

Transfer Case

RECEIVED

35084-0  
NO. 25015-6-III

JUN 26 2006

In the Office of the Clerk of Court  
Washington Court of Appeals, Division Three

COURT OF APPEALS<sup>By</sup> \_\_\_\_\_  
DIVISION III  
OF THE STATE OF WASHINGTON

---

SPOKANE & EASTERN LAWYER,  
a Washington non-profit corporation,

Appellant,

vs.

HON. LINDA G. TOMPKINS,  
Presiding Judge, Spokane County Superior Court for the State of  
Washington in and for Spokane County (Spokane County Superior  
Court); DAVID HARDY, Administrator, Spokane County Superior  
Court; and the SPOKANE COUNTY SUPERIOR COURT,

Respondents.

---

BRIEF OF RESPONDENTS

---

STEVEN J. TUCKER  
Prosecuting Attorney

James P. Emacio  
Deputy Prosecuting Attorney  
Attorneys for Respondents

Spokane County Prosecutor's Office  
W. 1115 Broadway, 2<sup>nd</sup> Floor  
Spokane, Washington 99260  
(509) 477-5764

INDEX

	PAGE
A. APPELLANT’S ASSIGNMENT OF ERROR.....	1
B. RESPONDENT’S ISSUE PERTAINING TO APPELLANT’S ASSIGNMENT OF ERROR.....	1
C. STATEMENT OF THE CASE .....	1
D. SUMMARY OF ARGUMENT.....	5
E. ARGUMENT .....	6
1. STANDARD OF REVIEW .....	6
2. <i>STARE DECISIS</i> IS CONTROLLING. THE COURT IS NOT AN “AGENCY” UNDER THE PUBLIC DISCLOSURE ACT .....	7
F. CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Cases

<i>Amren v. City of Kalama</i> , 131 Wn.2d 25, 929 P.2d 389 (1997) .....	13
<i>Beuhler v. Small</i> , 115 Wn. App. 914, 64 P.3d 78 (2003).....	12, 13, 14, 15
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993).....	13
<i>In re Marriage of Roth &amp; Coke</i> , 72 Wn. App. 566, 865 P.2d 43 (1994).....	11
<i>Nast v. Michels</i> , 107 Wn.2d 300, 730 P.2d 54 (1986).....	9, 10, 11, 12, 14, 15
<i>State ex rel. Lemon v. Langlie</i> , 45 Wn.2d 82, 273 P.2d 464 (1954) .....	11
<i>Wagg v. Estate of Dunham</i> , 146 Wn. 2d 63, 42 P.3d 968 (2002) .....	6

### Washington Constitutional Provisions

Const. art. II, § 1 .....	13
Const. art. III, § 1 .....	13
Const. art. IV, § 1 .....	13

### Statutes

ESSB 5684, Laws of 1995, ch. 397, § 1 .....	13
RCW 42.17 .....	1
RCW 42.17.010(11).....	6, 7

**Statutes, cont.**

RCW 42.17.020(1).....8, 9, 11, 12, 13  
RCW 42.17.020(36)..... 8, 13  
RCW 42.17.260(1)..... 8  
RCW 42.17.310(1)(b) ..... 14  
RCW 42.17.310(1)(d) ..... 14  
RCW 42.17.310(1)(j) ..... 14  
RCW 42.17.340(1)..... 1, 6, 7

**Court Rules**

GR 29 ..... 1, 2  
GR 29(f)(5)..... 2  
GR 31 ..... 5, 14  
LAR 0.2(d)(2) ..... 2  
LAR 0.2(f)..... 2  
SAR 13 ..... 14

**A. APPELLANT’S ASSIGNMENT OF ERROR**

1. Appellant assigns error to the Order Denying Motion for Inspection and Copying of Public Records under RCW 42.17.340 of the trial court on March 8, 2006, denying Spokane & Eastern Lawyer’s application for disclosure of public records of the Superior Court of the State of Washington.

**B. RESPONDENT’S ISSUE PERTAINING TO APPELLANT’S ASSIGNMENT OF ERROR**

1. Is the Spokane County Superior Court an “Agency” as that term is defined in the Public Disclosure Act codified in chapter 42.17 RCW<sup>1</sup> and as such subject to the provisions of the PDA with respect to inspection and copying of records?

**C. STATEMENT OF THE CASE**

Spokane County has twelve (12) separately elected Superior Court Judges. Consistent with the provisions of GR 29, the Spokane County Superior Court Judges elected the Honorable Linda G. Tompkins as their Presiding Judge for a term commencing January 1,

---

<sup>1</sup> Effective July 1, 2006, certain provisions within chapter 42.17 RCW were recodified in chapter 42.56 RCW.

