

Supreme Court No. 88036-1

Court of Appeals No. 66428-1-I

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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Aaron Hundtofte and Kent Alexander,

Plaintiffs,

v.

Ignacio Encarnación and N. Karla Farías,

Defendant/Petitioner,

v.

King County Superior Court Office of Judicial Administration

Intervenor/Respondent.

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**PETITIONERS' REPLY TO INTERVENOR/RESPONDENT'S  
ANSWER TO PETITION FOR DISCRETIONARY REVIEW**

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## **I. Preface**

In its Answer to the Petition for Review, Intervenor/Respondent King County Superior Court Office of Judicial Administration's (hereafter "the Clerk") raised the new issue of whether GR 15 permits a trial court to order the redaction of a party's full name from court indices, such as the Superior Court Management Information System (SCOMIS). This reply is limited to that issue only.

## **II. Procedural Summary Regarding New Issues**

Under *Seattle Times v. Ishikawa*, a court may redact or seal a court record that poses a serious and imminent threat to an individual privacy interest if it holds an open hearing and allows any present to object, finds that the privacy interest is compelling and outweighs the public interest in access to the record, finds also that the proposed redaction or sealing is the least restrictive effective means of protecting the privacy interest, and limits the redaction or sealing in both scope and duration.<sup>1</sup>

In 2009, the Court of Appeals (Division One) held in *Indigo Real Estate Services v. Rousey* that unlawful detainer information stored on-line judicial databases, such as the Superior Court Management Information System (a.k.a. "SCOMIS"), constitutes a "court record" for purposes of GR 15 and may be redacted or sealed under the *Ishikawa* analysis in the

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<sup>1</sup> See *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39; 640 P.2d 716 (1982).

same manner as other court records.<sup>2</sup>

In this case, Petitioners Ignacio Encarnación and N. Karla Farías filed a motion in the superior court to have their full names redacted from the on-line indices and replaced with their initials (“I.E.” and “N.F.”), so as to protect their rental housing prospects.<sup>3</sup> The superior court held an open hearing, determined that the proposed redaction was appropriate under the *Ishikawa* analysis, and granted the motion.<sup>4</sup> The court limited the order in both scope (ordering redaction of the Petitioners’ names from the on-line databases only, leaving the rest of the court file intact and fully accessible) and duration (setting the order to expire in 2016).<sup>5</sup>

The Clerk opposed the redaction order in the superior court, based essentially on contentions that the *Rousey* court was incorrect in concluding that judicial indices were subject to redaction.<sup>6</sup> Specifically, the Clerk argued that the redaction of court indices is impermissible under the text of GR 15, contrary to the scheme of the rule, and amounts to the

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<sup>2</sup> See *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 947; 215 P.3d 977 (2009) (“SCOMIS thus meets both prongs of the definition of court record for purposes of GR 15. Accordingly, the standard for redacting court records under GR 15 applies to Rousey’s motion to redact the record of the unlawful detainer action in the SCOMIS index.”).

<sup>3</sup> See CP at 1-12, 662-667.

<sup>4</sup> See RP 9/28/2010; see RP 11/3/2010; see CP at 727-733.

<sup>5</sup> See CP at 731-732; see *Ishikawa*, 97 Wn.2d at 39.

<sup>6</sup> See CP at 294-302, 376-387, 498-501, 624-635; see RP 9/28/2010 at 3-6; RP 11/3/2010 at 3-8.

impermissible “destruction” of court records.<sup>7</sup> The superior court rejected those arguments as irreconcilable with *Rousey*, and entered the redaction order.<sup>8</sup>

The Clerk appealed, making the very same arguments regarding the supposed conflict between the redaction of party names from court indices and GR 15.<sup>9</sup> The Court of Appeals reversed the redaction order, but without considering any of the Clerk’s arguments regarding conflicts with GR 15; indeed, in a specific footnote, the Court of Appeals made clear that it didn’t reach the Clerk’s arguments in deciding the case.<sup>10</sup>

### **III. Argument**

The Court should accept discretionary review in this case because the overarching issue of whether protecting a family’s ability to obtain rental housing can be a sufficient compelling privacy interest to warrant the redaction of their names from a court database is of substantial public

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<sup>7</sup> See CP at 297-298, 381-382, 627-630; see RP 9/28/2010 at 3-4; RP 11/3/2010 at 3-8.

