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December 21, 2012

Via E-mail and First Class Mail
The Honorable Barbara Madsen
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504

Dear Chief Justice Madsen,

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The American Civil Liberties Union of Washington Foundation (ACLU) welcomes this opportunity to comment on Proposed General Rule 31.1 (GR 31.1). We are a statewide, non-partisan, non-profit organization with over 20,000 members, dedicated to the preservation and defense of constitutional and civil liberties. One of those civil liberties is the right of access to information about our government, necessary to allow public oversight of government workings. Another civil liberty is the right to personal privacy, and the right to control the dissemination of information about one's private life. The ACLU has advanced both of these liberties, participating in numerous cases involving the Public Records Act as *amicus curiae*, as counsel to parties, and as a party itself. In addition to litigation, the ACLU has participated in legislative and rule-making procedures surrounding access to a wide variety of public records, including judicial records.

We continue to be pleased that the Court is considering adoption of a rule governing access to judicial administrative records. Public access to those records is already guaranteed through the common law, or as a constitutional right, but we believe that both judicial entities and the public will be well served by a clear rule providing for consistent procedures and exemptions across judicial entities. Our state's experience with the Public Records Act (PRA), Chapter 42.56 RCW, demonstrates the value added by codification of the common law right of access. In the nearly four decades since the PRA was enacted by a vote of the people, it has become a central tool used by members of the public (including the media and advocacy organizations) for oversight of the operation of a wide variety of public agencies. If properly drafted, we foresee GR 31.1 providing similar benefits for oversight of the operation of courts and judicial agencies.

The ACLU provided input to the work group that created the first drafts of what is now GR 31.1. We have also submitted multiple comments as the draft has worked its way towards adoption, including comments to this Court last year (when the rule was proposed as GR 31A). We are pleased to see some of our concerns addressed in the latest draft, especially with the new section (e), providing a method for record subjects to assert privacy rights. We fear, however, that some of the other changes made in the latest draft have substantially weakened the rule overall. We therefore

urge the Court to modify some sections of GR 31.1, as described below. The modifications will improve the rule by providing both a greater degree of public access and a greater degree of privacy protection.

Effective Review Process

One of the strengths of the PRA is its effective review process. Of course, most public records requests are properly handled by agencies, and we expect that will be true for judicial entities as well. Nonetheless, there will undoubtedly be some instances in which records are wrongfully withheld, perhaps due to misinterpretation of the scope of an exemption. This is not surprising, since a particular agency may find it hard to objectively evaluate the various interests at issue. It is only natural that an agency will have some degree of bias, perhaps subconscious, towards the agency's own interests, or those of the agency's employees or clients, and consequently underappreciate the public's interest in transparency and oversight. Effective review of an agency's decision by a neutral party is therefore essential to a meaningful public access rule.

An effective review scheme must also accommodate the wide variety of records requesters, who come with varying resources and interests. Some have considerable legal expertise and financial resources; others have neither. In some instances, requesters have a very strong urge to obtain documents, and are willing to fight at length if necessary to obtain them; in other cases, the desire for documents is more casual, and the requester is willing to accept a denial as long as it reasonably justified.

GR 31A drew upon years of experience with the PRA to propose a scheme to accommodate all of these interests. One track of review was most suited for the more casual requester; it provided for prompt and final review by a neutral external party. The other track was slower, but more thorough, involving both internal agency review and subsequent judicial review; it was suitable for the more sophisticated and determined requesters. Both tracks avoided some of the pitfalls of the PRA, by ensuring that agencies were given the opportunity to correct mistakes, and limiting the possibility of financial windfall to a requester.

This carefully crafted scheme is uprooted in GR 31.1. There is now no quick way to obtain external review; section (d)(4) requires all requesters to first exhaust the internal review process. There are also tight deadlines for both steps of the review; a requester has 90 days to seek internal review, (d)(2), and just 30 days to seek external review, (d)(4)(iv). For a relatively unsophisticated and casual requester, the likely result is that review by a neutral party will never be obtained; it is just too difficult to get to that outside decision maker.

In some ways, the situation is even worse for a determined requester. In order to obtain judicial review, under section (d)(4)(i) the requester will need to figure out (within 30 days) the intricacies of an unusual legal process (judicial writ), rather than filing an ordinary civil action. This is likely to entail considerable costs and legal expenses, but (d)(4)(iii) prohibits recovery of those expenses under all

circumstances—even if the court determines the request is totally meritorious and the judicial agency denied the request in bad faith. The result is that very few requesters will have both the determination and resources to fight to vindicate their rights of access.

The combined effect of these provisions is to make denials of records requests practically unreviewable. An agency can effectively stonewall a requester, and wear the requester down by attrition. Even if the requester eventually succeeds in obtaining the records, it may well be a Pyrrhic victory. The agency, on the other hand, runs little risk by improperly denying records requests. It can easily delay disclosure for extended periods, and faces no penalties for doing so. In fact, the proposed GR 31.1 rule provides only one type of sanction: section (f) raises the possibility of discipline, but only for actions taken in bad faith, and only via a separate disciplinary proceeding conducted by a third party—not the external reviewer of a request.

