WSR 25-02-019
RULES OF COURT
STATE SUPREME COURT
[December 5, 2024]

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO CR 68—OFFER OF JUDGMENT	)))	ORDER NO. 25700-A-1623

The Washington Coalition for Open Government (WCOG), having recommended the suggested amendments to CR 68—Offer of Judgment, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2025.

(b) The purpose statement as required by GR 9(e) is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2025. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 5th day of December, 2024.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET
Suggested Amendment to
CIVIL RULE 68

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C. Purpose

The proposed revision to CR 68 would clarify that the rule does *not* apply to actions under the Public Records Act, Chap. 42.56 RCW ("PRA"). The revision would reject the contrary interpretation of CR 68 by the Court of Appeals in *Rufin v. Seattle*, 199 Wn. App. 348, 361-62, 398 P.3d 1237 (2017).

1. Background

CR 68 was adopted in 1967 for the purpose of encouraging settlement of civil claims for money or property. CR 68 allows a defendant to offer "money or property" to an adverse party at least 10 days before trial, and provides: "If the judgment finally obtained by the of-

feree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The rule is intended to encourage settlement of disputes over money and property by making litigation riskier for plaintiffs.

The PRA did not exist at that time. Consequently, the consequences of applying CR 68 to the PRA were never considered by this Court.

The PRA was enacted by voter initiative in 1972. Laws 1973 c 1 (Initiative Measure No. 276, approved November 7, 1972). The PRA empowers superior courts to order agencies to produce public records and to order other injunctive relief to compel agencies to comply with the PRA. *See Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 327 P.3d 600 (2013), *amended* (2014) (trial court ordered agency to produce properly redacted records in electronic format and to adopt new PRA procedures). The primary purpose of the PRA is ***not*** recovery of money or property, but rather "the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592, 597 (1994).

Although the PRA also provides for discretionary daily penalties for one type of PRA violation—wrongfully withholding records, RCW 42.56.550(4)—such penalties are ***not*** compensatory damages for the requestor, but are intended to deter PRA violations by agencies.[1] In *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 463-468, 229 P.3d 735 (2010), this court stated that a superior court's award of penalties should be based on consideration of various policy factors, including but not limited to the agency's bad faith and/or the need to deter future violations.

This Court further held that PRA penalties are not compensatory damages, and that personal economic loss to the requestor is irrelevant unless such losses were foreseeable to the agency. 168 Wn.2d at 461-462.

In 2017 the Court of Appeals, Division I, concluded for the first time that CR 68 should apply to PRA cases. *Rufin v. Seattle*, 199 Wn. App. 348, 361-62. In *Rufin* the King County Superior Court ruled that CR 68 was incompatible with the PRA, and that application of CR 68 in PRA cases would:

undermine the statutory purpose of the PRA to limit Plaintiff's recovery of costs and attorney fees. The purpose of the PRA is to protect the sovereignty of the people of this State. RCW 42.56.020. To assure that the public interest will be fully protected, the PRA is a strongly worded mandate for broad disclosure of public records and should be liberally construed to promote full access to public records, and its exemptions are to be narrowly construed. … Application of CR 68 in this context would have a chilling effect on this public policy.

199 Wn. App. at 354. The superior court was correct.

Without inviting amicus briefing, three judges of Division One of the Court of Appeals reversed, concluding that CR 68 should apply to the PRA:

Applying CR 68 to the PRA is a reflection of this reasonableness requirement: if a plaintiff fails to improve her position at trial, the costs and attorney fees associated with the additional litigation are not reasonable, and may be limited pursuant to CR 68. The reasonableness requirement inherent in CR 68 is not in conflict with the PRA provision that the prevailing party "shall be awarded all costs, in-

cluding reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4) …

Rufin also argues that the trial court correctly reasoned that applying CR 68 would have a chilling effect on actions to access public records. The City argues that CR 68 is good public policy because it promotes the settlement of PRA disputes. In spite of concerns about a chilling effect on litigation brought in the public interest, courts have nevertheless applied CR 68 to other remedial statutes such as the Consumer Protection Act, chapter 19.86 RCW, and the WLAD. The public policy goal of encouraging settlement of lawsuits is equally applicable to the disputes under the PRA.

