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Case No. 82288-3

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF FEDERAL WAY, *Respondent*,

v.

DAVID KOENIG,
Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case presents the significant question of whether, and to what extent, the Public Records Act, Chapter 42.56 RCW (“PRA”), applies to state and local courts. This Court has addressed this issue once, more than twenty years ago, in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). In that case, the Court held that the PRA¹ did not apply to court case files. *Nast*, 107 Wn.2d at 307.

In two recent cases the Court of Appeals has expanded upon *Nast*, holding that the PRA was not applicable to a judge’s sentencing notes or to correspondence from Spokane County judges to the Washington State Bar Association. *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003) (sentencing notes); *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 617, 150 P.3d 158 (2007), *review denied*, 162 Wn.2d 1004 (2007) (correspondence). Agencies, like the respondent City of Federal Way (“City”), have gone much further, relying on *Nast* and its progeny to withhold a broad and poorly defined class of “court records.” Many of these records have little, if anything, to do with the judiciary or the judicial functions of courts. To make matters worse, agencies refuse to identify withheld records, or admit that such records exist, based upon the

¹ At the time of *Nast* the PRA was codified as part of the Public Disclosure Act, Chapter 42.17 RCW. *See* RCW 42.56.001.

argument that the entire PRA, with all of its procedural safeguards and provisions for judicial review, is inapplicable to “courts” or “court records.”

In this case, the City withheld (i) a judge’s correspondence relating to a controversy involving public officials, (ii) records relating to the appointment of pro tem judges, and (iii) records of work-related exemptions from jury duty. The City refused to provide these records based on assertions that the Federal Way Municipal Court (“Municipal Court”) and/or records held by that court are not subject to the PRA under *Nast*. Concluding that it was constrained by “existing case authority,” the trial court held that the entire Municipal Court is not subject to the PRA. CP 102.²

However, the trial court also observed that the time has come for this Court to re-visit *Nast*. VRP (9/19/08) at 32-33.³ Agencies are relying upon *Nast* to exclude a large slice of Washington government from the openness promised by the PRA. See RCW 42.56.030 (“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

² ‘CP’ refers to the Clerk’s Papers in this case.

³ ‘VRP’ refers to the Verbatim Report of Proceedings of the hearing on September 19, 2008.

know.”); *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995) (“The stated purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.”)

As explained in Section V(A) (below), there are significant flaws in *Nast*. *Nast*’s analysis of the PRA is untenable in light of a significant amendment to the PRA after *Nast*. None of the original *Nast* justices are still on the Court today, and there is real doubt as to whether the Court should adhere to the erroneous analysis in that 22-year-old case. The Court might well reach the same result as *Nast* with respect only to case files and certain types of judicial records. But the Court is unlikely merely to repeat the erroneous, inadequate, and result-driven analysis of the PRA in *Nast*.

The Court should not give agencies unfettered and unreviewable discretion to withhold whatever public records agencies choose to characterize as “court records.” Nor should the Court permit agencies to simply ignore requests for “court records” or to refuse to admit that such records even exist. Instead, the Court should reject *Nast* in favor of an analysis under the doctrine of separation of powers.

II. ASSIGNMENTS OF ERROR

Assignment of Error. The trial court erred in issuing the *Order Declaring Public Records Act Does Not Apply to Federal Way Municipal Court* entered on or about September 24, 2008. CP 101-03.

Issues Pertaining To Assignment of Error:

A. Whether the erroneous analysis of the PRA in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), should be extended to other types of records.

B. Whether the application of the PRA to the administrative functions, records, or personnel of courts may be limited by the doctrine of separation of powers.

C. Whether the City must identify all records that it has withheld and disclose the particular person(s) in possession of the records that the City has withheld.

III. STATEMENT OF THE CASE

A. First Request for Records

On February 17, 2008, Koenig sent a request for public records to the Federal Way City Manager. Koenig requested:

...all public records related to the recent resignation of Colleen Hartl from her position as municipal court judge for the City of Federal Way. The records would include but not necessarily be limited to the results of any internal city investigation; all e-mail correspondence; letters;

memos. This would be inclusive of correspondence with the media; staff; city council members; members of the public; correspondence with Colleen Hartl; etc. Additionally, I am seeking all correspondence from Michael Morgan; correspondence to Michael Morgan; or about Michael Morgan, that has any relation to the issue of Colleen Hartl.

