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SUPREME COURT
STATE OF WASHINGTON

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NO. 82229-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE YAKIMA HERALD-REPUBLIC,

Appellant,

v.

YAKIMA COUNTY,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case presents an opportunity for this Court to revisit its prior ruling in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), and clarify the full scope of its meaning. The narrow ruling of *Nast*—that court *case files* within the judiciary are not subject to the Public Records Act (“PRA”)—has been misinterpreted by lower court decisions to mean that any and all records within the “judiciary,” even those not within “court case files,” are immune from the PRA.

In *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 622, 150 P.3d 158 (2007), the Court of Appeals Division II held that correspondence between county judges and the State Bar Association was not accessible under the PRA because, citing *Nast*, courts are not “agencies.” The *Spokane* court expressly rejected the argument that the *Nast* ruling was confined to only “court case files” within the judiciary. 136 Wn. App. at 621. Similarly, in *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003), the Court of Appeals Division III held that courts are not subject to the PRA because they are not “agencies.”

This expansion of *Nast*’s breadth allows purely administrative documents to be withheld from the public. This has created a “black hole” for public access, leaving government agencies free to withhold records that clearly fit the definition of a “public record” within the PRA by

claiming that they are held, used, or owned by the judicial branch.

Appellant respectfully insists that is not what *Nast* held or intended, but if it is, this Court must re-asses the viability of *Nast*'s reasoning in light of changes that have occurred in the over 20 years since the decision was made.

In the present case, Yakima County used a budget judge to make funding decisions for the public defense of two murder cases. The budget judge was independent of the trial court judge and decided whether the bills of defense counsel should be approved for payment by the County. These bills cost taxpayers an estimated \$2 million. Appellant Yakima Herald-Republic ("Herald-Republic" or "the Newspaper") requested three sets of public records: (1) worksheets and spreadsheets created by county employees detailing the submitted billing requests and expenditures; (2) billing orders issued by the budget judge approving payment; and (3) actual billing records of defense counsel. The Newspaper asked the County to redact privileged attorney work product or attorney-client communications in the billing records.

It is unknown where the requested records are located. It is impossible to tell if they are or ever were in a "court case file" as contemplated by *Nast*. Some categories of records have been disseminated

to other administrative agencies, such as the County Auditor's Office, and the Board of Commissioners Office.

These types of records are clearly not what *Nast* contemplated as judicial "court case files," and the fact that a judicial officer is involved in one step in the billing process should not magically transform these records into judicial records immune from disclosure. These are administrative records serving an executive rather than judicial function and should not be immune from public access under the PRA.

The budget judge ordered these records to be sealed. The sealing order itself has been improperly sealed, precluding any review of whether the budget judge did the required analysis under *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), for restricting public access to court records. When Appellant tried to challenge the propriety of the sealing in its action, Yakima County Cause #08-2-02355-8, the trial court refused to decide the issue and improperly instructed Appellant to challenge it in front of the same judge who sealed the records.

The public's right to know how over \$2 million of its tax money was spent is at stake, and if the erroneous expansion of *Nast* continues unabated, that right will be severely undermined. Such secrecy is inconsistent with the forceful and broad mandate for public disclosure under the PRA. *See* RCW 42.56.030.

II. ASSIGNMENTS OF ERROR

Assignments of Error. The trial court erred in (1) issuing the Memorandum Decision of June 30, 2008; (2) issuing the Order granting Yakima County's Motion for Injunctive and Declaratory Relief on August 1, 2008; and (3) issuing the Order Denying Motion for Reconsideration on September 2, 2008.

Issues Pertaining to Assignments of Error:

- A. Whether a "budget" judge's records relating to the funding of public defense are exempt from the PRA even if the judge had no involvement in the merits of the case;
- B. Whether *Nast* exempts all records from disclosure under the PRA that come in to possession of the judicial branch, even when the judiciary is acting in an administrative capacity, and whether such exemption is proper;
- C. Whether all records in the possession of the judiciary or judicial administration qualify as "court case files" under *Nast*; and
- D. Whether a trial court must address the unsealing of sealed court records under GR 15 and *Ishikawa*.

III. STATEMENT OF THE CASE

A. Background

In 2005, Jose Luis Sanchez and Mario Mendez were charged in Yakima County with Aggravated First Degree Murder in *State v. Sanchez*, Yakima County Cause No. 05-1-00459-8, and *State v. Mendez*, Yakima County Cause No. 05-1-00507-1, respectively. CP 8. The appointed defense attorneys made several requests for public funds to pay their own

legal fees, retain experts, hire consultants, and aid in the preparation of mitigation packages. *Id.*

When the State funds the defense of an indigent individual, a public defender agency often provides the attorney or handles the payment of appointed private counsel. CP 79. In such cases, the public defender agency maintains the record of the hours spent and fees paid to defense counsel, *id.*, and public defender organizations are subject to the PRA. *See* CP 32.¹ In the *Mendez* and *Sanchez* cases, Yakima County instead used private appointed defense attorneys and assigned a judge to act as the budget judge for the County to review the invoices and affidavits of the appointed defense counsel and decide whether to approve them for payment. CP 8. The Honorable C. James Lust of the Yakima County Superior Court was appointed the budget judge for both cases. CP 8.

Defense attorneys submitted requests for funds and payment to Judge Lust and asked that the financial records be sealed. CP 9. The requests to seal were granted by the budget judge, not the trial court judge. CP 9. There is no evidence the budget judge complied with

¹ Declaration of Heather Clarke, paralegal for Appellant counsel, stating that after investigating a list of Public Defender Agencies, “[e]ach of the agencies I contacted understood that they were subject to the [PRA]. Each of the agencies I contacted appeared to understand the records I was after—specifically billing statements from appointed attorneys—would be disclosable if requested.”

Ishikawa in sealing the records and the sealing orders were and remain sealed. CP 9.²

Mendez subsequently pled guilty. Sanchez went to trial and was convicted of first degree murder. *Id.* Sanchez then filed a notice of appeal and that appeal is currently pending. *Id.*

On March 7, 2008, the Herald-Republic filed a motion to intervene and to unseal the billing records in the *Sanchez* case. CP 192-93, 320. On April 21, 2008, Sanchez asked the trial court to deny the Newspaper's motion under RAP 7.2, arguing that the trial court did not have authority to hear the motion because *State v. Sanchez* was on appeal, and that the public's right to access the materials was outweighed by Sanchez's constitutional right to a fair proceeding. CP 231-41.

After a hearing on April 25, 2008, the budget judge ruled that RAP 7.2 required the Newspaper to seek leave of the Court of Appeals to give the trial court authority to hear its motion to intervene. CP 321. Believing strongly that the PRA mandated access to the records, the Newspaper proceeded with its efforts for access through the PRA. *Id.*

² In his June 30, 2008 Memorandum Decision, where Judge Cooper found that "Judge Lust granted each defendant's requests and ordered the financial records be sealed, presumably pursuant to *Ishikawa* [.]". CP 9.

B. Newspaper Requests for Records under the Public Records Act

On June 5, 2008, the Newspaper made a request under the PRA to Yakima County, the Yakima County Prosecutor, and the administrative offices of the Yakima County Superior Court for

[A]ll records, including attorney billing records, invoices, and supporting documentation, of public funds spend for private legal counsel, including associated costs of such representation in the matters of *State v. Sanchez*, Yakima County Cause No. 05-1-00459-8 and *State v. Mendez*, Yakima County Cause No. 05-1-00507-1. This includes records retained, owned, used, or prepared by the Yakima County Superior Court, Yakima County Court Administrator's Office, Yakima County Prosecuting Attorney's Office, or any of their agents.

CP 339-40.

The County claimed the billing records sought were "sealed" by a court order. CP 345; RP (6/26/08) at 10. The County also stated that the Clerk of the Court prepared worksheets for the payments made to the defense attorneys and that those records were "sealed" as well despite not being included in the actual court file. CP 345.

In a letter dated June 13, 2008, the County's attorney responded to the Newspaper's PRA request, stating, in part, that the PRA does not apply to court records. CP 341-42. The Newspaper responded on June 18, 2008, indicating that it would pursue an enforcement action under the PRA to compel disclosure. CP 343.

