

No. 82229-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE YAKIMA HERALD REPUBLIC,

Appellant,

v.

YAKIMA COUNTY,

Respondent.

BRIEF OF RESPONDENT YAKIMA COUNTY

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I. INTRODUCTION

Yakima County hereby responds to the Yakima Herald-Republic's petition for direct review of the Memorandum Decision of the Yakima County Superior Court entered on June 30, 2008, finding that the Public Records Act does not apply to records in the possession of the court and sealed by court order. The Memorandum Decision of the Superior Court, the Order Granting Yakima County's Motion for Injunctive and Declaratory Relief entered on August 1, 2008, and the Order Denying Motion for Reconsideration of the Court's prior rulings entered on September 2, 2008, correctly ruled that the records sought were not subject to the Public Records Act ("PRA"), codified at Chapter 42.56 RCW, and should not be disclosed pursuant to that statute.

The case law is well settled that the Public Records Act does not apply to sealed court records involving criminal defendants. Yakima County acknowledges that the Public Records Act is "a strongly worded mandate for broad disclosure of public records." *Rental Housing Association v. City of Des Moines*, 165 Wn.2d 525, 527 (2009). However, the Yakima Herald-Republic's insistence on applying the PRA to court records fails to consider the competing tensions between indigent Defendants' constitutional rights and a newspaper's right to information. Washington State case law as well as the facts in this

specific case confirms that visiting Superior Court Judge Cooper made the correct decision when he enjoined release of the sealed court records. The Yakima Herald argues that the *Nast v. Michels*, 107 Wn.2d 300 (1986), decision has been construed too broadly. On the contrary, in the case at bar, the attorney billing and expense records of indigent Defendants held in the court's files are precisely the kind of records the *Nast* court contemplated. For these reasons, the Court should uphold the rulings of Judge Cooper and reaffirm *Nast*.

Moreover, as visiting Superior Court Judge Cooper noted in his decision, the proper forum for the newspaper to attempt to gain access to sealed criminal court records is to petition the Superior Court Budget Judge who sealed the records to unseal them pursuant to Court's General Rule 15(e)2 and the process detailed in this Court's decision in *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1983).

II. ISSUE PRESENTED

Was the Court correct in holding that the PRA does not apply to sealed court records, and that only by petitioning the court to vacate the order sealing records could the records be made public?

III. STATEMENT OF THE CASE

This matter came before Yakima County Superior Court on Yakima County's request for clarification pursuant to RCW 42.56.540.

Yakima County sought guidance from the Superior Court as to whether the County was obligated under the Public Records Act ("PRA") to provide billing records in two criminal cases where counsel had been appointed to represent indigent Defendants. The records in question had been placed under seal by court order at the request of defense attorneys. Appointed counsel for the two indigent Defendants sought to seal the records in order to protect the Defendants' Fifth Amendment, Sixth Amendment and Fourteenth Amendment rights. *See* Yakima County Petition CP 1-6.

Specifically in the instant case, the Yakima Herald-Republic, a daily newspaper, requested all billing records and accounts relating to two murder cases in which the death penalty was being sought: State v. Sanchez, Yakima County Cause No. 05-1-00459-8 and State v. Mendez, Yakima County Cause No. 05-1-00507-1. On June 5, 2008, the Yakima Herald-Republic, through the paper's legal counsel, submitted a written request to Mr. Harold Delia, Yakima County Court Administrator, Ms. Kim E. Eaton, Clerk of the Superior Court, and Ms. Stormy Miller, Yakima County Public Records Officer, requesting the following:

[A]ll records, including attorney billing records, invoices, and supporting documentation, of public funds spent 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.

The request included 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 2.

