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VIA OVERNIGHT MAIL and EMAIL

Camilla.faulk@courts.wa.gov

Mr. Ronald R. Carpenter, Clerk
Washington Supreme Court
Temple of Justice
415 12th Avenue SW
Olympia, WA 98504-0929

Re: Allied Daily Newspapers of Washington (ADNW)
Comments and Revisions to Proposed GR 31A

Mr. Carpenter:

Allied Daily Newspapers of Washington (ADNW) is pleased that the Board for Judicial Administration has recommended for approval a long, overdue rule governing the right of public access to administrative judicial records. Enclosed are ADNW's proposed revisions in black-lined format. A "clean" version is also enclosed.

The right of public access to administrative judicial records is concomitant with the principle of open administration of justice as provided in article 1, section 10 of the Washington Constitution. Of course, like the Public Records Act, there are numerous exceptions and restrictions. ADNW's proposed revisions are designed to make clear that exemptions and restrictions must be specific and that absent such clarity and specificity, public access shall not be denied.

The proposed GR 31A incorporates and relies upon the Public Records Act, Chapter 42.56 RCW, as the framework for the scope, substance, and procedures under GR 31A. Given that the records in question are administrative records, this framework is completely appropriate and is the touchstone consistently utilized throughout the rule. Most of ADNW's proposed revisions are designed to re-enforce these principles and eliminate confusion and ambiguity by removing unnecessary language, clarifying other language, and removing terms and terminology that introduce standards that are vague, unprecedented, or in conflict with the principles found in the Public Records Act.

Many of the proposed revisions are intended to clarify language or to make terminology consistent. These do not need further comment.

ADNW proposes several revisions to eliminate exceptions or exemptions that are unnecessary or confusing.

- (c)(5)—There is no requirement that a judicial officer personally respond to public records requests; thus, there is no need to state the opposite. In any event, stating that a judicial officer "is not a court or judicial agency" is confusing.

- (c)(6)—A subagency is a judicial agency. Unnecessary and confusing language is deleted.

- (d)(4)(A)—"Chambers records" should not include administrative records but be related to a judicial officer's "work-product" in connection with official judicial proceedings.

- (e)(1)(B)(4)—The deliberative process exemption should expire once a decision has been made.

- (e)(1)(B)(6)—Birthdates are needed to distinguish between similarly named people. Birthdates are not highly confidential personal identifying information.

- (e)(1)(B)(7) and (8)—These records are covered either by GR 31, attorney-client privilege, attorney work-product, or the PRA exception for investigative records. There is no need to create special exemptions in GR31A for this type of information.

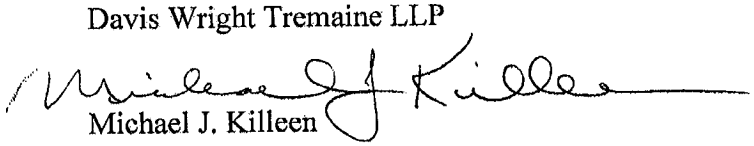
- (e)(1)(B)(9), (10) and (11)—These are judicial records covered by GR 31.

ADNW's proposed revisions to Sections (a) and (e)(1)(A) are designed to reinforce the existing principles behind proposed GR 31A, namely, that there is a presumptive right of access to court and judicial administrative records, that exemptions and restrictions must be clearly stated, and that, in the event of ambiguity, the PRA will be used to provide guidance in interpreting GR 31A.

Finally, ADNW's proposed revisions to the Section (3), regarding the process for access, are designed to streamline the rule, promote promptness, and insure that requesters who prevail on a petition for review in Superior Court are entitled to their attorney fees.

Respectfully submitted,

Davis Wright Tremaine LLP



Michael J. Killeen
Enclosures

cc: Mr. Rowland Thompson, Executive Director, ADNW

ADNW Proposed Revisions – 11/30/11

[SUGGESTED NEW RULE]
From the Board for Judicial Administration

General Court Rule 31A

ACCESS TO ADMINISTRATIVE RECORDS

(a) Policy and Purpose. ~~It~~Consistent with the principle of open administration of justice as provided by article I, section 10 of the Washington State Constitution, it is the policy of the judiciary to facilitate access to administrative records. Access to administrative records is not absolute and shall be consistent with ~~reasonable expectations of~~exemptions for personal privacy ~~as provided by article 1, section 7 of the Washington State Constitution~~, restrictions in statutes, restrictions in court rules, and as required for the integrity of judicial decision-making. Access shall not unduly burden the business of the judiciary.

(b) Scope.

This rule governs the right of public access to administrative judicial records. This rule applies to all administrative records, regardless of the physical form of the record, the method of recording the record, or the method of storage of the record. Access to court records is governed by GR 15, 22, and 31.

COMMENT: "Court records" is a term of art, defined in GR 31 as meaning case files and related documents.

(c) Application of Rule.

(1) This rule applies to the Supreme Court, the Court of Appeals, the superior courts, the district and municipal courts, and the following judicial branch agencies:

(A) All judicial entities that are overseen by a court, including entities that are designated as agencies, departments, committees, boards, commissions, task forces, and similar groups;

(B) The Superior Court Judges' Association, the District and Municipal Court Judges' Association, and similar associations of judicial officers and employees; and

(C) All subgroups of the entities listed in this section (1).

COMMENT: The elected court clerks and their staff are not included in this rule because (1) they are covered by the Public Records Act and (2) they do not generally maintain the judiciary's administrative records that are covered by this rule.

(2) This rule does not apply to the Commission on Judicial Conduct. The Commission is encouraged to incorporate any of the provisions in this rule as it deems appropriate.

1 Workshare Compare comparison of interwovenSite://DWTDOCS/DWT/18593339/1 and interwovenSite://DWTDOCS/DWT/18593339/2. Performed on 11/29/2011.

COMMENT: The Commission on Judicial Conduct is not governed by a court. The commission has a heightened need for maintaining independence from courts. It would be inappropriate to dictate to the commission its policies on public records.

(3) This rule does not apply to the Washington State Bar Association. Public access to the Bar Association's records is governed by GR 12.4.

COMMENT: This paragraph (3) presumes that the Bar Association's proposed rule 12.4 (currently being drafted) is adopted.

(4) This rule does not apply to the Certified Professional Guardian Board. Public access to the board's records is governed by GR 23.