C. Yakima County Sues to Stop Release of Records

The next day, on June 19, 2008, the County filed a PRA injunction lawsuit against the Newspaper to prevent disclosure. CP 344. The County stated it was concerned that it would be held in contempt of court if it released records under seal, but also subject to mandatory penalties under the PRA if it did not. *See* RP (6/26/08) at 3. The County argued that (1) it met the two-prong test under the PRA (specifically, RCW 42.56.540) for a court to allow a public agency to enjoin a request for disclosure; and that (2) there was a distinction between “court records” and “public records” and that the PRA does not apply to the “court records” sought by the Newspaper, citing *Nast* and *Spokane Eastern Lawyer*. CP 346-48. In the alternative, the County also moved for a declaratory judgment seeking guidance for its legal obligation to respond to the Newspaper’s “pending and future public records requests.” CP 349.

The Newspaper filed its own PRA action the next day to gain access to all the records responsive to its request and, in the alternative, under *Ishikawa* to gain access to the sealed records held in the Yakima County Superior Court. CP 7-8, 13. The Newspaper sought access to the billing records under (1) the PRA for non-court case files and/or (2) Wash. Const. art. I, § 10 and the *Ishikawa* line of cases regarding the unsealing of court records. CP 7-8. and the two lawsuits were consolidated. CP 8.

D. Sanchez Intervenes

On June 25, 2008, Sanchez moved to intervene in the PRA case arguing that unsealing the records or providing them via the PRA would deprive Sanchez of his right to a fair trial, due process, right to meaningful appeal, and right to counsel. CP 319. Defense counsel also argued that *Nast* precludes public access to court records via the PRA. CP 323-24. At oral argument, counsel argued that legal invoices detailing who was paid and how much is privileged work product or otherwise precluded from access under the PRA since they are court records. RP (6/26/08) at 13, 15. The parties agreed to allow Sanchez to intervene. CP 8, 13.

Mendez and his lawyers have not objected to the production of the documents requested by the Newspaper. CP 295. The County has no objection to production of the requested documents for *State v. Mendez* under either the PRA or *Ishikawa*. CP 295.

E. June 30 Memorandum Decision and August 1 Order

On June 26, 2008, the court held an expedited hearing on the County's injunction motion. RP (6/26/08). A third judge (not the budget judge or the trial judge), the Honorable Judge Michael E. Cooper issued a Memorandum Decision on June 30, 2008. CP 7. In the decision, Judge Cooper, citing *Nast*, ruled that although the PRA governs how the public can access public records,

[it] does not apply to court case files because the common law provides access to court case files, because [the PRA] does not specifically include courts or court case files within the definitions, and because to interpret [the PRA] public records section to include court case files undoes all the developed law protecting privacy and governmental interests.

CP 9-10. Judge Cooper held that because the records sought by the Newspaper are sealed “court records,” the PRA is not the proper vehicle for accessing those records and that under *Nast* use the procedures delineated in GR 15(e)(2) and *Ishikawa*, and file an application with the sealing judge to unseal the records. CP 10. Judge Cooper did not rule on the Newspaper’s GR 15 and *Ishikawa* claims; instead, he noted that because Mendez had by then pled guilty, “it would seem [Judge Lust] would have the ability to hear a GR 15 motion on the records sealed in that case.” *Id.* Judge Cooper ruled that the same should apply to Sanchez, whose case was on appeal. *Id.* Judge Lust was to then use the factors outlined in *Ishikawa* and decide whether to unseal the records. *Id.*

The June 30 Memorandum Decision was later incorporated by reference into the August 1 Order signed by Judge Cooper, which granted the County’s motion for injunctive relief and denied the Newspaper’s enforcement action under the PRA and *Ishikawa*. CP 14-15. Specifically, Judge Cooper ruled that: (1) under *Nast*, the PRA “has no application to

the Yakima Herald-Republic's request for the particular billing records it seeks because they are sealed court records, not administrative records, and... [the PRA] does not apply to court files"; (2) because the records sought are sealed, the proper mechanism for attaining them is through GR 15(e)(2), and (3) the Newspaper is not entitled to statutory penalties and attorney's fees since the PRA does not apply. CP 13-14.

F. Motion for Reconsideration

On August 11, 2008, the Newspaper filed a Motion for Reconsideration under CR 59(a)(1), (4), and (7)-(9) and CR 60(a), (b)(1) and (11). CP 77. The Newspaper asked the court to (1) order the County to lodge all responsive records with the court and for the court to conduct an in camera review of the records, (2) decide whether the records are subject to the PRA and not exempt from disclosure, (3) declare the records to be subject to potential disclosure as court records under Article I, Section 10 of the State Constitution and the First Amendment to the United States Constitution or (4) declare the records to be subject to the PRA and Article I, Section 10 of the State Constitution and the First Amendment to the United States Constitution. CP 77-78.

The Newspaper argued the court erred in issuing its August 1 Order because (1) the County has not met its burden to prevent disclosure under either the PRA or *Ishikawa*; (2) the PRA applies because *Nast* only

precluded access to court case files and the County had not met its burden of proving that all of the sought records constitute “court case files”; (3) the requested records constitute “public records” under the PRA and the court should conduct an in camera review of any documents the County claims are exempt from disclosure; (4) the County failed to meet its burden under the PRA’s injunction statute, RCW 42.56.540, because it did not identify a specific applicable exemption for any of the sought records; (5) GR 15 does not require the public to file a motion to unseal to be decided by the same judge that ordered the records sealed; (6) the County has not met its burden, even if the PRA does not apply, of showing that the sought records should remain sealed under Article I, Section 10 of the State Constitution and the *Ishikawa* test; (7) the trial court erred in not addressing the constitutional claims; and (8) reconsideration is warranted under CR 59(a)(4) because newly discovered evidence indicates that the records being denied are in fact not “court case files” under *Nast*, and therefore should be disclosed pursuant to the PRA.³ CP 82-93.

G. Order Denying Motion for Reconsideration

On September 2, 2008, the trial court denied the Newspaper’s Motion for Reconsideration. CP 16. The court stated that

³ Specifically, the Newspaper included new evidence indicating that public defense agencies used in other counties to handle payment of appointed counsel were subject to the PRA for the same type of records at issue in this case. *See* CP 93, 31-77.

[T]he role of the budget judge (Judge Lust) was to review all requests for funds of the defendants in order to determine the merits of the requests, to gauge the cost of a trial and its corresponding impact on the court's budget, and to provide a basis to seek state funding of a potential death penalty trial.

CP 17. Further, the court found that Judge Lust was presented with the grounds for sealing the records, and that Judge Lust concluded that they warranted sealing "presumably" pursuant to [*Ishikawa*]. CP 17. Following the June 30 Memorandum Decision by Judge Cooper, the court held that Judge Lust's conclusions under *Ishikawa* are "not before this court so no analysis of the propriety of the sealing of those records was considered by this court." CP 17-18. The court also stated that the requests for funds by the defendant's counsel were all sealed by Judge Lust, and that documents "generated for budget purposes of the trial in the form of worksheets are maintained by the court administrator, not the county clerk, under the order sealing the records of the case as they pertain to financial matters." CP 18 n.1. Moreover, the court concluded that *Nast* precludes access to the sought records because the PRA does not apply to court case files and that the proper channel is through the procedures in GR 15(e)(2) for unsealing a criminal court record. CP 18. The trial court in its September 2 Order Denying Reconsideration also rejected the Newspaper's argument

that the budget judge was acting in a purely administrative function. CP

19. Specifically, the court stated

[h]aving a financial judge administer the costs of an aggravated first degree murder case is no less judicial just because the financial judge was not the trial judge. Every case bears its administrative aspects and the fact that two judges were involved does not detract from the fact the judiciary administered these cases, not the legislative or executive branches [.]