During the course of the Public Records Officer's investigation, it was learned that the aforesaid billing records had been sealed by Order of the Court by the Honorable James Lust, who was assigned to the criminal cases as the Budget Judge. The criminal cases involved charges of Aggravated First Degree Murder. Moreover, it has been learned that the Clerk of the Court had prepared worksheets recording the defense attorney payments which were considered by the Superior Court to be covered by the Court's sealing order because they were prepared in order for Yakima County to be able to process payments as ordered by Judge Lust. CP 2. *See also* CP 7, Declaration of Paul McIlrath at ¶8. In addition, there were also payment records held in the Yakima County Auditor's Office, which were held solely for payment purposes and records in the Yakima County Board of County Commissioners' Office solely for budgeting purposes. *Id.*

By letter dated June 13, 2008, counsel for Yakima County informed the requestor of the status of the records and advised the

requestor that court records were not subject to the Public Records Act and moreover had been sealed by the Honorable James Lust. CP 2. On June 18, 2008, the Prosecuting Attorney received an e-mail message from the requestor, advising that they would pursue an action under the public records act for the County's failure to provide records. Attorneys for the Yakima Herald also stated that they would seek statutory fees, costs and attorney's fees. *Id.*

Yakima County is a public agency and as such, is subject to the provisions of Chapter 42.56 RCW (the Public Records Act, or "PRA"). Yakima County did not take the position that it refused to release the records. Rather, Yakima County sought the guidance of the Court, as the Public Records Act specifically allows at RCW 42.56.540, if an agency is unsure how to proceed. Yakima County sought the Court's guidance in the form of a declaratory judgment as to whether or not to release the records so as to not violate a court order sealing the very records sought by the newspaper. CP 3-4.

RCW 42.56.540 provides a two-prong test for determining whether a reviewing court should enjoin the release of these records. The statute states that the test is whether the Superior Court "... 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.” CP 3-4.

In his opinion issued after oral argument on the matter, visiting Kittitas County Judge Cooper ruled that the Public Records Act did not apply to the Yakima Herald’s request for billing records that were sought because the records in question were court records that had been sealed by court order. CP 226. Judge Cooper noted that “appointed counsel for each defendant made numerous requests for funds to retain various experts to assist in the preparation of both mitigation packages and defenses of each defendant. On each occasion, counsel for the defendants sought the funds to either pay legal fees or to hire consultants and experts.” CP 226. From the sealed financial records, the superior court’s administrator’s office assisted the superior court by preparing a budget summary of the cases so appropriate vouchers could be prepared to pay the funds as ordered by Judge Lust.” CP 227. Furthermore, because the records sought were in the sealed court files of *State v. Sanchez* and *State v. Mendez*, Judge Cooper ruled that the proper mechanism for accessing these records is a GR 15 (e)(2) motion before the Budget Judge asking the Judicial Officer who originally sealed the records to unseal them pursuant to the factors outlined in *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1983). CP 227.

The Yakima Herald-Republic next filed a Motion for Reconsideration of Judge Cooper's August 1, 2008, Order. CP 232-275. Judge Cooper denied the Motion for Reconsideration reiterating that court files are not covered by the Public Records Act because the common law provides access to case files and that GR 15(e)(2) "governs the specific procedure by which sealed criminal case court records may be unsealed." CP 329. Judge Cooper also explained why a superior court budget judge performs much more than an administrative function for Yakima County. "As the court indicated in its Memorandum Decision, the role of the budget judge was to review all requests for funds of the defendants in order to determine the merits of the requests...and to provide a basis to seek state funding of a potential death penalty trial. A separate reason for utilizing a separate superior court judge to review defense requests for funds was to keep the trial judge appointed to hear the case from the undue burden of having to deal with both the financial cost of the trial and the substantial legal issues involved in the death penalty case by potentially compromising the rights of defendants to a fair trial by making financial compromises." CP 328.

In the order denying the newspaper's motion for reconsideration, the Court ruled: "The Public Records Act[and its predecessor (Public Disclosure Act)] procedures do not apply to court case files because the

common law provides access to court case files, because the Public Records Act public records section does not specifically include courts or court case files within its definitions, and because to interpret the Public Records Act public records section to include court case files undoes all developed law protecting privacy and governmental interests.” CP 329.

