Remarks to the Washington State Supreme Court
Regarding Proposed Rule on Access to Judicial Administrative Records (GR31A)

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The Washington Coalition for Open Government deeply appreciates the invitation to appear before you today to comment on Proposed Rule GR31A.

As you know, this year is the 40th anniversary of the passage of Initiative 276 by an overwhelming 72% vote of the people of Washington.

The Coalition has consistently held the position that it was the intent of the People that courts were to be subject to the public records provisions of I-276, in exactly the same way candidates for judicial office are subject to its campaign finance disclosure provisions and judges and justices are subject to its personal finance disclosure provisions.

During the campaign for I-276, both its proponents *and* its opponents assumed and publicly stated that courts would be subject to the Act.

When asked whether courts were intended to be covered, Bennett Feigenbaum, chair of the original Coalition for Open Government which sponsored I-276, said "It applied to everyone. Absolutely. It didn't really have to come up and be discussed because it was assumed."

The 1972 Voter's Pamphlet included language that implied oversight over all government agencies. It said: "Initiative 276 makes *all* public records and documents in state and local agencies available for public inspection and copying." That's what the voters thought they were approving.

Then-State Senator Charles Newschwander, who co-wrote the opposition statement for the voter's pamphlet, said "It should involve judges. Judges are a pain in the butt as far as I'm concerned, and if the law applies to me as a legislator, it should apply to them."

News articles written at the time also assumed that courts were included. A *Seattle Times* story four days before the 1972 election quoted Harold Potter (not *that* Harry Potter), the chief deputy superior court clerk in King County, lamenting that the initiative would cost his department $100,000 a year because he would no longer be able to charge $1 per page to photocopy court records.

After the initiative passed, there was significant public discussion about whether the court proceedings defending its constitutionality could even be held in Washington state, because every judge in the state would have to recuse because of their conflict of interest in being subject to the law.

The definition of "agency" in the Act is very broad – "all state agencies and all local agencies." And the definitions of "State agency" and "local agency" are also very broad.

If only the initiative authors had thought to explicitly mention courts in the long list of examples of agencies covered by the Act, we might not be here at all today.

But we are. The act has been interpreted as not covering court administrative records.

The Coalition has long advocated that the simplest, most expedient way to address the issue would be for the Supreme Court to request the legislature to simply add "courts" to the definition of agency and eliminate all ambiguity. We could enact a few additional PRA exemptions needed for certain types of records, such as chambers records, and move ahead, leveraging the well-established PRA case law instead of starting all over.

While reviewing the written comments submitted on GR31A, I noted that a number of them express concern about gaps and inconsistencies between GR31A and the PRA. These problems could be resolved by simply applying the PRA to court administrative records. The Coalition is also concerned about the many instances where GR31A departs from the PRA.

The provision allowing "substantive response" rather than "strict compliance" leaves the possibility that particularly embarrassing records can be omitted without consequence, inconsistent with PRA case law such as *Zink v. Mesa*.

Other statements in the proposed rule seem to leave a lot of room for discretion on the part of courts as to what records to release or not release, resulting in inconsistent implementation and disagreements which will inevitably result in expensive litigation until a body of case law is established to resolve the ambiguity.

The draft rule would allow courts faced with limited resources to simply say "we're done" and declare a response complete. No other state or local agency has such discretion. As with non-judicial agencies, large or

complex responses should be able to be spread over time *within* resource limitations, as allowed by RCW 42.56.100, not simply declared "done".

In your opinions in *Yousoufian v. Sims*, this court has recognized the importance of monetary penalties in motivating agencies to be in full compliance and in making requesters whole. The fact that this draft rule excludes the possibility of penalties is dissonant.

The Coalition steadfastly opposes the imposition of hourly search fees for records. Search fees create perverse incentives for agencies to work *slowly* and to have their records poorly indexed and disorganized, rather than having incentives to efficiently index and organize records so as to find them quickly and minimize work. The availability of search fees also discourages agencies from making records proactively and freely available online so that requests need not be made at all. We urge the removal of the search fee provision.

We do not support the provision that GR31A will apply only to records that are created *after* its effective date. It makes no sense for judicial agencies to separate their records into "old" records that are not available and "new" records that are. Initiative 276 did not have any similar prospective application provision.

We're also very concerned that the "public access balancing test" conflicts with the unambiguous principles stated in our state's open government laws.

> "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." *(RCW 42.56.030, 42.30.010)*

These principles apply just as much to the judicial branch as they do to the executive and legislative branches of government. There is no "balancing test". Court administrative records are *The People's Records.* We think it's unfortunate that GR31A is lacking some of the other strong statements of principles that appear in Initiative 276 and the Public Records Act:

- "the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty, and fairness in their dealings"
- "public confidence in government at all levels is essential and must be promoted by all possible means"
- "public confidence in government at all levels can best be sustained by assuring the people of the impartiality and honesty of the officials in all public transactions and decisions"
- "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society"
- "provide full public access to public records"
- "provide for the fullest assistance to inquirers"
- "the most timely possible action on requests for information"
- "free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others"

The constitutional mandate that "Justice in all cases shall be administered openly" has an important corollary that we should keep in mind: "*The Judiciary should* in all cases be administered openly." All of these key principles of open government apply to the judiciary as well.

The Coalition's preference continues to be that court administrative records simply be made subject to the Public Records Act. We support GR31A as a step in the right direction, but will watch carefully to see how it is implemented. It will be critically important for the Supreme Court to exercise oversight to ensure that the discretion it grants is not abused and that it achieves the important goals the People expressed so well in Initiative 276.

Thank you very much for your kind consideration of these remarks.