NO. 33241-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

KITTITAS COUNTY, a municipal corporation and political subdivision of the State of Washington,

Respondent.

vs.

SKY ALLPHIN, ABC HOLDINGS, INC., and CHEM-SAFE ENVIRONMENTAL, INC.,

Appellants,

BRIEF OF RESPONDENT KITTITAS COUNTY

Kenneth W. Harper
WSBA #25578
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902
(509) 575-0313

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATE CASES

FEDERAL CASES

RULES

STATUTES

PUBLICATIONS

I. INTRODUCTION

This lawsuit concerns a request made under the Public Records Act, Chapter 42.56 RCW ("PRA") by Mr. Sky Allphin, a principal with Chem-Safe Environmental, Inc. ("CSE"). The request sought disclosure of materials prepared by the Kittitas County Prosecuting Attorney's Office and the County's Public Health Department during the course of litigation over CSE's waste handling facility.

After it became clear to the County that a separate request for substantially the same materials had been sent to the Washington Department of Ecology ("Ecology"), the prospect arose that the County's claims of PRA exemptions might be rendered moot by the actions of Ecology. Ecology's responses to the separate PRA request it received also created an opportunity -- and the realization -- of much confusion because of the different times that records were produced; the different content of certain records produced; and the County's lead role in enforcement of moderate risk waste regulations with Ecology acting as a consultant during administrative and judicial litigation involving CSE.

The record before the trial court consistently showed that the County responded to the PRA request as required by law. The County's response efforts were performed in good faith. The County produced records in installments as it was able to do so. The County provided an

exemption log that listed a brief explanation for every document withheld. Over the course of many months the County continued to work with CSE in an interactive process to confirm the scope of the County's production and to make clarifications or corrections as necessary.

In none of the proceedings below was any element of the PRA found to have been violated. As the statement of facts will show, this is a case in which honest mistakes have been made by both litigants. The PRA should not be construed as an instrument to inflict liability on an agency that engages in an interactive process with a requestor to clarify and respond to a request for public records. The trial court's rulings should now be affirmed.

II. COUNTER-STATEMENT OF THE CASE

A. History of solid waste regulatory enforcement actions against CSE.

Beginning in 2009, Kittitas County's Public Health Department ("KCPHD" or the "County") requested that CSE develop operations and engineering plans meeting the requirements of WAC 173-350-360 ("Moderate Risk Waste Handling") for CSE's facility in Kittitas, Washington. CP 1265. Throughout 2010 and early 2011 CSE did not submit satisfactory plans. CP 1265. In a letter dated January 27, 2011, the County identified "major violations of state and federal statues [sic] and pose a large concern to KCPHD about facility operations." CP 1265.

This letter was written by James Rivard, the County's Environmental Health Supervisor, and was copied to Ecology employees Gary Bleeker, Wendy Neet, and Richard Granberg. CP 1266. Ms. Neet was a solid waste inspector for Ecology (CP 866), Mr. Bleeker was the facilities specialist lead (CP 1275), and Mr. Granberg was a hazardous waste specialist/inspector (CP 881).

On January 27, 2011, Mr. Rivard issued a notice of violation and abatement ("NOVA") requiring that CSE suspend all operations until a solid waste permit was obtained. CP 1267-1269. The NOVA assessed a penalty of $500. CP 1268-1269. The NOVA required CSE to provide relevant information to the County. CP 1268. CSE was also required to test the facility's concrete floor pursuant to a testing plan approved by the County. CP 1268. The County's health officer issued a health order on the same date. CP 1270-1271. The health order made reference to inspections performed by Mr. Rivard and Ecology during which violations were observed. CP 1271.

Also on January 27, 2011, Mr. Rivard and Ecology employees conducted a site visit of CSE's facility. CP 1946. Mr. Rivard noted the lack of a permit to operate a moderate risk waste facility, failure to properly label hazardous waste, unsanitary drums, and lack of secondary containment for any of the drums. CP 1946.

In April 2011, CSE removed all waste from the facility and appealed the NOVA. CP 1947. The NOVA was affirmed by the hearing examiner. CP 1273-1279. Mr. Bleeker with Ecology testified before the hearing examiner in support of the County's position. CP 1275-1276. The hearing examiner noted that CSE did not dispute that it had "been operating during the period of investigation by Mr. Rivard without the required license and/or permit." CP 1276. The hearing examiner found that the interior floor of the CSE facility showed "deterioration that most likely was caused by unknown chemicals" which he found "may pose a risk to the public's health, safety and welfare." CP 1276. The hearing examiner found a violation of local ordinances and state regulations governing moderate risk waste. CP 1278. His final order required that CSE make the facility available for testing by a third party approved by the County. CP 1279.

The hearing examiner's decision was appealed by CSE and affirmed by the superior court. CP 1281-1288. The court agreed that testing of the flooring was necessary. CP 1283-1284. The court commented that abatement of CSE's facility was reasonable and legally appropriate "given the broad based overall flagrant permit violation which regulates all aspects of solid waste, and also given the observations by Mr. Rivard when at the premises." CP 1287.

CSE appealed the trial court's decision in a notice of appeal dated April 9, 2012. CP 1290-1300. CSE sought a stay of the trial court's order, which was denied by the trial court on November 5, 2012. CP 59. CSE next sought a stay from the Court of Appeals, which was denied on November 16, 2012. CP 59.

Over a year later CSE had still not complied with the obligation to test its facility. CP 378. After more than 26 months elapsed following the NOVA the County filed a motion for an order to show cause why CSE should not be held in contempt. CP 264-265. The trial court found that CSE was in contempt for its failure to comply with the requirements of the court's May 14, 2012, order. CP 1305-1306. CSE was again ordered to submit a sampling plan and perform testing of the facility. CP 1306. CSE next filed its second notice of appeal to the Court of Appeals. CP 1301-1306.

On November 4, 2013, CSE filed a motion for clarification of the trial court's November 5, 2012, order. CP 1310-1314. The trial court found no basis warranting vacation of any of its earlier orders. CP 1311. The trial court stated that any confusion regarding labeling violations had been "**clearly** addressed previously at the administrative level." CP 1311 (emphasis in original). Any such confusion "was because of the faulty labeling practices of Chem-Safe." CP 1312. The trial court disagreed that

CSE's motion identified any legitimately "new" evidence and instead noted that CSE's materials "were so lengthy and out of context that it was difficult to determine what purpose they served." CP 1314.

After this ruling, CSE filed its third notice of appeal relating to the NOVA. CP 1307-1314. In separate proceedings filed in federal court, CSE sued the County, Ecology, and several persons associated with both agencies in their individual capacity. CP 1316-1344.

This Court affirmed the trial court in a published opinion dated April 23, 2015. *ABC Holdings, Inc. v. Kittitas County*, 187 Wn. App. 275, 348 P.3d 1222 (2015). This Court found that "CSE did not comply with local permitting ordinances." *ABC Holdings*, 187 Wn. App. at 285. CSE's appeal of the contempt ruling was moot because CSE ultimately satisfied the testing requirement. *Id*. at 289.