Id. The court agreed with the Newspaper that the court records are public records, but ruled that “the public’s right of access is not absolute and may be limited to protect other interests,” and directed the Newspaper to follow the state Supreme Court’s alleged mandate that records be unsealed via GR 15(e) and not the PRA. *Id.* Finally, the trial court also refused to consider the Newspaper’s newly discovered evidence as a basis for reconsideration, as it concluded the Newspaper -- which had less than 8 days from service to hearing on the County’s original motion -- had failed to make a showing that the evidence “could not have with reasonable diligence been discovered and produced at the initial hearing.” *Id.*

IV. STANDARD OF REVIEW

The standard of review for an appellate court under the PRA or Article 1, Section 10 and *Ishikawa* is *de novo*. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004); RCW 42.56.550(3) (PRA); *In re Bonds*, ___ Wn.2d ___, 196 P.3d 672 (2008) (Art. I, § 10).

V. LEGAL AUTHORITY AND ARGUMENT

The central issue in this case is whether the PRA applies to the records sought by the Herald-Republic. The PRA is “a strongly worded mandate for broad disclosure of public records.” *Rental Housing Association v. City of Des Moines (“RHA”)*, ___ Wn.2d ___, 2009 WL 146541 at *5 (January 22, 2009) (citation omitted); *see also Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“PAWS II”) (citation omitted). Courts are mandated to take into account the explicit policy of the PRA that “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.” RCW 42.56.550(3). Further, the PRA states

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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.56.030; *see also Hartman v. Washington State Game Comm’n*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975) (“Where the legislature prefaces an enactment with a statement of purpose... that declaration... serves as

an important guide in understanding the intended effect of operative sections.”) (citation omitted).

A. *Nast v. Michels*

The County and counsel for Sanchez rely on the holding from *Nast* as the basis for denying the Newspaper access to the records sought through the PRA. In *Nast*, the dispute arose when the King County Department of Judicial Administration began allowing court case file access only on a prior appointment basis. 107 Wn.2d at 300-01. Specifically, the Superior Court clerk amended the prior system of allowing for on-demand access to such records to a new system requiring one-day advance notice—a plan that caused “inconvenience and costly delays” to attorneys and others who sought court records. *Id.*

Nast, an attorney, challenged the new policy, alleging that it violated the precursor statute to the PRA, the common law right to access court records, and the State and Federal constitutions. *Id.* at 301. The trial court agreed, finding that case records are public records of an agency under the PRA and that the new policy violated both the PRA and the common law right of access to court records. *Id.* at 302.

This Court, after granting direct review for the defendants, subsequently reversed the trial court. *Id.* at 309. The Court first noted that “[m]ost of the court case files at issue in this case were and are available

by common law access. *Nast* was not denied access to a particular file, but rather challenged the new access procedure.” *Id.* at 304. The Court also noted that the parties stipulated as to what kind of records constituted “court case files”:

[t]he official Superior Court records, indexes and case files... maintained by the clerk in the King County Department of Judicial Administration. These court records and files include all pleadings in filed court cases. Such court cases include civil lawsuits for damages, declaratory judgment proceedings, arbitration confirmations, felony criminal cases, actions involving title to real property, unlawful detainer actions, appeals from Justice and Municipal courts, probate matters, guardianship matters, juvenile court matters, divorces, marital dissolutions and petitions for legal separation, paternity actions, guardianship cases, adoptions, mental illness cases, alcohol treatment cases, receiverships, actions to abate nuisances, injunctions, writs of certiorari, prohibition, and mandamus and Superior Court reviews of administrative proceedings in King County, Washington.

Id. at 303. The *Nast* Court noted that court case files have traditionally been treated as public records, which is why the common law provides access to them. *Id.* at 305. The Court then concluded that despite the King County Department of Administration being, “by its name,” a county agency, because its primary function was judicial in nature, the issue became whether or not “the judiciary and its case files” are within the purview of the PRA. *Id.* at 305-06.

The *Nast* Court ultimately concluded that the PRA did not apply to court case files. *Id.* at 304. In particular, the Court, after reviewing the definitions of “agency” and “public record” under the PRA, found it convincing that the PRA did not explicitly reference court or case files. *Id.* at 306. However, the main concern of the Court in making this ruling was that the language of the PRA made no specific reference to the many recognized restrictions on the common law right of access, such as those pertaining to adoption records, paternity action records, and mental commitment files. *Id.* at 306-07. The Court noted that the PRA was silent as to these exceptions to public access.. *Id.* at 307.

Ultimately, the *Nast* Court ruled that the PRA does not apply to court case files for three specific reasons:

[1] because the common law provides access to court case files, and [2] because the PDA does not specifically include courts or court case files within its definitions, and [3] because to interpret the PDA to include court case files undoes all the developed law protecting privacy and governmental interests.

Id. at 307.

B. *Buehler and Spokane & Eastern Lawyer*

Subsequent case law has greatly expanded the scope of *Nast*'s ruling, extending its holding to all records created, used or held in the judicial branch. In *Beuhler*, a criminal defense attorney made a PRA

request for notes a judge took on his laptop during hearings where the judge referred to the notes during hearings including sentencing hearings. 115 Wn. App. at 916-17. The request was denied, and the attorney brought a PRA enforcement action also claiming the records should be disclosed under the common law and the State and Federal constitutions. *Id* at 917.

On appeal, the Court of Appeals Division III concluded that the judge's personal notes were not within the purview of the PRA. *Id.* at 918. Specifically, the court cited *Nast*'s ruling that courts and case files are not listed within the definitions in the PRA, and that therefore a citizen must look to the common law to gain access to court records. *Id.*

The court rejected the common law and constitutional claims finding the records were not official court case records. *Id* at 916, 18-21. In sum, the *Beuhler* court expanded the *Nast* ruling that court *case files* are immune from the PRA to include judges' personal notes that are used in sentencing—and in the process, demonstrated how a separate class of record, not covered under the PRA nor common law, can be entirely inaccessible to the public.

In *Spokane & Eastern Lawyer*, a non-profit organization made a PRA request for communications between county judges and the State Bar Association regarding lawyers practicing in the county. 136 Wn. App. at 618. An agent for the court and the court's administrators refused the

request, claiming that a court is not an agency under the PRA. *Id.* The nonprofit organization brought a PRA action, and the trial court ruled that the court was not an agency under the PRA. *Id.* at 619.

Division II agreed that courts are not agencies under the PRA citing *Nast*'s ruling that the PRA's definitions do not specifically cite courts or court case files, indicating that they are not "within the realm of the [PRA]." *Id.* at 620 (citation omitted).⁴ The court in *Spokane & Eastern*, however, added that *Nast* applies not only to court files and records—but now to the entire judiciary. *Id.* at 621. Citing *Nast* and *Beuhler*, Division II ultimately concluded that courts are not agencies under the PRA, and thus the trial court did not err in denying access to the correspondence. *Id.* at 622.

C. Records Sought in This Case

The records sought by the Newspaper here fit within three distinct categories: (1) budget spreadsheets and worksheets; (2) budget judge orders, and (3) attorney billing records. RP (6/26/08) at 6. Each category of records is subject to disclosure under the PRA.

1. Spreadsheets and Worksheets

The County acknowledges that the budget spreadsheets and worksheets have been shared among the Board of County Commissioners

⁴ Even though the trial court decision arose out of Spokane County, Division II heard the case.

for budgeting purposes and the Auditor's Office for payment. CP 337 at ¶8; RP (6/26/08) at 4. The County has not shown that these spreadsheets and worksheets, after being distributed among the County Commissioner's Office and Auditor's Office, are now in court case files, or if they are, that they properly reside there. Counsel for the County stated that "the entire billing records for defense in the two criminal cases that are the subject for [Appellant's] request had been sealed by Order of the Court." CP 337 at ¶7. This sealing order, which is itself sealed, included "all records used in the preparation of payments and held in the Clerk's office, as well as in the Auditor's and [Board of County Commissioner's] offices [.]" CP 337 at ¶8.

2. Budget Judge Orders

The location of the budget judge's orders is less clear. The records were never given to the trial judge and were kept from the trial judge. RP (6/26/08) at 7. It is unknown whether or not these records have been distributed to other county administration offices, as the spreadsheets and worksheets apparently have been, or if they are in or have ever been in a court file. All that is known, assuming the County is correct, is that they are covered by a sealing order (which is itself sealed). CP 337 at ¶7.