(5) ~~A judicial officer is not a court or judicial agency.~~

~~*COMMENT: This provision protects judges and court commissioners from having to respond personally to public records requests. Records requests would instead go to the court's public records officer.*~~(6) An attorney or entity appointed by a court or judicial agency to provide legal representation to a litigant in a judicial or administrative proceeding does not become a judicial agency by virtue of that appointment.

COMMENT: The Washington Association of Criminal Defense Lawyers (WACDL) expressed a concern that appointed criminal defense attorneys and their agencies not be covered by this rule by virtue of their appointment. Paragraph (6) removes them from the scope of this rule.

(~~7~~6) A person or agency entrusted by a judicial officer, court, or judicial agency with the storage and maintenance of its public records, whether part of a judicial agency or a third party, ~~is not a judicial agency. Such person or agency~~ may not respond to a request for access to administrative records, absent express written authority from the court or judicial agency or separate authority in court rule to grant access to the documents.

COMMENT: Judicial e-mails and other documents sometimes reside on IT servers, some are in off-site physical storage facilities. This provision prohibits an entity that operates the IT server from disclosing judicial records. The entity is merely a bailee, holding the records on behalf of a court or judicial agency, rather than an owner of the records having independent authority to release them. Similarly, if a court or judicial agency puts its paper records in storage with another entity, the other entity cannot disclose the records. In either instance, it is the court or judicial agency that needs to make the decision as to releasing the records. The records request needs to be addressed by the court's or judicial agency's public records officer, not by the person or entity having control over the IT server or the storage area. On the other hand, if a court or judicial agency archives its records with the state archivist, relinquishing by contract its own authority as to disposition of the records, the archivist would have separate authority to disclose the records.

Because of the broad definition of "public record" appearing later in this rule, this paragraph (6) would apply to electronic records, such as e-mails (and their meta-data) and telephone records, among a wide range of other records.

(d) Definitions.

(1) "Access" means the ability to view or obtain a copy of an administrative record.

(2) "Administrative record" means a public record created by or maintained by a court or judicial agency and related to the management, supervision, or administration of the court or judicial agency.

COMMENT: The work group has developed a list of categories of records maintained by courts and judicial agencies. The list is annotated with the work group's expectation of whether such records are subject to disclosure. The list is found as an appendix to the work group's report. It is intended for illustrative purposes only.

The term "administrative record" does not include any of the following: (1) "court records" as defined in GR 31; (2) chambers records as set forth later in this rule; or (3) an attorney's client files that would otherwise be covered by the attorney-client privilege or the attorney work product privilege.

(3) "Court record" is defined in GR 31.

(4) (A) "Chambers record" means any writing that is created by or maintained by any judicial officer or chambers staff, and is maintained under chambers control, ~~whether~~when directly related to an official judicial proceeding, ~~the management of the court, or other chambers~~or judicial decision-making activities. "Chambers staff" means a judicial officer's law clerk and any other staff when providing support directly to the judicial officer at chambers.

COMMENT: Some judicial employees, particularly in small jurisdictions, split their time between performing chambers duties and performing other court duties. An employee may be "chambers staff" as to certain functions, but not as to others. Whether certain records are subject to disclosure may depend on whether the employee was acting in a chambers staff function or an administrative staff function with respect to that record.

(B) Chambers records are not public records. Court records and administrative records do not become chambers records merely because they are in the possession or custody of a judicial officer or chambers staff.

COMMENT: Access to chambers records could necessitate a judicial officer having to review all records to protect against disclosing case sensitive information or other information that would intrude on the independence of judicial decision-making. This would effectively make the judicial officer a de facto public records officer and could greatly interfere with judicial functions. Records may remain under chambers control even though they are physically stored elsewhere. For example, records relating to chambers activities that are stored on a judge's personally owned or workplace-assigned computer, laptop computer, cell phone, and similar electronic devices would still be chambers records. However, records that are otherwise subject to disclosure should not be allowed to be moved into chambers control as a means of avoiding disclosure.

Chambers records do not change in character by virtue of being accessible to another chambers. For example, a data base that is shared by multiple judges and their chambers staff is a "chambers record" for purposes of this rule, as long as the data base is only being used by judges and their chambers staff.

(5) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC) Application of the Code of Judicial Conduct Section (A).

(6) "Public" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency, however constituted, or any other organization or group of persons, however organized.

(7) "Public record" includes any writing, except chambers records ~~and court records~~, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any court or judicial agency regardless of physical form or characteristics. "Public record" also includes meta-data for electronic administrative records.

COMMENT: The definition in paragraph (7) is adapted from the Public Records Act. The work group added the exception for chambers records, for consistency with other parts of the proposed rule.

(8) "Writing" means electronically stored information, handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations and electronic databases from which information may be obtained or translated.

COMMENT: The definition in paragraph (8) is taken from the Public Records Act. E-mails and telephone records are included in this broad definition of "writing."

(e) Administrative Records.

(1) Administrative Records—Right of Access.

(A) The public has a presumptive right of access to court and judicial agency administrative records unless access is exempted or prohibited expressly under this rule, other court rules, federal statutes, state statutes including the Public Records Act, Chapter 42.56 RCW, court orders, or case law. To the extent that an ambiguity exists as to whether records access would be exempt or prohibited under this rule or the other enumerated sources, responders and reviewing authorities shall be guided by the Public Records Act, Chapter 42.56 RCW, ~~access is also exempt or prohibited~~in making interpretations under this rule. ~~In addition, to the extent required to prevent a significant risk to individual privacy or safety interests, a~~A court or judicial agency ~~shall~~may delete ~~identifying details~~exempt information in a manner

consistent with this rule when it makes available or publishes any public record; however, in each instance, the justification for the deletion shall be provided fully in writing.

COMMENT: The paragraph states that administrative records are open to public access unless an exemption or prohibition applies. The paragraph's final sentence allows agencies to redact exempt information from documents ~~based on significant risks to privacy or safety~~.

Any public-access exemptions or prohibitions from the Public Records Act and from other statutes or court rules would also apply to the judiciary's administrative records. For example, GR 33(b) provides that certain medical records relating to ADA issues are to be sealed; the sealed records would not be subject to access under this proposed GR 31A.

(B) In addition to exemptions referred to in paragraph (A) above, the following categories of administrative records are exempt from public access:

(1) Requests for judicial ethics opinions;

COMMENT: This exemption was requested by the Judicial Ethics Advisory Committee.