Personnel with the County and Ecology communicated regarding litigation of the NOVA. The development of legal strategy began with Suzanne Becker, a deputy prosecuting attorney with the County. CP 279.

Over the succeeding months after the NOVA the County and Ecology continued to communicate. Topics included litigation strategy relating to CSE's avoidance of sampling and testing activities (CP 2744); responding to CSE's motion for a stay of testing (CP 3481-3482); and

evaluation of CSE's evolving legal positions on the relationship between dangerous waste and moderate risk waste (CP 3449-3451).

B. CSE's requests for records and the County's responses.

Between October 2012 and January 2013, Mr. Allphin made three public records requests directed to the County. CP 61-62. The second and third requests (November 21, 2012, and January 29, 2013), were fulfilled without controversy. CP 62. This lawsuit relates to the first public records request, dated October 17, 2012. CP 70. The request sought all records of KCPHD and the prosecuting attorney's office regarding CSE dating from January 1, 2010, to the date of the request. CP 70. The request focused on communications of the County's civil deputy prosecuting attorney. CP 70. The date range encompassed the period of administrative and judicial litigation between CSE and the County. CP 70.

Within five business days after the request the County responded that a large number of records would need to be retrieved and reviewed and that the County would provide responsive material in installments. CP 1120. The County updated Mr. Allphin on a periodic basis.[1] CP

[1] The County produced 1,022 pages of records with its response of December 21, 2012; 1,481 pages on January 23, 2013; 850 pages on February 27, 2013; 2,400 pages on March 27, 2013; 1,007 pages on March 28, 2013; 72 pages on April 12, 2013; 131 pages on April 26, 2013; 2,320 pages on May 24, 2013; and 10,500 pages on June 19, 2013. CP 1109-1111. In subsequent productions occurring during 2013 and early 2014, the County produced approximately 217 additional emails. CP 1112-1113.

1120; 841-842; 840; 1154-1155; 839; 837-838; 836; 835; 834; 833; 832; 831; 1493; 1195; 1495; 1200. The County also provided updates of its exemption log. CP 840; 1154; 839; 837; 834; 833; 832; 831; 1493; 1195. Altogether, the County produced more than 20,000 pages of records. CP 1108-1114.

The County asked Mr. Allphin to clarify how he wished to receive certain types of records. CP 1127-1128. The County also asked him to clarify his request for communications relating to the prosecuting attorney's office. CP 1128-1129. In a letter dated February 27, 2013, the County stated that certain records exchanged between the County and Ecology were exempt under the work product doctrine and that the County "retains the right to seek court protection" regarding records of Ecology that might constitute "inappropriate disclosures." CP 1144.

C. The nature and extent of the County's search and production effort.

The County organized its main response effort through deputy prosecuting attorney Zera Lowe and legal assistant Angela Bugni. CP 1105; 1411. Ms. Lowe and Ms. Bugni transmitted the PRA request to all appropriate County departments. CP 1411. Ms. Lowe communicated with Mr. Rivard to ensure coordination of responses from KCPHD. CP 1411. Ms. Lowe and Ms. Bugni were prepared to follow any leads

indicating responsive records might be located elsewhere within the County. CP 1105.

They determined that extensive responsive records were maintained in electronic format. CP 1105-1106. Responsive records existed within the County's computer network server as well as the County's email system. Both were searched. CP 1105. Ms. Lowe and Ms. Bugni obtained permission from the Board of County Commissioners to search the email archive system. CP 1107. The query terms used to search for electronic records were preserved. CP 1107. These query terms were calculated to identify all responsive records and were based on the wording contained in the PRA request. CP 1107. At no point was it apparent that responsive records might be located in any repository that was not actually searched. CP 1106-1107. By mid-2013, Ms. Lowe retired and deputy prosecuting attorney Paul Sander took over the County's overall response. CP 1108. By that date, most of the responsive documents had been located but not necessarily reviewed for suitability to be produced. CP 1108.

As for KCPHD, Mr. Rivard first considered all likely locations where records might reasonably be located. CP 1387. He reviewed physical files located in filing cabinets and in bankers boxes. CP 1387-1388. He searched for responsive electronic records. CP 1389. Mr.

Rivard used the same key word approach as Ms. Lowe and Ms. Bugni. CP 1389.

Mr. Rivard's search effort encountered technological problems. CP 1389. His querying of the Microsoft Outlook email system failed to produce attachments. CP 1389. Mr. Rivard learned from the County IT department that he would have to look for attachments in a separate archive system. CP 1389. This required him to first locate potentially responsive emails within Microsoft Outlook. CP 1389. If the email indicated that it contained an attachment, Mr. Rivard would have to separately access the archive system, identify the subject email, and print its attachment. CP 1389-1390. Mr. Rivard used his best efforts to ensure that all records were complete prior to producing records to Ms. Lowe and Ms. Bugni for review and disclosure to Mr. Allphin. CP 1390.

At relevant times, Ms. Bugni was the sole legal assistant in the prosecuting attorney's office-civil division. CP 1107. Providing diligent attention to Mr. Allphin's request required Ms. Bugni to delay or shift performance of other duties. CP 1107. Ms. Bugni spent more than 200 hours on her portion of the County's response effort. CP 1107. Ms. Lowe was assigned the administrative code enforcement action against CSE in the spring of 2012 after the departure of former deputy prosecuting attorney Suzanne Becker. CP 1410. The time expended by the County on

its response effort totaled approximately 357 hours, or approximately 44.6 work days, exclusive of more than 100 hours spent addressing considerations of exemptions. CP 1412.

After the departure of Ms. Lowe in mid-2013, Mr. Sander continued to work on Mr. Allphin's PRA request. CP 1209-1210. Mr. Sander handled nearly 90 requests for public records in 2013 and worked on Mr. Allphin's request in a manner consistent with other public records requests. CP 1209-1210.

Mr. Rivard was the KCPHD interim administrator while he worked on Mr. Allphin's public records request. CP 1386. Mr. Rivard had no administrative support staff to assist him and he performed almost all of the searching and copying for responsive records by himself. CP 1388. Mr. Rivard made the PRA response a higher priority than many of his other job duties at that time. CP 1388. Mr. Rivard placed other projects and reviews on hold or delayed responding to them while he worked on the PRA response. CP 1388. Time records indicate that Mr. Rivard expended more than 180 hours on the PRA response. CP 1391; 1394-1403.

D. Trial court litigation prior to the County's motion to amend order on in camera review.

On February 22, 2013, the County filed a complaint for declaratory judgment and injunctive relief regarding the release of records by Ecology

that the County believed were exempt from disclosure as work product. CP 1-8. The County requested in camera review of the records.

The County's lawsuit was filed after Ms. Lowe determined that Mr. Allphin had submitted a similar public records request to Ecology. CP 61; 1413. Ms. Lowe recognized that disclosure of records by Ecology would result in waiver of the work product exemption notwithstanding the County's position. CP 61. Ms. Lowe obtained a commitment from Roger Johnson, the Ecology employee charged with handling Ecology's PRA response, that Ecology would not release any potentially exempt communications until the County had an opportunity to obtain a judicial determination on this point pursuant to RCW 42.56.540. CP 105.

