

SUPREME COURT OF THE STATE OF WASHINGTON

KITTITAS COUNTY,

Respondent,

v.

SKY ALLPHIN, et al.,

Petitioners.

No. 93562-9

**MOTION FOR LEAVE TO
FILE BRIEF OF AMICI
CURIAE**

I. RELIEF REQUESTED

The Washington Coalition for Open Government (“WCOG”), the American Civil Liberties Union of Washington (“ACLU-WA”), and The Spokesman-Review hereby request permission to file an amicus curiae brief in support of petitioners pursuant to RAP 10.6.

II. IDENTITY OF AMICI CURIAE

The Washington Coalition for Open Government (“WCOG”), a Washington nonprofit organization, is an independent, nonpartisan organization dedicated to promoting and defending the public’s right to know in matters of public interest and in the conduct of the public’s business. WCOG’s mission is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy. WCOG represents a cross-section of the Washington

public, press, and government. Its board of directors exemplifies this diversity. A description of WCOG's board of directors is attached to this motion as an **Appendix**. WCOG is the state's freedom of information association, Washington citizens' representative organization on the National Freedom of Information Coalition, and a champion of the public's right of access in its educational programs and in court.

ACLU-WA is a statewide, nonpartisan, nonprofit organization with over 50,000 members, dedicated to the preservation and defense of constitutional and civil liberties. ACLU-WA supports the right of any member of the public to promote government transparency and accountability through public records requests. ACLU-WA is also a leading proponent of informational privacy. Where both interests are implicated, ACLU-WA believes that the two competing civil liberties are most prudently evaluated on a case-by-case basis to achieve the purpose of the Public Records Act ("PRA") with minimal harm to legitimate privacy interests.

The Spokesman-Review is a news company that produces a daily newspaper and website. The newspaper is published in Spokane and distributed in 10 counties in Eastern Washington and North Idaho. The news company regularly reports on actions, policy and decision-making

involving public agencies, public officials and public employees.

III. INTEREST OF AMICI CURIAE

The interest of WCOG, ACLU-WA and The Spokesman-Review in this case stems from the public's strong interest in timely access to accurate and complete information concerning the conduct of government and in maintaining government accountability to the people of the state of Washington. WCOG, ACLU-WA, their members, and The Spokesman-Review believe that state and local agencies exercise their authority by consent of the governed, and therefore have a duty to conduct their activities in a transparent and open manner. Access to public records under the Public Records Act, Chapter 42.56 RCW ("PRA") is an essential tool of transparency that should be protected and encouraged. WCOG, ACLU-WA, and The Spokesman Review have a legitimate interest in assuring that the Court is properly briefed on important issues involving the PRA.

IV. FAMILIARITY WITH ISSUES

WCOG, the ACLU-WA and their members and constituents, and The Spokesman-Review are frequent users of the PRA. Undersigned counsel have extensive experience with the PRA. Counsel have represented individual requesters, WCOG, ACLU-WA, and other amici

curiae in PRA cases in the Court of Appeals and Washington Supreme Court. Undersigned counsel have read the briefs filed by the parties in this Court. Undersigned counsel are familiar with the scope of the arguments presented by the parties, and will not unduly repeat arguments raised by the parties.

V. ISSUES TO BE ADDRESSED BY AMICUS CURIAE

The amicus brief of WCOG, ACLU-WA and The Spokesman-Review addresses the following issues:

A. Whether the County and the Department of Ecology were on the same “legal team” as that phrase was used in *Soter v. Cowles Publ’g Co.*, 161 Wn.2d 716, 174 P.3d 60 (2007).

B. Whether and to what extent the “common interest” doctrine applies to the PRA exemption for work product in RCW 42.56.290.

VI. WHY AMICUS BRIEFING WILL ASSIST THE COURT

WCOG, ACLU-WA and The Spokesman-Review believe that their experience in using the PRA and promoting the public’s right to know will assist the Court in deciding the present case by providing an important perspective on the broader impact of the case that the individual parties cannot provide. WCOG, ACLU-WA, and The Spokesman-Review

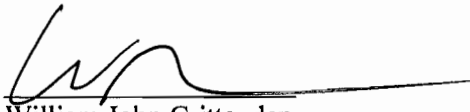
therefore ask this Court for leave to file an amicus brief pursuant to RAP

10.6.