(2) Identity of writing assignment judges in the appellate courts prior to issuance of the opinion;

COMMENT: This exemption was suggested by Judge Quinn Brintnall at a BJA meeting.

(3) Minutes of meetings held by judges within a court and staff ~~products~~writings when prepared solely for judicial discussion or decision-making during the meeting; however, final decisions on administrative matters and the documents embodying them are not exempt from disclosure.

COMMENT: Minutes of the deliberations at judges' meetings are exempt. Records produced by staff for consideration in judges' meetings and identified in the minutes would be exempt under this section. ~~The preliminary recommendations continue to be protected under the next subsection, after final decision. However, final decisions on administrative matters and the documents embodying them are not exempt from disclosure.~~

(4) Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this rule, except that a specific record is not exempt when publicly cited by a court or agency in connection with any court or agency action. This exemption no longer applies ~~both before and~~ after a final decision is made on the opinion or policy;

COMMENT: The first sentence of paragraph (4) is the "deliberative process" exemption from the Public Records Act, RCW 42.56.280.

~~Unlike~~Like the Public Records Act, ~~in which~~ the deliberative process exemption expires once the decision is made (see Progressive Animal Welfare Soc'y v. University of Wash., 125 Wn.2d 243, 257, 884 P.2d 592 (1994)), ~~this rule provides a continuing exemption.~~

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(5) Evaluations of and recommendations ~~for~~concerning candidates seeking appointment or employment within a court or judicial agency;

COMMENT: Paragraph (5) is intended to encompass documents such as those of the Supreme Court's Capital Counsel Committee, which evaluates attorneys for potential inclusion on a list of attorneys who are specially qualified to represent clients in capital cases.

(6) Personal identifying information, including individuals' home contact information, ~~birth dates,~~ Social Security numbers, driver's license numbers, and identification/security photographs;

COMMENT: The exemption was requested by staff for the Office of Public Defense. The work group considered including private financial information in this provision, but ultimately concluded that financial information is already addressed in the Public Records Act's exemptions.

~~(7) An attorney's request to a court or judicial agency for a trial or appellate court defense expert, investigator, or social worker, any report or findings submitted to the attorney or court or judicial agency by the expert, investigator, or social worker, and the invoicing and payment of the expert, investigator or social worker;~~

~~*COMMENT: The exemption was requested by the Office of Public Defense.*~~

~~(8) Documents, records, files, investigative notes and reports, including the complaint and the identity of the complainant, associated with a court's or judicial agency's internal investigation of a complaint against the court or judicial agency or its contractors during the course of the investigation. The outcome of the court's or judicial agency's investigation is not exempt;~~

~~*COMMENT: The exemption was requested by the Office of Public Defense.*~~

~~(9) Family court evaluation and domestic violence files when no action is legally pending;~~

~~(10) Family court mediation files; and~~

~~(11) Juvenile court probation's social files.~~ ~~*COMMENT: The three preceding paragraphs create exemptions for files that are already covered, at least in part, by exemptions in state statutes or elsewhere. These paragraphs are included here to make sure that there is no doubt about their exempt status. The inclusion of these three paragraphs should not be interpreted as excluding other statutory (or rule) exemptions that are not expressly listed here.*~~ *Per section (e)(1)(A) above, exemptions existing in other rules, statutes, and other authorities apply to records under this rule, even if they are not expressly stated here.*

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FURTHER COMMENT: Additional express exemptions were also requested. Some were not included in the rule because it is currently believed that the items were already exempt from disclosure under other laws. These items include:

- *Private financial information, including financial account numbers;*
- *Dockets/index information for protected case types; and*
- *Testing/screening materials/results.*

Other items were not included for other reasons, including when insufficient information was available to evaluate the items, such as information about the implications of excluding an item and about the variety of practices used by courts and judicial agencies. These items include:

- *Investigative records of regulatory or disciplinary agencies;*
- *Copyrighted information; and*
- *Performance measures for evaluating court processes. (Some of this subject matter is taken care of with the deliberative process exemption, above.)*

(2) Chambers Records. Chambers records are not ~~subject to disclosure~~public records as stated in subsection (d)(4)(B).

(3) Administrative Records—Process for Access.

(A) Administrative Records—Procedures for Records Requests.

(1) AGENCIES TO ADOPT PROCEDURES. Each court and judicial agency must adopt a policy implementing this rule and setting forth its procedures for ~~accepting~~receiving and responding to administrative records requests. The policy must include the designation of a public records officer and ~~must~~may require that requests for access be submitted in writing to the designated public records officer. Best practices for handling administrative records requests shall be developed under the authority of the Board for Judicial Administration.

(2) PUBLICATION OF PROCEDURES FOR ~~REQUESTING~~PUBLIC ACCESS TO ADMINISTRATIVE RECORDS. Each court and judicial agency must prominently publish ~~the~~its policy and procedures for ~~requesting~~public access to its administrative records. If the court or judicial agency has a website, the policy and procedures must be included there. The publication shall include the public records officer's work mailing address, telephone number, fax number, ~~and~~ e-mail address, and business hours.

(3) ~~INITIAL~~PROMPT RESPONSE. ~~Each~~Within five working days of its receipt, each court and judicial agency must ~~initially~~ respond to a ~~written~~ request for access to an administrative record ~~within five working days of its receipt. The response shall acknowledge~~either by providing the record or acknowledging receipt of the request and ~~include~~providing a good-faith

estimate of the time needed to respond to the request. ~~The estimate may be later revised, if necessary~~If the court or judicial agency is unable to fully comply in this timeframe, then the court or judicial agency should comply to the extent practicable and provide a new good faith estimate for responding to the remainder of the request. If the court or judicial agency does not fully satisfy the records request in the manner requested, the court or judicial agency must justify in writing any deviation from the terms of the request. For purposes of this provision, "working days" mean days that the court or judicial agency, including a part-time municipal court, is open.

(4) COMMUNICATION WITH REQUESTER. Each court and judicial agency must communicate with the requester as necessary to clarify the records being requested. Such communication must occur promptly. The court or judicial agency may also communicate with the requester in an effort to determine if the requester's need would be better served with a response other than the one actually requested.