Ecology answered the County's complaint and took no position on the County's request for declaratory judgment. CP 12.

Two days after CSE answered the complaint, the County filed a motion for in camera review of the records that it considered to be exempt as work product. CP 25-50. The County did not include the records in question with its motion, but instead stated that it would provide the records in advance of the scheduled hearing set for April 1, 2013. CP 49. After filing the motion, the County was informed that CSE's counsel, Mr. Les Powers, would not be available for a hearing on April 1, 2013, which resulted in the County re-scheduling the matter. CP 108.

The day before the motion was set to be heard, new counsel for CSE, Mr. Nicholas Lofing, emailed the County's counsel and asked for a postponement of the hearing. CP 109. The County refused, on the basis that it would be difficult to get the matter reset quickly and that release of records by Ecology would make the County's assertion of exemption moot. CP 109-111. The day before the scheduled hearing an affidavit of prejudice was filed by Mr. Allphin against Judge Scott Sparks. CP 78-80; CP 81-83. That same day, an affidavit of prejudice was filed by CSE against Judge Frances Chmelewski. CP 84-89. The superior court in Kittitas County consists of two judges. CP 783.

When the matter was called by Judge Chmelewski, the court acknowledged that the two affidavits of prejudice would preclude the matter from being heard by any judge of Kittitas County. VRP 11. The County disputed that more than one affidavit of prejudice could be used and stated that it was important to get a ruling on the County's motion on that date. VRP 9. The court advised that it would be necessary to speak with the court administrator to set up a visiting judge to address the matter. VRP 11.

Difficulties posed by the two affidavits of prejudice were raised by visiting Judge Blaine Gibson, who considered the County's motion later the same day in an ex parte telephonic hearing. VRP 14-49. Judge

Gibson granted the County's motion for a TRO to encompass documents that were part of the "investigation done by the prosecutor's office insofar as those documents may be contained in the records of the County or of the Department of Ecology." VRP 23. Judge Gibson also identified that the validity of the second affidavit of prejudice needed "to be addressed very quickly." VRP 26. Judge Gibson pointed out that "the general rule is there's one affidavit, not per party but per side." VRP 26. The TRO was filed late on April 4, 2013. CP 92-97. The TRO set a hearing date for in camera review and further determination of the appropriateness of injunctive relief for May 6, 2013. CP 96.

The May 6 hearing proceeded before Judge Michael McCarthy, also a visiting judge. VRP 50-87. Judge McCarthy noted the difficulty of coordinating a decision on the County's request for injunctive relief while Judge Gibson's request for briefing and a decision on the multiple affidavits of prejudice remained pending. VRP 58-59. CSE argued that Judge Gibson had abused his discretion by questioning the validity of the affidavits of prejudice. CP 127-135. Judge McCarthy commented, "how do you get two? How do you file two?" VRP 63. Judge McCarthy reiterated that "because the case law is clear, at least in my—in my understanding that you only get the one." VRP 63.

Judge McCarthy ruled that materials that had been released by Ecology previously would not be further restrained by the court. VRP 84. However, he agreed that the TRO should be extended to encompass all documents over which the County asserted a claim of work product, whether in the possession of the County or Ecology. VRP 84. Judge McCarthy extended the TRO until May 17. VRP 86.

At the hearing on May 17, Judge Gibson pointed out that "the law is extremely clear that the defense only gets one affidavit." VRP 101. He commented on the situation of CSE "who filed the affidavits [now] complaining about the delays that are being caused by the affidavits" and observed that "the defense really brought this whole thing on themselves." VRP 101. If there had not been two affidavits filed, "this case would have been much further along now than—than it is." VRP 101.

The County stated that it was no longer seeking return of potentially exempt records that had been disclosed by Ecology. VRP 114. Judge Gibson extended the TRO as to documents possessed by Ecology and further ruled that proceedings in the matter should continue before Judge Sparks. VRP 114-115. Judge Gibson commented that "the fact that the County has filed the lawsuit is indicative of the County's effort to quickly and responsibly resolve this issue without unnecessary delay." VRP 130. Similarly, he stated that "I am finding that the County is

endeavoring to resolve the matter quickly and expeditiously. And so the delays that have resulted here have—primarily have been caused by the fact that the defendants filed two affidavits." VRP 131-132.

Disputes regarding the effect of Judge Gibson's ruling required a lengthy hearing on June 6, 2013. VRP 149-204. Judge Gibson signed an order extending the TRO. CP 661-677. The relevant records to which Judge Gibson's order related were identified by reference to an exemption log created by the County dated April 2, 2013, and amended May 24, 2013. CP 668-677.

During the next two months, the parties filed additional pleadings regarding the pending in camera review. CP 4007-4008. The matter was heard by Judge Sparks on September 9, 2013. VRP 205-225. At the hearing, the County's counsel submitted documents for in camera review, which were identified as 11 emails listed by sender, recipient, and date/time sent. CP 781. These documents were lodged with the court during the hearing. VRP 214.

The County's counsel explained that these emails corresponded to the records for which the County claimed an exemption but which had not been previously released by Ecology. VRP 216. Counsel for CSE noted that the exemption log attached to the June 10 TRO (CP 661-677) identified individual emails "collectively under one number in the

County's numbering system." VRP 217. CSE's counsel did not understand the basis of the email numbering system identified by the County's counsel. VRP 217. CSE's counsel stated that the reason that he believed there to be 32 emails was because 32 emails were "identified on the County's Exhibit A to the temporary restraining order." VRP 220. He further stated that "I don't know where the—the difference is here." VRP 220.

Judge Sparks reserved ruling at the time of the hearing (VRP 224) and issued a memorandum decision finding that the records he reviewed were exempt from disclosure under the PRA. CP 782-789. The court noted that this "case was properly brought by the County and all it has ever sought from the court was for the court to review certain records to determine whether they are exempt from disclosure." CP 787-788. The court commented that "defendants have attempted to thwart the court's resolution of the County's request at every turn. Yet the County was and is following the accepted and established practice and this issue needs resolution." CP 788.

Turning to the substance of the emails, the court stated that "it is clear and there is no doubt that the emails were a product of litigation ongoing between Kittitas County and defendants and relate only to the facts, legal strategy, and issues involved in that litigation." CP 788. The

court did not find it to be relevant that there was no formal "joint prosecution agreement" between Kittitas County and the Attorney General's office because there was clearly a cooperative relationship between Kittitas County and Ecology "in enforcing the environmental laws." CP 788. Ecology employees "were in fact part of the County's legal team in its enforcement of the environmental laws of the state and county." CP 788. The court's memorandum decision was incorporated by reference into a formal order. CP 964-974.

