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8 September 2011

Honorable Barbara A Madsen, Chief Justice
The Supreme Court of the state of Washington
Temple of Justice
P.O. Box 40929
Olympia, WA 98504

Re: Suggested New Rule GR31A: Access To Administrative Records

Dear Chief Justice Madsen:

I have read the proposed rule regarding access to administrative records for the courts. I commend the effort to set guidelines for public access to these records.

I write to comment on what I perceive to be some areas that require adjustment. I will start with two questions that will become a foundation for some other comments. Who is the Public Records Officer (hereinafter "PRO") and who designates this person?

The term "Public Records Officer" is not defined. Perhaps the meaning can be derived from the context of the proposed rule. In two comments and two different sections, I found mention of the "court's" public records officer (see comments to sections (c)5 and (c)7, and sections (e)3(A)(1) & (2)).

Neither does the rule make clear who will appoint the PRO or to whom that person will report for purposes of interpreting the new rule and whether a particular document should be produced, redacted, or withheld altogether. From whom does that person seek legal advice on such thorny questions, the presiding judge or the city's (or county's, or state's) attorney?

The answers to the foregoing questions will direct other issues. For example: should the PRO actually seek advice from the presiding judge when it is that person (or his/her designee) who will "review" that decision (See (e)(3)(B)(3).) Admittedly, a person could ask for an Alternate Review pursuant to (e)(3)(B)(4). And, such review would be by a visiting judge. However, if there is no agreement on who that visiting judge will be, the review lands back in the lap of the presiding judge. Moreover, before a person can even ask for an outside reviewer, that person must waive any further review of the decision as well as any attorneys fees and costs to which he/she might otherwise be entitled. In order to obtain a disinterested magistrate's review, the person must waive certain privileges provided in this rule. That seems patently unfair.

That waiver problem only becomes relevant if the privileges granted in the proposed new rule are legitimate at the start. I submit they are not.

The rule purports to create a cause of action, resulting in sanctions, costs, and attorneys' fees. Section (e)(3)(B)(5)(i) speaks of "commencing an action". However, there is no RCW that provides for litigation based on the denial of access to these types of records.

The comment to the rule describes the action as being "brought in superior court in the same manner as under the Public Records Act."[1] But, this is not a Public Records Act matter. So, it appears that this rule would create a new cause of action.

In my view, the proposed rule violates the separation of powers doctrine. According to Art. 2 §1 of the Washington State Constitution "[t]he legislative authority of the state of Washington shall be vested in the legislature...", subject to the right of the people in initiatives and referenda. According to the case of *Senior Citizens League v. Dept. of Soc. Sec.*,[2] "[l]egislative power is authority to pass rules of law for the government and regulation of people or property."

Compare that to the constitutional provision regarding the judiciary. Art. 4 §4 sets out the jurisdiction of the supreme court,[3] which does not include the "authority to pass rules of law for the government or people or property."

This is not a situation where the court is recognizing a cause of action that was created in common law, like alienation of affections.[4] This is a situation where the court is creating a new, not previously available, cause of action. That is the purview of the legislature, not the court.

The identity of the PRO and to whom that person reports becomes problematic when one considers the provision in the proposed rule about who pays the sanctions, costs, and attorneys fees.[5] Section (e)(3)(B)(6) provides for the payment of those penalties. The comment to the section says the payment will be made from the city/county/state funds. This raises the question about to whom the PRO answers. If the city (or county or state) is going to have to make a

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[1] Would such litigation be brought in a neighboring county? Or, possibly, Thurston County?
[2] 38 Wn. 2d 142, 164 (1951).
[3] That section provides, in pertinent part: "The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, tool, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction."
[4] Cause of action abolished in *Wyman v. Wallace*, 94 wn. 2d 99 (1980).
[5] While the comment to the rule is silent on the point of costs of defense, that expense cannot be overlooked. The city's funds would be at risk for that as well.

financial investment based on the decision of the court's PRO, shouldn't the city's (or county's or state's) attorney have some ability to review and advise? Shouldn't the city's mayor (or the county's executive, or the state's financial officer) have the final say regarding whether records will be produced?

Furthermore, by law, governmental entities must have a PRO. If the city (or county or state) will be paying the penalties, shouldn't the city's PRO be the person designated as the PRO for the purposes of the court's administrative records, for those entities that have their own courts? Here, in Renton, we have our own municipal court. Many other cities do as well. We have a PRO (appointed by the mayor) for the city who consults with the city attorney's office whenever she has a question. According to the proposed rule, the court's PRO would not go to the city attorney for advice when there needs to be interpretation of the law as applied to the facts that present themselves in any given request for records. If the city's coffers are at risk, the city's executive should identify the person/people to decide the question of dissemination of records, not the court. The city's executive, not the judge, should have the final say in what, if anything, is disseminated or withheld. This, too, appears to me as a separation of powers issue.