<sup>8</sup> See RP 11/3/2010 at 3-9; see CP at 727-732; see also RP 9/28-2010 at 4.

<sup>9</sup> See [Intervenor]/Respondent’s Answer in Opposition to Petitioner’s Petition for Discretionary Review (hereafter “Clerk’s Answer”) at 3-5.

<sup>10</sup> See Court of Appeals Published Opinion at 13, fn 5 (“[T]he Clerk contends only that the trial court’s order contravenes GR 15 because either (1) it orders the destruction of a court record without statutory authorization or (2) it is inconsistent with the terms and intent of that rule. Because we resolve this case based upon our review of the trial court’s application of the standard for redaction of court records . . . we need not further address these contentions.”), attached to Petition for Review at Appx. p. 13.

importance.<sup>11</sup> In resolving that question, the Court would necessarily address the procedural matters that the Clerk presents as “new issues” under RAP 13.4(d). While those contentions are ultimately unconvincing, it appears appropriate to at least consider the Clerk’s arguments if review is granted.

**A. GR 15 does not, and cannot, prevent a court from ordering the redaction of party names from court indices.**

There is no question that GR 15, which “sets forth a uniform procedure for the destruction, sealing, and redaction of court records,” applies to electronic information stored in a judicial database.<sup>12</sup> The rule reaches all “court records,” as defined in GR 31(c)(4), and that definition encompasses judicial indices and electronically-stored information.<sup>13</sup>

Under GR 15, a “court may order the court files and records in the proceeding, *or any part thereof*, to be sealed or redacted” if the relevant requirements (i.e., those arising under *Ishikawa*) are met.<sup>14</sup> Since party names stored in a court index are part of the court file, the *Rousey* court rightly concluded that GR 15 allows such information to be redacted in

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<sup>11</sup> See RAP 13.4(b)(4).

<sup>12</sup> GR 15(a) (“This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.”).

<sup>13</sup> See GR 31(c)(4) (“‘Court record’ includes ... any information in a case management system created or prepared by the court that is related to a judicial proceeding.”); see also GR 15(b)(2) (“‘Court record’ is defined in GR 31(c)(4).”).

<sup>14</sup> GR 15(c)(2) (*italics added*); see also *Ishikawa*, 97 Wn.2d at 37-39.

accordance with the *Ishikawa* test.<sup>15</sup> In its ruling below, the Court of Appeals appears to have at least left this portion of *Rousey* intact.<sup>16</sup>

**1. Temporarily redacting party names from court indices does not amount to “destruction” under GR 15.**

The Clerk is correct that a court may not order the destruction of a civil court record except pursuant to express statutory authority.<sup>17</sup> But to “destroy” a record “means to obliterate a court record or file in such a way as to make it permanently irretrievable.”<sup>18</sup> Redacting a court record does not render the information “irretrievable,” and even if it did, an order that expires on a date certain is not “permanent.”

When a court record is redacted, “the original court record shall be replaced in the public court file by the redacted copy,” and “[t]he original unredacted court record shall be sealed.”<sup>19</sup> The Clerk keeps the original copy of the record, and may either “return [it] to the file under seal or store

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<sup>15</sup> See *Rousey*, 151 Wn. App. at 949-50 (“In sum, GR 15 authorizes courts to redact information in SCOMIS, and GR 15 and the *Ishikawa* factors together provide the legal standard for evaluating Rousey’s motion to redact her name from the SCOMIS index.”).