CP 9, 48. At that time, Michael Morgan was the presiding judge of the City of Federal Way Municipal Court. CP 7. Colleen Hartl is a former judge of that court. *Id.*

On February 27, 2008, the City Attorney responded to Koenig's request. The City stated that it had located certain responsive records that would be provided. The City further stated:

The court is not subject to the Public Records Act pursuant to WAC 44-14-01001 and *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). Accordingly, correspondence to or from Judge Morgan that was not from or to a City employee or City official is not subject to disclosure and will not be identified on the index identifying withheld documents and redactions with the bases.

CP 10, 49.

Koenig responded on March 18, 2008, disagreeing with the City's application of *Nast* and suggesting that *Nast* was in need of review by either the Supreme Court or the Legislature. CP 12, 51.

The City Attorney responded on March 21, 2008, and provided indices of documents that were withheld and/or redacted. The City Attorney further stated that:

Lastly, in response to the issue regarding the application of the Public Records Act to the Municipal Court, the City is also looking at *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 150 P.3d 158 (2007), and *Beuhler v. T.W. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003) as guidance that court documents are not subject to disclosure. If you do not agree with the City's position based upon the additional authority, please let me know as soon as possible in order for the City to seek a determination from the court.

CP 53. By letter dated May 19, 2008, the City provided a log of email messages being withheld by the City. CP 57-59.

By letter dated May 20, 2008, Koenig suggested that the City reconsider its interpretation of *Nast*. Koenig further stated that if the City intended to seek an injunction against the disclosure of the records in question then he expected to be advised of, and joined in, any such action. CP 13-14, 60-61.

By letter dated June 6, 2008, the City stated that it would ask a court to resolve the issue of whether requested records were exempt and that it would notify Koenig so that he could participate. CP 8, 62-63.

The City filed this action against Koenig on June 25, 2008. CP 3-6. One day later the City filed a dispositive motion, seeking an order that the Municipal Court is not subject to the PRA. CP 19-25.

B. Second Request for Records

On August 11, 2008, Koenig's counsel sent a request for public records to the Federal Way City Clerk. This request sought, *inter alia*:

(c) all records relating to the appointment of pro tem judges pursuant to Federal Way Municipal Code, Chapter 2, Article X (Municipal Court), §2-311(e) since January 1, 2007;...

(e) all requests from prospective jurors for a job-related exemption from jury duty since January 1, 2007.

CP 64.

The City responded on August 18, 2008, with a letter and 103 pages of records. The City did not provide any log of withheld records or assert that any requested records were exempt from public disclosure under the PRA. CP 66-67.

In response to Koenig's request for records relating to the appointment of pro tem judges the City provided only eleven pages of records. These consisted of two letters from the City Clerk to the King County Elections Division and signed oaths of office for nine pro tem judges. CP 68-78. The City did not state whether other responsive records were being withheld. *Id.*

In response to Koenig's request for records of job-related exemptions from jury duty, the City provided no records but stated that:

Your request under (e) for "all requests from prospective jurors for job-related exemption from jury duty since January 1, 2007" are documents belonging solely to the Federal Way Municipal Court. As the Court is not an agency as defined in RCW 42.56.010(1), the documents are not subject to the Public Records Act...

CP 66-67.

C. Trial Court Procedure

The City filed a dispositive motion, seeking an order that the Municipal Court is not subject to the PRA. CP 19-25. Koenig filed a cross-motion for partial summary judgment. CP 28-45.

The City argued that all of these records were “court records” that are not subject to the PRA under *Nast*. CP 22-23. In response, Koenig argued that the analysis of the PRA in *Nast* is erroneous and, in any event, should not be extended to other types of records. CP 33-37. Koenig further argued, based on decisions of this Court since *Nast*, that the application of the PRA to the administrative functions, records, or personnel of the municipal court should be analyzed under the doctrine of **separation of powers**. CP 37-43. In reply, the City argued that *Nast* was binding on the trial court whether or not the analysis in that case was actually correct. CP 86.

After hearing the parties’ arguments at the motion hearing, the trial court observed that the important legal issues in this case need to be decided by this Court:

Regardless of how I rule, it seems to me that this is a case that in view of related issues that have come about over the course of the last several years that the State Supreme Court ought to take a look at, regardless.

