

No. 82288-3

Korsmo, J.\* (concurring) — *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), was wrongly decided. However, only the legislature should overturn the longstanding construction of a statute. It has not done so. Accordingly, *Nast* does control and requires affirmance.

Nast

At issue in *Nast* was a King County policy requiring 24-hour notice before a person could check out a court file. The appellant argued that the Public Records Act (PRA), former chapter 42.17 RCW, invalidated the 24-hour notice requirement. *Nast*, 107 Wn.2d at 301-02. The *Nast* court had to address the threshold question of whether the PRA even applied to the records in question before it could decide if appellant was entitled to any relief. As the majority accurately notes, this court concluded that the court files were not public records because the judicial branch of government was not included within the statute’s definition of the word “agency.” *Id.* at 305-06.

Then, as now, that term was defined to mean “all state agencies and all local

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\* Judge Kevin M. Korsmo is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

agencies,” including “every state office, department, division, bureau, board, commission, or other state agency.” RCW 42.56.010(1). The definition of “local agency” is equally broad. *Id.*; former RCW 42.17.020(1) (1985).<sup>1</sup> The *Nast* majority’s exclusion of the judicial branch from that definition, even after noting that the broad definition might apply to the judiciary, is unconvincing. 107 Wn.2d at 305. The broad definition brooks no exceptions. If the people intended to exempt an entire branch of government from the reach of the PRA, it would seem that a clear statement of such intent would be in order. The mere addition of a few words would have been sufficient to exempt the judicial branch from the reach of the statute. Those words are not there, probably because the people did not see any reason to treat the judicial branch differently from the executive or legislative branches.

In defense of its interpretation, the *Nast* majority noted that the PRA did not expressly address or exempt the various statutes requiring privacy in certain court records. *Id.* at 306-07. This oversight apparently helped convince the court that the judiciary was not intended to be included in the definition of “agency.” *Id.* As originally enacted, Initiative 276 contained many general exemptions for personal or business privacy, and only one of those exemptions referenced a specific statute. Laws of 1973,

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<sup>1</sup> With the exception of some clarification of the meaning of “local agency,” the current definitions are identical to those originally enacted. Laws of 1973, ch. 1, § 2(1).

ch. 1, § 31. While the statement that the PRA did not reference specific statutes was accurate, that observation was also true of many public records maintained by executive branch agencies that had long been subject to confidentiality requirements. *E.g.*, RCW 46.52.080 (creating confidentiality in automobile accident reports and limiting access to them);<sup>2</sup> RCW 68.50.105 (confidentiality of autopsy records).<sup>3</sup> If the failure to reference other statutes requiring confidential treatment of public records meant that the PRA did not apply, then quite a few executive branch agencies needed to be exempted from the act as well. This rationale, which subsequently was amended out of existence in 1987,<sup>4</sup> simply does not support the claim that the people intended to exempt the judiciary from the PRA.

As its first argument, the *Nast* majority also found that there was no need for the PRA to apply since the common law already permitted access to court files. This argument makes little sense as an aid to statutory interpretation. The question was what the people *intended* to do in 1972 when they passed Initiative 276, not whether it was *necessary* for them to include court records in the PRA. RCW 4.04.010 provides that the “common law, so far as it is not inconsistent with” the laws of this state, “shall be the rule of decision in the courts of this state.” This court has noted that it will assume that the

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<sup>2</sup> This provision was initially created by Laws of 1937, ch. 189, § 140.

<sup>3</sup> This provision was created by Laws of 1953, ch. 188, § 9.

<sup>4</sup> Laws of 1987, ch. 403, § 3 (now codified as RCW 42.56.070(1)).

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legislature was aware of common law rules when it adopted a statute, and courts will consider those rules in ascertaining legislative intent. *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973), *cert. denied*, 419 U.S. 808 (1974).

However:

But where, as here, a statute is plain and unambiguous, it must be construed in conformity to its obvious meaning without regard to the previous state of the common law.

*Id.*

The fact that the common law allowed access to court records did not mean that the people could not exercise their legislative power in a consistent manner. Indeed, by clarifying that all public records are to be accessible, the people harmonized the common law involving government records. The fact that the PRA was consistent with the common law simply did not provide a basis for ignoring the plain language of the PRA.

None of the three reasons set out in *Nast* justify the decision to ignore the plain language of the PRA. *Nast* was wrongly decided.

Stare Decisis

The United States Supreme Court has long recognized that the doctrine of stare decisis most strongly applies to issues of statutory construction. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991); *Patterson v.*

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*McLean Credit Union*, 491 U.S. 164, 172-73, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989);  
*Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). In  
*Hilton*, the court declined to alter its interpretation of a statute where Congress had not  
acted in 28 years to amend it. 502 U.S. at 201-02.