2005 and ending December 31, 2006. (CP 61) The Presiding Judge's responsibilities include, among others, the management and administration of the Court's business. GR 29 and Spokane County Superior Court LAR 0.2(d)(2). (CP 61)

The Spokane County Superior Court has created a court administrator's office. Spokane County Superior Court LAR 0.2(f). David Hardy is the duly appointed Superior Court Administrator. (CP 61) The Presiding Judge supervises the Superior Court Administrator. GR 29(f)(5). (CP 61)

On May 30, 2005, Spokane & Eastern Lawyer, a non profit corporation, through its President Stephen K. Eugster, solely referencing the Public Disclosure Act, directed correspondence to Presiding Judge Linda G. Tompkins and Superior Court Administrator David Hardy. (CP 3, 9, 64) In that correspondence Mr. Eugster wrote:

*Request for Public Records*

For the period of January 1, 2005 to date, please provide Spokane & Eastern Lawyer with copies of the following public documents.

1. Letters, email, and other writings sent to the Washington State Bar Association regarding lawyers practicing in Spokane County,

Washington by the court, the presiding judge or any other judge of the Spokane County Superior Court.

2. Letters, email, and other writings directed to the Spokane County Bar Association and or Susan W. Troppmann, its president, by the court, the presiding judge or any other judge of the Spokane County Superior Court.

(CP 9, 64)

On June 20, 2005, James P. Emacio, Chief Civil Deputy Prosecuting Attorney, responded to Mr. Eugster's May 30, 2005 correspondence on behalf of Presiding Judge Tompkins and Court Administrator Hardy. (CP 17-18, 65-66) In that response, Deputy Prosecutor Emacio advised Mr. Eugster that the Court was not an "Agency" as that term was defined in the Public Disclosure Act. (CP 17-18, 65-66) As such, the documents requested were not subject to disclosure under the Public Disclosure Act. (CP 17, 65)

Specifically, Deputy Prosecuting Attorney Emacio wrote in part as follows:

Your request has been carefully considered in light of the Public Disclosure Law set forth in chapter 42.17 RCW, GR 31, and the common law right to access "judicial records." After such consideration, this correspondence should act as notification on behalf of

the Spokane County Superior Court bench, that your request is being denied.

The following reasons are put forth in support of this determination.

It is the Court's view that it is not subject to the Public Disclosure Law. The "Court" is not included within the definition of "agency" as defined in chapter 42.17 RCW. The holdings in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) and *Beuhler v. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003) support this conclusion.

(CP 17, 65)

On June 27, 2005, Spokane & Eastern Lawyer filed a Complaint against Presiding Judge Linda G. Tompkins, Court Administrator David Hardy, and the Spokane County Superior Court. (CP 3) The Complaint alleged that they violated the Public Disclosure Act in failing to make available for inspection and copying those documents referenced in their May 20, 2005 Public Records Request. (CP 7)

On October 20, 2005, Visiting Judge Allen C. Neilson heard argument and orally denied Spokane & Eastern Lawyer's Motion for an Order to Allow Inspection and Copying of Public Records. (CP 67) An Order was entered on March 8, 2006 denying Spokane &

Eastern Lawyer's request for an Order to Allow Inspection and Copying of Public Records. (CP 68-70) The Order included the following language:

**WHEREFORE**, having considered the above-reference pleadings and having heard the arguments of counsel on Plaintiff's Motion for Order to Allow Inspection and Copying of Public Records, and having rendered an oral decision on October 20, 2005 holding that the Court was bound by the decisions in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) and *Beuhler v. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003) and as such the "Court" was not an "Agency" as that term is defined in RCW 42.17.020(1),

(CP 69)

This matter was appealed to the Court of Appeals on March 13, 2006. (CP 71)

**D. SUMMARY OF ARGUMENT**

Case law has clearly established that the Court is not an "Agency" as that term is defined in the Public Disclosure Act. As such, the Public Disclosure Act can not be used to access judicial records. Instead, judicial records are available under common law and/or GR 31.

The trial court properly applied the doctrine of *stare decisis*

and denied Spokane & Eastern Lawyer's request to inspect and copy under the Public Disclosure Act those items set forth in its May 30, 2005 correspondence.

**E. ARGUMENT**

**1. STANDARD OF REVIEW**

Spokane & Eastern Lawyer filed a Motion under RCW 42.17.340(1) to obtain an Order compelling the Spokane County Superior Court to allow the inspection and copying of certain judicial records. After considering supporting affidavits and memoranda of law, the trial court denied the Motion based on established judicial precedence that the Court was not subject to the Public Disclosure Act. The trial court in effect denied Spokane & Eastern Lawyer's motion for summary judgment. An appeal of a decision on a summary judgment is de novo. *Wagg v. Estate of Dunham*, 146 Wn. 2d 63, 67, 42 P.3d 968 (2002).