I haven’t made up my mind how I am going to rule, but if I rule against you, I would really strongly encourage you to take that up...

And what I am also encouraging you to do is ... bypass the court of appeals and go right to the State Supreme Court because you are just going to be wasting your time at the court of appeals. Not that they won't give you a reasoned, good decision, but ultimately the State Supreme Court has to resolve this issue regardless of how I rule.

So, I would be willing to assist you in seeing that the matter is transferred directly to the State Supreme Court.

VRP (9/19/08) at 32-33.

After taking the matter under advisement, the trial court concluded, in its written order, that it was constrained by the "existing case authority" to hold that the entire Municipal Court is not subject to the PRA. CP 102. The trial court further held that the City was not obligated to redact or identify any of the records that it had withheld. *Id.*⁴

D. Appeal to this Court

Following the trial court's advice, Koenig appealed directly to this Court. CP 104.

⁴ The City's initial motion used "injunction" language. CP 22, 102. Koenig replied that the legal issues presented in the parties' motions were dispositive, and did not object to the request for an injunction on procedural grounds. CP 95; see *Ameriquest Mortgage Co. v. State Attorney General*, __ Wn. App. __, __ P.3d __ (January 6, 2009), slip op. at 6 (noting that the purpose of distinguishing between preliminary and permanent injunctions "is to give the parties notice and time to prepare so that they will have a full opportunity to present their cases at the permanent injunction hearing"). Given that there is no third party resisting disclosure in this case, the City arguably had no need for an injunction as opposed to mere declaratory relief. Indeed, the title of the City's proposed order, signed by the trial court, shows that the order is more properly characterized as declaratory relief. *Order Declaring Public Records Act Does Not Apply to Federal Way Municipal Court*, CP 101. In any event, the form of relief is of no consequence in this case, and for that reason neither party has raised the issue on appeal.

Koenig filed his *Statement of Grounds for Direct Review by Supreme Court* on November 4, 2008. The City does not oppose direct review, but argues that *Nast* remains good law. *City of Federal Way's Answer to Petition for Direct Review* (November 18, 2008) at 2.

IV. STANDARD OF REVIEW

Judicial review under the PRA is *de novo*. *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.550(3).

V. ARGUMENT

The Public Records Act (PRA) “is a strongly worded mandate for broad disclosure of public records.” *PAWS II*, 125 Wn.2d at 251 (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). The PRA’s disclosure provisions must be liberally construed, and its exemptions narrowly construed. ~~*PAWS II*, 125 Wn.2d at 251~~; RCW 42.56.030. Courts are to take into account the Act’s policy “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).

A. The analysis in *Nast v. Michels* is erroneous and should not be extended to other types of records.

The *City's Motion* is entirely based on *Nast*, *supra*, and two Court of Appeals decisions that purport to follow *Nast*. The City cites *Nast* and

its progeny for the proposition that “courts and court records” are not subject to the PRA. *City’s Motion* at 1. The actual holding in *Nast*, that the PRA does not apply to court case files, is based on an erroneous analysis of the PRA that should not be extended to other types of public records. The other cases relied on by the City are merely erroneous extensions of *Nast* by Divisions Two and Three of the Court of Appeals.

In *Nast*, the King County Superior Court clerk adopted a new policy that required 1-day notice to access court case files. An attorney, *Nast*, sued under the PRA arguing that the 1-day policy violated the PRA, the common law right of access to court files, and the state and federal constitutions. The superior court found that the new policy violated both the PRA and the common law because the files were not promptly available. *Nast*, 107 Wn.2d at 301. On direct review, the Supreme Court ruled that the common law provides a right of access to court files but that the PRA was not applicable to case files. *Nast*, 107 Wn.2d at 304. This conclusion was based on three points:

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

Nast, 107 Wn.2d at 307.⁵

The analyses supporting these three points is seriously flawed and based on erroneous assumptions. First, the *Nast* court's observation that the common law provides for access to court files is largely irrelevant. The court appeared to erroneously assume that pre-existing common law principles and the PRA could not coexist. In fact, the common law yields to statutory law, not vice versa. "So long as it is consistent with Washington statutory law, Washington courts adopt and reform the common law." *In re Parentage of L.B.*, 155 Wn.2d 679, 688, 122 P.3d 161 (2005). The *Nast* court's error is demonstrated by *Nast's* references to various statutes that restrict access to court records. *Nast*, 107 Wn.2d at 307 (citing RCW 13.50.050; RCW 26.26.050(3); RCW 26.26.200; RCW 26.33.330; and RCW 71.05.390). The City did not address this point in the trial court. CP 97.