CSE next filed a motion seeking an award of fees, costs and penalties as the prevailing party related to 41 emails that it contended had been wrongfully withheld beginning on April 2, 2013 (the date of the County's initial PRA exemption log—CP 843-850) and subsequently released between May and August of 2013. CP 791-792. In a related declaration, Mr. Allphin acknowledged his awareness that "oftentimes one entry [on the county's exemption log] will contain multiple records, e.g., email chains." CP 826.

Mr. Allphin admitted to his own previous error in believing that there were 33 emails at issue at the time of the in camera review hearing. CP 828. The emails that he contended had not been released or reviewed in camera (CP 828-829) reflected emails identified as individual emails within a chain corresponding to log entries designated by the County and

incorporated into the June 6 TRO. To illustrate, Mr. Allphin's statement of 12 emails that he believed had not been released or reviewed in camera listed seven emails that correlated specifically to portions of an email chain that had been identified on the list of items for in camera review. CP 828-829; 669; 673; 674; 676. Mr. Allphin's identified emails correlate to the first, second, fourth, and tenth items identified on the list of documents submitted for in camera review. CP 781; 828-829; 669; 673-674; 676. This state of confusion was not further discussed or explored by the litigants or the court at the in camera review hearing and was not mentioned in the court's memorandum decision. CP 782-789.

The court entered an order on the motion for in camera review on December 19, 2013. CP 964-966. This order referenced the same listing of emails as identified previously by the County. CP 965. The order constituted a permanent injunction as to Ecology regarding emails that it had not yet disclosed, but also ordered Ecology to produce records that had been governed by the TRO and not protected by the in camera review decision. CP 965. The following day the court entered an order permanently sealing the subject documents. CP 975-976.

CSE filed an amended answer and counterclaim on March 4, 2014. CP 1022-1031.

E. Trial court litigation after motion to amend order on in camera review.

Shortly after the association of new counsel on March 6, 2014, the County sought to amend the order on in camera review because the County determined that the index of documents submitted for in camera review contained errors. CP 4013-4014; 1038-1039; 1040-1080. The County pointed out that the index erroneously listed an item that had already been disclosed to Mr. Allphin. CP 1041. The County also wanted to be clear that the records provided to the court included several email chains, which meant that in addition to the 11 emails listed on the index there were eight sealed emails corresponding with items identified on the exemption log. CP 1042. The County requested an amended order so that the extent of the court's determination of exemption would accurately correlate with the items over which the County claimed an exemption. CP 1043-1044.

In response to the County's motion, CSE insisted that the County had sought review of only the 11 principal emails listed on the index. CP 1089. CSE claimed that the County had "secretly included" additional emails into the envelope through "bad faith" and "dishonesty with the judicial process." CP 1090-1092. In its reply brief, the County pointed out that the eight emails in question had been identified on the County's exemption log as early as April 2, 2013, and that the point of its motion was only to clarify whether the court's in camera review encompassed the

entire email chains attached to the principal emails identified on the index. CP 1095.

CSE nevertheless claimed that there had been "a fraud on the court" and "dishonesty here in what happened."[2] VRP 268. The court concluded that "the record's fine the way it is" (VRP 278) and that "I'm not gonna change what I've already done" but that "we can do that at a later time if we need to." VRP 280.

During this time period, counsel for the County communicated with CSE's counsel about other records that CSE claimed were missing. As early as March 13, 2014, the County's counsel spoke with CSE's counsel about the possibility of errors in the coordination of sealing and production of records. CP 1543-1547. The County's counsel stated that "the record in this matter is fragmented and voluminous." CP 1543. The County's counsel further stated that "I welcome your comments as to where I may have misapprehended or misstated the factual record on this matter." CP 1547. CSE's counsel responded on April 25, 2014, with a document titled "Possible Missing Emails." CP 1356-1357.

Three days later, the County stated that it would inquire as to the status of these records. CP 1515. The County produced the copies of the records in its possession corresponding with the records that had been

[2] In a letter, however, CSE's counsel stated to the County's counsel that "I admire your honesty in regards to the records actually provided in the envelope." CP 1585.

withheld by Ecology until Ecology released the records in response to the court's order of December 19, 2013. CP 1514. The County pointed out that its production was not a waiver of the County's position that the records were exempt as work product. CP 1514.

Later investigation by the County indicated that several of the "possible missing" records had been already produced while other records could not be located despite further search effort. CP 1605-1606. The parties continued to exchange correspondence regarding whether various emails existed and whether others had been previously disclosed. They also worked toward identifying specific records to be lodged with the court for a second in camera review. CP 1595-1597; 1598-1599.

The County located two additional records that had been considered missing. CP 1610. It also identified that certain records deemed missing could have been mistakenly overlooked because of a minor discrepancy in the time stamp associated with the sending/receipt of subject emails. The County identified that it possessed an email dated 4.26.2011 - 3:52 p.m. - Rivard to Bleeker, Granberg, Neet, whereas CSE demanded an email identified as 4.26.2011 - 3:50 p.m. - Rivard to Bleeker, Granberg, Neet. CP 1610-1611 (emphasis added).

CSE continued to claim that the County possessed additional records that had not been disclosed. CP 1600-1601. The County

conducted another search effort (its third) and reaffirmed that the County did not possess the records at issue (although it restated that the only discrepancy for certain records might be the specific time of send/receipt). CP 1378-1379.

By early September 2014, the parties had agreed upon 21 records for in camera review. CP 1378-1380. These included records selected by CSE (CP 1595-1597; 1598-1599) less records that the County identified that it had already disclosed or was unable to produce. CP 1378-1379. In addition, the records for in camera review included one email that had been submitted to the court during the September 2013 hearing but mis-identified on the pertinent index. CP 781; 1380. This particular record (email of July 19, 2012, 12:46 p.m., between James Rivard and Zera Lowe, cc'ing Norm Peck) was previously identified in the County's motion to amend the first in camera review order in April 2014. CP 1041-1042.

F. The cross-motions for summary judgment.

With the parties having agreed upon the scope of records for a second in camera review hearing, the County moved for summary judgment on the basis that it had performed a search reasonably calculated to uncover all relevant records and that its exemption claims were lawful. CP 1213-1230. The County supported its motion with detailed, non-

conclusory declarations demonstrating that all places likely to contain responsive materials were searched. CP 1104-1207; 1208-1210; 1386-1408; 1409-1430. CSE responded with a summary judgment motion of its own. CP 1431-1432. CSE supported its summary judgment position with a lengthy declaration of Mr. Allphin.[3] CP 1461-1985.

None of the materials filed by CSE disputed the County's summary judgment evidence regarding the adequacy of its search, including with respect to the query terms, the physical and electronic repositories searched, or whether the overall search effort contained any specific deficiencies.

The matter was heard on December 23, 2014. VRP 283-357. Judge Sparks granted the County's motion for summary judgment, denied the summary judgment motion of CSE, and found that the records designated by the parties were exempt under the PRA as work product. CP 2884-2890 (corrected order at CP 2978-2984). Judge Sparks directed the County to prepare a sealing order to account for the 21 records reviewed in camera. CP 2883.

