Johnston George LLP
a Northwest Law Firm

2800 1st Avenue, Suite 226
Seattle, WA 98121
Phone: 206 832-1820
Fax: 206 770-6393
kathy@johnstongeorge.com

April 30, 2025

Honorable Mary I. Yu, Chair
Washington Supreme Court Rules Committee
c/o Clerk of the Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929
Sent via email to: supreme@courts.wa.gov

Re: Comments by Allied Daily Newspapers of Washington
in Support of Proposed Civil Rule 68 Amendment

Dear Justice Yu,

I submit these rulemaking comments on behalf of Allied Daily Newspapers of Washington ("Allied"), a trade association representing 25 daily newspapers across the state. Allied is a strong advocate for strict enforcement of the Public Records Act (PRA), Chap. 42.56 RCW, a voter-approved mandate for government transparency. Newspapers use the PRA to investigate and report on matters of public interest, in keeping with the watchdog role of the press.

Allied supports the proposal by the Washington Coalition for Open Government (WCOG) to remove PRA cases from Superior Court Civil Rule 68 (the offer of judgment rule), although for somewhat different reasons than outlined in WCOG's cover sheet.[1] PRA cases are unique because they determine the rights of the general public, not just those of the parties involved. PRA judgments are designed to deter agency violations and achieve government transparency for the benefit of the entire public – not to compensate for individual damages. CR 68 is useful for efficiently dispensing with money disputes between parties. But it is ill-suited to resolve the non-monetary issues of government accountability inherent in PRA cases. The WCOG proposal would solve that problem.

[1] Allied finds it unnecessary to fault the reasoning of *Rufer v. Seattle*, 199 Wn.App. 348 (2017), or to criticize attorney practices. The Supreme Court has broad authority to "promote justice" through rulemaking. GR 9(a). The proposed amendment can be adopted as a matter of fairness and justice, regardless of how CR 68 has been applied in the past.

CR 68 Deals With Individual Money Interests

Under CR 68, a defendant may offer to allow judgment for "money or property" or other specified "effect" at least 10 days before trial, and "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." In other words, a plaintiff risks losing an award of post-offer costs if the litigation outcome is measurably less favorable than the rejected offer. The rule contemplates a numerical (dollar for dollar) comparison of rejected offers and actual judgments.

The purpose of CR 68 is to encourage parties to settle before trial, thereby conserving resources. *Trotzer v. Vig*, 149 Wn.App. 594, 613 (2009). It operates by increasing the financial risk for an "offeree" (plaintiff) to proceed to trial. To put it in the harshest terms, CR 68 works when high-minded goals such as truth-seeking and accountability yield to individual money concerns (fear of losing "costs" that would otherwise be available to a prevailing plaintiff).

The PRA Deals With General Public Interests

It bears emphasis that the PRA is designed to inform the people of Washington about their government. See, e.g., RCW 42.56.030 (requiring liberal construction of the PRA so that the people may remain informed) and RCW 42.56.080(2) (requiring prompt disclosure of records upon request). A public record available to one person is available to all. RCW 42.56.080(2) (agencies shall not distinguish among requesters). Courts must consider the general public's interest in disclosure when adjudicating PRA lawsuits.[2] To vindicate that public interest, courts order disclosure of unlawfully withheld records (thereby making them available to everyone) and must award attorney fees to a prevailing PRA plaintiff. See RCW 42.56.550. Courts also have discretion to award penalties of up to $100 for each day a record is unlawfully withheld. In essence, a PRA plaintiff is a private prosecutor of the public's right to know.

[2] RCW 42.56.550(3) says: "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest."

PRA penalties are designed to deter improper denials of public records.[3] This is a benefit to the public as a whole, not just the plaintiff who took the risk of litigating. In fact, the factors considered in penalty awards are mostly unrelated to individual financial loss (which is rare in a PRA case), focusing on procedural compliance and whether an agency acted in good faith.[4] Even when penalties are minimal or absent, a court judgment favoring a PRA plaintiff has a value to the entire public, vindicating the right of all people in Washington to full and prompt disclosure of agency records. This sets PRA cases apart from most lawsuits subject to CR 68.

CR 68 Should Not Apply To PRA Cases

Allied recognizes the value to the public of conserving agency and court resources and certainly does not oppose PRA settlements generally. A key concern, however, is that CR 68 does not address intangible but important benefits of litigation such as agency accountability and improved public knowledge. When a plaintiff prevails by proving a PRA violation, the value of that outcome cannot easily be measured in dollar terms and compared to a purely monetary offer under CR 68. Yet, plaintiffs receiving CR 68 offers are expected to accurately estimate how much a court would award in costs and discretionary penalties and the extent to which a court would account for intangible benefits of winning a PRA case (if at all) when applying CR 68.[5] By threatening a loss of costs for plaintiffs who successfully prosecute PRA claims, the rule pits a plaintiff's personal financial interests against the broad public interests underlying the PRA and can have a chilling effect on holding agencies accountable.

Application of the rule is particularly problematic when a PRA case involves an exemption dispute. In such a dispute, a CR 68 offer typically will not include disclosure of records because the agency is interpreting the exemption more broadly than the requester is. The records requester must decide within 10 days of the offer whether to take the money and run, so to speak, or to risk losing costs even if a court ultimately agrees with a narrower interpretation of the exemption. Neither CR 68

[3] See *Yousoufian v. Off. of Ron Sims*, 168 Wn.2d 444, 461, 229 P.3d 735, 744 (2010).

[4] See *Yousoufian*, 168 Wn.2d at 467–68 (listing mitigating and aggravating factors in PRA penalties).

[5] CR 68 can punish a PRA plaintiff for over-estimating discretionary penalties although (especially when discovery is incomplete) the agency often will have greater knowledge of the facts bearing on penalty calculations.

nor case law provides guidance for evaluating which is more "favorable" - a rejected money-only offer or an order for disclosure (making records available to everyone) but less cash.

Rulemaking is an appropriate way to recognize the unique nature of PRA cases and the need to safeguard public interests in transparency and accountability. Court rules are designed to "to provide necessary governance of court procedure and practice and to promote justice by ensuring a fair and expeditious process." GR 9(a). It is not fair or just to reduce costs for prevailing PRA plaintiffs whose victories vindicate the interests of the entire public. Parties would, of course, still be free to settle PRA cases if the proposed amendment (or a like-minded alternative) is granted. They would simply do so without pressure from court rules to elevate monetary considerations above policy considerations.

Thank you for considering these comments.

Very truly yours,

Katherine George

Katherine A. George, WSBA #36288
Attorney for Allied Daily Newspapers of Washington

From: OFFICE RECEPTIONIST, CLERK
To: Farino, Amber
Cc: Ward, David
Subject: FW: rulemaking comment letter (CR 68)
Date: Wednesday, April 30, 2025 2:22:16 PM
Attachments: Allied Daily Newspapers of Washington comment letter on CR 68 proposal 4 30 25.pdf

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From: kathy@johnstongeorge.com <kathy@johnstongeorge.com>
Sent: Wednesday, April 30, 2025 12:32 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'anewspaper' <anewspaper@aol.com>
Subject: rulemaking comment letter (CR 68)

Good afternoon. Please find attached a comment letter regarding the CR 68 amendment proposal on behalf of Allied Daily Newspapers of Washington.

Thank you,

Katherine George
Johnston George LLP
2800 First Avenue Suite 226
Seattle, Washington 98121
206 832-1820
kathy@johnstongeorge.com