Second, the *Nast* court's determination that the PRA did not specifically include courts or case files was based on a narrow interpretation of the terms "agency" and "public record." As the dissent pointed out, it is well established that the PRA must be broadly and

⁵ In two prior cases this Court had declined to determine whether the "judicial branch" was an agency for purposes of the PRA. *Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981); see *Cohen v. Everett City Council*, 85 Wn.2d 385, 390, 535 P.2d 801 (1975).

liberally construed in favor of public access to public records. *Nast*, 107 Wn.2d at 309-11 (Durham, J., dissenting) (citing *Hearst*, 90 Wn.2d at 127-28). Indeed, the majority conceded that the King County Department of Judicial Administration “by its name falls within the definition of ‘agency,’” and that court case files have been referred to as public records.

Nevertheless, the majority fudged on the definitions of “agency” and “public record,” merely stating that (i) the PRA definitions did not “specifically include” courts or case files. *Nast* 107 Wn.2d at 306. Having recognized that those definitions could be interpreted to include courts and case files, the majority relied on unspecified language in the entire chapter to reach a different result. “A reading of the entire public records section of [Chapter 42.17 RCW] indicates ... that they are not within the realm of the [PRA].” *Nast* 107 Wn.2d at 306. The majority never expressly concluded that courts are not “agencies” or that court records are not “public records.”

Third, the *Nast* court erroneously assumed that the application of the PRA to court case files would eliminate various statutory restrictions on access to court files, including provisions that protect various privacy interests. *Nast*, 107 Wn.2d at 307. The court erroneously concluded that:

Nowhere in the [PRA] are included these well-developed and engrafted exemptions. If the [PRA] applied to court case files, these developed exemptions could easily

have been incorporated. To follow the respondent's suggestion that the [PRA] applies generally to court case files would undo all that has been developed.

Nast, 107 Wn.2d at 307. The following year, the 1987 legislature obviated this significant concern by expressly adding the "other statute" exemption to the PRA. RCW 42.56.070(1); Laws of 1987, ch. 403, § 3. After the 1987 legislation, the application of the PRA to court case files would not eliminate existing statutory restrictions but rather incorporate them.

Although the analysis in *Nast* is clearly wrong in light of the 1987 legislative response and subsequent cases on the doctrine of separation of powers (see section IV(B) (below), two decisions of the Court of Appeals have now expanded upon *Nast* to exclude additional records from the reach of the PRA. In this case, the trial court felt that it was constrained by *Nast* and its progeny to hold that all of the records withheld by the City were beyond the reach of the PRA. CP 102.

In *Beuhler*, 115 Wn. App. 914, a defense attorney (Beuhler) requested notes that a judge kept on his computer and occasionally referred to during sentencing. The attorney argued that he had the right to see the notes under PRA, the common law, the Washington Constitution, and due process. The trial court disagreed. The Court of Appeals affirmed, relying entirely on *Nast*:

[A]lthough the Department of Judicial Administration falls

within the definition of an agency, neither courts nor court case files are specifically included in the [PRA] and are not within its realm. In light of the extensive development of the common law right of access to certain court case files, *Nast* held, a public citizen must look to the common law and the discretion of the trial court for inspection of judicial records. Assuming for the sake of this argument that [the judge's] computer notes constitute judicial records, we find that the trial court here properly concluded that the [PRA] did not grant...a right to access the computer files.

Beuhler, 115 Wn. App. at 918 (citations omitted).

Spokane & Eastern Lawyer, 136 Wn. App. 616, involved a request for correspondence from Spokane County judges to the Washington State Bar Association “regarding lawyers practicing in Spokane County.” The trial court upheld the judge’s refusal to provide these records. The Court of Appeals affirmed, citing *Nast* for the proposition that the superior court was not an “agency” for purposes of the PRA. *Spokane & Eastern Lawyer*, 136 Wn. App. at 617.