Spokane & Eastern Lawyer urges this Court to apply several Public Disclosure Act policies set forth in RCW 42.17.010(11) in support of its argument that the Spokane County Superior Court should be subject to the Public Disclosure Act. (Appellant's Brief at

pages 5-6.) Spokane & Eastern Lawyer further references RCW 42.17.340(1) for the proposition that the Spokane County Superior Court has the burden of establishing the basis for denying any inspection and copying of its records. (Appellant's Brief at page 7.)

The policies set forth in RCW 42.17.010(11) and the burden of proof set forth in RCW 42.17.340(1) are only applicable in a de novo review **if** an "agency" has denied a public records request. In the present case, it was determined that Spokane County Superior Court was not an "agency". Accordingly, neither the policies nor the burden of proof are applicable in this appeal.

**2. STARE DECISIS IS CONTROLLING. THE COURT IS NOT AN "AGENCY" UNDER THE PUBLIC DISCLOSURE ACT.**

In 1972, the citizens of the Washington State enacted the Public Disclosure Act ("PDA") by passing Initiative 276. Initiative 276, as noted by Spokane & Eastern Lawyer, addresses campaign financing, lobbyist reporting, reporting of public officials' financial affairs and "public records." (Appellant's Brief at page 4.)

Under the "public records" section of the PDA, an "Agency" is required to make a "Public Record" available to any person for

inspection and copying subject to various exemptions. RCW 42.17.260(1).

The terminology “Agency” and “Public Record” are defined in the PDA as follows:

42.17.020. Definitions.

(1) “Agency” includes all state agencies and all local agencies. “State agency” includes every state office, department, division, bureau, board, commission, or other state agency. “Local agency” includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

.....

(36) “Public record” includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local **agency** regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and other record designated a public record by any official action of the senate or the house of representatives. (Emphasis added).

Washington Courts in two seminal cases examined whether or not “courts” are an “Agency” as that term is defined in RCW 42.17.020(1) and as such required to make their records available for inspection and copying under the PDA. Spokane & Eastern Lawyer argues that these cases are “not apposite.” (Appellant’s Brief at page 8) The Spokane County Superior Court and trial court Judge Nielson believed that they were not only pertinent but also controlling.

The first case to address whether or not courts were subject to the PDA was *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). In that case, the court squarely held that the judicial branch of government was not an “Agency” as that term is defined in RCW 42.17.020(1). As such, the court was not subject to the PDA.

The issue in *Nast* was whether an individual could use the PDA to obtain access to King County Superior Court Case files that were maintained by the King County Department of Judicial Administration. The court held that neither the court, nor judicial records, fell within the definition of “Agency” or “public record” respectively as those terms were defined in the PDA and as such, the

PDA did not apply. In *Nast, supra* at 305-307 the court wrote:

These are very broad definitions which could be interpreted to include court case files held by the Department of Judicial Administration. Court case files historically have been referred to as public records. . . . The PDA was enacted to allow access by the public to records held by an "agency" concerning "the conduct of government or the performance of any governmental or proprietary function". RCW 42.17.020(26).

.....

Because court case files are within the province of the judiciary we must determine whether the judiciary and its case files are under the realm of the PDA. **The PDA definitions do not specifically include either courts or case files. A reading of the entire public records section of the PDA indicates and we find that they are not within the realm of the PDA.**

.....

We hold the PDA does not apply to court case files because the common law provides access to court case files, and **because the PDA does not specifically include courts or court case files within its definitions** and because to interpret the PDA public records section to include court case files undoes all the developed law protecting privacy and governmental interests.

Because we find the PDA does not apply, we need not determine whether next day access to court case files complies with the PDA requirement that public records be "promptly available". RCW 42.17.270. (Emphasis added)

Spokane & Eastern Lawyer argues that the above holding is dicta. (Appellant's Brief at page 10)

"Dicta" is defined as:

'[A] remark by the way;' that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion."

*State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954),

*In re Marriage of Roth & Coke*, 72 Wn. App. 566, 570, 865 P.2d 43 (1994).

Clearly, the above-bolded language in *Nash* is not dicta. Moreover, the two (2) dissenting judges in *Nast* clearly understood the majority's holding that the court did not fall within the definition of an "Agency" as defined in RCW 42.17.020(1) when they wrote:

The majority holds, however, that the Department of Judicial Administration is not covered by the PDA because the PDA does not cover courts. We need not decide, however, whether the PDA applies to courts, an issue about which the PDA is far from clear.