Rufin argues that CR 68 would discourage an individual from bringing a claim for a PRA violation that does not support a free-standing penalty because in such a case, a plaintiff can be a prevailing party but not improve her financial position at trial. This may be so, but CR 68 is nonetheless an appropriate tool for resolving such violations of the PRA. It does not discourage a citizen from bringing an enforcement action. It promotes reasonable, prompt, and proportional resolution of PRA violations. [citations omitted]

199 Wn. App. at 362-363 (2017). As explained further below, the Court of Appeals did ***not*** consider the actual consequences of applying CR 68 to the PRA, nor explain how CR 68 could apply in PRA actions primarily seeking access to public records. Contrary to *Rufin*, CR 68 directly conflicts with the PRA in several ways. In addition, actual experience with applying CR 68 to the PRA has shown that CR 68 thwarts transparency.

[1] From 1992 to 2005, a minimum penalty of $5 per day was mandatory. Laws of 1992, ch. 139, § 8. But in 2005, the legislature amended the PRA such that penalty range is $0 to $100 per day. Laws of 2011, ch. 273, § 1; RCW 42.56.550(4).

2. CR 68 conflicts with the proper enforcement of the PRA.

The PRA is a transparency statute, and the purpose of PRA litigation is to force agencies to comply with that statute in the public interest. PRA cases are ***not*** tort cases for damages. The discretionary daily penalties authorized by RCW 42.56.550(4) are ***not*** compensatory damages.

The legislature's elimination of mandatory minimum penalties in 2011 demonstrates that PRA cases are ***not*** about PRA penalties. Furthermore, PRA penalties are only available for one type of PRA violation: wrongful withholding of records. RCW 42.56.550(4). Agencies may be held liable for a number of other PRA violations, including improper PRA procedures and inadequate exemption logs, and superior courts may order injunctive relief under the PRA.

CR 68 distorts PRA litigation and thwarts the policy of the PRA by forcing trial courts to focus not on the enforcement of the PRA, but on the impossible task of determining whether a finding of liability and any other nonmonetary relief is worth as much or more to the requestor (not the public) than the agency's offer of taxpayer money to the requestor without any judicial determination of liability.

An agency may not use a CR 68 offer to avoid complying with the PRA because a court cannot place a dollar value on the disclosure (or nondisclosure) of particular records or PRA compliance generally. *Rufin* enables agencies to conceal PRA violations and withhold public records because a CR 68 offer of judgment must be accepted in just ten (10) days, and, if accepted, results in the dismissal of the case. *Rufin* did not consider this problem because *Rufin* only involved a comparison between the CR 68 offer and the penalty actually awarded by the superior court ***after*** the agency had complied with the PRA.

CR 68 also interferes with the ability of trial courts to impose additional injunctive relief on agencies by ordering changes in agency procedures. See *Resident Action Council*, 177 Wn.2d at 446-447 (upholding trial court order to produce electronic records and adopt new PRA procedures). In such cases, CR 68 would require a superior court to place a dollar value on the injunctive relief to the requestor in order to determine whether the requestor has improved their position after rejecting a CR 68 offer. Attempts to place a dollar value on PRA compliance is neither practical nor consistent with the policy of the PRA.

CR 68 offers of judgment discourage requestors from seeking injunctive relief that would otherwise be in the public interest. CR 68 incentivizes requestors to focus on obtaining the largest possible PRA penalty award in order avoid the negative effect of CR 68 on their recovery of attorney's fees. CR 68 offers of judgment thus have the anti-transparent effect of turning lawsuits about PRA compliance into lawsuits about PRA penalties.

Even where an agency has fully complied with the PRA ***before*** an offer of judgment is made, applying CR 68 conflicts with the policy of the PRA. According to *Rufin*, a judicial determination that the City of Seattle violated the PRA had no value, and the requestor should have accepted the City's no-fault offer of judgment, which was larger than the judgment actually entered by the trial court after finding the City liable. According to *Rufin*, public policy favored allowing the City of Seattle to pay off the requestor under CR 68 in order to avoid actually being held publicly accountable for wrongful withholding of records.