~~(5) SUBSTANTIVE RESPONSE. Each court and judicial agency must respond to the substance of the records request within the timeframe specified in the court's or judicial agency's initial response to the request. If the court or judicial agency is unable to fully comply in this timeframe, then the court or judicial agency should comply to the extent practicable and provide a new good faith estimate for responding to the remainder of the request. If the court or judicial agency does not fully satisfy the records request in the manner requested, the court or judicial agency must justify in writing any deviation from the terms of the request.~~

(5) ~~(6)~~ EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS. If a particular request is of a magnitude that the court or judicial agency cannot fully comply within a reasonable time due to constraints on the court's or judicial agency's time, resources, and personnel, the court or judicial agency shall communicate this information to the requester. The court or judicial agency must attempt to reach agreement with the requester as to narrowing the request to a more manageable scope and as to a timeframe for the court's or judicial agency's response, which may include a schedule of installment responses. If the court or judicial agency and requester are unable to reach agreement, then the court or judicial agency shall respond to the extent practicable and inform the requester ~~that~~as to the court's or judicial agency ~~has completed its~~'s reasons for an incomplete response.

(6) ~~(7)~~ LIMITATIONS ON INMATE REQUESTS.

(i) The inspection or production of any nonexempt public record by persons incarcerated in federal, state, local, or privately operated correctional facilities may be enjoined pursuant to this section. The request shall be made by motion and shall be a summary proceeding based on affidavits or declarations, unless the court orders otherwise.

(ii) The injunction may be requested by a court or judicial agency which is the recipient of the records request or its representative, or by a person to whom the records request specifically pertains or his or her representative. The injunction request must be filed in the superior court in which the court or judicial agency which is the recipient of the records request is located. If the injunction request is filed by a superior court the decision on the injunction must be made by a visiting judicial officer.

(iii) The court may enjoin all or any part of a request or requests. In order to issue an injunction, the court must find by a preponderance of the evidence that: the request was made to harass or intimidate the court or judicial agency or its employees; fulfilling the request would likely threaten the security of the court or judicial agency; fulfilling the request would likely threaten the safety or security of staff, family members of staff, or any other person; or fulfilling the request may assist criminal activity. Based on the evidence, the court may also enjoin, for a period of time the court deems reasonable, future requests by the same requestor or an entity owned or controlled in whole or in part by the same requestor.

(iv) In deciding whether to enjoin a records request the court may consider all relevant factors including, but not limited to: other requests by the requestor; the type of record or records sought; statements offered by the requestor concerning the purpose for the request; whether disclosure of the requested records would likely harm any person or vital government interest; whether the request seeks a significant and burdensome number of documents; the impact of disclosure on the court's or judicial agency's security and order, the safety or security of court or judicial agency staff, families, or others; and the potential deterrence of criminal activity.

(v) The court or judicial agency shall not be liable for any attorney fees, costs, civil penalties, or fines under (e)(3)(B)(6) for any

period during which an order under this section is in effect, including during an appeal of an order under this section, regardless of the outcome of the appeal.

(B) Administrative Records—Review of ~~Public Records Officer's~~Court or Judicial Agency Response.

(1) NOTICE OF REVIEW PROCEDURES. The ~~public records officer's~~ response of a court or judicial agency to a public records request shall include a written summary of the procedures under which the requesting party may seek further review.

(2) TIMELINE FOR SEEKING REVIEW. The timelines set forth in section (e)(3)(A) shall apply likewise to requests for review of the ~~public records officer's~~ response. of a court or judicial agency.

(3) FURTHER REVIEW WITHIN COURT OR AGENCY. Each court and judicial agency shall provide a method for review by the judicial agency's director, presiding judge, or judge designated by the presiding judge. For a judicial agency, the presiding judge shall be the presiding judge of the court that oversees the agency. The court or judicial agency may also establish intermediate levels of review. The court or judicial agency shall make publicly available the applicable forms. The review proceeding is informal and summary. The review proceeding shall be held within five working days. If that is not reasonably possible, then within five working days the review shall be scheduled for the earliest practical date.

(4) ALTERNATIVE REVIEW. As an alternative to review under section (e)(3)(B)(3), a ~~requesting person~~requester may seek review by a person outside the court or judicial agency. If the ~~requesting person~~requester seeks review of a decision made by a court or made by a judicial agency that is directly reportable to a court, the outside review shall be by a visiting judicial officer. If the ~~requesting person~~requester seeks review of a decision made by a judicial agency that is not directly reportable to a court, the outside review shall be by a person agreed upon by the ~~requesting person~~requester and the judicial agency. In the event the ~~requesting person~~requester and the judicial agency cannot agree upon a person, the presiding superior court judge in the county in which the judicial agency is located shall either conduct the review or appoint a person to conduct the review. The review proceeding shall be informal and summary. ~~In order to choose this option, the requesting person~~To seek alternative review, the requester must sign a written waiver of any further review of the decision by the person outside the court or judicial agency. The decision by the person outside the court or judicial agency is

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final and not appealable. Attorney fees and costs are not available under this option.

COMMENT: The bifurcated procedures for review are intended to provide flexible, prompt, informal, and final procedures for review of public records decisions. The option for a visiting judge allows a requester to have the review heard by an outside decision-maker; in the interest of obtaining prompt, final decisions, a requester selecting this option would be required to waive further review. If the Legislature creates a new entity to review public records decisions made by agencies of the executive branch, then the work group recommends that the BJA consider using this entity for review of judicial records decisions as well.

(5) REVIEW IN SUPERIOR COURT.

(i) A requester may seek review of a decision under section (e)(3)(B)(3) by ~~commencing an action~~filing a petition in superior court. The burden of proof shall be on the court or judicial agency that made the public records decision to establish that refusal to permit public inspection and copying is in accordance with section (e)(1) which exempts or prohibits disclosure in whole or in part of specific information or records. Judicial review of all court or judicial agency actions shall be de novo. The superior court shall apply section (e)(1) of this rule in determining the accessibility of the requested documents. ~~Any ambiguity in the application of section (e)(1) to the requested documents shall be resolved by analyzing access under the common law's public access balancing test.~~

COMMENT: A ~~civil proceeding~~petition to review a denial may be brought in superior court in the same manner as under the Public Records Act.

~~The common law's balancing test is addressed in detail in Cowles Publishing v. Murphy, 96 Wn.2d 584 (1981), and Beuhler v. Small, 115 Wn.App. 914 (2003). The interest in disclosure is balanced against the extent to which disclosure poses a significant risk to individual privacy or safety.~~

(ii) The right of de novo review is not available to a requester who sought review under the alternative process set forth in section (e)(3)(B)(4).