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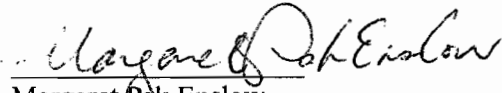
RESPECTFULLY SUBMITTED this 30th day of January, 2017.



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APPENDIX

WASHINGTON COALITION FOR OPEN GOVERNMENT BOARD MEMBERS

Emily Arneson, Witherspoon Kelley

Emily Arneson's practice includes employment law, health law, and media law. She has experience litigating employment discrimination matters, FMLA claims, unemployment appeals, and public records cases.

Prior to joining Witherspoon Kelley, Emily worked for Morton McGoldrick, P.S. in Tacoma, Washington, where she practiced elder law, including estate planning, guardianships, and probate. Additionally, Emily worked as a summer extern for Chief Judge Robert H. Whaley of the United States District Court, Eastern District of Washington.

D. Edson Clark, Clark, Raymond & Company

D. Edson Clark, CPA, graduated *summa cum laude* from the University of Washington in 1977. He obtained his license to practice in the State of Washington as a certified public accountant in 1980. After several years as a tax partner in a multiple partner local accounting firm, Ed co-founded Clark, Raymond & Company in 1991, where he continues to serve as the executive professional.

During his years in public accounting, Ed has been the engagement principal on numerous client engagements that involve the preparation of audited, reviewed, or compiled financial statements, and has extensive experience providing commercial and personal income tax advice. Ed also has extensive experience in the estate taxation and estate planning arena. Ed is a member of the American Institute of Certified Public Accountants and the Washington State Society of Certified Public Accountants. Ed was a founding Director and former Board Chair of the Rotary Wishing Well Foundation and a former Board member of the Make A Wish Foundation of Washington.

Ed recently received a Key Award from the Washington Coalition for Open Government in recognition of his success in unlocking government secrets related to the improper regulation of the accounting profession in the State of Washington and currently is a Board member of the Coalition.

William Crittenden, Attorney at Law

William Crittenden is an attorney in private practice. Mr. Crittenden represents parties in litigation and appeals involving freedom of speech and access to public records. He is also Of Counsel to Groff Murphy, PLLC where he represents developers, builders, owners, and other interested parties in litigation and in administrative and legislative land use matters. Mr. Crittenden has represented WCOG and the League of Women Voters as amicus curiae in cases involving public records and voting rights. He is a member of the Washington Appellate Lawyers Association. Before entering private practice Mr. Crittenden served as a law clerk to Chief Justice Barbara Durham of the Washington Supreme Court and Judge William W. Baker of the Court of Appeals. He is a 1992 graduate of the University of Washington School of Law.

David Dewhirst, Litigation Counsel, Freedom Foundation

David Dewhirst is Litigation Counsel for the Freedom Foundation. He represents the Foundation in all aspects of litigation and provides pro bono advocacy for clients throughout the Pacific Northwest. His practice focuses in the areas of public records, constitutional, civil rights, labor, and campaign finance law. David earned his J.D. from The George Washington University Law School. During law school, he served as Symposium Editor for the Harvard Journal of Law & Public Policy. He earned his M.A. from Regent University, where he focused on constitutional philosophy and American political thought.

Michele Earl-Hubbard, Allied Law Group

Michele Earl-Hubbard is the President and a media law attorney at Allied Law Group LLC in Seattle. She has been listed in *Best Lawyers in America* for First Amendment Law every year since 2007 and for First Amendment Litigation since 2012, and has been named a “Super Lawyer” since 2007. Her law firm, Allied Law Group LLC, which she co-founded in 2007 has been named a “Best Law Firm” by U.S. News and World Report for Media and First Amendment Law every year since the rankings began in 2010. Ms. Earl-Hubbard represents clients in appeals, defamation, privacy, advertising law, copyright, prior restraint, reporter’s privilege, media antitrust matters, public records, open meetings, and open courts and runs several newsroom hotlines for newspapers throughout the Pacific Northwest. She serves on the Prepublication Review Committee of the Media Law Resource Center in New York City. She is a Senior

