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NO. 95441-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE ASSOCIATED PRESS, NORTHWEST NEWS NETWORK,  
KING-TV (“KING 5”), KIRO 7, ALLIED DAILY NEWSPAPERS OF  
WASHINGTON, THE SPOKESMAN-REVIEW, WASHINGTON  
NEWSPAPER PUBLISHERS ASSOCIATION, SOUND PUBLISHING,  
INC., TACOMA NEWS, INC. (“THE NEWS TRIBUNE,”) and THE  
SEATTLE TIMES,

Plaintiffs/Respondents/Cross-Appellants

v.

THE WASHINGTON STATE LEGISLATURE; THE WASHINGTON  
STATE SENATE, THE WASHINGTON STATE HOUSE OF  
REPRESENTATIVES, Washington state agencies; and SENATE  
MAJORITY LEADER MARK SCHOESLER, HOUSE SPEAKER  
FRANK CHOPP, SENATE MINORITY LEADER SHARON NELSON,  
and HOUSE MINORITY LEADER DAN KRISTIANSSEN,

Defendants/Appellants and Cross-Respondents

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**MEDIA CROSS-APPELLANTS/RESPONDENTS THE  
ASSOCIATED PRESS, NORTHWEST NEWS NETWORK, KING-  
TV, KIRO 7, ALLIED DAILY NEWSPAPERS OF WASHINGTON,  
THE SPOKESMAN-REVIEW, WASHINGTON NEWSPAPER  
PUBLISHERS ASSOCIATION, SOUND PUBLISHING, INC.,  
TACOMA NEWS, INC. and THE SEATTLE TIMES’  
ANSWER TO ALL AMICI CURIAE BRIEFS**

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## I. ARGUMENT AND AUTHORITY

This cross-appeal concerns whether the trial court erred in determining that the four individual legislators, named here as defendants, were “agencies” under the Public Record Act (“PRA”), and that the House of Representatives, State Senate, and State Legislature were not “agencies” under the PRA. All Amici Curiae agree with the Media Cross-Appellants and the trial court that the offices of the individual legislators are “agencies”. Three of the Amici agree with the Media Cross-Appellants that the House, Senate and Legislature are agencies under the PRA. Amicus Curiae the Attorney General of Washington (“ATG”) contends the Legislature as a “unified branch of government” is not an agency subject to the PRA but that the House and Senate are covered by the PRA but solely through the provision applicable to the Offices of the House Clerk and Senate Secretary. This brief responds to all four Amici briefs but focuses on the ATG’s disagreements with the Media Cross-Appellants’ positions.

### A. Standard of Review

The appellate court reviews issues of statutory construction de novo. **State v. Dennis**, 191 Wn.2d 169, 172, 421 P.3d 944 (2018). The Court’s fundamental objective when interpreting the PRA is to ascertain and carry out the intent of the people in enacting the original measure and

the Legislature in subsequently amending and recodifying it. **Robbins Geller v. State**, 179 Wn. App. 711, 720, 328 P.3d 905 (2014). Courts are to avoid interpreting the PRA in a way that would frustrate its purpose. **Worthington v Westnet**, 182 Wn.2d 500, 507, 341 P.3d 995 (2015); **Amren v. City of Kalama**, 131 Wn.2d 25, 31, 929 P.2d 389 (1997).

The PRA is to be “liberally construed and its exemptions narrowly construed” to ensure the public’s interest in “full access” to government information is protected. RCW 42.56.030. As this Court stated:

We interpret the [PRA] liberally to promote full disclosure of government activity that the people might know how their representatives have executed the public trust placed in them and so hold them accountable.

**Spokane Research & Defense Fund v. City of Spokane**, 155 Wn.2d 89, 100, 117 P.3d 1117 (2003).

The PRA itself further states its intended purpose, to be effectuated by this Court’s statutory interpretation. In 1992, the Legislature amended the Act to add the following mandate, now found at RCW 42.56.030, and in 1992 found at RCW 42.17.251:

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**. The public records

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

(emphasis added).