3. Attorney Billing Records

The location of the attorney billing records for the defense attorneys is also unknown. The County alleges all records related to billing for the defense of the two defendants are located in the County Clerk's Office, the Auditor's Office, and the Board of Commissioner's Office, and are under seal. CP 337 at ¶8. However, as with the aforementioned records, it is unclear whether this category of records is, or has ever been, within a court case file.

D. The PRA Applies to the Records Sought Here

Both *Beuhler* and *Spokane & Eastern Lawyer* and the Respondents here rely on *Nast* for the proposition that the judiciary itself is not within the definition of an "agency" under the PRA, and therefore its records are not covered within the statute. The Newspaper contends that *Nast* does not completely shield the judiciary from the PRA. To the extent this Court believes *Nast* ruled that any and all records created, used, or in the hands of the judicial branch are precluded from disclosure under the PRA because the judiciary itself is not an agency, the Newspaper respectfully submits that *Nast* should be overruled for the reasons below.⁵

⁵ As described above, *supra* pages 16-18, much of the 1986 *Nast* ruling was based on that Court's concern that the PRA did not contain the well-developed body of exceptions to common law access to court documents. This concern was solved the next year when the Legislature added the "other statute" language to the PRA. RCW 42.56.070(1); Laws of 1987, ch. 403, §3. The "other statute" language means that exemptions from disclosure in other statutes apply to the PRA. Now there are now hundreds of exemptions and

1. Courts are Agencies under the PRA and the Records Sought are Public Records

The *Nast* Court admitted that an administrative division of the county court “falls within the definition of agency” in the PRA and the definition of “public record” also “could be interpreted to include court case files held by the Department of Judicial Administration.” 107 Wn.2d at 305. The Court then decided that because this department was a “unique institution” in that it serves a function within the judiciary as custodian of case files generated by litigation, it was outside the scope of the PRA. *Id.* at 306. The Court did not explain the logical basis for creating such an exception. However, it is important to note that the *Nast* Court did not explicitly say that “courts” or the “judiciary” do not fit within the definition of “agency” under the PRA.

The *Nast* Court clearly believed that courts and court case files could fit within the broad definitions of the PRA. Under RCW 42.56.010(1), “agency” includes:

[A]ll 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 quasi-

prohibitions under the PRA, including the statutes specifically cited by *Nast* as examples of common law restrictions on public access. *See* WASH. ADMIN. CODE 44-14-06002 (“The [PRA] and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them.”); *see also* *Public Records Act for Washington Cities and Counties*, Municipal Research and Services Center, Report Number 61, Appendix C (May 2007) (providing list of exemption and prohibition statutes not specifically addressed in PRA).

municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

The definition of agency, as well as all the other provisions of the PRA, are construed broadly. *See* The Washington State Bar Association *Public Records Act Deskbook*, § 3-2 (emphasizing that “agency” is broadly defined and “any semi-governmental entity in the “gray area” of PRA coverage would likely be considered an ‘agency.’”). Further, RCW 42.56.010(2) states that a “public record”

“[I]ncludes any writing containing information relating to the conduct of government or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics [.]”

See also Oliver v. Harborview Med. Ctr., 94 Wn.2d 559, 566, 618 P.2d 76 (1980) (“public record” is to be liberally construed so as to ensure full access to public records).

Financial records created by publicly-paid defense counsel, approved by a county employee, and later incorporated into the county budget falls within the definition of a public record of an agency. *See Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998) (holding that “[where] records relate to the conduct of ... [a public agency]... and to its governmental function... [T]he records are public records within the scope of the public records

act”). This is the only conceivable interpretation of the unusually broad and forceful PRA mandate.⁶

Beuhler and Spokane & Eastern Lawyer did not broadly construe the definition of “agency” or “public record” under the PRA -- they did just the opposite. Again, if this Court does believe *Nast* to so hold, it should be overturned as it is without legal basis and not in conformity with the unambiguous language of the PRA.⁷

2. Records Sought are Not Precluded from Disclosure under PRA by *Nast* As They are not “Court Case Files”

Even if this Court believes *Nast* holds that the judiciary and all court-related records are precluded from disclosure via the PRA, that is not dispositive because the records at issue are not “court case files” and were not generated by the judiciary. The Court in *Nast* explicitly stated

⁶ See *King County v. Sheehan*, 114 Wn. App. 325, 328, 57 P.3d 307 (2002) (referring to the three legislative intent provisions of the PRA as “the thrice-repeated legislative mandate that exemptions under the [PRA] are to be narrowly construed”); see also *West v. Port of Olympia*, 146 Wn. App. 108, 116 n.10, 192 P.3d 926 (2007) (quoting *Sheehan*); see also Attorney General’s Open Government Internet Manual, §1.1 (“In any ‘gray areas,’ a court will look to the requirement to interpret the Act in favor of disclosure and will decide a dispute in favor of open government.”) (last accessed Jan. 15, 2009).

⁷ The Newspaper contends that the issue of whether the judiciary meets the PRA definition of “agency” is still undecided, or at a minimum, unclear. Washington courts prior to *Nast* avoided the issue on at least two occasions. See *Cohen v. Everett City Council*, 85 Wn.2d 385, 390, 535 P.2d 801 (1975) (“The city does not address the threshold question of whether a trial court is a state agency within the [PRA]. However, we do not reach that issue.”); see also *Cowles Publ’n. Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981) (“We again reserve the question [of whether the judiciary is an agency under the [PRA] since it is not necessary under our rationale.”). It seems odd that the *Nast* Court would continue its analysis at all after answering the threshold question of whether a county court could be considered an “agency” in the negative, as both *Spokane & Eastern Lawyer* and *Beuhler* assume.

that “[b]ecause the common law provides a right of access to court case files and because of the language of the public records section of the [PRA], we hold the [PRA] does not provide access to *court case files*.” 107 Wn.2d at 304 (emphasis added). In its August 1 Order denying the Newspaper access to the records, the trial court cited *Nast* for the proposition that the PRA does not apply to court case files. CP 13-14. However, this conclusion only begs the question of whether the worksheets and spreadsheets, budget judge orders and attorney billing records meet the definition of “court case files” as contemplated by *Nast*. It is proper to infer that the records described in *Nast* (107 Wn.2d at 303) are what the *Nast* Court was referring to when discussing “court case files.” Even a broad interpretation of the records listed above demonstrates that the records generated by or for a budget judge are not part of this definition—nowhere in the comprehensive list above are the billing records of county-paid defense counsel, the orders authorizing payments, or billing worksheets or spreadsheets hinted at whatsoever.

The subsequent case law has misinterpreted and expanded the *Nast* ruling. First, *Nast* never explicitly stated that courts are not “agencies” and that court records are not “public records” under the broad definitions of the PRA—something upon which those subsequent cases erroneously relied. In *Beuhler*, Division III interpreted *Nast* to hold that courts are not

an agency under the PRA, and therefore “judicial records” (and not merely “court case files”) are precluded from disclosure. 115 Wn. App. at 918. This ruling implies, as does the failure of the *Beuhler* court to analyze whether the judge’s personal notes fall under *Nast*’s “court case files” definition, that if the records are “judicial,” they are by default outside the purview of the PRA.

Likewise, *Spokane & Eastern* expanded *Nast*’s limited holding to preclude access to all records in the possession of the judiciary because it interpreted *Nast*’s ruling to be that a court cannot be an agency under the PRA. 136 Wn. App. at 622. *Spokane & Eastern Lawyer* failed, though, as did *Nast*, to contemplate the unique role of a budget judge, and the extension of those rulings to this context is inappropriate. The central issue before the Court presently is whether access to the records produced by or for the administrative functions of an independent budget judge are by definition barred from public access under the PRA.