Editor and an author of the Washington State Bar Association's Public Records Act Deskbook. Ms. Earl-Hubbard serves as a Washington State Freedom of Information Delegate for the Society of Professional Journalists and is a former member of the Board of the National Freedom of Information Coalition and a founding board member and former President of the Washington Coalition for Open Government. She obtained her J.D. from Northwestern University in 1996 where she was appointed to the Order of the Coif and served as Articles Editor on the *Law Review*. She holds an undergraduate degree in Journalism.

Judy A. Endejan, Attorney, Garvey Schubert Barer

For over two decades, Judy has served communications-related clients after working as a professional journalist. Her background is a unique blend of private practice and in-house experience. She has assisted media clients on a variety of content and newsgathering issues and has litigated public records and access cases. During 2006, Judy took off a year from private practice and worked as General Counsel for Fisher Communications, Inc., a major Northwest broadcast corporation. Judy also spent ten years with GTE Corporation (now Verizon) in the Northwest and California. During that time she acquired substantial experience in public utility regulation and administrative law. She has broad experience litigating communications issues before state and federal courts and administrative agencies.

Judy has been a board member for numerous professional and community organizations, and was a founding member of the Washington Coalition for Open Government. She earned her law degree and a bachelor's degree in journalism from the University of Wisconsin.

George Erb, Seattle-based Journalist and Educator

George Erb is an adjunct instructor of journalism at Western Washington University and a contributing writer to such publications as the National Law Journal and The Seattle Times. Erb is also a member of the state Bench-Bar-Press Committee. He was editor of the Puget Sound Business Journal for nearly eight years. During that time, the Business Journal won numerous national awards and was a 2010 finalist for a Pulitzer Prize. For 30 years he worked as an editor and a reporter at daily and weekly newspapers, all in Washington state. Erb has a bachelor's degree in history from Hanover College and a master's degree in journalism from the University of Oregon. In addition to his work on the coalition's

Revenue Committee, Erb is building the organization's audience on social media.

Mike Fancher, Former Executive Editor, The Seattle Times

Mike Fancher retired from The Seattle Times in 2008 after 20 years as executive editor. Fancher served as a 2008-2009 Donald W. Reynolds Fellow in the Missouri School of Journalism. He received a B.A. degree in journalism from the University of Oregon in 1968 and a Master's degree in Communication from Kansas State University in 1970. He received his MBA degree from the University of Washington in 1986.

Fancher currently serves as chairman of the ethics committee of the American Society of News Editors. He serves on an advisory committee to the Fordham University Graduate School of Business and is a member of the board of directors of the University of Oregon Alumni Association. In 2009, he was a consultant to the Knight Foundation Commission on the Information Needs of Communities in a Democracy and to the Aspen Institute's Forum on Communications and Society. Also in 2009, the Western Washington Chapter of the Society of Professional Journalists presented Fancher its award for Distinguished Service to Journalism. He was inducted into the University of Oregon's Journalism Hall of Achievement in 2002.

Katherine George, Attorney, Johnston George LLP

Katherine George is a public interest attorney. She helps citizens obtain public records from local, state, and federal governments through litigation and appeals. She also helps parents obtain special public school services for children with disabilities. As a lawyer and volunteer, Kathy has worked to protect the environment from pollution and land-use violations. Kathy is a partner at Johnston George LLP in Seattle. She started her law career as a clerk to then-Chief Justice Gerry Alexander of the Washington Supreme Court. Before practicing law, Kathy worked for 15 years as a reporter and assistant city editor at the Seattle Post-Intelligencer, and also was a reporter for the Tacoma News Tribune. As a journalist and attorney, Kathy has been dedicated to promoting the free exercise of First Amendment rights and the right of the people to know what their governments are doing.

Marty McCurry, McCurry Investments, LLC

Mr. McCurry is a private angel investor in small businesses and real estate in the State of Washington.

