SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

BRYAN CHUSHCOFF, Judge
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December 27, 2011

Clerk of the Supreme Court
ATTN: Camilla Faulk
P.O. Box 40929
Olympia, WA 98504-0929

Re: *Proposed Rule GR 31A*

Dear Ms. Faulk:

Pierce County Superior Court has the concern of many that government be open to its citizens. It is essential to maintain the public's confidence and trust that the court's administrative operations as well as its courtroom actions are performed competently and with integrity. For these reasons, Pierce County Superior Court provides responsible and full responses to public records requests even when not mandated to do so.

With the shared goal of an effective system of government, it is recognized that public confidence in the courts is jeopardized and the efficacy of judicial decision-making is deleteriously impacted should either: 1) the courts be seen as not in compliance with its rules; or, 2) if the courts' are compelled to disclose records that threaten a court's ability to deliberate on its policies or on its judicial decisions.

I.

Courts are at risk for noncompliance when the process for disclosure of records is vague. Courts are at risk of significant impairment of their mission to provide for fair, prompt, and efficient resolution of disputes and to provide due process and individual justice in each case if their deliberative processes are hampered or compromised.

The definition of "chambers records" and the reference to "chambers staff" as including a judicial officer's law clerk and "any other staff when providing support

directly to the judicial officer at chambers" are both unclear. It appears that the reason for including "other staff" is an attempt by the Rule to preserve an area for deliberation by judicial officers in both their capacity of a) making decisions in the cases that come before them; and, b) in considering court policies. The rule recognizes that such deliberation process may sometimes involve staff members who would usually have an administrative role and not a courtroom role; that sometimes such administrative staff would be involved in a deliberative process. The comment to the definition of "chambers record" expressly recognizes this for small jurisdictions. Yet consideration and evolution of court policies are likely to commonly involve a court's administrators in a large jurisdiction too. This should be recognized.

The existence of a bright line that would focus, say, on the status of the employee without regard to their task or role in relation to a given document or record, would damage the operation and functioning of the court by being under-inclusive. It is laudable, then, to include such other employees in the exception to disclosure because it protects a court's deliberative processes. Given the nearly endless variations in the settings by which staff might be used to assist the court, creating such a bright line is likely not possible.

But the lack of a bright line does risk embroiling the courts in controversies the mere existence of which will compromise the public's trust in the court's status as a neutral arbiter of disputes. It will also compromise confidence in the courts when the courts are the arbiter of disputes involving themselves regardless of the use of visiting judges. They will say, as did Alexander Hamilton, that "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias." Federalist No. 80 (1788).

There is likely to be abundant dispute over whether or not a document is an administrative record that is to be disclosed (absent an exemption) and chambers records that are not subject to disclosure. Moreover, to carry the burden of proving that the refusal to permit public inspection and copying is in accordance with section (e)(1) the court risks revealing the deliberative process.

There is likely no way to avoid such a formulation once litigation begins. But the language in (e)(3)(A)(5) that if the court "does not fully satisfy the records request in the manner requested, the court . . . must justify in writing any deviation from the terms of the request" does threaten to reveal the deliberative process in the justification process. This could be ameliorated if the rule were to provide that the failure to correctly or completely identify the justification for deviating from the terms of the request would not be considered a "deficient" response under (e)(3)(B)(5) provided that the non-disclosure or deviation from the request was determined to be proper or justified for any reason.

II

Courts are at risk for noncompliance if they lack the resources to comply. Pleading poverty does not really address the issue of public disclosure. Of course little has been budgeted to deal with such requests as this is a new requirement. Things change and so must the court. But there should be no illusion that GR31A will not impose significant work time on staff; and, time, we know, is money.

As with the Public Records Act, the requester need not articulate any reason or purpose for the request so there is no limit on relevance; nor is there any limit to the scope of the request. Litigation cost is one expected expense, of course. Also, pursuant to paragraph (g)(1) there is no fee to view documents. The drafters of the rule might have imagined that allowing requesters to merely view documents would not entail any copying cost to the court. But in order to provide a requester a view of a document it may be necessary to print documents, especially those that are electronically maintained. Printing may be necessary to assure that there is no tampering with the court's records and/or to safeguard documents that are not subject to disclosure.[1]

But perhaps more significant and somewhat less obvious is that responding to broad requests such as "all email for the last five years" may or may not take much time to

[1] It is for security purposes that I have to enter a password to log on to my computer so as to compose this letter or to access AOC's "Inside Washington Courts" website for example. It cannot be intended that records requesters be exempt from such restrictions. So if requesters cannot view the materials on the court's computers, it may be necessary to print the documents.

locate but it will certainly take hundreds of hours to vet. The records will have to be examined with care for identifying details, chambers records or other exempted or prohibited documents under the Public Records Act or other state or federal statutes or court orders. This takes time.

Proposed GR 31A(e)(3)(A)(6) sets forth a limiting provision as to "extraordinary requests limited by resource constraints."[2] There is certainly hazard to the court should it result in litigation and the tribunal disagrees with the court's conclusion that it has responded "to the extent practicable." Even should the court follow the "Best Practices" that are ultimately developed, there is no assurance that this will insulate the court from liability if in following such practices a reviewing court determines that the responding court was in error. It is hoped that "Best Practices" will quickly tackle this issue as it is the most significant concern for the financial burden and litigation risk on the courts. A safe harbor rule from liability for complying with "Best Practices" may be appropriate.

III.

There is a provision for enjoining the requests of inmates for such improper purposes as harassment and intimidation of the court or its staff, a threat to security or somehow to assist in criminal activity. I assume the injunction must terminate when the person enjoined is no longer incarcerated. But the improper purpose for the request may remain. Why should the status of the requester as being incarcerated make a difference? After all are not those persons with such designs and not incarcerated more likely to pose a realistic threat of harm to the court, its staff or other people? The enjoining of anyone seeking public records for the reasons set forth at (e)(3)(A)(7) would seem justified.[3]

[2] This applies if a particular request is of a magnitude that the court cannot fully comply within a reasonable time due to constraints on the court's "time, resources, and personnel ...."

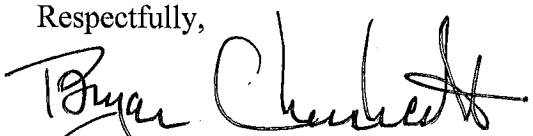
[3] It should be remembered that the limitation on inmates does not include cost (in either time or money) of complying with the request(s) as a basis for injunction.

IV.

While there is a reference to exemptions set forth in the Public Records Act, it would seem a better practice to expressly incorporate those provisions of the Act into GR 31A to avoid unintended modifications to the Supreme Court's rules for the court of the State of Washington by the Washington State Legislature.

Please extend our thanks to the drafters of GR 31A for the evident hard work and care that they have taken in crafting this rule.

Respectfully,



Bryan Chushcoff
Presiding Judge