<sup>16</sup> Court of Appeals Published Opinion at 15 (In *Rousey*, “we held that the redaction of a SCOMIS record is subject to the requirements set forth in *Ishikawa* and, thus, that the five-step *Ishikawa* analysis must be applied when considering a motion to redact such a record. We did not hold, however, that Rousey’s asserted interest—protecting her future housing rental opportunities—was compelling enough to override the presumption of openness of court records.”) (internal citation to *Rousey* omitted), attached to Petition for Review at Appx. p. 15.

<sup>17</sup> See GR 15(h)(1) (“The court shall not order the destruction of any court record unless expressly permitted by statute.”).

<sup>18</sup> GR 15(b)(3).

<sup>19</sup> GR 15(c)(6).

separately.”<sup>20</sup> The Clerk can retrieve the redacted information at any time, either by unsealing the original record or by removing it from the separate place of storage.

**2. GR 15(c)(4) is not applicable to orders directing the redaction of party names from court indices only.**

When a court orders an entire court file to be sealed, GR 15(c)(4) applies.<sup>21</sup> Under GR 15(c)(4), “[t]he existence” of a case sealed in its entirety must remain “available for viewing by the public on court indices,” and “[t]he 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[.]”<sup>22</sup> Arguably, this provision suggests that a court cannot order a party’s name redacted from a court index when the rest of the file is sealed entirely—though even this is uncertain (because the text does not actually require that party names remain on the indices, only that the information in the indices is “limited to” party names and certain other items).<sup>23</sup>

Nonetheless, GR 15(c)(4) is not relevant at all to orders directing

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<sup>20</sup> GR 15(c)(5)(B).

<sup>21</sup> See GR 15(c)(4).

<sup>22</sup> GR 15(c)(4).

<sup>23</sup> See GR 15(c)(4).

the redaction or sealing of only specific records within a file.<sup>24</sup> Nothing in GR 15(c)(5) or (6), which do pertain to the sealing or redaction of specific court records, precludes the redaction of party names from court indices.<sup>25</sup> Thus, an order directing the Clerk to redact a party's name from the court indices, while leaving the balance of the court file perfectly intact and accessible, presents no conflict with any part of GR 15.

**3. Courts have inherent constitutional authority to seal their own records in compelling circumstances.**

Furthermore, even if GR 15 did purport to restrict the redaction of party names from judicial indices, the seminal authority for determining what records a court can redact and when is *Seattle Times v. Ishikawa*—not GR 15. Courts have inherent control over public access to their own records and files,<sup>26</sup> and while all such materials are presumed open, a court may limit public access in compelling circumstances where the record infringes on other constitutionally-protected rights—such as a criminal defendant's right to a fair trial<sup>27</sup> or an individual's right to privacy.<sup>28</sup>

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<sup>24</sup> See GR 15(c)(5) (concerning orders “to seal specified court records”), GR 15(c)(6) (concerning orders to redact court records).

<sup>25</sup> See GR 15(c)(5-6).

<sup>26</sup> See *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 795; 246 P.3d 768 (2011) (“And it is without question that the court has inherent authority to control its own documents.”); see *Nast v. Michels*, 107 Wn.2d 300, 305; 730 P.2d 54 (1986) (“Courts have the inherent authority to control their records and proceedings.”), quoting *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 588; 637 P.2d 966 (1981).

<sup>27</sup> See *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 66; 615 P.2d 440 (1980).

Indeed, when a court record poses a serious and imminent threat to such an interest, redacting or sealing that record is a constitutional imperative.<sup>29</sup> In such an instance, a court may redact a record even despite a contrary statute.<sup>30</sup> If that record happens to be a database field showing that a party was sued for unlawful detainer, then so be it.

The Clerk's contention that GR 15 creates substantive, rather than procedural, limitations on what records a court may withhold from public view would erode both the courts' autonomous control over its records and its ability to protect constitutional interests, such as privacy, against threats emanating from judicial databases. But the public's "right of access is not absolute, [it] may be outweighed by some competing interest as determined by the trial court on a case-by-case basis according to the *Ishikawa* guidelines."<sup>31</sup>

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<sup>28</sup> See *Ishikawa*, 97 Wn.2d at 36.