**B. The PRA Definitions Include the Legislature, House and Senate.**

The PRA today—and back when it was passed as Initiative 276 (“I-276”) by the people in 1972—requires “all state agencies and all local agencies” to produce public records, broadly defined. RCW 42.56.010, originally codified as RCW 42.17.020. “‘State agency’ includes every state office, department, division, bureau, board, commission, or other state agency.” RCW 42.56.010(1). The provision ends with the unlimited language of “or other state agency” showing the list is illustrative and not exclusive. Thus broadly construing the PRA, as is required, the Court is to conclude the terms listed are illustrations of what is meant by “agency” and not the exhaustive list.

When terms are undefined, as most of the above terms are in the PRA, the Court may use common dictionary definitions to assess their meaning. **Nissen v. Pierce County**, 183 Wn.2d 863, 881, 357 P.3d 45 (2015). In 1995, the term “state office” was defined in the definition section of the Act and included specifically the office of each Senator and Representative. The other terms—office, department, division, bureau,

board, and commission—included within the definition of “state agency” were not defined and instead rely on their common understanding and meaning. As Amici ACLU et al. points out, those stated terms—office, department, division, bureau, board, and commission—would logically encompass the House, Senate, Legislature and its various subparts. See dictionary definitions at ACLU Amici Br. at 7-12.

Further, it cannot reasonably be disputed that the people who passed I-276 meant for the law to apply to all public officials, all public employees, and all parts of state and local government regardless of which “branch” of government the person or entity was encompassed. The Initiative came a year after the Legislature’s efforts to create a repository of certain defined “legislative records” with the offices of the Chief Clerk of the House and Secretary of the Senate—clearly indicating that the Legislature’s 1971 action was not sufficient in the public’s mind since it passed a much broader Initiative the next year. I-276 required all state, county, and city governments to allow and provide access to their records and required disclosure of all political campaign and lobbying contributions and expenditures as well as full access to information concerning the conduct of government. CP 228-249. The measure became the Public Disclosure Act and was codified at RCW 42.17 et seq. in 1973. I-276’s declaration of policy included the following:

SECTION 1. Declaration of Policy. It is hereby declared by the sovereign people to be the public policy of the State of Washington: ...

(2) That the people have the right to expect from their **elected representatives at all levels of government** the utmost of integrity, honesty and fairness in their dealings.

(3) That the people shall be assured that the private financial dealings of their **public officials**, and of candidates for those offices, present no conflict of interest between the public trust and private interests....

(5) **That public confidence in government at all levels is essential and must be promoted by all possible means.**

(6) That public confidence in government **at all levels** can best be sustained by assuring the people of the impartiality and honesty of the officials in all public transactions and **decisions**....

(11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, **full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.**

The provisions of this act shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and **full access to public records so as to assure continuing public confidence in fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.**

CP 228-249 (emphasis added).

I-276 mandated that “Each agency, in accordance with published rules, shall make available for public inspection and copying all public records.” I-276 defined public record as follows: “‘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.” I-276 defined “state agency” as follows: “‘State agency’ includes **every state office, public official, department, division, bureau, board, commission or other state agency.** (emphasis added). The underlying terms “state office, public official, department, division, bureau, board, commission or other state agency” were not defined.

In 1977, the Legislature amended the definition of “agency” in the Act to remove the words “public official” but kept the remaining parts of the definition. The bill summary made clear the edit was “to be more specific in **encompassing all governmental units at each level of state and local government.**” CP 250-292 (emphasis added). There was no indication that any branch of government was to be omitted from the reach of the Act, or that anyone thought it was, particularly given the bill summary that the Act would still encompass “all governmental units at each level of state and local government.”

In 1992 the Legislature amended the Act again to adopt the purpose and construction language now found at RCW 42.56.030:

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**. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

(emphasis added).

And in 1995 the Legislature amended the Act again in part with the language that is at the center of the dispute by defining the term “state office” to include the office of each Senator and Representative. ESSB 5684; CP 123-124 at ¶(1); CP 132 at ¶¶(38)-(39).

