

December 31, 2012

VIA EMAIL and U.S. MAIL
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Mr. Ronald R. Carpenter, Clerk
Washington Supreme Court
Temple of Justice
P.O. Box 40929
415 12th Avenue S.W.
Olympia, WA 98504-0929

Re: Allied Daily Newspapers of Washington (ADNW)
Comments on and Revisions to Proposed GR 31.1

Mr. Carpenter:

Allied Daily Newspapers of Washington (ADNW) is pleased that the Washington Supreme Court has published proposed GR 31.1 for further comment. The changes from the original proposal, GR 31A, are a significant improvement.

ADNW requests that the Court make the following revisions consistent with the Policy and Purpose of the proposed rule:

GR 31.1(a). Replace the phrase “reasonable expectations of” personal privacy with the phrase “exemptions for” personal privacy. “Exemptions” is an objective standard for personal privacy, whereas “reasonable expectations” allows for a range of subjectivity depending on the decision-maker.

GR 31.1(c)(4). Insert the word “promptly” after the words “must communicate.” Promptness is consistent with the PRA and is necessary to underscore the need for public records officers and others to address public records requests in a very timely matter, not as a low priority behind other official duties.

GR 31.1(c)(7). Insert the phrase “pursuant to section (c)(7)(iii)” in the first sentence of section (c)(7)(iv) so that it reads: “In deciding whether to enjoin a records request pursuant to section (c)(7)(iii) the court may consider all relevant factors including, ...” This addition is needed to clarify that section (c)(7)(iv) is not a separate basis for enjoining a records request.

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GR 31.1(d). The requirements regarding access to public records only work effectively and efficiently when a civil action can be brought for delay, diversion, or outright refusal to release non-exempt records and attorney fees and costs are awarded to a prevailing requestor. Consequently, subsection (d)(4) should allow for a civil action in court and subsection (d)(4)(iii) should allow for attorney fees, costs, and civil penalties to a prevailing requestor under external review. The unfamiliar, narrow, and expensive writ process is not an effective method for redress when records are improperly withheld.

GR 31.1(e). Court or agency administrative records are public records, not personal records that a court or agency holds as custodian for an individual.

A court or judicial agency having an “administrative record” as defined in GR 31.1(i)(2) is responsible for making the determination and defending its decision as to whether a public record is exempt or not, not a person who is named in the record. Such persons have no independent rights regarding use or disclosure of court or judicial agency records. Consequently, a person named in the record should not be able to independently initiate a review if a court or judicial agency decides to allow access to a requested record nor should a person who is named in the record be allowed to veto a requester’s decision to seek administrative review. If a court or judicial agency wants to notify a person named in the record that access to such record has been requested that is the prerogative of a court or judicial agency. However, such notice should not delay the obligations of a court or judicial agency to respond to the records request as set forth in GR 31.1(c) or conduct a review pursuant to GR 31.1(d). Too often the erroneous premise that an individual named in the record has a personal right to control or limit public access to a court or agency’s administrative records is used to deter or prevent access by creating delay and expense. In addition, the prevailing requestor has no recourse against the interfering person to recover attorney’s fees, costs, or civil penalties for delay and denial.

This subsection should be deleted in its entirety.

GR 31.1(k). Proposed GR 31.1 is a court rule governing public disclosure of administrative records of *all* judicial agencies, which means the courts and their subsidiary administrative agencies, including the Washington State Bar Association and any special programs of short- or long-duration created by the judicial system to administer or aid in the administration of justice. The WSBA should be treated like all judicial branch agencies and be subject to GR 31.1.

Because all courts, judicial agencies, and programs are governed by GR 31.1, GR 31.1 is where all exemptions to public disclosure for these agencies will be listed. Some exemptions are general in nature, such as the exemption for release of home contact information, and are common to all judicial agencies. Where judicial agencies, such as the WSBA, require a specific exemption from the release of public records as governed by GR 31.1, such as a prohibition on release of Bar examination questions, examination scoring keys, and the identity of proctors, the specific exemption should be set forth in GR 31.1(l) rather than in a separate rule.

If an agency, such as the WSBA, attempts to exempt itself of GR 31.1 and create its own General Rule or separate agency rules, it will likely create resentment on the part of Bar members, other judicial agencies, or the public. It will certainly lead to confusion, litigation, and further actions by this Court as other judicial agencies seek to carve themselves out of GR 31.1. The statement of principles, administration, appeals and compliance with regard to administrative records of the courts and judicial agencies are all stated as coherently and succinctly as possible in GR 31.1 and have taken years of this Court's time and years of effort by many participants in the judicial system and the public to propose, edit, refine, and, hopefully, adopt a uniform rule. When an agency, such as the WSBA, attempts to hold itself apart, it must necessarily reinvent a version of GR 31.1 in an equally lengthy and equally arduous process subjecting other judicial agencies and the public as well as this Court to a separate review process of whatever formulation their governing rule they might seek. It is impractical, disruptive, and unnecessary to embark on such an effort when GR 31.1 can address any judicial agency's need for agency-specific exemptions to be incorporated in GR 31.1's framework.

Requests for records of the WSBA should be processed and reviewed in the same manner as other judicial agencies and the same standards should apply. Consequently, subsection (k) should be deleted.

Respectfully submitted,

Davis Wright Tremaine LLP


Michael J. Killeen

cc: Mr. Rowland Thompson, Executive Director, ADNW