<sup>29</sup> See *State v. Noel*, 101 Wn. App. 623, 628-29; 5 P.3d 747 (2000) (even though trial court correctly determined that party was not entitled to seal records under a relevant statute, error not to consider sealing under GR 15); see *State v. C.R.H.*, 107 Wn. App. 591, 596-97; 27 P.3d 660 (2001) (same but holding further that a court must consider sealing a record under GR 15 even if doing so would run counter to a relevant statute); see also Wash, St. Const., Art. I, Sec. 7 (creating an explicit constitutional protection for the right of privacy in Washington).

<sup>30</sup> See *State v. C.R.H.*, 107 Wn. App. 591, 596-97; 27 P.3d 660 (2001) (court could seal juvenile record under GR 15 if compelling circumstances were present, even though a statute purported to require the file to remain open "at least 10 years after entry of disposition" and the ten year mark had not yet passed).

<sup>31</sup> *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211; 848 P.2d 1258 (1993); see also *Dreiling v. Jain*, 151 Wn.2d 900, 913; 93 P.3d 861 (2004); see also GR 31(a) ("Access to court records is not absolute and shall be consistent with reasonable

**B. Redacting party names to protect privacy, while leaving the balance of a court file intact, is consistent with the spirit of both GR 15 and *Seattle Times v. Ishikawa*.**

When a party has a compelling privacy interest that outweighs the public's interest in access to a court record, then, as discussed above, the court should redact or seal that record in the least restrictive manner that effectively protects the party's privacy.<sup>32</sup> Here, removing the Petitioners' names from the on-line indices was the only way to protect their privacy interest, because the specific record that diminished their housing opportunities was the court database listing their names and the unlawful detainer case type.<sup>33</sup> The court properly sealed that record, only that record, and only for as long as necessary.<sup>34</sup> All the other documents in the court file remain open because none of those records materially impair the Petitioners' housing prospects.

Redacting the Petitioners' names from the on-line indices may, as the Clerk contends, have a greater practical impact on public access than sealing the entire court file (in the manner GR 15(c)(4) contemplates) would have. But because redacting the Petitioners' names is *only* effective means of protecting their privacy interest, it is also the least-restrictive

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expectations of personal privacy as provided by article 1, Section 7 of the Washington State Constitution and shall not unduly burden the business of the courts.”).

<sup>32</sup> See *Ishikawa*, 97 Wn.2d at 36-39.

<sup>33</sup> CP at 730-732.

<sup>34</sup> CP at 732.

means, and thus the appropriate means under *Ishikawa*.<sup>35</sup>

The Clerk makes much of the unsupported assumption that “[a]s a practical matter, the public does not search court records by case number [but by] using the parties’ names.”<sup>36</sup> Yet the evidence in the record proves only that tenant-screening firms and other background-checkers rely on name searches, not that the general public does.<sup>37</sup> Our state constitution protects the open administration of justice primarily so that the public can oversee and evaluate the performance of our courts—not to facilitate private background checks.<sup>38</sup>

This Court has already held in the Public Records Act context that the public has no legitimate interest in the names of people subject to unsubstantiated allegations—even when those allegations concern subject matter as serious as sexual misconduct by public school teachers.<sup>39</sup> The Court should find consumer reporting agencies’ use of superior court

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<sup>35</sup> See *Ishikawa*, 97 Wn.2d at 37-39; see also *Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 544; 114 P.3d 1182 (2005) (“To balance the constitutional requirement of the open administration of justice against potentially conflicting rights, we directed courts to apply the five *Ishikawa* factors in determining which documents may continue to be sealed.”).

<sup>36</sup> See Clerk’s Answer at 13.

<sup>37</sup> See CP at 19-37, 97-99.