So the 1995 amendment made clear that “**the office of a member of the state house of representatives or the office of a member of the state senate**” was a “**state agency**,” and the amendment continued to require “**state agencies**” to **comply with the Act and produce public records**, which continued to be defined as “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.” CP 132 at ¶(36). Thus, the 1995 amendment further established that the individual offices of each Senator and Representative were state agencies under the Act and that those agencies had to respond to and produce records under the Act under the broad definition of “public

records” that applies to all other state agencies. The amendment did not define the terms “department, division, bureau, board, [or] commission”, the other terms constituting a “state agency.”

The ATG appears to acknowledge that within the Legislature there are “legislative agencies” that are subject to the PRA as “state agencies”. See ATG Amicus Br. at 12 fn. 4. The ATG contends, however, that as a “unified branch of government,” the Legislature is not subject to the Act, apparently because neither Senate or House can act alone to legislate, and that the Governor is part of the Legislature since he or she must approve or disprove legislation. ATG Amicus Br. at 6-7.

Nothing in the text of the legislation suggests that the people ever intended for the PRA to **only** apply to the Executive Branch of State government or for it **not** to apply to the Legislative Branch as a “unified branch of government” as the ATG qualifies its position. Nothing in any of the PRA amendments passed by the Legislature (and not overridden by veto)<sup>1</sup> suggest the members voting for the amendments had any intention to remove the Legislature from the reach of the PRA or understanding that that was what they were attempting. As Amici Reporters Committee (“RCFP”) document, public record laws in other states either apply to state

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<sup>1</sup> See ESB 6617 (2018), vetoed by the Governor, attempting to exempt the Legislative branch available at <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/6617.PL.pdf> (last visited 5/28/19).

legislatures or explicitly exempt their legislatures, RCFP Amici Br. at 11-14. The only explicit statement in Washington legislation regarding exempting the Legislature, Senate, House or Legislators was in amendments in 2003, 2005 and 2019 none of which passed, and in a 2018 amendment that was vetoed and the veto was not overridden.

The ATG, like the Defendants in this case, next relies on this Court's decisions deeming the PRA not to apply to the Judicial Branch as a basis for its contention that the PRA cannot, despite its language and clear intent, apply to the Legislative Branch (at least as a "unified branch of government" as the ATG qualifies its position.) None of those cases justify a reading removing the Legislature from the reach of the PRA.

A key basis of this Court's rationale in the trio of cases declaring the judiciary outside of the PRA was the fact that the public had a right and means to obtain the records being sought that was certain and stronger than the rights afforded by the PRA.

In **Nast v. Michels**, 107 Wn.2d 300, 730 P.2d 54 (1986), the Court held that the PRA did not apply to requests for court case files noting that the public already was guaranteed a more immediate right of access to such records under the common law.

In **City of Federal Way v. Koenig**, 167 Wn.2d 341, 217 P.3d 1172 (2009), decided October 15, 2009, the Court declined to overrule

**Nast** finding the appellant had not shown the established rule was “incorrect or harmful.”

In **Koenig**, the requestor was seeking correspondence involving Federal Way Municipal Court Judge Michael Morgan related to his resignation following a workplace harassment investigation. Of importance, two months before this Court’s decision in **Koenig**, this Court issued its August 20, 2009 decision in **Morgan v. City of Federal Way**, 166 Wn.2d 747, 213 P.3d 596 (2009), where it overturned an injunction granted to this same Judge Morgan and ordered the City of Federal Way to produce a copy of the City’s investigation of the workplace harassment complaint made by a City employee against the Judge which led to his resignation as well as the Judge’s emails to a City Councilmember and a City Attorney. This Court held the records at issue in **Morgan** to be City records, and rejected all Judge Morgan’s claims of exemptions. **Id.**

The third case in the trio is **Yakima v. Yakima Herald-Republic**, 170 Wn.2d 775, 246 P.3d 768 (2011), argued just six months after the **Koenig** decision. The **Yakima** case dealt with the newspaper’s request for attorney billing records submitted by public defenders to a Yakima Superior Court budget judge for approval and forwarding for reimbursement by Yakima County in two murder trials. While the Court again confirmed its conviction that the PRA did not apply to records held

within the judicial branch, it held the records did not fall into a “black hole” as the records that were held outside of the Court, such as with the County, were fully accessible under the PRA. **Id.**