COMMENT: The Supreme Court may wish to clarify any period of limitation on the bringing of an action for judicial review under this section, expressly or by reference to the limitations on such actions under the Public Records Act.

(6) MONETARY SANCTIONS.

(i) In the de novo review proceeding under section (e)(3)(B)(5), the superior court ~~may in its discretion~~shall award reasonable attorney fees and costs to a ~~requesting party~~requester if the court finds that (1) the court's or judicial agency's response was deficient, (2) the

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requester specified the particular deficiency to the court or judicial agency, and (3) the court or judicial agency did not cure the deficiency.

(ii) Sanctions may be imposed against either party under CR 11, if warranted.

(iii) Except as provided in sections (e)(3)(B)(6)(i) and (ii), a court or judicial agency may not be required to pay attorney fees, costs, civil penalties, or fines.

COMMENT: Monetary penalties for failure to produce records available under the Public Records Act are not available under this rule.

(iv) No individual judicial officers or court or judicial agency employees may be assessed a monetary sanction under this section (6).

COMMENT: Only a court or judicial agency may be assessed monetary sanctions, not an individual. This is consistent with the approach of the Public Records Act. The monetary sanctions would be payable from state/city/county funds, absent some insurance or risk pool availability.

(f) Administrative Records—Court and Judicial Agency Rules. Each court by action of a majority of the judges may from time to time make and amend local rules governing access to administrative records not inconsistent with this rule. Each judicial agency may from time to time make and amend agency rules governing access to its administrative records not inconsistent with this rule.

(g) Judicial Records—Charging of Fees.

(1) A fee may not be charged to view administrative records.

(2) A fee may be charged for the photocopying or scanning of judicial records. If another court rule or statute specifies the amount of the fee for a particular type of record, that rule or statute shall control. Otherwise, the amount of the fee may not exceed the amount that is authorized in the Public Records Act, Chapter 42.56 RCW.

(3) The court or judicial agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If a court or judicial agency makes a request available on a partial or installment basis, the court or judicial agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed within 30 days, the court or judicial agency is not obligated to fulfill the balance of the request.

COMMENT: Paragraph (3) incorporates a modified version of the Public Records Act's "deposit and installments" language.]

(4) A fee not to exceed $30 per hour may be charged for research services required to fulfill aan individual request taking longer than one hour. The fee shall be

assessed from the second hour onward. Requesters shall be provided a reasonable estimate, in advance, of any research service fees.

COMMENT: The authority to charge for research services is discretionary, allowing courts to balance the competing interests between recovering the costs of their response and ensuring the open administration of justice. The fee should not exceed the actual costs of response. It is anticipated that a best-practices group will consider further guidelines in this area, including fee waivers.

(h) Best Practices. Best practice guidelines adopted by the Supreme Court may be relied upon in acting upon public requests for documents.

COMMENT: A new work group is contemplated to recommend best practices to guide courts and judicial agencies in implementing this rule's necessarily broad, general standards. Courts and judicial agencies would benefit greatly from further work in applying the general principles to the specific types of documents and requests that are most likely to arise. For example, best practices could include designating more specific lists of records that are presumptively characterized as "chambers records" or as being within other categories of records under this rule. The BJA's first work group prepared some documents to assist a new best-practices group in this regard. The best-practices group could also recommend the best methods and resources for training judges and staff.

(i) Effective Date of Rule.

(1) This rule goes into effect on July 1, 2012, and applies to records that are created on or after that date.

COMMENT: A delayed implementation date is used to allow time for development of best practices, training, and implementation.

(2) Public access to records that are created before that date are to be analyzed according to other court rules, applicable statutes, and the common law balancing test. The Public Records Act, Chapter 42.56 RCW, does not ~~apply to~~govern judicial records, but it may be used for non-binding guidance.

 Workshare Compare comparison of interwovenSite://DWTDOCS/DWT/18593339/1 and interwovenSite://DWTDOCS/DWT/18593339/2. Performed on 11/29/2011.

ADNW Proposed Revisions – 11/30/11

[SUGGESTED NEW RULE]
From the Board for Judicial Administration

General Court Rule 31A

ACCESS TO ADMINISTRATIVE RECORDS

(a) Policy and Purpose. Consistent with the principle of open administration of justice as provided by article I, section 10 of the Washington State Constitution, it is the policy of the judiciary to facilitate access to administrative records. Access to administrative records is not absolute and shall be consistent with exemptions for personal privacy, restrictions in statutes, restrictions in court rules, and as required for the integrity of judicial decision-making. Access shall not unduly burden the business of the judiciary.

(b) Scope.

This rule governs the right of public access to administrative judicial records. This rule applies to all administrative records, regardless of the physical form of the record, the method of recording the record, or the method of storage of the record. Access to court records is governed by GR 15, 22, and 31.

COMMENT: "Court records" is a term of art, defined in GR 31 as meaning case files and related documents.

(c) Application of Rule.

(1) This rule applies to the Supreme Court, the Court of Appeals, the superior courts, the district and municipal courts, and the following judicial branch agencies:

(A) All judicial entities that are overseen by a court, including entities that are designated as agencies, departments, committees, boards, commissions, task forces, and similar groups;

(B) The Superior Court Judges' Association, the District and Municipal Court Judges' Association, and similar associations of judicial officers and employees; and

(C) All subgroups of the entities listed in this section (1).

COMMENT: The elected court clerks and their staff are not included in this rule because (1) they are covered by the Public Records Act and (2) they do not generally maintain the judiciary's administrative records that are covered by this rule.

(2) This rule does not apply to the Commission on Judicial Conduct. The Commission is encouraged to incorporate any of the provisions in this rule as it deems appropriate.

COMMENT: The Commission on Judicial Conduct is not governed by a court. The commission has a heightened need for maintaining independence from courts. It would be inappropriate to dictate to the commission its policies on public records.

(3) This rule does not apply to the Washington State Bar Association. Public access to the Bar Association's records is governed by GR 12.4.

COMMENT: This paragraph (3) presumes that the Bar Association's proposed rule 12.4 (currently being drafted) is adopted.

(4) This rule does not apply to the Certified Professional Guardian Board. Public access to the board's records is governed by GR 23.

(5) An attorney or entity appointed by a court or judicial agency to provide legal representation to a litigant in a judicial or administrative proceeding does not become a judicial agency by virtue of that appointment.