The proposed revision to CR 68 would promote the policy of the PRA, which favors holding agencies accountable in order to deter future violations. A PRA litigants' acceptance of a CR 68 offer of judgment is ***not*** an adequate substitute for a judicial determination that an agency has in fact violated the PRA. Contrary to Rufin, a judicial determination that a government agency has violated the PRA has significant intangible public value.

CR 68 was intended to settle private civil cases by giving litigants an incentive to be reasonable in their assessments of liability and/or damages. That rule is based on an underlying public policy assumption that attorney's fees and scarce judicial resources should not be expended on otherwise unnecessary and expensive determinations of private fault or precise determinations of private compensatory damages. These considerations are ***not*** applicable to PRA cases.

First, the litigation-reducing value of CR 68 is largely absent in PRA cases. There are no compensatory damages in PRA cases. A PRA penalty award does not require a jury or any sort of trial, evidence may be submitted in declarations, and no live witnesses are necessary. Trial courts exercise their broad discretion to determine penalties under the *Yousoufian* factors based on whatever information the parties provide, and their decisions are deferentially reviewed on appeal under the abuse of discretion standard.

Second, the Court of Appeals assumed that PRA litigants are able to make reasonable estimates of a trial court's likely penalty award, and that a requestor should be punished with reduced recovery of costs and/or attorney's fees under CR 68 for guessing wrong. Given the numerous *Yousoufian* factors and the enormous discretion of trial courts to determine penalties, PRA penalty awards and the fact patterns on which they are based are all over the map. There is no basis for *Rufin's* erroneous underlying assumption that PRA litigants can make rea-

sonable estimates of likely penalty awards for purposes of making or accepting offers of judgment under CR 68.

CR 68 is also based on the assumption that private litigants can be expected to be reasonable **with their own money**. That assumption is **not** valid in PRA cases where at-fault elected officials and/or their attorneys can use CR 68 offers of judgment—to be paid with the taxpayers money—to conceal their own mistakes or bad faith. Experience has demonstrated that agencies and their attorneys have repeatedly misused CR 68 offers of judgment to pay off requestors in PRA cases that they have mishandled or over-litigated. By offering the requester a few thousand dollars to go away without a finding of liability, an agency and its attorney can blame the PRA while avoiding any scrutiny of the agency's bad PRA violations and/or litigious behavior.

The applications of CR 68 to PRA cases has allowed numerous agencies and agency attorneys to conceal their lack of PRA compliance, their wrongful withholding of records, their lack of proper training or rules, and their excessive litigation tactics. Agencies may make several offers of judgment over the course of a PRA case, gradually increasing the amount offered until requestor finally decides to accept an offer and dismiss the case.

When a CR 68 offer is accepted, there is no judicial determination of fault. Each time a requestor accepts a CR 68 offer of judgment the policy of the PRA is thwarted. Each time an agency uses CR 68 to terminate a PRA case the agency has effectively used taxpayer dollars to:

• purchase the ability to deny violating the PRA and blame the requestor and/or PRA, regardless of how bad the agency's conduct actually was;

• prevent any inquiry into why the agency violated the PRA and/or whether particular public officials or attorneys should be held accountable for the PRA violations;

• eliminate any possibility that a superior court might impose injunctive relief requiring the agency to obtain additional training or adopt new PRA procedures; and

• prevent any inquiry into whether agency attorneys have actually increased their agency's PRA liability by going into "litigation mode" rather than acting in the public interest by bringing their agencies into PRA compliance.

Since *Rufin*, numerous agencies and their attorneys have used CR 68 offers of judgment to conceal PRA violations and to avoid being held accountable.

CR 68 directly conflicts with the policy of the PRA in numerous ways, and the misuse of CR 68 offers of judgment by agencies has harmed the goals of the PRA. This Court should amend CR 68 to state that the rule does not apply to actions under the PRA.

D. Hearing Requested

A hearing is requested.

E. Expedited Consideration

Expedited consideration is requested as the next scheduled review of the Civil Rules is several years away.

F. Supporting Material

Exhibit A: Suggested Amendment to CR 68 in redline.

CR 68 OFFER OF JUDGMENT

(a) At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the defending party's offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(b) This rule does not apply to actions under the Public Records Act, Chap. 42.56 RCW.