowed or delayed responses, so as not to unduly interfere with the other operations of the court or judicial agency. This is a much better solution than erecting financial barriers to effective public oversight.

The ACLU itself has significant experience as a requester of public records, under both the PRA and the federal Freedom of Information Act (FOIA). We can confidently state that the PRA works much better than FOIA; it provides greater transparency into government activity, and engenders fewer disputes. We strongly urge this Court to continue our state's commitment to open records, and reject the barriers to access to public records created by section g(4).

Retroactivity

Section (i) provides that GR 31A shall apply only to records created on or after July 1, 2012. The ACLU strongly urges this Court to amend the section so it will apply to all records *requests* made after the effective date. In other words, the rule should retroactively apply to older records. This was the approach taken by both the PRA and FOIA, and there is no good reason for a different approach to apply to judicial administrative records.

Implementation of different access rules depending on the date of record creation would confuse members of the public trying to access records and would be an administrative nightmare. Judicial entities would need to develop two sets of access procedures, and train staff on two different methods of responding to access requests.

Members of the public would have to figure out which method applied. This is, of course, mostly an issue when the records request is denied (in full or in part). The appeals mechanism might be radically different depending on whether a record was created before or after July 1, 2012, and the cost of pursuing an appeal may similarly be radically different, as is the possibility of recovering that cost if the appeal is successful.

To further complicate the situation, it would not always be clear which set of rules would apply. Requesters may not know the date a record was created; even the judicial entities maintaining that record may not know the creation date until after the record has been located. So how is either party supposed to know which procedure to follow? Some records requests will be for multiple records, some older and some newer; will access require two separate records requests? In some cases, a single record may have been created prior to July 1, 2012, but then modified subsequent to that date; which set of rules should apply?

Compared to this cost (in both implementation/training and confusion), there is no significant downside to a simple rule that applies to all records. At most there is a speculative risk that some information in older records will be disclosed under GR 31A that would not be disclosed under the common law. It is unclear to the ACLU exactly what that information would be. The primary purposes of GR 31A is to provide clear procedures for accessing records, to clarify the existing common law, and to eliminate uncertainty in its application. We do not believe that GR 31A is supposed to substantively increase the amount and types of information available—after all, the existing common law already allows access to administrative records except in narrow circumstances. In any event, if there actually is some information that should be protected, the same concerns will probably exist for records created after July 1, 2012. In other words, the solution to this hypothetical problem is to add additional exemptions to GR 31A, presuming the need for nondisclosure can be justified.

In summary, the ACLU strongly supports adoption of GR 31A. It will provide clarity to both judicial entities and members of the public regarding access to judicial administrative records. We believe, however, that a few modifications can be made to better effectuate that result. Thank you for your consideration of the above suggestions.

Sincerely,

Jennifer Shaw