COMMENT: The Washington Association of Criminal Defense Lawyers (WACDL) expressed a concern that appointed criminal defense attorneys and their agencies not be covered by this rule by virtue of their appointment. Paragraph (6) removes them from the scope of this rule.

(6) A person or agency entrusted by a judicial officer, court, or judicial agency with the storage and maintenance of its public records, whether part of a judicial agency or a third party, may not respond to a request for access to administrative records, absent express written authority from the court or judicial agency or separate authority in court rule to grant access to the documents.

COMMENT: Judicial e-mails and other documents sometimes reside on IT servers, some are in off-site physical storage facilities. This provision prohibits an entity that operates the IT server from disclosing judicial records. The entity is merely a bailee, holding the records on behalf of a court or judicial agency, rather than an owner of the records having independent authority to release them. Similarly, if a court or judicial agency puts its paper records in storage with another entity, the other entity cannot disclose the records. In either instance, it is the court or judicial agency that needs to make the decision as to releasing the records. The records request needs to be addressed by the court's or judicial agency's public records officer, not by the person or entity having control over the IT server or the storage area. On the other hand, if a court or judicial agency archives its records with the state

archivist, relinquishing by contract its own authority as to disposition of the records, the archivist would have separate authority to disclose the records.

Because of the broad definition of "public record" appearing later in this rule, this paragraph (6) would apply to electronic records, such as e-mails (and their meta-data) and telephone records, among a wide range of other records.

(d) Definitions.

(1) "Access" means the ability to view or obtain a copy of an administrative record.

(2) "Administrative record" means a public record created by or maintained by a court or judicial agency and related to the management, supervision, or administration of the court or judicial agency.

COMMENT: The work group has developed a list of categories of records maintained by courts and judicial agencies. The list is annotated with the work group's expectation of whether such records are subject to disclosure. The list is found as an appendix to the work group's report. It is intended for illustrative purposes only.

The term "administrative record" does not include any of the following: (1) "court records" as defined in GR 31; (2) chambers records as set forth later in this rule; or (3) an attorney's client files that would otherwise be covered by the attorney-client privilege or the attorney work product privilege.

(3) "Court record" is defined in GR 31.

(4) (A) "Chambers record" means any writing that is created by or maintained by any judicial officer or chambers staff, and is maintained under chambers control, when directly related to an official judicial proceeding, or judicial decision-making activities. "Chambers staff" means a judicial officer's law clerk and any other staff when providing support directly to the judicial officer at chambers.

COMMENT: Some judicial employees, particularly in small jurisdictions, split their time between performing chambers duties and performing other court duties. An employee may be "chambers staff" as to certain functions, but not as to others. Whether certain records are subject to disclosure may depend on whether the employee was acting in a chambers staff function or an administrative staff function with respect to that record.

(B) Chambers records are not public records. Court records and administrative records do not become chambers records merely because they are in the possession or custody of a judicial officer or chambers staff.

COMMENT: Access to chambers records could necessitate a judicial officer having to review all records to protect against disclosing case sensitive information or other information that would intrude on the independence of judicial decision-making. This would effectively make the judicial officer a de facto public records officer and could greatly interfere with judicial functions. Records may remain under chambers control even though they are physically stored elsewhere. For example, records relating to chambers activities that are stored on a judge's personally owned or workplace-assigned computer, laptop computer, cell phone, and similar electronic devices would still be chambers records. However, records that are otherwise subject to disclosure should not be allowed to be moved into chambers control as a means of avoiding disclosure.

Chambers records do not change in character by virtue of being accessible to another chambers. For example, a data base that is shared by multiple judges and their chambers staff is a "chambers record" for purposes of this rule, as long as the data base is only being used by judges and their chambers staff.

(5) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC) Application of the Code of Judicial Conduct Section (A).

(6) "Public" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency, however constituted, or any other organization or group of persons, however organized.

(7) "Public record" includes any writing, except chambers records, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any court or judicial agency regardless of physical form or characteristics. "Public record" also includes meta-data for electronic administrative records.

COMMENT: The definition in paragraph (7) is adapted from the Public Records Act. The work group added the exception for chambers records, for consistency with other parts of the proposed rule.

(8) "Writing" means electronically stored information, handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations

and electronic databases from which information may be obtained or translated.

COMMENT: The definition in paragraph (8) is taken from the Public Records Act. E-mails and telephone records are included in this broad definition of "writing."

(e) Administrative Records.

(1) Administrative Records—Right of Access.

(A) The public has a presumptive right of access to court and judicial agency administrative records unless access is exempted or prohibited expressly under this rule, other court rules, federal statutes, state statutes including the Public Records Act, Chapter 42.56 RCW, court orders, or case law. To the extent that an ambiguity exists as to whether records access would be exempt or prohibited under this rule or the other enumerated sources, responders and reviewing authorities shall be guided by the Public Records Act, Chapter 42.56 RCW, in making interpretations under this rule. A court or judicial agency may delete exempt information in a manner consistent with this rule when it makes available or publishes any public record; however, in each instance, the justification for the deletion shall be provided fully in writing.

COMMENT: The paragraph states that administrative records are open to public access unless an exemption or prohibition applies. The paragraph's final sentence allows agencies to redact exempt information from documents.

Any public-access exemptions or prohibitions from the Public Records Act and from other statutes or court rules would also apply to the judiciary's administrative records. For example, GR 33(b) provides that certain medical records relating to ADA issues are to be sealed; the sealed records would not be subject to access under this proposed GR 31A.

(B) In addition to exemptions referred to in paragraph (A) above, the following categories of administrative records are exempt from public access:

(1) Requests for judicial ethics opinions;

COMMENT: This exemption was requested by the Judicial Ethics Advisory Committee.

(2) Identity of writing assignment judges in the appellate courts prior to issuance of the opinion;

COMMENT: This exemption was suggested by Judge Quinn Brintnall at a BJA meeting.

(3) Minutes of meetings held by judges within a court and staff writings when prepared solely for judicial discussion or decision-making during the meeting; however, final decisions on administrative matters and the documents embodying them are not exempt from disclosure.

COMMENT: Minutes of the deliberations at judges' meetings are exempt. Records produced by staff for consideration in judges' meetings and identified in the minutes would be exempt under this section.