Second, the character of the records as contemplated by *Nast* are markedly different than those requested by Appellant here. Specifically, *Nast*’s true “court case files” relate to substantive judicial proceedings where the legal merit of arguments and pleadings are weighed and conclusions drawn, and in no way bear a resemblance to the administrative county records sought by the Herald-Republic. The narrow ruling of *Nast*

is that court case files are not under the purview of the PRA, *not* that all records in the possession of an administrative division or department of the judiciary are precluded from access under the statute. *Nast* cannot be extended to mean that any and all files that pass through a court, no matter from what office or branch of government or generated for a clearly non-judicial purpose, should automatically be precluded from disclosure under the PRA. The Herald-Republic is not challenging *Nast*'s narrow holding that the common law route of access for *court case files* is sufficient for an open government. Instead, the Newspaper urges this Court to limit the scope of those records to *Nast*'s definition of "case court file" and prevent the expansion to other records. The Newspaper also urges the Court to clarify that the existence of a record in a court case file does not remove it from the reach of the PRA where, like here, it is also in the possession of another agency or held by a judicial department out of a "court case file".

Further, since *Nast* was decided, the Legislature has amended the PRA to specifically compel public access to attorney billing records and payment records when the fees and costs are paid by the public. RCW 42.56.904 provides:

It is the intent of the legislature to clarify that no reasonable construction of [the PRA] has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. It is further the intent of the legislature that specific descriptions of

work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden on the public entity to justify each redaction and narrowly construe any exception to full disclosure. The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public resources, including through liability insurance, upon private legal counsel or private consultants.

This amendment applies retroactively. *West v. Thurston County*, 144 Wn. App. 573, 583-84, 183 P.3d 346 (2008). To the extent this statute conflicts with the ruling in *Nast* the statutory language controls.⁸

To hold that *Nast* precludes access to all court-related records if they are at all associated with a judicial or quasi-judicial function would produce absurd results and render the above statute meaningless, especially when government entities utilize the budget judge approach. *Nast* is being interpreted to mean that if the reader or writer of a document wears a black robe, the document can be kept secret. The absurdity is compounded by the fact that the budget judge approach is primarily used, as it was here, when dealing with large and complicated cases—exactly the kind of cases that will require public expenditure. The Herald-

⁸ See *In re Parentage of L.B.*, 155 Wn.2d 679, 688, 122 P.3d 161 (2005) (“So long as it is consistent with Washington statutory law, Washington courts adopt and reform the common law.”) (emphasis added); see also *State v. Bergeron*, 105 Wn.2d 1, 15, 711 P.2d 1000 (1985) (“[Where] 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.”).

Republic has made it clear that it is not seeking privileged material or work product, as referenced in the amended statute. RP (6/26/08) at 8-9. It is illogical that a document expressly covered under the PRA somehow becomes inaccessible because it may or may not be in a "court case file." Neither the physical location of the record or the fact that a judge is involved in what is essentially an administrative function in reviewing those records should be determinative. It is the unique function of the budget judge as an administrative arm of the judicial branch that makes him or her the "agency" at issue, making the question of which governmental branch that employs that person superfluous.⁹ The proper inquiry is the nature of the records themselves, for what purpose they were produced, and not who produced them or in which government department they are physically stored.¹⁰ Additionally, Washington case law has held that the PRA applies to the administrative functions of the courts. *See Smith v. Okanogan County*, 100 Wn. App. 7, 16-17, 994 P.2d 857 (2000)

⁹ A large source of complication on this issue is recognized in The Washington State Bar Association Public Records Act Deskbook, ch. 20: "Court documents for Superior Courts are managed by the state's 39 county court clerks, while municipal courts handle their own records and the Supreme Court and Court of Appeals handle their records. Among the county court clerks, some consider themselves part of the judiciary, some the executive branch, and a half dozen both branches." Basing accessibility of court-related documents under the PRA dependent on what branch they reside is thus untenable.

¹⁰ *See Cowles Publ'g Co*, 96 Wn.2d at 587 ("[W]e reject the notion that documents are public or private simply because the person who handles them is or is not a public servant (or government employee)... If the term public record is to mean anything it must be more than who handles it. Instead, the issue of access to records should be determined by the role the documents play in our system of government and the legal process.").

(holding that a request for judge's oaths falls under the PRA).¹¹ The intent of the Legislature in allowing attorney billing records used in calculating public expenditure to be accessed via the PRA could not be more clear—administrative aspects of the judiciary should be accessible under the PRA.

The proper reading of *Nast* is that court case files within the judiciary are immune from disclosure via the PRA, *not* that courts do not meet the definition of an “agency” under the PRA or that the administrative records of the judiciary do not meet the definition of a public record. The plaintiff in *Nast* was challenging the new procedure adopted by King County as it applied to unmistakably “court case files,” such as pleadings, real property actions, injunctions, etc. The significance of this is that to the Court in *Nast*, these kind of clearly judicial records have traditionally been available through other means—specifically the “open courts” case law. In other words, the *Nast* Court was looking to the nature of the records in concluding that they properly belonged within the judiciary, and not merely where the files were stored (which was with the executive branch). In contrast, the *Nast* progeny seem to be focusing only

¹¹ See also The Open Government Internet Manual, §1.3: “The PRA does not apply to court case files; but those files are available through common law rights of access... [T]here is authority for the proposition that the Act does not apply to the judicial functions of the courts and *only to its administrative* functions, but there is no clear decision on that point [.]” (emphasis added).

on whether the records touch the judiciary at all—concluding that if they do, then the records (whether or not they meet the PRA definition above and whether or not they are actually part of a “court case file”) are not accessible under the PRA. This extension of *Nast* does not survive scrutiny in a legal or policy sense, and particularly in the context of a budget judge who essentially serves as a county clerk making budgetary and not legal decisions.

In sum, the holding from *Nast* that true court case files within the judiciary are immune from the PRA is not being challenged by the Herald-Republic—but the Court here must clarify that *Nast* does not bar disclosure under the PRA of court related records of an administrative nature or records held in a court file but also held elsewhere or by other agencies, or records created or used by courts or the judicial branch and not appropriately deemed part of a “court case file.”

3. Defendant Cannot Meet Its Burden of Showing Requested Records are “Court Case Files”

Even if this Court believes *Nast* precludes PRA access to all judicial records (substantive and administrative), and that the records sought by the Newspaper could conceivably fall within the “court case file” definition within *Nast*, the trial court still erred because the County and Sanchez failed to meet its burden of showing the records are indeed in

court case files or even in the sole possession of the judiciary.¹² Under both laws at issue here, the PRA and Article I, Section 10 of the State Constitution, the burden of proof is on the party resisting disclosure. RCW 42.56.550(1) (stating burden proof of showing exemption applies is on the agency resisting disclosure of public records); *Ishikawa*, 97 Wn.2d at 37-38 (“Because courts are presumptively open, the burden of justification should rest on the parties seeking to infringe the public’s right.”) (citation omitted).

The County and Sanchez did not, and could not, meet this burden in any circumstances, and the trial court thus erred in failing to hold such. First, as shown above, none of the categories of records related to the function of a budget judge were contemplated in *Nast*’s understanding of “court case files.” *See Nast*, 107 Wn.2d at 303. Second, the County has not shown that any of the records are actually in a court case file. Simply believing that the records are in the County Clerk’s Office is not sufficient—even if accurate, it says nothing of where they are located within that Office, whether they should be appropriately deemed court case files, and whether the records have been circulated to purely

¹² The Herald-Republic’s PRA request was directed to several County departments and not solely the Court, and the County has acknowledged that some of the responsive records were at times in the possession of non-judicial departments. They were thus “used,” and “owned” by the non-judicial departments and may still be “retained” by those departments, making them public records pursuant to RCW 42.56.010(2).

administrative county offices.¹³ See RP (6/26/08) at 4-5 (Defense counsel states that records were sent to Auditor's Office and Board of County Commissioners, and that administrative files have been sent to County Clerk—but admits he does not know where records are currently located). We know, for instance, that the sealed spreadsheets and worksheets at a minimum were sent to non-court personnel, and were possibly never placed in an actual court case file.¹⁴ The locations of the sealed budget orders and the attorney billing records, both of which were not generated by the judiciary in a judicial function, are also unknown and the County and Sanchez made no showing at trial of how or why these categories of records could properly be deemed part of "court case files" or that they are contained in such files. On that basis alone, the trial court erred in granting the County's injunction and denying the Newspaper's PRA enforcement action.