I note that the rule does not define the term "judicial agency". Section (c) does address the application of the rule and by the context, it appears that "judicial agency" is an entity overseen by a court as well as the various judges' associations and subgroups thereof. I bring that up because the term "judicial agency" is used throughout the proposed rule as well as the term "agency", without the modifier, and there is some inconsistency. For example: Section (c)(7) says, in part, that "[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." (Emphasis added.) If that "agency" is "part of a judicial agency" but still is not a judicial agency, that appears inconsistent with Section (c)(1)(C), which says that subgroups of those entities identified in subsection (1) are subject to the rule. Subsection (c)(1)(A) says, in part, that "[a]ll judicial entities ..., including entities that are designated as agencies..." are subject to the rule. (Does this make them a "judicial agency"?) As I say, the term is not defined except through the context of Section (c)(1). But, then there is created an internal inconsistency when compared to Section (c)(7). The ultimate questions, however, are whether the rule will apply to the "agency" and whether the rule will apply to the subunit of the judicial agency? Those answers are not self-evident from the current language of the proposed rule.

Section (d)(4) defines "[c]hambers staff" to include a law clerk. There is no mention of a bailiff for a superior court judge. Some superior court bailiffs operate more like law clerks. In some municipal courts, the court's clerks function as bailiffs. They sit in on policy discussions about how the court is operated and provide input to the judge. The phrasing of the rule does have the catch all phrase of "any other staff when providing support to the judicial officer at chambers." Is it contemplated that this catch all phrase would include bailiffs and court clerks? If so, why doesn't it contemplate law clerks as well? Why does the rule expressly list the law clerk, but not the bailiff, or the court's clerk? It is hard to know how this wording will come into play in the future when a PRO is faced with having to interpret and apply the rule. But, given

rules on construction, the argument could be made that something different was intended, considering the fact that one type of job function is expressly mentioned and the others are not. That risk is eliminated by just using the catch all phrasing and not mentioning the law clerk; or there might be some other wording that accomplishes the purpose without creating the risk of an unintended interpretation.

I can see an argument down the road about whether the court staff member was "providing support to the judicial officer at chambers" at the time the record was created or as the reason the record was created. What does the "at chambers" language mean? Does it mean that documents created in support of the judicial officer while he/she is on the bench, rather than "at chambers", would not meet the test? As I don't grasp the full intent of this language, I have no suggestions to offer.

Section (e)(1)(B)(8) is either inconsistent with the court's recent decision in the *Bainbridge Island Police Guild v. Puyallup* (hereinafter "*Bainbridge*") case or it is unclear. Subsection (8) of the proposed rule says that records of an internal investigation of a complaint against the court or judicial agency or its contractors *during the course of the investigation*...are exempt. This seems to say that the exemption is lifted once the investigation is completed. If that is what it means, then it is not inconsistent with the *Bainbridge* case. However, the last sentence of the subsection makes the meaning of the first sentence unclear. The last sentence says: "The outcome of the court's or judicial agency's investigation is not exempt." The "outcome" comes about only after the investigation is complete. So, after the investigation is complete, is it 1) only the records relating to the "outcome" that are not exempt? OR, 2) are all of the documents relating to the investigation not exempt? Again, the application of rules of construction forces this inquiry. If the intent of the rule is to comply with the recent ruling in the *Bainbridge* case, I would urge that the sentence regarding the "outcome" be removed. Of course, as I have said earlier, this is not a Public Records Act matter. But, the context throughout the proposed rule and comments thereto is that the drafters had at least one eye on the Public Records Act throughout the drafting process.

Additionally, consider an internal investigation involving court staff. A question arises because the Executive Ethics Board provisions do not apply to state employees of the judicial branch.[6] So, if a staff member of the supreme court is the subject of an investigation, would that investigative body be a judicial agency subject to the proposed rule? Would the records compiled during that investigation be subject to this rule or the PRA? And, if those records would be covered by this rule, it is still unclear, as set out above, whether those records remain exempt after the investigation.

Section (g) of the proposed rule addresses the fees that can be charged for copying the records. Do these fees go to the city's (county's or state's) general fund? Subsection (3) says that the court or judicial agency may require a deposit. This suggests that it is the court that gets the fees. Not to suggest that the fees collected would ever be enough to pay possible penalties,

[6] RCW 42.52.360(6).

but if the city coffers are at risk, shouldn't the fees collected go to the city's (county's or state's) general fund?

Justice Madsen, this is a well intentioned rule and I don't mean to sound as though I disagree with the intent. On the contrary, I applaud the efforts of the members of the committee who undoubtedly worked many hours on this draft. I hope my comments will help to make this a better rule.

Thank you for considering my comments.

Very truly yours,

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cc: Hon. Gerry L. Alexander
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