This court recognized the same doctrine in *Riehl v. Foodmaker, Inc.*, 152 Wn.2d  
138, 94 P.3d 930 (2004). That case involved an argument that this court’s previous  
construction of a portion of the Washington Law Against Discrimination should be  
changed. Rejecting the argument, the court first noted that stare decisis requires a  
showing that a previous rule is both ““incorrect and harmful before it is abandoned.”” *Id.*  
at 147 (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d  
508 (1970)). *Riehl* then went on:

Further, “[t]he Legislature is presumed to be aware of judicial interpretation of its  
enactments,” and where statutory language remains unchanged after a court decision the  
court will not overrule clear precedent interpreting the same statutory language.

*Id.* (alteration in original) (quoting *Friends of Snoqualmie Valley v. King County*  
*Boundary Review Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992)).

The basis for this reasoning is clear. The purpose of statutory construction is to  
give effect to the meaning of legislation. *Roberts v. Johnson*, 137 Wn.2d 84, 91, 969  
P.2d 446 (1999). Once a court has construed a statute, the legislative branch is free to

clarify its intent by altering the statute if it sees fit. *Hilton*, 502 U.S. at 202. If it does not do so, then we presume the legislature is satisfied with the interpretation. At some point, legislative acquiescence in the interpretation is assumed.<sup>5</sup> *Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980). When that point is reached, courts essentially lose the ability to change their mind about what the statute means. *Riehl*, 152 Wn.2d at 147; *Buchanan*, 94 Wn.2d at 511. The legislative process then becomes the sole method of changing the statute's interpretation.

That is why the standard analysis for considering whether or not to depart from precedent is not dispositive in this situation. *Stranger Creek*, 77 Wn.2d 649. If the question were simply whether the decision was both wrong and harmful, Mr. Koenig's request to overturn *Nast* would have to be granted. As noted previously, *Nast* was wrongly decided. That it was harmful should also be clear from the statement of public policy adopted by the people in 1972. With respect to public records, the people declared that "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." Laws of 1973, ch. 1, § 1(11).<sup>6</sup> Denial of this fundamental right asserted

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<sup>5</sup> While reasonable minds could differ on how long legislative inaction must exist before it can be equated with agreement, once the legislature has acted, or attempted to act, on the statute in question, the judicial interpretation should be considered fixed and unalterable.

<sup>6</sup> Now codified at RCW 42.17.010(11).

by the people cannot be harmless. The traditional standards for abandonment of precedent have been met.

However, this is not a *Stranger Creek* situation. *Nast* clearly exempted the judiciary from the PRA. Subsequent cases from the Court of Appeals confirmed that interpretation of *Nast*. *Spokane & E. Lawyer v. Tompkins*, 136 Wn. App. 616, 621-22, 150 P.3d 158 (superior court is not an “agency” under the PRA), *review denied*, 162 Wn.2d 1004 (2007); *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003) (judge’s personal notes not accessible under PRA).

The legislature has acquiesced in the judicial exemption from the PRA because it has not amended the PRA to include the judiciary in the 23 years since *Nast*. This is a greater period of time than other cases where this court was willing to find acquiescence. In *Riehl*, only three years had passed since the challenged interpretation at issue there. 152 Wn.2d at 144, 146-47. In *Buchanan*, the legislature had met 22 times in 17 years without amending the statute.<sup>7</sup> 94 Wn.2d at 511. Since the elapsed period in this case is longer than that in *Riehl* and *Buchanan* combined, this court can safely say that the legislature has acquiesced to the *Nast* interpretation.

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<sup>7</sup> *Buchanan* is particularly compelling because there the United States Supreme Court subsequently interpreted the federal counterpart of a state labor statute in the opposite manner that this court did. 94 Wn.2d at 509-10. Nonetheless, this court declined to reconsider the issue and left the matter to the legislative process.

A second reason for finding acquiescence involves the prompt legislative response to a case contemporary to *Nast*, *In re Matter of Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986). There the legislature expressly altered *Rosier*'s interpretation of the PRA. See Laws of 1987, ch. 403, § 1. In the course of doing so, the amendment also took care of the oversight found by *Nast* and expressly incorporated confidentiality required by other statutes into the PRA. *Id.* at § 3. This suggests that the legislature was quite capable of dealing with *Nast*, if it had been so inclined, when it also revised *Rosier*. The failure to do so is additional evidence that it is satisfied with *Nast*.

This court, whether it agrees that *Nast* was correctly decided or not, simply is no longer in a position to change that interpretation of the PRA. Mr. Koenig's argument is best addressed to the legislature. Accordingly, I agree with the majority that the judgment must be affirmed.

AUTHOR:

Kevin M. Korsmo, Justice Pro Tem.

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WE CONCUR:

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