See In re Parentage of L.B., 155 Wn.2d 679, 688, 122 P.3d 161 (2005)

("So long as it is consistent with Washington statutory law, Washington

¹³ Paul McIlrath, Senior Deputy Prosecuting Attorney for Yakima County, stated in his June 13, 2008 letter response to the original PRA requester, that "none of the defense billing records exists in any of our files. However, I have learned that copies of the records you seek have been, at various times and for various accounting purposes, been made available to other public agencies." CP 341. Mr. McIlrath also indicated that he was unsure of "whether the Court considers its Order sealing the court records to include all related billing records." CP 342.

¹⁴ The September 2 Order Denying Reconsideration stated that "documents generated for budget purposes of the trial in the form of worksheets are maintained by the court administrator, not the county clerk, under the order sealing the records of the case as they pertain to financial matters." CP 18 n.1.

courts adopt and reform the common law.”) (emphasis added); *see also State v. Bergeron*, 105 Wn.2d 1, 15, 711 P.2d 1000 (1985) (“[Where] 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.”).

4. The Erroneous Expansion of *Nast* has Created a Judicial Black Hole for Certain County Records

The fundamental ruling from *Nast* is that the PRA should not apply to court case files because there is an accepted and well-developed body of law in the common law providing access to these judicial records. 107 Wn.2d at 303-04. While the Herald-Republic does not challenge this holding, attempting to apply it to the immediate issue shows why the scope of *Nast* needs to be at least clarified by this Court, and why this Court must now decide how the unique function of a budget judge fits into the doctrines concerning public access to court documents.

The substantive effect of the recent interpretations of *Nast* has created what could be seen as a judicial “black hole” of public access to certain court-related records. *Nast*’s primary reasoning for finding that the PRA does not apply to court case files is simply that the public already has access through the common law mechanisms. *See Nast*, 107 Wn.2d at 304 (“Most of the court case files at issue in this case were and are available

by common law access.”). However, the expansion of *Nast* by *Beuhler* and *Spokane & Eastern* have arguably created a broader, and more ambiguous, third category of court-related records that cannot be accessed by the public. Without clarification of *Nast*’s scope, purely administrative documents that have been generated by and for executive purposes, and that at some point passed through or were stored with the judiciary or a quasi-judiciary body will not be accessible under either the PRA nor the common law (as they would not be sufficiently related to the judiciary to warrant disclosure).¹⁵ All an agency would have to do is allege a record that unquestionably fits within the PRA’s definition of a public record of an agency is a “court-related” record, and the public might not have any avenue for access. In the immediate case, that would mean records related to how over \$2 million of taxpayer money was spent could not be accessed. This is inconsistent with the broad policy and strongly worded mandate of governmental transparency within the PRA, or the common law.

¹⁵ See *Woo v. Fireman’s Fund Ins. Co.*, 137 Wn. App. 480, 486, 154 P.3d 236 (2007) (constitutional provision that “justice in all cases shall be administered openly” limited to documents that became part of court’s decision-making process) (citation omitted); see also *Beuhler*, 115 Wn. App. at 920 (disclosure of particular documents from public trial required when “instrumental in the process of determining guilt or innocence [.]”) (citation omitted).

5. The Court Should Conduct an In Camera Review

RCW 42.56.550(1) provides that any agency action denying access to public records for inspection and copying is subject to judicial review:

Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.56.550(3) also states that the court shall not defer to any determination made by the agency but shall review the matter *de novo*. See *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834-35, 904 P.2d 1124 (1995) (agencies not allowed to define the scope of a statutory rule making or policy). Also, “[t]he court is the proper body to determine the construction and interpretation of statutes,” including whether or not an exemption applies. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130, 580 P.2d 246 (1978) (citation omitted).

Additionally, in considering the application of the PRA, the court is required to take into consideration the public policy favoring disclosure: “Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest.” RCW 42.56.550(3). As the PRA applies to the records sought by the Herald-

Republic, the Court must take into account this strong policy language in favor of disclosure under the PRA.

The PRA allows a court to conduct an in camera review of disputed records to determine if an exemption applies. RCW 42.56.550(3). Indeed, the PRA strongly encourages in camera review. *See, e.g., Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 577, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000) (“the better practice is to... conduct an in camera inspection. In camera inspection enhances a trial court’s ability to assess the nature of the documents, decide applicable exemptions, and perform necessary redaction.”). This Court should remand the proceedings to the trial court after ordering that the PRA applies to these records, and order that the trial court conduct an in camera review. The trial court will need the requested records and this Court should therefore order the County to lodge all the responsive public records with the trial court. Also, to facilitate the trial court’s in camera review process and to allow the records requester to provide argument, the agency must provide an index to the Court and the parties describing the records and the basis for withholding. *See RHA*, 2009 WL 146541 *7 (clarifying that a valid claim of exemption “should include the sort of ‘identifying information’ a privilege log provides,” including the identifying of a specific statutory exemption and “how it

applies to individual agency record”); *see also PAWS II*, 125 Wn.2d at 271).

6. Trial Court Improperly Granted Yakima County’s Injunction Under the PRA

The trial court granted the County’s Motion for Relief in its August 11 Order, which was brought under the PRA’s injunction statute, RCW 42.56.540. That statute provides:

The examination of any specific public record may be enjoined if... the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions [.]

However, neither the County nor Sanchez identified an applicable statutory exemption. RCW 42.56.540 requires a showing of irreparable damage *and* that a specific exemption applies. As the Supreme Court held:

[RCW 42.56.540] is simply an injunction statute. It is a procedural provision which allows a superior court to enjoin the release of specific public records if they fall within specific exemptions found elsewhere in the Act. Stated another way, [RCW 42.56.540] governs access to a remedy, not the substantive basis for that remedy.

PAWS II, 125 Wn.2d at 257-58 (citation and emphasis omitted); *see also Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 755, n.18, 174 P.3d 60 (2007) (“to warrant an injunction preventing disclosure, a public record must fall within a specific exemption under the [PRA].”) (citation

omitted). Because neither party resisting disclosure identified an exemption from disclosure, nor showed how any “irreparable damage” would occur to anyone or any thing, a PRA injunction against disclosure could not be granted.

It is further inconsistent for the trial court to rule that the PRA does not apply in the same motion that grants an injunction brought under the PRA. Both substantively, and procedurally, this was reversible error.

7. The Herald-Republic is Entitled to Attorney’s Fees and Daily Penalties Under the PRA

Pursuant to RAP 18.1, Appellants respectfully requests an award of reasonable attorney’s fees. RCW 42.56.550(4) of the PRA provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record ... *shall* be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount *not less than* five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.

(Emphasis added). Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.”

Spokane Research, 155 Wn.2d at 101 (citation omitted). Accordingly,

“permitting a liberal recovery of costs” for a requestor in a PRA

enforcement action, “is consistent with the policy behind the act by

making it financially feasible for private citizens to enforce the public’s

right to access public records.” *Am. Civil Liberties Union of Washington (“ACLU”) v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999).

The PRA does not allow for court discretion in deciding *whether* to award attorney fees to a prevailing party. *PAWS*, 114 Wn.2d at 687-88; *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). The only discretion the court has is in determining the *amount* of reasonable attorney’s fees. *Amren*, 131 Wn.2d at 36-37 (discussing how statutory penalties combine with attorney’s fees and costs under the PRA to comprise the statute’s “punitive provisions”) (citation and internal quotation marks omitted).

Penalties are also mandatory, with the only discretion being the amount (between \$5 and \$100 per day). *Yousoufian v. Office of Ron Sims*, ___ Wn.2d ___, 2009 WL 92066 at *7-8 (January 15, 2009) (clarifying that penalties under PRA are mandatory, and recognizing that “the PRA exhorts us to liberally construe it ‘to assure that the public interest will be fully protected’”) (citation omitted); *see also Spokane Research*, 155 Wn.2d at 102 n.9 (citation omitted). The purpose of the mandatory attorney fees provision is to encourage broad disclosure and to deter agencies from improperly denying access to public records. *Confederated Tribes*, 135 Wn.2d at 757 (citation omitted). An agency’s good faith does

not change the mandatory nature of the attorney's fee award. *See Amren*, 131 Wn.2d at 35-36; *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 964, 983 P.2d 635 (1999).