IV. ARGUMENT

A. *The Distinction Between Court Records and Agency Records is Well Settled*

The Yakima Herald Republic claims that the case before the Court involves an urgent issue of broad public import by asserting that Washington courts have construed the court’s holding in *Nast* too broadly, and that this “has created a black hole for public access.” Petitioner’s Brief at 1. While the newspaper makes a public policy argument to support its position that the PRA should be applied to court records, Petitioner has failed to show that courts are misinterpreting *Nast v. Michels*. The case law is well settled that sealed court records are governed by common law and *not* the Public Records Act. *See Nast v. Michels*, 107 Wn.2d 300 (1986).

The common law has long recognized that courts have the inherent authority to deny access to otherwise public court records when necessary to serve overriding public or private interests. As the United

States Supreme Court stated in *Nixon v. Warner Communications, Inc.* 435 U.S. 589 (1978): “It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has the supervisory power over its own files and records and access has been denied where court files might have become a vehicle for improper purposes.” *Id* at 598. (In *Nixon*, the court was discussing sealed affidavits.)

The determination that the Public Records Act does not apply to court records is supported by the Washington State Supreme Court decision in *Nast v. Michels, supra*. In *Nast*, the Court held that the PDA did not apply to court case files because (1) the common law provides access to court case files, (2) the PDA does not specifically include courts or court case files within its definitions, and (3) to interpret the PDA public records section to include court case files undoes all the developed law protecting privacy and governmental interest. *Nast*, 107 Wn.2d at 307.

In *Nast*, the plaintiff challenged a procedure that required people seeking access to superior court case files to provide one-day advance notice before the superior court would make the case files available. *Nast*, 107 Wn.2d at 302.

As a threshold issue, the court had to determine whether the PDA provides access to superior court case files. *Nast*, 107 Wn.2d at 303. The

court stated that “[t]he definitions [of ‘agency’ and ‘public record’] do not specifically include either courts or case files. A reading of the entire public records section of the PDA indicates and we find that they are not within the realm of the PDA.” *Nast*, 107 Wn.2d at 306.

The newspaper tries to broaden the issue currently before the Court well beyond the facts of this particular case in order to argue that *Nast v. Michels* should be overturned, or if not overturned, the case’s holding should be significantly narrowed. As this Court is aware, the records in both the *Mendez* and *Sanchez* cases involve documents that have been sealed in a criminal case. Yakima Herald-Republic cites to *Morgan v. City of Federal Way*, et al., Supreme Court No. 81556-9, a case that is currently pending before the Washington State Supreme Court to argue the Supreme Court should accept direct review in this case. *Morgan* is an employment law case involving a claim of hostile work environment. That civil case is not analogous to this case, which involves sealed documents in a criminal matter.

The newspaper also cites to *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn.App. 616 (2007) in an attempt to bolster its argument that *Nast* has been expanded and now encompasses all kinds of records. The *Spokane and Eastern Lawyer* case is distinguishable from the case at bar, however. The *Spokane and Eastern Lawyer* case involved

correspondence between judicial officers and the Washington State Bar Association. The current case before this Court involves Mr. Sanchez and Mr. Mendez's criminal cases and billing and expense records that their attorneys were required to submit to a judge for approval. The documents in question were sealed after defense motions. As the defense attorney for Mr. Sanchez, Susan Wilk, stated in her brief seeking to intervene in the superior court proceedings, the sealed documents could impact her client's appeal of his criminal matter. CP 32-37. Most importantly, the newspaper has failed to show that either the *Spokane and Eastern Lawyer* case or the *Morgan* decision is inconsistent with *Nast*.