(4) Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this rule, except that a specific record is not exempt when publicly cited by a court or agency in connection with any court or agency action. This exemption no longer applies after a final decision is made on the opinion or policy;

COMMENT: The first sentence of paragraph (4) is the "deliberative process" exemption from the Public Records Act, RCW 42.56.280.

Like the Public Records Act, the deliberative process exemption expires once the decision is made (see Progressive Animal Welfare Soc'y v. University of Wash., 125 Wn.2d 243, 257, 884 P.2d 592 (1994)).

(5) Evaluations of and recommendations concerning candidates seeking appointment or employment within a court or judicial agency;

COMMENT: Paragraph (5) is intended to encompass documents such as those of the Supreme Court's Capital Counsel Committee, which evaluates attorneys for potential inclusion on a list of attorneys who are specially qualified to represent clients in capital cases.

(6) Personal identifying information, including individuals' home contact information, Social Security numbers, driver's license numbers, and identification/security photographs;

COMMENT: The exemption was requested by staff for the Office of Public Defense. The work group considered including private financial information in this provision, but ultimately concluded that financial information is already addressed in the Public Records Act's exemptions.

COMMENT: Per section (e)(1)(A) above, exemptions existing in other rules, statutes, and other authorities apply to records under this rule, even if they are not expressly stated here.

FURTHER COMMENT: Additional express exemptions were also requested. Some were not included in the rule because it is currently believed that the items were already exempt from disclosure under other laws. These items include:

- *Private financial information, including financial account numbers;*
- *Dockets/index information for protected case types; and*
- *Testing/screening materials/results.*

Other items were not included for other reasons, including when insufficient information was available to evaluate the items, such as information about the implications of excluding an item and about the variety of practices used by courts and judicial agencies. These items include:

- *Investigative records of regulatory or disciplinary agencies;*
- *Copyrighted information; and*
- *Performance measures for evaluating court processes. (Some of this subject matter is taken care of with the deliberative process exemption, above.)*

(2) Chambers Records. Chambers records are not public records as stated in subsection (d)(4)(B).

(3) Administrative Records—Process for Access.

(A) Administrative Records—Procedures for Records Requests.

(1) AGENCIES TO ADOPT PROCEDURES. Each court and judicial agency must adopt a policy implementing this rule and setting forth its procedures for receiving and responding to administrative records requests. The policy must include the designation of a public records officer and may require that requests for access be submitted in writing to the designated public records officer. Best practices for handling administrative records requests shall be developed under the authority of the Board for Judicial Administration.

(2) PUBLICATION OF PROCEDURES FOR PUBLIC ACCESS TO ADMINISTRATIVE RECORDS. Each court and judicial agency must prominently publish its policy and procedures for public access to its administrative records. If the court or judicial agency has a website, the policy and procedures must be included there. The publication shall include the public records officer's work mailing address, telephone number, fax number, e-mail address, and business hours.

(3) PROMPT RESPONSE. Within five working days of its receipt, each court and judicial agency must respond to a request for access to an administrative record either by providing the record or acknowledging receipt of the request and providing a good-faith estimate of the time

needed to respond to the request. If the court or judicial agency is unable to fully comply in this timeframe, then the court or judicial agency should comply to the extent practicable and provide a new good faith estimate for responding to the remainder of the request. If the court or judicial agency does not fully satisfy the records request in the manner requested, the court or judicial agency must justify in writing any deviation from the terms of the request. For purposes of this provision, "working days" mean days that the court or judicial agency, including a part-time municipal court, is open.

(4) COMMUNICATION WITH REQUESTER. Each court and judicial agency must communicate with the requester as necessary to clarify the records being requested. Such communication must occur promptly. The court or judicial agency may also communicate with the requester in an effort to determine if the requester's need would be better served with a response other than the one actually requested.

(5) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS. If a particular request is of a magnitude that the court or judicial agency cannot fully comply within a reasonable time due to constraints on the court's or judicial agency's time, resources, and personnel, the court or judicial agency shall communicate this information to the requester. The court or judicial agency must attempt to reach agreement with the requester as to narrowing the request to a more manageable scope and as to a timeframe for the court's or judicial agency's response, which may include a schedule of installment responses. If the court or judicial agency and requester are unable to reach agreement, then the court or judicial agency shall respond to the extent practicable and inform the requester as to the court's or judicial agency's reasons for an incomplete response.

(6) LIMITATIONS ON INMATE REQUESTS.

(i) The inspection or production of any nonexempt public record by persons incarcerated in federal, state, local, or privately operated correctional facilities may be enjoined pursuant to this section. The request shall be made by motion and shall be a summary proceeding based on affidavits or declarations, unless the court orders otherwise.

(ii) The injunction may be requested by a court or judicial agency which is the recipient of the records request or its

representative, or by a person to whom the records request specifically pertains or his or her representative. The injunction request must be filed in the superior court in which the court or judicial agency which is the recipient of the records request is located. If the injunction request is filed by a superior court the decision on the injunction must be made by a visiting judicial officer.

(iii) The court may enjoin all or any part of a request or requests. In order to issue an injunction, the court must find by a preponderance of the evidence that: the request was made to harass or intimidate the court or judicial agency or its employees; fulfilling the request would likely threaten the security of the court or judicial agency; fulfilling the request would likely threaten the safety or security of staff, family members of staff, or any other person; or fulfilling the request may assist criminal activity. Based on the evidence, the court may also enjoin, for a period of time the court deems reasonable, future requests by the same requestor or an entity owned or controlled in whole or in part by the same requestor.

(iv) In deciding whether to enjoin a records request the court may consider all relevant factors including, but not limited to: other requests by the requestor; the type of record or records sought; statements offered by the requestor concerning the purpose for the request; whether disclosure of the requested records would likely harm any person or vital government interest; whether the request seeks a significant and burdensome number of documents; the impact of disclosure on the court's or judicial agency's security and order, the safety or security of court or judicial agency staff, families, or others; and the potential deterrence of criminal activity.

(v) The court or judicial agency shall not be liable for any attorney fees, costs, civil penalties, or fines under (e)(3)(B)(6) for any period during which an order under this section is in effect, including during an appeal of an order under this section, regardless of the outcome of the appeal.

(B) Administrative Records—Review of Court or Judicial Agency Response.

(1) NOTICE OF REVIEW PROCEDURES. The response of a court or judicial agency to a public records request shall include a written summary of the procedures under which the requesting party may seek further review.