<sup>38</sup> See *Rufer*, 154 Wn.2d at 548 (“[T]he interest of the public that we are concerned with in making these determinations is the public’s right to the open administration of justice. We have already held that Art. I, Sec. 10 is not relevant to documents that do not become part of the court’s decision making process.”), citing *Dreiling*, 151 Wn.2d at 909-10.

<sup>39</sup> See *Bellevue John Does 1-11 v. Bellevue School District*, 164 Wn.2d 199, 221; 189 P.3d 139 (2008).

indices as a de facto tenant blacklist even more disconcerting; such use not only fails to advance the interest that makes judicial transparency so important, but also interferes with the courts' core function of hearing and deciding cases by chilling tenants, especially those with meritorious claims and defenses, from even appearing in court.<sup>40</sup>

From the perspective of a person who seeks court records for the purposes truly intended by Art. I, Sec. 10, the substitution of initials for party names (in the court indices) is a frankly infinitesimal interference with access. Party names are seldom necessary in evaluating a tribunal's performance in hearing and deciding civil cases.<sup>41</sup> And even a person who does have a legitimate need for a party's identity—e.g., someone who

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<sup>40</sup> See GR 31(a) ("Access to court records . . . shall not unduly burden the business of the courts."); see Kleystauber, Rudy, "Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records," 116 Yale L.J. 1344, 1363 (April 2007) ("[B]ecause tenant-screening reports function effectively as blacklists, they attach excessive stigma to involvement in the legal process and thus discourage tenants from vindicating the very rights that legislatures have gone to great pains to protect, and courts to enforce."); see also *White v. First American Registry*, 230 F.R.D. 365, 366 (S.D.N.Y. 2005) (Tenant-screening bureau that makes "comprehensive proprietary database of over 33 million landlord/tenant eviction court records" available to rental housing providers "offers a product readily usable by its customers to blacklist applicants to rent apartments and houses who have been involved in litigation with landlords."); see *U.D. Registry, Inc. v. State of California*, 34 Cal.App.4th 107, 114; 40 Cal.Rptr.2d 228 (1995) (discussing California Senate report that found "inappropriate inclusion of information about unlawful detainer actions results in 'tenant blacklisting' and imposes an unfair and unnecessary hardship on tenants seeking rental housing.").

<sup>41</sup> See *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) ("Party anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them."); see also, accord, *Bellevue John Does*, 164 Wn.2d at 221 ("Precluding disclosure of the identities of teachers who are subjects of unsubstantiated allegations will not impede the public's ability to oversee school districts' investigations of alleged teacher misconduct.").

wanted to interview the Petitioners about their case or their experience with the court, for instance—could still access the court file and obtain the Petitioners’ names (and, potentially, contact information) from pleadings or other materials in the court file.<sup>42</sup>

It is also unlikely that a person genuinely seeking to investigate or evaluate judicial performance would rely on name queries. Such a person would probably not know the cause numbers or party names from any specific cases, but instead would likely obtain the records through a “bulk distribution”—such as a batch of all unlawful detainer suits filed within a particular time period, or all files assigned to a specific judge.<sup>43</sup> Listing party names as “I.E.” and “N.F.” would in no way interfere with a file’s inclusion in a bulk distribution.<sup>44</sup> And even if a court researcher did wish to search by party name queries, the superior court’s order did keep the case reasonably accessible by preserving the landlords’ names and the Petitioners’ initials.<sup>45</sup>

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<sup>42</sup> See CP at 730-32.

<sup>43</sup> See GR 31(g) (authorizing the bulk distribution of court records through dissemination contracts)

<sup>44</sup> See GR 31(f-g).

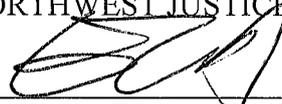
<sup>45</sup> CP at 732.

**VI. Conclusion**

For the foregoing reasons, the Court should grant discretionary review under RAP 13.4(b)(4) and consider, though ultimately, reject the Clerk's arguments regarding whether courts can order the redaction of party names from judicial databases.

RESPECTFULLY SUBMITTED this 5 day of November, 2012.

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