Next, the newspaper argues that the order sealing the records in question applies only to those records physically in the court file and not copies that may be located in other county agencies. See Petitioner's Brief at 20-35. This argument lacks merit because it would render Judge Lust's sealing order meaningless. Moreover, an examination of the *Nast* decision does not support Petitioner's argument. The records in *Nast* were held by the King County Department of Judicial Administration and not the court. 107 Wn.2d at 305. Therefore, the analysis does not depend on whether the court records are in court files or in a file held by another county agency. The reason behind the order sealing the records -- protecting indigent Defendants' constitutional rights -- remains

paramount and must include any copies held in other county offices, which were simply generated to allow Yakima County to process payments to appointed counsel as ordered by the Honorable James Lust.

B. Seeking to Have the Court Records Unsealed is the Proper Forum for Newspaper

Moreover, the newspaper has an avenue available to it for seeking the records it requests. As the record reflects, Mr. Sanchez was found guilty after trial and his appeal is currently pending before Division III of the Court of Appeals. Mr. Mendez pled guilty bringing his case to its conclusion. CP 227. In spring 2008, the Yakima Herald filed a motion asking Judge Lust, the Budget Judge in both the *Sanchez* and *Mendez* cases, to unseal the billing records. Judge Lust ruled that because Mr. Sanchez's case was currently on appeal, the newspaper would need to file a motion with the Court of Appeals to allow Judge Lust permission to hear the motion. The Yakima Herald withdrew its motion to unseal a mere four days before the Court of Appeals was scheduled to hear oral argument on the newspaper's motion. CP 227.¹ After withdrawing its appeal, the Yakima Herald sent a public disclosure request to Yakima County seeking the billing records. CP 1-3. Instead of bringing a lawsuit under the Public

¹ Yakima County is not taking a position as to whether the newspaper waived its right to petition the court to unseal the records when it withdrew its motion before the Court of Appeals.

Records Act, the Herald-Republic would have been better served if it had continued with its efforts to unseal the records through the court process.

C. Yakima Herald Republic's Request for Attorneys Fees Should Be Denied

The Yakima Herald seeks attorney's fees in this case. *See* Petitioner's Brief at 40-42. The daily penalties awarded under the Public Records Act would not apply in this case as sealed criminal court records do not fall under the provisions of the Public Records Act, as the *Nast* court held. Therefore, penalties and attorneys fees should not be awarded. *See Nast*, 107 Wn.2d at 309. Moreover, Yakima County promptly sought the guidance of the Superior Court when it received the request from counsel for the Yakima Herald-Republic. *See* CP 1-6. The public records act specifically provides for an injunction provision for agencies. RCW 42.17.330. "An agency asserting an exemption may seek a judicial ruling on the merits when either agency functions or individuals would be irreparably damaged by disclosure." RCW 42.17.330. This spares the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding. It does not prejudice the requester." *Progressive Animal Welfare Soc'y v. University of Washington*, 125 Wn.2d 243, 271 (1994). *See also Cody Soter et al v. Cowles Publishing*

Co., 131 Wn.App. 882, 907 (2006). For these reasons, no attorneys fees should be awarded.

V. CONCLUSION

Review of Court files and records in a criminal case is not covered by the PRA and the Petitioner has failed to show why overturning the long held judicial doctrine articulated by this Court in *Nast*, holding that the common law, and not the PRA, regulates Court case files and records is warranted. On the contrary, this Court should reaffirm its holding in *Nast*.

The Yakima Herald-Republic has chosen to disregard the appropriate mechanism for unsealing court records, as articulated in *Ishikawa* and as provided for in GR 15(e)(2). Instead, the newspaper seeks to persuade this Court that it should broaden the scope of the PRA not out of necessity, but because of the newspaper's belief that the public's right to access court files is greater than the right of indigent criminal defendants to receive a fair and impartial trial.

Respectfully submitted this 3rd day of April 2009.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 3, 2009, I caused to the delivery by email and U.S. mail a copy of the foregoing Brief of Respondent Yakima County to:

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Dated this 3rd day of April 2009 at Yakima, Washington


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