(2) TIMELINE FOR SEEKING REVIEW. The timelines set forth in section (e)(3)(A) shall apply likewise to requests for review of the response of a court or judicial agency.

(3) FURTHER REVIEW WITHIN COURT OR AGENCY. Each court and judicial agency shall provide a method for review by the judicial agency's director, presiding judge, or judge designated by the presiding judge. For a judicial agency, the presiding judge shall be the presiding judge of the court that oversees the agency. The court or judicial agency may also establish intermediate levels of review. The court or judicial agency shall make publicly available the applicable forms. The review proceeding is informal and summary. The review proceeding shall be held within five working days. If that is not reasonably possible, then within five working days the review shall be scheduled for the earliest practical date.

(4) ALTERNATIVE REVIEW. As an alternative to review under section (e)(3)(B)(3), a requester may seek review by a person outside the court or judicial agency. If the requester seeks review of a decision made by a court or made by a judicial agency that is directly reportable to a court, the outside review shall be by a visiting judicial officer. If the requester seeks review of a decision made by a judicial agency that is not directly reportable to a court, the outside review shall be by a person agreed upon by the requester and the judicial agency. In the event the requester and the judicial agency cannot agree upon a person, the presiding superior court judge in the county in which the judicial agency is located shall either conduct the review or appoint a person to conduct the review. The review proceeding shall be informal and summary. To seek alternative review, the requester must sign a written waiver of any further review of the decision by the person outside the court or judicial agency. The decision by the person outside the court or judicial agency is final and not appealable. Attorney fees and costs are not available under this option.

COMMENT: The bifurcated procedures for review are intended to provide flexible, prompt, informal, and final procedures for review of public records decisions. The option for a visiting judge allows a requester to have the review heard by an outside decision-maker; in the interest of obtaining prompt, final decisions, a requester selecting this option would be required to waive further review. If the Legislature creates a new entity to review public records decisions made by agencies of the executive branch, then the work group recommends that the BJA consider using this entity for review of judicial records decisions as well.

(5) REVIEW IN SUPERIOR COURT.

(i) A requester may seek review of a decision under section (e)(3)(B)(3) by filing a petition in superior court. The burden of proof shall be on the court or judicial agency that made the public records decision to establish that refusal to permit public inspection and copying is in accordance with section (e)(1) which exempts or prohibits disclosure in whole or in part of specific information or records. Judicial review of all court or judicial agency actions shall be de novo. The superior court shall apply section (e)(1) of this rule in determining the accessibility of the requested documents.

COMMENT: A petition to review a denial may be brought in superior court in the same manner as under the Public Records Act.

(ii) The right of de novo review is not available to a requester who sought review under the alternative process set forth in section (e)(3)(B)(4).

COMMENT: The Supreme Court may wish to clarify any period of limitation on the bringing of an action for judicial review under this section, expressly or by reference to the limitations on such actions under the Public Records Act.

(6) MONETARY SANCTIONS.

(i) In the de novo review proceeding under section (e)(3)(B)(5), the superior court shall award reasonable attorney fees and costs to a requester if the court finds that (1) the court's or judicial agency's response was deficient, (2) the requester specified the particular deficiency to the court or judicial agency, and (3) the court or judicial agency did not cure the deficiency.

(ii) Sanctions may be imposed against either party under CR 11, if warranted.

(iii) Except as provided in sections (e)(3)(B)(6)(i) and (ii), a court or judicial agency may not be required to pay attorney fees, costs, civil penalties, or fines.

COMMENT: Monetary penalties for failure to produce records available under the Public Records Act are not available under this rule.

(iv) No individual judicial officers or court or judicial agency employees may be assessed a monetary sanction under this section (6).

COMMENT: Only a court or judicial agency may be assessed monetary sanctions, not an individual. This is consistent with the approach of the Public Records Act. The monetary sanctions would be payable from state/city/county funds, absent some insurance or risk pool availability.

(f) Administrative Records—Court and Judicial Agency Rules. Each court by action of a majority of the judges may from time to time make and amend local rules governing access to administrative records not inconsistent with this rule. Each judicial agency may from time to time make and amend agency rules governing access to its administrative records not inconsistent with this rule.

(g) Judicial Records—Charging of Fees.

(1) A fee may not be charged to view administrative records.

(2) A fee may be charged for the photocopying or scanning of judicial records. If another court rule or statute specifies the amount of the fee for a particular type of record, that rule or statute shall control. Otherwise, the amount of the fee may not exceed the amount that is authorized in the Public Records Act, Chapter 42.56 RCW.

(3) The court or judicial agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If a court or judicial agency makes a request available on a partial or installment basis, the court or judicial agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed within 30 days, the court or judicial agency is not obligated to fulfill the balance of the request.

COMMENT: Paragraph (3) incorporates a modified version of the Public Records Act's "deposit and installments" language.]

(4) A fee not to exceed $30 per hour may be charged for research services required to fulfill an individual request taking longer than one hour. The fee shall be assessed from the second hour onward. Requesters shall be provided a reasonable estimate, in advance, of any research service fees.

COMMENT: The authority to charge for research services is discretionary, allowing courts to balance the competing interests between recovering the costs of their response and ensuring the open administration of justice. The fee should not exceed the actual costs of response. It is anticipated that a best-practices group will consider further guidelines in this area, including fee waivers.

(h) **Best Practices.** Best practice guidelines adopted by the Supreme Court may be relied upon in acting upon public requests for documents.

COMMENT: A new work group is contemplated to recommend best practices to guide courts and judicial agencies in implementing this rule's necessarily broad, general standards. Courts and judicial agencies would benefit greatly from further work in applying the general principles to the specific types of documents and requests that are most likely to arise. For example, best practices could include designating more specific lists of records that are presumptively characterized as "chambers records" or as being within other categories of records under this rule. The BJA's first work group prepared some documents to assist a new best-practices group in this regard. The best-practices group could also recommend the best methods and resources for training judges and staff.

(i) **Effective Date of Rule.**

(1) This rule goes into effect on July 1, 2012, and applies to records that are created on or after that date.

COMMENT: A delayed implementation date is used to allow time for development of best practices, training, and implementation.

(2) Public access to records that are created before that date are to be analyzed according to other court rules, applicable statutes, and the common law balancing test. The Public Records Act, Chapter 42.56 RCW, does not govern judicial records, but it may be used for non-binding guidance.