It is important that **Nast, Koenig** and **Yakima** be considered in context when evaluating their value to the analysis in this current appeal. In all three cases the Court’s ruling focused on the fact that the records being sought were available in some other manner. In **Nast** it was through the common law and the strong rights of immediate access to court records – a right even stronger today than at the time of **Nast** in light of continuing development of the Constitutional right of access to court records and court proceedings under Article I, Section 10 of the Washington Constitution and the First Amendment to the United States Constitution. In all three cases since they dealt with the judiciary there were Constitutional protections securing access to court case files, forbidding ex parte contacts with judges and assuring that all records impacting decision-making be made part of the court case files. In **Koenig**, where a requestor wanted records related to a judge’s resignation following a workplace harassment complaint, the requestor was denied that communication when it resided with the Court, but two months before the public had been declared to have the right under the PRA to the workplace harassment investigation report itself as well as the emails between the

Judge and a City Councilmember and a City Attorney. There was no “black hole” to swallow up the workplace harassment complaint or related records, and in fact there further was a designated public body, the Judicial Conduct Commission, charged with receiving complaints and investigating and publishing results of such investigations.

In Yakima the Court held that while the newspaper could not obtain attorney bills through the PRA that were sealed in the court file that the newspaper had a right to move to unseal court records under the court rules and Article I Section 10 of the Washington Constitution, and that the newspaper could obtain through the PRA any records held outside the court, such as with Yakima County which was the entity to pay the attorney bills.

In this appeal here, which seeks emails, texts, and calendars of legislators and records related to workplace harassment complaints and responses thereto, there was, and still is, no accessible, accountable public body to investigate the complaints and act on them and release the records to the public. There is no protection, like there is with the judiciary, that ex parte contacts that affect decision-making will be made part of an official public record so the public can assess what or who is influencing decisions. In short, this case does involve the “black hole” this Court found did not exist when it rejected access to the attorney billing records

from the courts in Yakima but authorized their access from the County instead. There is no other means of obtaining the records other than the PRA or relying on the good will and whim of the legislators to choose to disclose them. The protections the ATG mentions merely preserve the public hearings, public legislation versions introduced, public votes during public hearings, and whatever material legislators choose to make a part of the official public legislative record. Those protections do not reach and do not encompass the harassment complaints and resulting action, or lack of action, or the other records sought by the Media Cross-Appellants PRA requests here.

Further, the 1992 Amendment—referring to “agencies” that serve the people, denying “public servants” the right to decide what the people should know, and insisting on the public remaining informed “so they may control the instruments they have created”—indicates a broad meaning of the word “agencies” to cover all “public servants” and “all instruments” the people have created, including the Legislative Branch and all its subparts. RCW 42.56.030, and in 1992 found at RCW 42.17.251. Nothing in the text suggests an intention to narrow the meaning of “agencies” to exclude the Legislature, Senate or House or any of its subparts.

The Media Cross-Appellants in its appellate briefing has further offered evidence of the many other times the State or others, including in

other State and Federal Statutes, has used the term “agency” to refer to the Legislature, Senate or House. The Media Cross-Appellants did so to show that that usage was a common, and typical, one, and thus a normal and reasonable one for those who voted for Initiative 276 to apply to the Legislature, Senate and House, and for the amending legislators to also apply to the term over the past four decades. The ATG’s brief does not address any of those other usages. Further, the ATG, like the defendants, has identified no place in the legislative history or language of the Amendments that actually passed, and were not vetoed,<sup>2</sup> where any amendment was stated to intend to exclude the Legislature, Senate or House from the definition of agency, or any claim those entities were not included as agencies.