Prior to entry of an order on the County's motion to seal records, CSE filed another declaration of Mr. Allphin. CP 2941-2944. In this

[3] CSE filed a separate declaration of Mr. Allphin. CP 1988-2163. CSE also filed a supplemental declaration of Mr. Allphin. CP 2231-2553. CSE's counsel filed a declaration of his own (CP 2554-2665), which was shortly followed by another supplemental declaration of Mr. Allphin. CP 2694-2720. Altogether, this brought CSE's summary judgment total to 1,160 pages of materials.

declaration, Mr. Allphin stated that he had recently reviewed yet more records of Ecology. Mr. Allphin contended that he had "analyzed" a CD provided to him from Ecology, which indicated the presence of a "parent email" embedded in a series of other emails, some of which had not been previously produced by the County. CP 2942-2943. This declaration did not raise any contention regarding the methods of the County's search efforts or point out any specific deficiency of those efforts. CP 2941-2944.

On February 27, 2015, the court sealed the relevant 21 records. CP 2966-2973. The court made findings of fact regarding the applicability of the work product doctrine to the records. CP 2967-2969.

Because the various cross-claims of CSE against Ecology related to separate records requests and would be reviewed in relation to Ecology's separate response effort, the court granted final judgment in favor of Kittitas County. CP 2985-2990.

III. ARGUMENT

A. Standard of review.

The standard of review requires special consideration. Review of summary judgment orders is de novo, viewing the facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Challenges to an

agency's actions under the PRA are also reviewed de novo. RCW 42.56.550(3); *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 428, 327 P.3d 600 (2013).

Other standards of review are applicable. The decision to exempt public documents as attorney work product presents a mixed question of law and fact. *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 891, 130 P.3d 840 (2006), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007). The definition of work product is a question of law reviewed de novo. *Soter*, 131 Wn. App. at 891. But whether a particular document falls within the definition of work product is an issue of fact. *Id.* (quoting *Dawson v. Daly*, 120 Wn.2d 782, 792, 845 P.2d 995 (1993)). A trial court's findings of fact will be upheld if substantial evidence supports them. *Id.*

CSE's opening brief failed to assign error to any findings of fact made below. Accordingly, the trial court's findings are verities on appeal. *Adams v. Washington State Dep't of Corr.*, ___ F.3d ___, 2015 WL 5124168, at *7 (September 1, 2015). The trial court made factual findings regarding the work product status of the exempt records. CP 964-974; 2967-2969. The trial court made findings of fact regarding the actions of CSE and the County during the initial stages of the PRA litigation. CP 972-973. The court made findings of fact regarding the relationship between the County and Ecology. CP 973-974; 2967-2969. The court

also made findings of fact that the County did not treat Mr. Allphin's PRA request differently or less favorably from other requestors, that the County's production of records in installments was lawful and appropriate, and that the County did not act in bad faith. CP 2887-2888.

This Court may affirm the trial court on any grounds supported by the record. *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

B. The trial court properly granted summary judgment on the adequacy of the County's search for responsive records.

Even after the first in camera review in September 2013, the County continued to communicate with CSE regarding the production of records. CP 1543-1547; 1514-1515; 1605-1608; 1610-1612; 1378-1380; 2855-2857.

The County's ongoing engagement with CSE was undertaken in good faith. Because CSE believed there to be possibly missing emails, the County renewed its search effort a second and even a third time. CP 1378-1379. The County acknowledged that it could have made errors in its production and invited CSE's clarification. CP 1547. When CSE identified 11 specific possibly missing emails (CP 1356-1357), the County replied three days later that it would inquire into the status of those records. CP 1515.

As a result of the County's further research, the County learned that several of the "possible missing" emails had actually been produced to CSE. CP 1605. On May 14, 2014, the County determined that one of the emails on the list had not been produced. The County provided it to CSE. The County also stated that no records had been destroyed. CP 1605-1606. In a letter dated July 25, 2014, the County notified CSE that it was able to locate one additional record from the list, which it produced. CP 1610. The County pointed out that it possessed three emails with delivery dates and times similar (but not identical) to those requested by CSE. CP 1610-1611. The County produced those emails. CP 1611. The County was unable to locate other items on the list. CP 1378-1379.

CSE continued to claim the discovery of records that the County had not produced, which almost invariably were versions of emails between the County and Ecology. CP 2852-2853. These claims were based on Mr. Allphin's comparison of emails he separately obtained from Ecology with records produced by the County. CP 2735. Many of the records identified by Mr. Allphin could not be located by the County with the precise time stamp sought but the County nevertheless produced as many of the records as it could locate. CP 2855-2857.

A government agency must conduct an adequate search for responsive records to a public records request. *Block v. City of Gold Bar*,

___ Wn. App. ___, 355 P.3d 266, 269 (2015). The adequacy of an agency's search for records may be resolved on summary judgment. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 719-21, 261 P.3d 119 (2011). Whether an adequate search was performed is considered separately from whether additional responsive documents exist but are not found. *Id*. at 720. Under this rule, a search need not be perfect, but only adequate. *Id*. Daily penalties under the PRA will not accrue at all if an agency carries its burden of showing an adequate search. *Id*. at 725.

The County supported its motion with detailed declarations demonstrating that it conducted a reasonable search. The declarations of Ms. Bugni (CP 1104-1207), Mr. Sander (CP 1208-1210), Mr. Rivard (CP 1386-1408), and Ms. Lowe (CP 1409-1430) provided a non-conclusory account of the scope of the search, including the search terms and the type of search performed, and averred that the County searched all files likely to contain responsive materials.

CSE introduced no summary judgment evidence identifying any deficiencies in the County's response. CSE did not, for instance, show that further search procedures were available to the County or that the County failed to search in a particular location where responsive records might be found. CSE conducted no depositions of any persons. Despite

filing over 1,000 pages of declarations and exhibits, the only material of CSE that responded to the County's motion consisted of three pages in which Mr. Allphin claimed that Ms. Lowe "flatly lies in her declaration" and that the County had made "blatantly untruthful representations." CP 1475-1478. Because CSE could not identify any failure in the County's search effort, the mere fact that certain records only later came to light did not preclude summary judgment in the County's favor. *Id*. at 719-20.

C. The handwritten notes of Mr. Granberg were not a County record at the time of the PRA request and their subsequent disclosure by the County did not violate the PRA.

CSE argues that certain handwritten notes prepared by Ecology representative Richard Granberg should have been produced in response to Mr. Allphin's PRA request. CSE claims that these notes were transmitted from the County's copier to a County employee and then forwarded from the County employee to a DOE employee in 2011. Br. 48.

CSE's argument ignores the facts regarding these notes, including as found by the trial court. CP 2888. This topic helps illustrate the complexity of managing CSE's PRA request and also reveals CSE's eagerness to label the County's efforts as "bad faith," "wrongful" conduct and "absurd argument." Br. 47-48.