Although *Nast*’s actual holding is narrow, the effect of *Nast* on open government has been substantial. The lower courts have interpreted *Nast* to hold that courts are not agencies under the PRA, and that court records are not subject to the PRA. *Spokane & Eastern Lawyer*, 136 Wn. App. at 621-22. The limits of this interpretation are not clear. An enormous variety of public records are potentially beyond the reach of the PRA until this Court rejects or at least clarifies the muddled analysis of the

PRA in *Nast*.⁶ Koenig is aware of at least two other appeals currently pending that involve the application of the PRA to courts or court records. *Morgan v. City of Federal Way*, Supreme Court No. 81556-9; *Yakima County v. Yakima County Herald Republic*, Supreme Court No. 82229-8.

Nast held only that a particular type of public records — court case files — were not governed by the PRA, but this holding did not place such records beyond the reach of the public. Indeed, *Nast* was based, in part, on a determination that the public already had a common law right to access such files. *Nast*, 107 Wn.2d at 303. However, the expansion of *Nast* by the lower courts and agencies, such as the City in this case, has created a third category of public records to which there is no public right of access. If the PRA does not apply to so-called “court records” and there is no common law right to access such records, then all of the

⁶ The *Open Government Internet Manual* published by the Washington Attorney General observes that the scope and effect of *Nast* is not entirely clear:

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.

Attorney General, Open Government Internet Manual §1.3, <http://www.atg.wa.gov/OpenGovernment/InternetManual/Chapter1.aspx> (last visited Jan. 6, 2009)

records, including administrative records that have nothing to do with the judicial functions of courts, are removed from Washington's system of open government.

The analysis of the PRA in *Nast* is erroneous and should not be extended to other types of records. The Court should overrule *Nast*, and analyze the PRA unencumbered by the language in that case.⁷

B. The application of the PRA to the administrative functions, records, or personnel of courts may be limited by the doctrine of separation of powers.

The erroneous analysis of the PRA in *Nast* stemmed from the *Nast* court's inexplicable failure to consider the relevant legal doctrine: separation of powers. Rather than perpetuate and extend the errors in *Nast*, *Beuhler*, and *Spokane and Eastern Lawyer*, this Court should recognize that the application of the PRA to the administrative functions, records, or personnel of the municipal court may be limited by the doctrine of separation of powers. Under a correct analysis of the separation of powers, the Court may conclude that *Nast*, *Beuhler*, and *Spokane and Eastern Lawyer* reached the right result for the wrong reasons.

⁷ In the event that this case is transferred to the Court of Appeals, Division One, that court is not obligated to follow the interpretation of *Nast* in either *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003), or *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 617, 150 P.3d 158 (2007), review denied, 162 Wn.2d 1004 (2007). See *State v. Nonog*, 145 Wn. App. 802, 187 P.3d 335 (2008).

In cases decided after *Nast*, the Court has recognized that the branches of government are not “hermetically sealed off from one another.” *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Instead, the “branches must remain partially intertwined ... to maintain an effective system of checks and balances, as well as an effective government.” *Id.* This “intertwining” of branches is constitutionally permitted so long as “the fundamental functions of each branch remain inviolate.” *Id.*⁸

To constitute a violation, the invasion of one branch’s fundamental and inherent functions must “directly and unavoidably conflict” with those of another branch or “clearly contravene” the separation of powers. For example, in *Washington State Bar Ass’n v. State*, 125 Wn.2d 901, 906, 890 P.2d 1047 (1995), the Legislature enacted a statute that declared the Washington State Bar Association to be a “public employer” subject to the Public Employees’ Collective Bargaining Act, RCW 41.56. The statute had the effect of making collective bargaining mandatory for the WSBA. *Washington State Bar Ass’n*, 125 Wn.2d at 905. The Court held that the statute violated the doctrine of separation of powers because it conflicted

⁸ Although Washington’s constitution lacks a formal separation of powers clause, “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

with a previously-adopted court rule, GR 12(b)((16), that gave the WSBA Board of Governors the discretion to determine whether to collectively bargain with employees. *Washington State Bar Ass'n*, 125 Wn.2d at 909.