*Nast, supra* at 311.

The second case to address whether or not courts were subject to the Public Disclosure Act was *Beuhler v. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003). That case dealt with a criminal defense attorney's request to access a superior court judge's computer files where the judge kept notes and records from past sentencings. The defense attorney was denied access by the trial court. On appeal to this Court, the defense attorney argued that the public had a right to access the judge's computer files under the PDA, common law, Washington Constitution and due process. This Court unanimously affirmed the trial court's denial of the defense attorney's request. With regard to the argument that the judge's computer files were public records under the PDA, this Court, applying the doctrine of *stare decisis*, affirmed the Supreme Court's holding in *Nast* that the court was not an "Agency" and held:

Mr. Beuhler contends the superior court is an agency and the judge's computer files are public records for the purposes of the PDA. However, in *Nast v. Michels*, 107 Wn.2d 300, 305-07, 730 P.2d 54 (1986), the Washington Supreme Court held that although the Department of Judicial Administration falls within the definition of an agency, neither the courts nor court case files are specifically included in the PDA and are not within its realm

*Beuhler, supra* at 918.

Case law has established the rule of law. And that rule of law is that the court is not an “Agency” under the PDA. As such, the public cannot look to the PDA as a basis to view or obtain copies of judicial records.<sup>2</sup>

There is sound rational for holding that the court is not subject to the PDA.

First, the Court is a separate branch of government under Const. art. IV, §1. It is distinguished from the legislative branch established under Const. art. II, §1 and the executive branch established under Const. art. III, §1. Harmonious cooperation among the three branches of government is a fundamental of our system of

---

<sup>2</sup> Until 1995, there was an issue as to whether or not legislative records were subject to the PDA. In 1995, under ESSB 5684, Laws of 1995, ch. 397, § 1, the legislature specifically amended the definition of “public record” as set forth in RCW 42.17.020(36) to include certain legislative records. This amendment confirms that the PDA definitions are not as encompassing as argued by Spokane and Eastern Lawyer. Moreover, the court has consistently limited the definition of “Agency” as set forth in RCW 42.17.020(1) to the executive and legislative branches of the government. *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993), *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997).

government. The Court has inherent authority to control its records and proceedings. *Nast v. Michels, supra* at 305. The legislative branch has been hesitant to impair the power or functioning of the Court. The Court's holding that a court is not an "Agency" under the PDA preserves the separate of powers doctrine and furthers harmonious relationships among the three branches of government.

Additionally, there is a common law right of access to judicial records. *Beuhler v. Small, supra* at 115 Wn. App. 918. This right of access is similar to the right to access legislative and executive records under the PDA. Just like the PDA with its exemptions for personal information (RCW 42.17.310(1)(b)), ongoing criminal investigations (RCW 42.17.310(1)(d)), and attorney client work product (RCW 42.17.310(1)(j)), the common law right to access judicial records acknowledges that certain sensitive judicial records are not subject to inspection or copying<sup>3</sup>. Such was the case with Judge Small's personal work related computer files. The Court's holding that it is not an "Agency" under the PDA does eliminate the right to access

---

<sup>3</sup>GR 31 and SAR13 are two (2) court rules which acknowledge the common law right of access to judicial records.

judicial records. In fact the common law right to access judicial records is strikingly similar to the PDA in many respects.

E. CONCLUSION

The Spokane County Superior Court respectfully requests that this Court affirm Judge Nielson's Order of March 8, 2006. In that Order, Judge Nielson, following judicial precedence in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) and *Beuhler v. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003), held that the court was not an "Agency" under the Public Disclosure Act. As such, the Public Disclosure Act could not be used to access judicial records. Spokane & Eastern Lawyer has not presented any compelling reasons to abandon this rule of law.

Respectfully submitted this 26<sup>th</sup> day of June, 2006.

STEVEN J. TUCKER  
Prosecuting Attorney

  
James P. Emacio, WSBA# 7836  
Deputy Prosecuting Attorney  
Attorneys for Respondents

**PROOF OF SERVICE**

On the 26<sup>th</sup> day of June, 2006, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

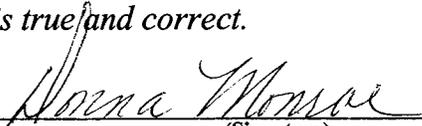
Steven K. Eugster  
423 West First Avenue, Suite 100  
Spokane, WA 99201

Personal Service  
 U.S. Mail  
 Hand-Delivered  
 Overnight Mail  
 Facsimile

*I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.*

6/26/06  
(Date)

Spokane, WA  
(Place)

  
(Signature)