This system provides no incentive for an agency to properly disclose records, and instead encourages violations of the rule. By so doing, it significantly undercuts the value of the rule as a whole. The ACLU strongly urges the Court to return to a scheme similar to that proposed in GR 31A—one that provides strong incentives for judicial entities to comply with the rule, while also discouraging requesters from abusing the system.

Interaction with the PRA

It is our understanding that the rule is intended to incorporate the exemptions found in the PRA, as indicated in the comment to section (j), as well as the comment to section (l)(5). We fear, however, that the new language of section (j) fails to accomplish that goal. The PRA, by this Court's determination, does not apply to judicial records, including administrative records. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009). Therefore, it is insufficient for section (j) to simply refer to information "exempted or prohibited under ... the Public Records Act"—*no* information in judicial records is exempted by the PRA. This is probably most important for a variety of information exempted from disclosure for privacy reasons. For example, RCW 42.56.230(5) exempts financial account numbers *in public records* from disclosure; it is necessary to similarly exempt account numbers *in judicial administrative records* from disclosure.

We urge a return to language similar to that used in GR 31A: "To the extent that records access would be exempt if the Public Records Act, Chapter 42.56 RCW, applied to judicial administrative records, access is also exempt or prohibited by this rule."

Protection of Personal Privacy

Most of the time there is no conflict between privacy and access to public records. Indeed, open access to government documents is necessary to ensure that the government respects the privacy guaranteed to and demanded by its constituents.

When government maintains personal information, however, disclosure of that information may violate individuals' privacy. We are therefore pleased to see that GR 31.1 recognizes that some limits on access to judicial administrative records are necessary in order to protect personal privacy. We are disappointed, however, that section (a) no longer references the Washington Constitution. Privacy is a constitutionally protected right, as recognized by this Court in many cases. This right is sometimes explicitly based on Article 1, Section 7, and other times simply referred to as "constitutional right to privacy." *See, e.g., Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, P.2d 1258 (1993); *Peninsula Counseling Ctr. v. Rahm*, 105 Wn.2d 929, 719 P.2d 926 (1986). We therefore urge the Court to restore a reference to the Constitution in section (a), perhaps saying "... reasonable expectations of personal privacy as provided in the Washington State Constitution, restrictions in statutes..."

We also urge greater clarity in sections of the rule that provide substantive privacy rights. We are pleased to see that section (j) provides for substantive general privacy by requiring redaction of identifying details when needed to protect privacy. We fear, however, that the reference is a little unclear, and may eventually be interpreted to be procedural in nature, rather than substantive.

A look at the history of the PRA explains both this fear and the harm that could result from such an interpretation. When the PRA was passed by initiative in 1972, the voters specifically stated that the purpose was to assure "full access to information concerning the conduct of government" and that access must be "mindful of the right of individuals to privacy." By this reasoning, personal information that does not advance the oversight of government conduct should not be disclosed to the public.

Twenty-five years ago, this Court properly evaluated those competing interests in the PRA, and established a balancing test for personal information, permitting nondisclosure of public records if the privacy interest in those records outweighs the public interest in disclosure. *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986). Similar tests have been prescribed by this Court for determining whether court proceedings and records should be available to the public. *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981); *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

Regrettably, the Legislature chose to amend the PRA in response to *Rosier*, and eliminated both the generalized privacy exemption and the balancing test used to evaluate privacy interests. Laws of 1987, ch. 403 (now codified as RCW 42.56.050). It is quite possible that this legislative amendment has contributed to the proliferation of exemptions added to the PRA over the past 25 years—since there is no longer a generalized privacy exemption, the Legislature has been forced to regularly add specific exemptions when it becomes aware of new types of personal information maintained in public records.

Protection of personal privacy has thus become a cumbersome and haphazard process. In order for the Legislature to act to protect personal information, it must

first learn that such information exists in public records, which typically happens only when some individual, agency, or advocacy organization is successful in catching the Legislature's attention.[1] And, of course, even when the Legislature is aware of the existence of personal information (and the need to protect it), passage of a bill is subject to the vagaries of politics and competing priorities. The result is that it may be years before any particular personal information is protected, quite often long after such information has been released to a requester and the damage has already been done.

The ACLU urges this Court to avoid the path followed by the PRA and instead ensure that GR 31.1 contains a clear directive that follows the judicial tradition of balancing privacy interests against the public interest in disclosure. It must be remembered that "the basic purpose and policy of [public access to records] is to allow public scrutiny of government, rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation." *Rosier*, 105 Wn.2d at 611.

We suggest the creation of a new section following the existing section (l):

> PROTECTION OF PERSONAL PRIVACY. The basic purpose and policy of public access to court and judicial agency administrative records is to allow public scrutiny of government, rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation. Consistent with the Washington State Constitution, and in order to protect personal privacy, a court or judicial agency need not allow access to information in administrative records when the personal privacy interest in that information outweighs the public interest in disclosure, whether or not the information is explicitly covered by an exemption in sections (j) and (l) above. Consistent with section (j), access must be provided to the remaining portions of the administrative records, with only as much information deleted as is necessary to protect personal privacy.