CSE brought to the County's attention the existence of an attachment relating to an email from Mr. Rivard to Mr. Granberg dated March 7, 2011, as part of CSE's statement of "possible missing emails." CP 1357. The County pointed out that the email and its attachment had been provided previously on March 27, 2013. CP 1359. CSE continued to maintain that the County was unlawfully withholding the email and its purported attachment. CP 1348; 1368.

Initially, certain handwritten notes (CP 2051) were believed to be associated with the March 7 email. CP 1390; 1406-1408. After further questioning by the County's own legal counsel in July 2014, it became apparent that the March 7 email contained as an attachment solely two color photographs and not Mr. Granberg's handwritten notes. CP 1391; 1406-1408.

The misattribution of the Granberg notes to the March 7 email initially began with a declaration filed by Mr. Allphin in proceedings related to appeal of the NOVA. CP 1260-1261. The misattribution was continued in interrogatory answers provided by CSE. CP 1348. In those answers, CSE claimed that Mr. Granberg was the author of "a handwritten letter" that corresponded to the March 7 email. CP 1348. In mistaken reliance on these misattributions, the County's counsel appended the

handwritten note to the March 7 email and disclosed the same to CSE's counsel in a letter dated July 25, 2014. CP 1372.

Additional scrutiny was placed on this matter as the County assembled its summary judgment position. The County conducted another comprehensive search of its records. This search once again indicated that the only attachment to the March 7 email consisted of two photographs of labels and no handwritten notes. CP 1115; 1201-1207. The County correlated the unique file path name of the documents disclosed to Mr. Allphin on March 27, 2013 (CP 1206-1207) with the original electronic record. CP 1202-1207; 1115-1116.

It was not until after July 2014 when Mr. Rivard located a compact disc contained in a file box within KCPHD that the County was able to finally establish that the handwritten notes came into its possession when the County received a courtesy copy of the CD from Ecology.[4] The CD had been provided to the County when Ecology responded to the separate PRA request of Mr. Allphin directed to Ecology. CP 1390-1391. Mr. Allphin provided a declaration to the court dedicated specifically to the issue of these handwritten notes. CP 1988-2163. In this declaration, Mr. Allphin revealed that the version of the handwritten notes in his

[4] Because of this confusion, ultimately tied to Mr. Allphin's own mistaken assumption, the County indeed referred to the notes as if they were part of the email in the federal action. But this was in error (the federal pleadings were filed in April – June 2014, before the conundrum was solved) and CSE has no evidence that this error was relied upon by the federal court in a way to support judicial estoppel.

possession was produced to him on November 15, 2012, by Ecology.[5] CP 1993. In the exhibit attached to Mr. Allphin's declaration, the handwritten notes are reproduced after the March 7 email and before the two label photographs. CP 2050-2053. From this source Mr. Allphin formed the erroneous conclusion that the handwritten notes constituted an attachment to the email. CP 1993.

At summary judgment, however, Mr. Allphin introduced no evidence disputing that the actual records of the County did not contain the handwritten notes as an attachment to the email.

The County disproved Mr. Allphin's erroneous belief. Mr. Allphin compared a record provided to him by Ecology with a similar (but not identical) record of the County. This is not evidence that the County wrongfully withheld anything. Mr. Allphin introduced no summary judgment evidence regarding the manner in which Ecology compiled this record. The County directly supplied detailed forensic electronic records demonstrating that the email did not include the handwritten notes.

Under the PRA, only records prepared, owned, used, or retained by an agency must be produced. The duty to produce such materials is measured as of the time of the request. RCW 42.56.010; WAC 44-14-

[5] Indicating, among other things, that he had been in possession of these notes for more than two years before this case proceeded to summary judgment. In fact, Mr. Allphin possessed most, if not all, of the records he demanded in litigation with the County because they had already been produced to him by Ecology. CP 2233.

04004(4)(a). An agency is not obligated to supplement its responses and if a public record is created or "comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided." WAC 44-14-04004(4)(a). The CD from Ecology containing Mr. Granberg's handwritten notes was received by the County only after the same records were produced by Ecology to Mr. Allphin. CP 1391. This release occurred on November 15, 2012 (CP 1993), nearly a month after the County received Mr. Allphin's PRA request of October 17, 2012. CP 70. The notes were never a County record required to be produced under the PRA. The trial court did not err in granting summary judgment to the County on this issue.

D. The County did not violate the PRA by amending its initial production of records.

Following receipt of Mr. Allphin's PRA request, the County began searching for and producing responsive materials. Ms. Lowe learned in early 2013 that Mr. Allphin had made a similar PRA request to Ecology. CP 1413. By April 2013, Ms. Lowe became aware that Ecology had produced to CSE certain records that the County believed constituted work product and that were therefore exempt under the PRA. CP 1413-1414. This was problematic because the County had commenced a lawsuit to address the issue of work product as a PRA exemption. That lawsuit was filed February 22, 2013. CP 1-8.

Consistent with its assertion of an exemption on the basis of work product, the County provided to CSE an exemption log on April 2, 2013. CP 230-231; 843-850. This exemption log contained entries that encompassed chains of emails. CP 843-850.

When the trial court denied the County's request to compel return of the documents that had been voluntarily produced by Ecology, notwithstanding the pendency of the County's complaint for declaratory judgment and injunctive relief (CP 596-602), the County disclosed an amended exemption log and no longer claimed any exemption over 37 separate email records. CP 644-653.

Other records were also produced by the County in the succeeding several months. These productions also followed the County ascertaining that corresponding records possessed by Ecology had been produced by Ecology, thereby effectively bringing those records within the scope of Judge McCarthy's order of May 6, 2013. CP 596-602. Examples include records released on July 26, 2013, August 26, 2013, and October 28, 2013. CP 1468.

This pattern recurred when Ecology released records to CSE in response to the order of Judge Sparks dated December 19, 2013, which required Ecology to produce additional records it had withheld subject to the TRO. CP 964-966. The County disclosed an additional eight records

that it had identified on its first exemption log and that could no longer be meaningfully protected because the records were produced by Ecology. CP 1514-1515.

Washington law encourages agencies to cooperate with PRA litigants. The Supreme Court has refused to penalize agencies that relinquish claimed exemptions through subsequent production of records. *Sanders v. State*, 169 Wn.2d 827, 849, 240 P.3d 120 (2010). This rule is particularly applicable where a complex and broad request for records makes it "difficult to grasp the scope of the responsive records" and where the responding agency diligently attempts to locate and assemble the information requested. *West v. Dep't of Licensing*, 182 Wn. App. 500, 512-15, 331 P.3d 72 (2014), *review denied*, 339 P.3d 634 (2014). CSE cites no PRA law – nor is there any – by which the County could be liable for producing exempt records simply because another party's actions have mooted the basis for the exemption.