He graduated in accounting from the University of Washington in 1975. He was a practicing CPA about thirty years ago and subsequently left the profession to establish and manage a durable medical equipment company specializing in respiratory care. The sale of this business allowed Mr. McCurry to invest and advise a number of other small businesses over the last twenty years.

Like many citizens, he is concerned about the level of integrity in government, and is passionate about maintaining a foundation of openness to prevent abuses of position from those in power. He has served on the Coalition's finance committee for the past year.

Cynthia Mitchell, Central Wash. University, Department of Communication

After 14 years in the newsroom, Cynthia Mitchell turned her career toward the classroom in order to help train the next generation of journalists. She's an associate professor at Central Washington University, where she directs the Digital Journalism program and is faculty adviser to The Observer, which won the Best in Show award at national college media conventions in 2015 and 2016. Her research and service passions are in First Amendment education. She serves on the national advisory board for the Associated Collegiate Press and has served as the president for the Pacific Northwest Association of Journalism Educators. In the professional world, she worked as a reporter for four years at The Wall Street Journal and as a reporter and editor for 10 years at the Atlanta Journal-Constitution, where her investigative, beat and enterprise work won numerous awards from local, state, chain and national organizations. She lives by a creek outside of Ellensburg, Wash., with her teenaged daughter and husband.

Walter Neary, Comcast PR Director; Former Lakewood City Council

Walter Neary served on the Lakewood City Council from 2004 through 2011. Walter holds an Advanced Certificate for Municipal Leadership from the Association of Washington Cities. Walter, a graduate of the Columbia University Graduate School of Journalism in New York, was a

newspaper reporter and editor for 15 years. He was night city editor for The Salinas Californian, editor of the weekly Lakewood WA Journal and business and technology editor at The Olympian. Walter received a number of awards from the California and Washington Newspaper Publishers Associations and other organizations for investigative reporting and editorial writing. Walter then became a science writer and assistant director for the University of Washington's health sciences public information office and currently works as communications director for Comcast, managing sponsorships, traditional media and social media relations, and other community communications initiatives. Walter also serves on the boards of the Lakewood Historical Society, Auburn Youth Resources and Fort Steilacoom Museum. He is a co-author of the book *Images of America: Lakewood*.

Toby Nixon, Kirkland City Council, Senior Standards Program Manager, Microsoft Corporation

Toby Nixon is a member of the Kirkland City Council. He previously served as a fire commissioner, and in the Washington State House of Representatives from 2002 through 2006 where he was ranking member of the committee which has responsibility for overseeing Washington's open government and election laws. He is the 2012 inductee to "Heroes of the 50 States: The State Open Government Hall of Fame" by the National Freedom of Information Coalition and the Society of Professional Journalists. In 2006, he received the "Freedom's Light Award" from Washington Newspaper Publishers Association in recognition of his work to protect and advance First Amendment interests in Washington. He's a member of the Washington State Historical Records Advisory Board, and serves as an officer and board member of a number of local non-profit organizations. Toby has worked in the computer industry for over 40 years, currently in the Windows group at Microsoft where he manages relationships with other companies in the computer industry and represents Microsoft in technical standards development organizations.

Fred Obee, Washington Newspaper Publishers Association

Fred Obee has been a reporter, editor and manager of weekly, twice weekly and small daily newspapers in the Pacific Northwest for the past 30 years. He is a graduate of Western Washington University's journalism program, was editor of the Whidbey News-Times in Oak Harbor, WA for 11 years, editor of the Daily Triplicate in Crescent City, CA for three years and has spent 17 years at the Port Townsend & Jefferson County

Leader in Port Townsend, WA, first as a writer and editor, and finally as the General Manager. He is a former Jefferson County Chamber of Commerce President, a current Rotarian and he serves on the board of directors for the Washington Newspaper Publisher's Association. He lives in Port Townsend with his wife Mary.