The doctrine must be interpreted and applied in light of its flexible and practical purpose. *Carrick*, 125 Wn.2d at 135. For example, in *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 679, 146 P.3d 893 (2006), the City of Spokane sought to terminate its arrangement with the Spokane County District Court and open its own independent municipal court. The district court challenged the transfer agreement between the city and the county arguing, *inter alia*, that the agreement violated GR 29 by interfering with the management and administration of the district court. *City of Spokane*, 158 Wn.2d at 670. The Court disagreed:

While GR 29 charges the presiding judge of a district court with supervising the day-to-day administration of court business and with serving as a spokesperson for the court, nothing in the rule conflicts with the legislature's directive that city councils and county commissions must determine the existence of independent municipal courts, or alternatively, municipal departments of district courts... The doctrine of separation of powers serves mainly to ensure that the fundamental functions of each branch remain inviolate. A local legislative determination of which court will hear municipal criminal cases does not infringe upon the fundamental administrative functions of a district court's presiding judge, nor does it infringe upon the fundamental functions of the judiciary.

City of Spokane, 158 Wn.2d at 680.

The authority to regulate court-related functions belongs exclusively to the judiciary. Nonetheless, this Court has “recognized that it is sometimes possible to have an overlap of responsibility in governing the administrative aspects of court-related functions.” *Washington State Bar Ass’n*, 125 Wn.2d at 908. Examples of legislative enactments which apply to the judicial branch without invading its inherent functions include “the Industrial Insurance Act (RCW Title 51), the Employment Security Act (RCW Title 50), Washington Minimum Wage Act (RCW 49.46), and the state’s law against discrimination (RCW 49.60).” *Spokane County v. State*, 136 Wn.2d 663, 671, 966 P.2d 314 (1998); *see also Zylstra v. Piva*, 85 Wn.2d 743, 749, 539 P.2d 823 (1975) (holding that a legislatively created bargaining scheme for juvenile court employees did not interfere with the ultimate power of the judiciary to administer its own affairs)

1. There is no *per se* prohibition against the application of the PRA to the administrative functions, records, or personnel of courts.

Applying the PRA’s requirements to “the administrative aspect of court-related functions” does not “clearly contravene” the doctrine of separation of powers, nor does it “directly and unavoidably conflict” with “the fundamental functions” of the judiciary. *Spokane County*, 136 Wn.2d at 672; *see also Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007) (court will not substitute its

judgment for legislature's unless statute "clearly contravenes" the constitution). Because "personnel policy and management ... is essentially an administrative or executive function rather than a function historically or traditionally resting with the judicial branch of government," legislative enactments concerning it do not violate the separation of powers. *Spokane County*, 136 Wn.2d at 670. Conversely, application of the PRA to a judge's sentencing notes (*Beuhler*) or correspondence with the bar association (*Spokane and Eastern Lawyer*) would arguably interfere with the fundamental or inherent functions of both the judiciary and the bar association.

This Court should address the fundamental question of how the separation of powers may apply to the PRA. This Court should undertake the initial analysis of whether and to what extent the application of the PRA would actually interfere with the fundamental or inherent functions of this branch of Washington's government. Indeed, the City notes that King County addressed the doctrine of separation of powers in its briefs to this Court in *Nast*, although the Court did not reach the issue. CP 89.

The *Nast* court did not address the issue, perhaps because of the broad sweep of the County's argument that any application of the PRA to

courts would be unconstitutional.⁹ Such a categorical approach would be inconsistent with this Court's more recent decisions that "The separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread." *Carrick*, 125 Wn.2d at 135. In light of the cases that have been decided since *Nast*, it is clear that the doctrine of separation of powers does **not** require the Court to remove all courts and court records from the reach of the PRA.

2. A remand is necessary to determine whether particular requests or records implicate separation of powers.

To date the City has relied entirely on *Nast* as the basis for its refusal to comply with the PRA. Consequently, the question of whether the Koenig's PRA requests implicate the doctrine of separation of powers is beyond the scope of the trial court's order and the present briefing. As suggested in Koenig's trial court motion, if this Court rejects the City's categorical reliance on *Nast*, the City should be given an opportunity to present an argument that the separation of powers limits the reach of the PRA with respect to one or more of Koenig's requests for records. CP 42-43.

⁹ Portions of the briefs of appellant and respondent in *Nast* are attached as to Koenig's *Statement of Grounds* as appendices.

A remand is necessary to determine whether particular requests or records implicate separation of powers. On remand the City should decide whether it will comply with the PRA or present an argument that the separation of powers limits the reach of the PRA with respect to one or more of Koenig's requests. Otherwise the City must either (i) provide the requested records to Koenig, (ii) explain why the records are exempt (or subject to redaction) under the PRA.