E. Errors Related to Sealing

In the June 30 Memorandum Decision by Judge Cooper and in the August 1 Order later adopting that decision, the trial court ruled that because the court files in the *State v. Sanchez* and *State v. Mendez* cases are sealed, and the PRA does not apply to those records, the proper channel for public access is through GR 15(e)(2) for the unsealing of court records. Further, the Order concluded that because the *Mendez* case has concluded due to Mendez's plea agreement, "the [budget] judge would have the ability to hear a GR 15 motion in that case, and possibly apply the factors outlined in *Seattle Times Company v. Ishikawa*, *supra*. in determining when to and how much to the records to unseal." CP 14.

1. Article I, Section 10

Through Article I, Section 10 of the Washington State Constitution, "Justice in all cases shall be administered openly." This "separate, clear and specific provision entitles the public, and... the press is part of that public, to openly administered justice." *Cohen*, 85 Wn.2d at 388; *see also State v. Russell*, 141 Wn. App. 733, 738, 172 P.3d 361 (2007). This provision applies with equal force in criminal as well as civil

cases. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004) (citation omitted). The State Constitution generally provides a right of access to trials, pretrial hearings, transcripts of trials, and exhibits introduced at these proceedings. *Beuhler*, 115 Wn. App. at 920. “Our founders did not countenance secret justice. [O]perations of the courts and the judicial conduct of judges are matters of utmost public concern.” *Dreiling*, 151 Wn.2d at 908 (citation and internal quotation marks omitted); *see also Seattle Times Co. v. United States Dist. Court for West. Dist. Of Washington*, 845 F.2d 1513, 1516 (9th Cir. 1988). “Open access to government institutions is fundamental to a free and democratic society. Open access to the courts is grounded in our common law heritage and our national and state constitutions.” *Dreiling*, 151 Wn.2d at 908; *see also Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 542, 114 P.3d 1182 (2005) (“Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.”) (citation omitted).

While it is true that the public's right to open proceedings is not absolute, the “high order of constitutional protection of the public's right to open proceedings [mandates] that a trial court limit closure to rare circumstances.” *State v. Bone-Club*, 128 Wn.2d 254, 258, 906 P.2d 325

(1995) (citation omitted). Generally, the sealing of court records “must be authorized by statute or required by compelling circumstances.” *State v. Breazeale*, 144 Wn.2d 829, 841, 31 P.3d 1155 (2001) (citation omitted). To seal court records consistent with the First Amendment to the United States Constitution, courts must find “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (“*Press Enterprise II*”).

2. *Ishikawa* Test

The test in Washington for sealing and unsealing court records, referenced by the trial court in the immediate case, stems from *Ishikawa*, *supra*. *Ishikawa* established a five-part test to be met before records or proceedings could be sealed in accordance with Article I, Section 10 of the State Constitution:

1. The proponent of closure or sealing must make some showing of the need for doing so, and where that need is based on a claim that the defendant’s fair trial right is threatened, the proponent of closure must show a likelihood of jeopardy to that right after specifically identifying how the fair trial right will be impacted, and if the right is anything other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993) (citing *Ishikawa*, 97 Wn.2d at 37-39); *see also State v. Momah*, 141 Wn. App. 705, 708, 171 P.3d 1064 (2007).

GR 15 also governs sealing. Under GR 15(c)(3), the sealing court must also consider redaction of portions of the records instead of sealing entire records.

After meeting the *Ishikawa* test, any sealing order must itself be open and remain unsealed. GR 15(c)(5)(C) (“When a clerk receives an order to seal specified court records, the clerk shall: File the order to seal and the written findings supporting the order to seal. *Both shall be accessible to the public.*”) (emphasis added). Further, the sealing order must be limited in duration. *Ishikawa*, 97 Wn.2d at 39. Moreover, the orders must identify with specificity the right at risk and the less restrictive alternatives considered. *Id.* at 38.

3. Standard of Review

The decision to seal by the trial court is reviewed *de novo*. *In re Bonds*, ___ Wn.2d ___, 196 P.3d 672 (2008) (A claim that a person’s right

to a public trial was violated is a question of law reviewed de novo) (citing *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)); *State v. Duckett*, 141 Wn. App. 797, 802, 173 P.3d 948 (2007) (citation omitted). *In re Detention of D.F.F.*, 144 Wn. App. 214, 220, 183 P.3d 302 (2008) (“Our Supreme Court ... has further held that article I, section 10 guarantees that any restriction on public access must be drawn as narrowly as possible while still effectively protecting that countervailing interest”) (citing *Dreiling*, 151 Wn.2d at 903-04). If a person’s right to a public trial is violated, the remedy is reversal and remand for a new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). The *Ishikawa* factors for protecting a criminal defendant’s right to a fair trial are mirrored in the context of protecting the public’s right to an open court under Article I, Section 10. *Easterling*, 157 Wn.2d at 175 (citation omitted).

4. Trial Court Erred in Not Addressing Constitutional Issue

In the immediate case, the accused’s right to fair trial is not at issue because Appellant does not seek any portions of the records covered by attorney-client privilege or work product. Further, the *Mendez* matter has concluded, and the *Sanchez* case has already been tried and is on appeal—in other words, any information disclosed by the requested records (such

as how much taxpayer funds were used to defend the defendants) will not jeopardize a fair trial. The Herald-Republic has made clear that counsel for Sanchez would be allowed a chance over the course of 10 days to review and even redact material it believes is protected. *See* RP (6/26/08) at 6, 8.

The trial court erred in not considering the sealing issue on this basis alone, but more importantly, the trial court erred in refusing to decide whether or not the budget judge properly did an *Ishikawa* analysis. *See* September 2 Order at 3. CP 18 (“This court cannot comment at all on the propriety of Judge Lust’s sealing the records in the first instance under [*Ishikawa*] because this court is not a reviewing court or sitting in an appellate capacity.”).

Further, the Herald-Republic was unlawfully denied the chance to object when the records were being sealed in their entirety during the criminal cases at issue. When the Herald-Republic tried to intervene to unseal the records, it faced objections by the parties to its standing and right to be heard. The trial court chose not to address the court sealing issue, and instructed the Herald-Republic to file separate actions in each case before the budget judge after it determined records could not be sought under the PRA. In the interest of judicial economy as well as to protect the Herald-Republic’s constitutional rights, this Court should instruct the trial court to decide the constitutional issue, rather than force

the Herald-Republic to engage in piecemeal trial court proceedings and ultimately piecemeal appeals.

Furthermore, there are a multitude of procedural and substantive problems with the sealing itself. The proponents of sealing apparently were not held to any requirement of showing a likelihood of jeopardy to the right to a fair trial or a serious and imminent threat to any other right. It is not clear the proponents of sealing even identified a right or explained how it would be harmed by openness. The budget judge did not appear to consider any less restrictive alternative, such as redaction (mandated by GR 15(c)(3)), and the order itself has been improperly sealed (prohibited by GR 15(c)(5)(C)). In addition, the sealing order has remained in effect long after the proceedings have concluded. As stated above, it is not known whether Judge Lust considered any of the *Ishikawa* factors, or whether the sealing order was properly decided because the order itself is sealed—in direct violation of GR 15(c)(5)(C). The judge ordering a court record sealed must leave open to the public the findings justifying the sealing order, as well as the order itself. A trial judge must make findings and include them in the sealing order—but the Herald-Republic or any other member of the public cannot see if the trial judge did so because, again, the sealing order is sealed. In fact, Judge Cooper's Memorandum Decision and subsequent Order admit the trial court did not know whether

Judge Lust actually applied *Ishikawa* at all and still refused to rule. *See* September 2 Order at 2. CP 17 (“Presumably Judge Lust sealed the court records pursuant to [*Ishikawa*].”)