CSE's arguments fail for a different reason. Kittitas County prosecuting attorney Paul Sander wrote to CSE's lawyer on March 14, 2014, indicating that the County's response to the PRA request was closed. But, in fact, the previous day, March 13, 2014, the County's newly-engaged outside counsel spoke with CSE's lawyer in order to further identify and produce records that CSE's lawyer believed were not

properly accounted for. CP 1543. The County's new counsel wrote a detailed letter dated March 20, 2014, explaining his efforts to independently verify claims of Mr. Allphin regarding records. CP 1543-1547. The County's lawyer stated that his review "leads to conclusions that are on certain points consistent and on other points not consistent with those of Mr. Allphin." CP 1543. The County's lawyer stated that "it is certainly possible that in reviewing and analyzing these records I have made errors on one regard or another. I appreciate your calling any such errors to my attention." CP 1543. The County's lawyer also asked for a response so that efforts to search for and produce records might continue. CP 1546-1547.

An agency is entitled to voluntarily remedy problems with its response to a records request. In *Andrews v. Washington State Patrol*, 183 Wn. App. 644, 334 P.3d 94 (2014), *review denied*, 182 Wn.2d 1011 (2015), the court was persuaded that the agency in question responded "with reasonable thoroughness and diligence" to the public records request. *Andrews*, 183 Wn. App. at 653. Summary judgment for the agency was affirmed. *Id*. at 654. An agency that remedies any alleged violation of the PRA prior to taking final action and denying the requested records has not committed a PRA violation. *Hobbs v. State*, 183 Wn. App. 925, 939, 335 P.3d 1004 (2014). The rationale for this result is that a

"mechanically strict" finding of liability does little to further the purpose of the PRA, which is better served by "communications between agencies and requestors, not by playing 'gotcha' with litigation." *Hobbs*, 183 Wn. App. at 941 n. 12.

At no time did the County cease cooperating with CSE. At no time did the County fail to explain its exemptions. The County sought judicial intervention as early as it could plausibly do so and continued in its efforts to produce records to CSE.[6] The County reached out to CSE to seek an agreed basis for a second in camera review of a stipulated list of records. CP 1378-1380. This was also permissible. *Soter*, 162 Wn.2d at 756. The County's early efforts were thwarted by CSE's blatantly improper use of two affidavits of prejudice in a two-judge county.

The policy of the PRA would be undermined by holding an agency liable when its ongoing engagement with a requestor reveals additional responsive records which it then discloses or when, because of subsequent developments of whatever nature, an agency elects to produce records that it had formerly deemed exempt prior to terminating its response efforts. *See Sanders*, 169 Wn.2d at 849. A similar concept was very recently expressed by the Supreme Court in *Nissen v. Pierce County*, 183 Wn.2d

[6] The County was legally permitted to commence litigation regarding its PRA duties. *Neighborhood Alliance*, 172 Wn.2d at 740 (citing *Soter*, 162 Wn.2d at 749-56).

863, ___, 357 P.3d 45, 58 (2015) (agency allowed to correct good-faith but erroneous interpretation of PRA with supplemental response).

CSE's first amended answer, affirmative defenses and counterclaims was filed March 4, 2014.[7] The PRA should not be construed to encourage requestors to disrupt the cooperative process of clarifying requests and identifying and producing responsive records. CSE should not be able to use the counterclaim of March 4, 2014, as a snare cutting off the County's ability to respond with cooperative dialogue calculated to identify additional records. CSE can hardly dispute that such cooperative dialogue in fact took place.

E. The trial court properly applied the work product doctrine to the records submitted for in camera review.

By late 2014 the parties reached agreement on a list of records that would be submitted to the court for in camera review. CP 1378-1380; 1454. The list consisted of 21 emails, including items identified by CSE. CP 1597. Also included on this list was the above-referenced email of

[7] CSE first answered the County's lawsuit with a document styled "Respondent's Answer, Affirmatively Defend and Counterclaim." CP 14-23. At the time this document was filed, the County had not yet disclosed its initial exemption log of April 2, 2013. CP 843-850. Even with a liberal interpretation allowed under CR 8, nothing raised in the counterclaim of March 20, 2013, can be read as challenging any of the County's grounds for withholding records. CP 21-22.

July 19, 2012 (time sent 12:46 p.m.), that had been erroneously designated on the September 9, 2013, index of records. CP 2977; 1041-1042; 781.[8]

All of the records listed were previously identified on exemption logs. CP 2977. Two of the records were withheld in their entirety and the remaining 19 were redacted and produced. CP 1421-1430. The records on the list dated from June 14, 2012, and later. CP 1281-1288. By this time, the hearing examiner's decision on the NOVA had been affirmed by the trial court but CSE's implementation of the decision was still hotly contested. The earliest item in the records submitted for the initial in camera review was dated July 15, 2011, which was during the period that the hearing examiner's decision was under appeal before the trial court. CP 59.

Once records are determined to be within the scope of the PRA, disclosure is required unless a specific exemption is applied. *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993). The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998).

The work product doctrine exempts records under the PRA to the same extent as in discovery under CR 26. *Limstrom*, 136 Wn.2d at 609;

[8] The record in question is identified as item number 1 at CP 2977 and was erroneously designated (but nevertheless disclosed to the court) as item number 7 on the index of September 9, 2013. CP 781.

Koenig v. Pierce County, 151 Wn. App. 221, 229, 211 P.3d 423 (2009) *review denied*, 168 Wn.2d 1023 (2010).

In *Koenig*, the court found that a factual document gathered by the prosecutor in anticipation of litigation was exempt under the PRA. *Koenig*, 151 Wn. App. at 230. Contrary to CSE's argument (Br. 24), the plurality in *Limstrom* rejected any requirement that the exemption for work product be based on a showing that the materials would actually reveal the research and opinions, mental impressions, theories, or conclusions of the other party's lawyer. *Limstrom*, 136 Wn.2d at 614. Instead, documents created during the prosecutor's fact-gathering process were deemed work product because of the purpose for which they were prepared. *Id*. at 612 (tangible items created by attorney and other representatives of a party are work product if prepared in anticipation of litigation) (citing *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985)).

Work product documents need not be prepared personally by counsel; they can be prepared by or for the party's representative as long as they are prepared in anticipation of litigation. *Doehne v. Empres Healthcare Mgmt*., ___ P.3d ___, 2015 WL 5714537, at *5 (September 29, 2015). The key characteristic of documents constituting work product is that they be prepared in anticipation of litigation or for trial by or for a

party or the representative of a party. *Soter*, 131 Wn. App. at 894; *see also* Lewis H. Orland, *Observations on the Work Product Rule*, 29 Gonz. L. Rev. 281, 285-91 (1993-94). "[T]he courts have few problems in finding that persons working for a lawyer or for a party to the suit acted as agents or representatives." *Id*. at 289. The doctrine is "intensely practical" and should reflect "the realities of litigation" where material may be prepared by the attorney or others working with the attorney. *U.S. v. Nobles*, 422 U.S. 225, 238-39 (1975). This privilege is well recognized as the basis for a FOIA exemption, "especially for the stages of discussion within an agency which precede an adjudication decision." 1 James T. O'Reilly, *Fed. Info. Discl.* § 15.56 (2015).