The ATG next argues that the Senate and House are subject to the PRA but only through the provision applying to the Clerk and Secretary. The ATG has not taken a position whether the public record obligations of the Clerk and Secretary are narrower than for entities defined as “agencies”. As Amici RCFP points out, the language of RCW 42.56.010 as it relates to the Clerk and Secretary does not preclude a broader definition as it uses the words “and also the following”—indicating an

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<sup>2</sup> See ESB 6617 (2018), vetoed by the Governor available at <http://lawfilesexxt.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/6617.PL.pdf> (last visited 5/28/19).

illustrative and expanding list and not the exclusive records to be produced. See RCFP Amici Br. at 15. If the ATG means to argue the Senate and House are only subject to the PRA through the Clerk and Secretary, and that the records to be produced are limited to just those actually itemized in this non-exclusive list, the ATG is wrong for the same reasons its is wrong about the Legislative Branch not being an agency under the PRA. The same legislative language described above shows the public and amending legislators intended the PRA to apply to all officials from all parts of state and local government. Contrary to the ATG's claim, the Media Cross-Appellants do not argue that the Offices of the Clerk and Secretary are not part of the Legislature or, respectively, the House or Senate. Rather, the Media Cross-Appellants explain why the 1995 amendment added specific obligations for the Clerk and Secretary but did not remove the Senate or House as agencies under the PRA. As Amici ACLU illustrates in its brief, the disclosure obligations under the PRA are found at RCW 42.56.070(1) and RCW 42.56.080(2) – both of which mention “agencies” but do not separately mention the Offices of the Chief Clerk of the House or Secretary of the Senate. ACLU Amici Br. at 13-19. RCW 42.56.010(3) is not a disclosure statute, but a definition section. If the ATG contends that the Clerk and Secretary are not “agencies” and that the Senate and House are only subject to the PRA through the Clerk and

Secretary in the manner stated in Section .010(3), then that would mean that the Secretary and Clerk, and Senate and House, could not avail themselves of the numerous exemptions catalogued by way of example by ACLU in its brief as those exemptions are only available to “agencies.” ACLU Amici Br. at 14-19. The sentences added to the definition of “public record” for the office of the clerk and secretary read as follows:

**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.

The ATG finds that the failure to name the House and Senate and instead to state just the Offices of the Clerk and Secretary meant the Senate and House were not otherwise subject to the PRA. The trial court here held that it was reasonable to hold that the Legislature, Senate and House fell within the definition of “division” or that the definition of “State Legislative Offices” could reasonably include the Legislature and its chambers as well, but like the ATG, it contended that solely because the Legislature listed the Office of the Secretary and Office of the Clerk in the 1995 Amendment but did not identify them as “agencies” but by name that the entities were not otherwise included in the Act. This assigns too

much importance to this addition. As explained in the Media's Opening Brief, the narrower duties for the Clerk and Secretary, and their specific inclusion in the PRA by name, was in conjunction with the companion addition of a definition for "State Office" making it clear that the individual offices of the Senators and Representatives were "agencies" under the law and subject to the broader PRA record definition and production duties. The Amendment also came on the heels of a public scandal and public mistrust of the Legislature following the prosecution of staff for performing campaign activities for Legislators while being paid by tax payers to perform other Legislative work duties they were not in fact performing. The 1995 Amendment was a compromise to impose certain duties on the Clerk and Secretary but to reduce their obligation to gather records from the individual Legislators over whom they had no real control.

The separate references to these two staff offices within the Legislature was an insufficient basis to find the Legislature, Senate and House could not fall within the definition of "state office, department, division, bureau, board, commission, or other state agency" that are included in the definition of "state agency" in RCW 42.56.010.

The Legislature, Senate and House are each agencies with many subparts, all of which meet the definition of agency and all of which are

subject to the PRA.

## II. CONCLUSION

For the foregoing reasons, the Court should uphold the trial court's determination that the individual Legislators are agencies under the PRA and have violated the PRA, but reverse the trial court's finding that the Legislature, Senate or House are not agencies under the PRA or subject to the PRA. The Court should further award the Media its reasonable fees and costs for the work on the appeal and remand to the trial court for a determination of the award of trial court fees, costs and penalties which the Media is thus due and to have the records finally produced.

RESPECTFULLY SUBMITTED this 28th day of May, 2019.



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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on May 28, 2019, I filed with the State Supreme Court and delivered through the Court's portal a copy of the foregoing Brief and this Certificate of Service by email pursuant to agreement to the following:

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### Comments:

Corrected -- includes TOC and TOA

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