Sam Pace, Association of REALTORS®

Sam Pace is a REALTOR® with Executive Real Estate and a contracted Housing Specialist for the Seattle-King County Association of REALTORS®. He is a Past President of the Washington REALTORS® and has been honored as King County's REALTOR® of the Year. Mr. Pace served as the founding chairman of the South Sound Chambers of Commerce Legislative Coalition and has served on the boards of more than a dozen community and professional organizations. Prior to his career in real estate Mr. Pace was a partner in the Springfield, Oregon, law firm of Harms, Harold, Leahy & Pace where a significant portion of his practice involved litigation and municipal law. He received his bachelor's degree (double major in urban and regional government, and political science) and MBA from Willamette University, and is a graduate of the University of Oregon School of Law.

Karen Peterson, The News Tribune

Karen Peterson has served as editor of The News Tribune since 2008. She was managing editor for three years before that. She joined the paper in 2000 as local news editor. She has been a reporter and editor for newspapers in Hawaii and Indiana, and for an Army publication in Germany.

She and her husband, a retired Army officer, have two grown sons and live in Gig Harbor. She's a graduate of Western Michigan University.

Peterson is a past board member of the Associated Press Managing editors and member of the Society of Professional Journalists, Investigative Reporters and Editors, American Society of News Editors and Washington Coalition for Open Government.

Rep. Gerry Pollet, State Representative, 46th District; Executive Director & Legal Counsel, Heart of America Northwest

Gerry Pollet is Executive Director and legal counsel for Heart of America Northwest, a 16,000 member citizens' group dedicated to "advancing our region's quality of life." Heart of America Northwest is the region's largest citizens' watchdog group for the cleanup of the Hanford Nuclear Reservation, the most contaminated area in North America. Gerry also serves as Executive Director and general counsel for Legal Advocates for Washington, which provides legal advice on non-profit law, open government law (public records / FOIA / open meetings), electoral law, and hazardous waste law to non-profit organizations. Gerry chaired the "Protect Washington" campaign for Initiative 297 in 2004, to stop Hanford from being used as a National Radioactive Hazardous Waste Dump and to end dumping of waste in unlined trenches. Gerry has been honored as the "National Grassroots Activist of the Year" by the Alliance for Nuclear Accountability and received the 2006 Washington Physicians for Social Responsibility Paul Beeson Peace Award. Gerry was involved in drafting and passing Washington laws to protect state and local government whistleblowers.

Brian Sonntag, Former Washington State Auditor

For 20 years Brian served as Washington State Auditor. First elected in 1992, Brian has been widely known as a leading advocate for open and accountable government. In 2013 he was inducted into the national Open Government Hall of Fame.

He has had a distinguished career in public service. Brian was elected Pierce County Clerk when he was 26 years old. After serving eight years in that office he was twice elected Pierce County Auditor.

Brian received an Honorary Doctorate of Laws from Northwest University in 2013 and in 2007 was named Distinguished Alumni by Tacoma Community College. As a Certified Government Financial Manager, Brian brought professionalism to each office he held.

Brian Sonntag spent many years as a youth baseball and basketball coach, an avid weightlifter and will be entering his fifth season as a high school umpire. Brian and his wife Jann are lifetime residents of Pierce County. They have 5 sons and 11 grandchildren.

Eric Stahl, Attorney, Davis Wright Tremaine LLP

Eric Stahl is a media and intellectual property attorney and partner with the law firm Davis Wright Tremaine. He represents news organizations, journalists, and others in public records, First Amendment, and intellectual property matters. He spent five years as a newspaper reporter before attending the University of Washington School of Law, from which he graduated in 1997.

Peggy Watt, Assistant Professor of Journalism, Western Washington University

Peggy Watt is an associate professor of journalism at Western Washington University. She has degrees in journalism and political science from Western, and worked as a reporter at several newspapers in the Pacific Northwest before moving to California, where she covered Silicon Valley for about 20 years. She remains a contributing editor to PC World magazine, where she previously was online news editor.

Ms. Watt completed a master's degree at Stanford University with a thesis on traditional journalism's role in new media. She is a longtime member of the Society of Professional Journalists and National Federation of Press Women, as well as the Online News Association and the Association for Education in Journalism and Mass Communication.

Additional information is available at www.washingtoncog.org.