Moreover, Judge Cooper’s Memorandum Decision and later Order stated that Judge Lust should be the judge that hears any subsequent motion to unseal under GR 15—this is without legal basis as there is no requirement that the unsealing motion must be brought in front of the same judge that ordered the records sealed. *See* September 2 Order at 3. CP 18 (“Judge Lust was the judge assigned to deal with the financial matters of the *Sanchez* and *Mendez* cases and Judge Lust is the one before whom [Appellant] should take its request to unseal the records.”). For this reason and those above, this Court should remand to the trial court and direct that, in lieu of potential access via the PRA, the records requested in the *State v. Mendez* and *State v. Sanchez* matters be unsealed and provided to the Herald-Republic.

VI. CONCLUSION

Appellant respectfully requests that this Court reverse the above orders. This matter should be remanded to the trial court with instructions to order the court to either (1) declare the records are subject to the PRA and are not exempt from disclosure after conducting an in camera review; (2) declare the records to be subject to potential disclosure as court records

pursuant to Article I, Section 10 of the Washington Constitution and the First Amendment of the United States Constitution; or (3) declare the records to be subject to disclosure pursuant to the PRA as well as Article, Section 10 of the Washington Constitution, and the First Amendment of the United States Constitution.

Respectfully submitted this 2nd day of February, 2009.

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APPENDIX

Washington State Constitution

ARTICLE I: DECLARATION OF RIGHTS

SECTION 10 ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

RCW 42.56.010: Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(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.

(2) "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 any other record designated a public record by any official action of the senate or the house of representatives.

RCW 42.56.070: Documents and indexes to be made public.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

RCW 42.56.540: Court protection of public records.

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

RCW 42.56.550: Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the

responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

...

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that 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. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.904: Intent — 2007 c 391.

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure. The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public

resources, including through liability insurance, upon private legal counsel or private consultants.

RULE 15. DESTRUCTION, SEALING, AND REDACTION OF COURT RECORDS

...

(c) Sealing or Redacting Court Records

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

(2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:

(A) The sealing or redaction is permitted by statute; or

(B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or

(C) A conviction has been vacated; or

(D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(E) The redaction includes only restricted personal identifiers contained in the court record; or

(F) Another identified compelling circumstance exists that requires the sealing or redaction.

(3) A court record shall not be sealed under this section when redaction will adequately resolve the issues before the court pursuant to subsection (2) above.

(4) Sealing of Entire Court File. When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed," the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, section (d) shall apply. The order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

(5) Sealing of Specified Court Records. When the clerk receives a court order to seal specified court records the clerk shall:

(A) On the docket, preserve the docket code, document title, document or subdocument number and date of the original court records;

(B) Remove the specified court records, seal them, and return them to the file under seal or store separately. The clerk shall substitute a filler sheet for the removed sealed court record. If the court record ordered sealed exists in a microfilm, microfiche or other storage medium form other

than paper, the clerk shall restrict access to the alternate storage medium so as to prevent unauthorized viewing of the sealed court record; and

(C) File the order to seal and the written findings supporting the order to seal. Both shall be accessible to the public.

(D) Before a court file is made available for examination, the clerk shall prevent access to the sealed court records.

(6) Procedures for Redacted Court Records. When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. The redacted copy shall be provided by the moving party. The original unredacted court record shall be sealed following the procedures set forth in (c)(5).

...

WAC 44-14-06002: Summary of exemptions.

(1) General. The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. Instead, these comments to the model rules provide general guidance on exemptions and summarize a few of the most frequently invoked exemptions. However, the scope of exemptions is determined exclusively by statute and case law; the comments to the model rules merely provide guidance on a few of the most common issues.

An exemption from disclosure will be narrowly construed in favor of disclosure. RCW 42.17.251/42.56.030. An exemption from disclosure must specifically exempt a record or portion of a record from disclosure. RCW 42.17.260(1)/42.56.070(1). An exemption will not be inferred.¹

An agency cannot define the scope of a statutory exemption through rule making or policy.² An agency agreement or promise not to disclose a record cannot make a disclosable record exempt from disclosure. RCW 42.17.260(1)/42.56.070(1).³ Any agency contract regarding the disclosure of records should recite that the act controls.

An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure. RCW 42.17.310(4)/42.56.210(4). One way to describe why a record was withheld or redacted is by using a withholding index.

After invoking an exemption in its response, an agency may revise its original claim of exemption in a response to a motion to show cause.⁴

Exemptions are "permissive rather than mandatory." Op. Att'y Gen. 1 (1980), at 5. Therefore, an agency has the discretion to provide an exempt record. However, in contrast to a waivable "exemption," an agency cannot provide a record when a statute makes it "confidential" or otherwise prohibits disclosure. For example, the Health Care Information Act generally prohibits the disclosure of medical information without the patient's consent. RCW 70.02.020(1). If a statute classifies information as "confidential" or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it.⁵ Some statutes provide civil and criminal penalties for the release of particular "confidential" records. See RCW 82.32.330(5) (release of certain state tax information a misdemeanor).

WAC 44-14-08004: Judicial review.

(3) Procedure. To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).⁴ The case must be filed in the superior court in the county in which the record is maintained. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW 42.17.340(5)/42.56.550(5). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.⁵ However, most cases are decided on a motion

to show cause.⁶

(4) Burden of proof. The burden is on an agency to demonstrate that it complied with the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).

(5) Types of cases subject to judicial review. The act provides three mechanisms for court review of a public records dispute.

(a) Denial of record. The first kind of judicial review is when a requestor's request has been denied by an agency. RCW 42.17.340(1)/42.56.550(1). This is the most common kind of case.

(b) "Reasonable estimate." The second form of judicial review is when a requestor challenges an agency's "reasonable estimate" of the time to provide a full response. RCW 42.17.340(2)/42.56.550(2).

(c) Injunctive action to prevent disclosure. The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW 42.17.330/42.56.540. An action under this statute can be initiated by the agency, a person named in the disputed record, or a person to whom the record "specifically pertains." The party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.⁷ The party seeking to prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.⁸

OPEN GOVERNMENT INTERNET MANUAL

Chapter 1

PUBLIC RECORDS ACT – GENERAL AND PROCEDURAL PROVISIONS

1.1 The Public Records Act Is Interpreted in Favor of Disclosure

The Public Records Act ("PRA" or "Act") was enacted by initiative to provide the people with broad rights of access to public records. The Act declares that it must be "liberally construed" to promote the public policy of open government:

Statutory Provisions: 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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy. RCW 42.56.030.

Courts shall take into account the policy of this chapter that 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. RCW 42.56.550(3).

See generally Chapters 2 and 6, Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) (available for purchase). See also WAC 44-14-01003 (Attorney General's non-binding model rules on public records summarizing how Act is interpreted by courts). In any "gray areas," a court will look to the requirement to interpret the Act in favor of disclosure and will decide a dispute in favor of open government.

...

1.3 What Is An "Agency" Subject to the Act

Statutory Provision: "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. RCW 42.17.020(1).

As noted above, only the records of an "agency" are covered by the Act. The Act's definition of "agency" in RCW 42.17.020(1) is broad. See generally WAC 44-14-01001. Courts have interpreted that definition to include a city's design and development department, *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 810 P.2d 507 (1991), appeal after remand, 70 Wn. App. 789, 855 P.2d 706, review denied, 123 Wn.2d 1009,

869 P.2d 1084 (1994); a county prosecutor's office, *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993), and a city's parks department, *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989), appeal after remand, 64 Wn. App. 295, 825 P.2d 324 (1992). Some non-government agencies (such as an association of counties) which nonetheless performs governmental or quasi-governmental functions can be considered an "agency" if they meet a four-part test. See 2002 Att'y Gen. Op. No. 2.

The PRA does not apply to court case files; but those files are available through common law rights of access. *Nast v. Michels*, 107 Wn.2d 300, 307, 730 P.2d 54 (1986); see also *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981). However, one court of appeals held that a request for judge's oaths to the superior court administrator was a disclosure request to be answered under the PRA. *Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) Accordingly, there is authority for the proposition that the Act does not apply to the judicial functions of the courts and only to its administrative functions, but there is no clear decision on that point.

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Dated this 2nd day of February, 2009 at Seattle, Washington.



David M. Norman