C. The City must identify all records that it has withheld and disclose the particular person(s) in possession of the records that the City has withheld.

RCW 42.56.210(3) requires agencies that withhold records to provide "a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." In addition, the Court has held that

The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request. The statute explicitly mandates that:

Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld...

The identifying information need not be elaborate, but

should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content...

PAWS II, 125 Wn.2d at 270, 271 n.18 (quoting former RCW 42.17.310(4)).

The City suggests that it has no obligation to provide a log of withheld records because, the City argues, the PRA is not applicable to the withheld records under *Nast*. CP 84, 90. This argument highlights another significant problem created by *Nast*. The suggestion that certain records are entirely beyond the reach of the PRA interferes with judicial review of an agency's assertion that records are exempt. As the Court noted in *PAWS II*, "without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated." *PAWS II*, 125 Wn.2d at 270. The PRA also provides that:

- agencies must acknowledge requests for records and respond promptly;
- agencies have the burden of proof to show that records are exempt; and
- courts may examine records in camera.

RCW 42.56.520; RCW 42.56.550(1). Presumably the City would argue

that these safeguards against improper withholding are not applicable to courts or court records under *Nast*.

If, however, the Court rejects the City's application of *Nast*, then the City must provide a log of withheld records. The pleadings filed by the City are not sufficiently clear as to the particular person(s) in possession of the records that the City has withheld. With respect to Koenig's February 2008 request, the City Attorney's letter dated February 27, 2008, indicates that the City is withholding all correspondence "to or from Judge Morgan that was not from or to a City employee or City official." CP 49. Subsequent letters dated March 21, 2008, and June 6, 2008, simply refer to these records as "court documents" or "court records." CP 53, 63. The City's trial court motion supporting declaration asserts that Judge Morgan's correspondence "are records belonging to the ... Federal Way Municipal Court." CP 8, 21. It is unclear, at least to Koenig, which particular persons are actually in possession of the requested records.

With respect to the jury service exemptions requested in August of 2008, the City Attorney's letter dated August 18, 2008, states that these records "are documents belonging solely to the Federal Way Municipal Court." CP 66. Again, it is unclear which particular persons are in possession of these records.

Under an analysis of the doctrine of separation of powers, the Court must know which particular person is in possession of the records at issue in this case. The result of such an analysis may depend on whether Koenig's request would require an actual judge (or his or her chambers staff) to respond to a request for records or whether the requested records are in the possession of the clerk or court administrative staff. On remand, the City must disclose the particular person(s) in possession of the records that the City has withheld.

Finally, with respect to the City's response to Koenig's request for records relating to the appointment of pro tem judges, the City provided only eleven pages of records. These consisted of two letters from the City Clerk to the King County Elections Division and signed oaths of office for nine pro tem judges. CP 47, 68-69. There must be additional responsive records. It is reasonable to assume that the City has silently withheld such records based on its assertion that such records are not subject to the PRA under *Nast*. Accordingly, the City must identify all records that it has withheld in response to Koenig's request in order to ensure proper judicial review of the City's response.

D. Koenig is entitled to attorney's fees pursuant to RCW 42.56.550(4).

The PRA requires an award of attorney's fees to a successful requester on appeal. *Progressive Animal Welfare Soc'y v. UW (PAWS I)*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990); RCW 42.56.550(4). Koenig respectfully requests an award of attorney's fees pursuant to RAP 18.1.

VI. CONCLUSION

The Court should reverse the trial court's order. This matter should be remanded to the trial court with instructions to order the City to (i) provide the requested records to Koenig, (ii) explain why the records are exempt (or subject to redaction) under the PRA, or (iii) explain why the City is excused from compliance with the PRA by virtue of the doctrine of separation of powers. Additionally, the City should be ordered to identify any records it has withheld and to disclose to the Court and to respondent Koenig the particular person(s) in possession of any records that the City has withheld.

Koenig should be awarded fees on appeal pursuant to RAP 18.1.

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RESPECTFULLY SUBMITTED this 6th day of January, 2009.

By:



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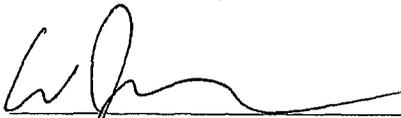
I, the undersigned, certify that on the 6th day of January, 2009, I caused a true and correct copy of this *Brief of Appellant* to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) to:

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