Adoption of such a provision would ensure that personal privacy remains protected even when the need arises for new personal information to be collected or maintained by a court or judicial agency. And it would avoid the need for frequent updating of the court rule, which involves a process even more cumbersome than legislative amendments to the PRA.

Fees Imposed on Requesters

Another significant difference between the PRA and GR 31.1 regards the cost of fulfilling requests. The PRA strictly limits fees to copying costs only. RCW 42.56.120. In contrast, section (h)(4) of GR 31.1 would allow charging requesters up to $30/hour to fulfill requests (with the first hour free). This charge

[1] There is no proactive mechanism for the Legislature to discover what personal information is held by government agencies and determine whether that information should be protected from public disclosure. The Legislature has so far declined to order a survey of personal information in state-held records, let alone in records held by local governments. *See, e.g.*, Senate Bill 5869 (2007).

could be a serious deterrent to members of the public attempting to fulfill their oversight role.

It is undoubtedly true that fulfilling many, perhaps most, requests will not exceed an hour's time, so no charge will apply. But those requests that are most likely to have a useful oversight purpose, uncovering instances of improper or wasteful government actions, often involve more complex records searches and production. This Court should not adopt a rule that creates a barrier to those requests.

At a minimum, if fees are to be charged at all, there must be a robust waiver mechanism to allow the media, public interest organizations, scholars, and researchers to pursue investigations of government activity. This is the approach taken by the federal Freedom of Information Act (FOIA). 5 U.S.C. 552(a)(4)(A)(ii). Experience with FOIA shows, however, that this is a deeply flawed approach to the problem, and leads to a significant number of disputes. Effort in applying for, evaluating, and settling disputes about the applicability of fee waivers may well exceed the amount of funds recovered through such fees—and it turns agencies and the public into adversaries, rather than joint participants in improving our government.

It should be noted that GR 31.1 already provides a mechanism for courts and judicial agencies to handle complicated requests without using fees to discourage such requests. Section (c)(6) allows a judicial entity to prioritize requests, and negotiate narrowed or delayed responses, so as not to unduly interfere with the other operations of the court or judicial agency. This is a much better solution than erecting financial barriers to effective public oversight.

The ACLU itself has significant experience as a requester of public records, under both the PRA and the federal Freedom of Information Act (FOIA). We can confidently state that the PRA works much better than FOIA; it provides greater transparency into government activity, and engenders fewer disputes. We strongly urge this Court to continue our state's commitment to open records, and reject the barriers to access to public records created by section (h)(4).

Retroactivity

Finally, section (o) provides that GR 31.1 shall apply only to records created on or after the effective date of the rule. The ACLU believes this provision is unwise and unworkable, and strongly urges this Court to amend the section so it will apply to all records *requests* made after the effective date. In other words, the rule should retroactively apply to older records. This was the approach taken by both the PRA and FOIA, and there is no good reason for a different approach to apply to judicial administrative records.

Implementation of different access rules depending on the date of record creation would confuse members of the public trying to access records and would be an administrative nightmare. Judicial entities would need to develop two sets of access

procedures, and train staff on two different methods of responding to access requests. Members of the public would have to figure out which method applied. This is, of course, mostly an issue when the records request is denied (in full or in part). The appeals mechanism might be radically different depending on whether a record was created before or after the effective date of the rule, and the cost of pursuing an appeal may similarly be radically different.

To further complicate the situation, it would not always be clear which set of rules would apply. Requesters may not know the date a record was created; even the judicial entities maintaining that record may not know the creation date until after the record has been located. So how is either party supposed to know which procedure to follow? Some records requests will be for multiple records, some older and some newer; does that mean that public access will require two separate records requests? In some cases, a single record may have been created prior to the effective date of the rule, but then modified subsequent to that date; which set of rules should apply?

Compared to this cost (in both implementation/training and confusion), there is no significant downside to a simple rule that applies to all records. At most there is a speculative risk that some information in older records will be disclosed under GR 31.1 that would not be disclosed under the common law. It is unclear to the ACLU exactly what that information would be. The primary purposes of GR 31.1 are to provide clear procedures for accessing records, to clarify the existing common law, and to eliminate uncertainty in its application. We do not believe that GR 31.1 is supposed to substantively increase the amount and types of information available—after all, the existing common law already allows access to administrative records except in narrow circumstances. In any event, if there actually is some information that should be protected, the same concerns will probably exist for records created after the effective date of the rule. In other words, the solution to this hypothetical problem is to add additional exemptions to GR 31.1, presuming the need for nondisclosure can be justified.

In summary, the ACLU supports adoption of a rule to provide clarity to both judicial entities and members of the public regarding access to judicial administrative records, and provides an effective access procedure. We fear, however, that the current draft of GR 31.1 fails to achieve those goals. A few modifications, as suggested above, can be made to effectuate a workable system for public access to judicial administrative records. We strongly urge the Court to make those modifications before adoption of GR 31.1. Thank you for your consideration of the above suggestions.

Sincerely,

Sarah Dunne

Sarah Dunne
Legal Director