The *Koenig* decision is important also because the court did not require detailed parsing of records to sift work product from non-work product on a page-by-page basis. Instead, the *Koenig* court upheld the prosecutor's withholding of 44 pages of police reports and 139 pages of transcripts of witness interviews as exempt in their entirety. *Koenig*, 151 Wn. App. at 235. Likewise, the court in *Doehne* stated that "we question whether paragraphs in a single document can be prepared for different purposes." *Doehne*, 2015 WL 5714537, at *5. In accord is *Soter*, 162 Wn.2d at 739 ("work product rule protects *documents*") (emphasis in original); *see also Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366,

370 (D.C. Cir. 2005) (because work product relates to documents, portions of documents are still work product and are not segregable).

The above citation to *Judicial Watch, Inc.*, requires additional comment. Washington courts do not treat the work product doctrine differently than do federal courts. *Neighborhood Alliance*, 172 Wn.2d at 731 (use of FOIA as guidance for similar exemptions); *Heidebrink*, 104 Wn.2d at 396 (reliance on federal interpretation of work product by attorney and non-attorney). In *Sanders*, a portion of a record was found to be outside the scope of the exemption and redaction was required, but this holding was fact-specific because certain records were unrelated to the actual litigation at issue. *Sanders*, 169 Wn.2d at 858. This portion of *Sanders* is also no more than dicta because it makes no comment on *Limstrom*'s view that *all* materials prepared in anticipation of litigation – not just attorney mental impressions – are to be protected, which view was endorsed by *Soter* and echoed by *Koenig*. *See id*.; *Soter*, 162 Wn.2d at 743-44; *Koenig*, 151 Wn. App. at 235-36 (disclosing portions of work product documents is not required; a work product record can be important not only because of what is included in it but also because of what is left out).

Here, the trial court made findings of fact regarding the nature of the challenged records. In its order and memorandum decision, the court

stated that "…it is clear and there is no doubt that the emails were a product of litigation ongoing between Kittitas County and defendants and relate only to the facts, legal strategy, and issues involved in that litigation." CP 973. The court also found as follows:

> The overlap in enforcement areas and the specific subject matter knowledge possessed by Ecology employees relevant herein, coupled with the manner and wording of the particular requests made by the County's attorneys to these employees, convinces the court that indeed these employees were in fact part of the County's legal team in its enforcement of the environmental laws of the State and County. CP 973.

In the order on the second in camera review, dated February 27, 2015, the court also made findings of fact regarding the creation of the challenged emails. CP 2967. The court noted that "since at least 2009, employees of the County and Ecology have worked shoulder-to-shoulder to enforce these regulations against respondents Chem-Safe." CP 2967-2968. The court found that "the 21 email records attached to Mr. Harper's declaration were created at the request of and in coordination with the County attorney in charge of the County's litigation with Chem-Safe." CP 2968.

Whether a particular document is work product is a factual determination that is reviewed for substantial evidence. *Soter*, 131 Wn. App. at 891. Because of the failure to assign error, CSE's arguments are not readily apparent. As to two documents specifically challenged by

CSE (records 2 and 21 from the list of 21), CSE is clearly incorrect. CSE claims that these records were not "sent or received by an attorney at all" (*see* Br. 23) but this Court's review of the records in camera will show that these records are indeed work product.

Records publicly filed illustrate the basis for the trial court's finding of work product. The earliest emails pertinent to this controversy occurred between Ms. Becker (of the prosecuting attorney's office) and Mr. Granberg (with Ecology) and related to assertions of CSE shortly after the NOVA was issued. CP 888-892. Subsequent emails related to litigation strategy in response to: legal contentions of CSE's counsel (CP 1614); the adequacy of CSE's testing plan and the potential need to obtain a court order compelling compliance (CP 2743-2745); draft declarations regarding the collaboration between Ecology and KCPHD (CP 865-866); the relationship between CSE's motion to stay enforcement of testing (CP 3453-3454) and the need to rely upon the expertise of Ecology to respond to engineering and technical claims of CSE (CP 3481-3482; 3449-3452). The County fully recognized that Ecology employees were acting in a consulting role with respect to the NOVA litigation. CP 1412.

CSE contends that any work product protection was waived as a result of communication from the County to Ecology. CSE exaggerates

the facts to claim that an opinion letter from Ecology's counsel disavowed the assertion of work product.[9] In fact, the "opinion letter" proves to be an informal email discussing only the attorney-client privilege. CP 1499.

CSE misstates the legal and factual basis for collaboration between Ecology and the County. The key element of work product protection is the anticipation of litigation, not the actual direct preparation of material by the lawyer. *Doehne*, 2015 WL 5714537, at *5. This status is not lost where, in anticipation of litigation, a lawyer or representative of a party exchanges information with other persons who share a common interest in the litigation. *Sanders v. State*, 169 Wn.2d 827, 853-54, 240 P.3d 120 (2010). The Supreme Court has recognized that the common interest doctrine is a non-waiver rule that applies when parties exchange information, but do not divulge it beyond themselves, so long as the communication relates to a matter of common interest. *Sanders*, 169 Wn.2d at 854. Because such materials are not discoverable in civil cases, they are also exempt from the disclosure under the PRA. *Id*. (citing *Soter v. Cowles Publ'g Co.*,162 Wn.2d 716, 731, 174 P.3d 60 (2007)). A written agreement is not required for this protection to apply. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012).

[9] Likewise, Ecology did not contradict the County's work product claim in its answer to the initial lawsuit – Ecology took no position at all. CP 12. CSE's record citations to the contrary do not support CSE's claims. Br. 11 (citing CP 5; 32-33).

Here, the trial court properly found, on two occasions, that the County had correctly claimed a PRA exemption based on work product. CP 782-789; 2966 2973. The two agencies shared a common interest in fact and under the law because Washington law contemplates regulatory oversight of solid waste by both local health departments and by Ecology. *See* RCW 70.105.005(10). The challenged records were never shared between anyone other than the County and its key personnel, on the one hand, and Ecology and its key personnel, on the other.

F. The County did not violate any other duty under the PRA.

CSE argues that the County violated the PRA because it improperly distinguished Mr. Allphin's request from other requests, failed to provide its fullest assistance, and falsely claimed not to possess records. Br. 2. But as in proceedings below, CSE cannot point to a factual basis for these claims. The County introduced specific summary judgment evidence that it treated Mr. Allphin's request similar to other requests (CP 1209-1210; 1388; 1390-1391; 1411); that it responded promptly, both initially and by the due dates set for its installments (CP 1108-1114; 1414); and that it did not possess certain records (CP 1114-1116; 1260-1263).

CSE makes broad allegations about the County's motives, such as the claim that the County structured its PRA response effort to interfere

with CSE's litigation of the NOVA. Br. 14. But that litigation related to CSE's failure to possess a permit that CSE admitted was required (CP 1276) and testing of the facility floor, which CSE eventually performed. *ABC Holdings*, 187 Wn. App. at 288. There were no records *ever* identified by CSE, including in the very belated "motion to clarify" that had anything to do with these issues.[10] CSE always had recourse to ordinary discovery practice (including a motion to compel production) if it felt that doing so was necessary.[11] A mere assertion of bad faith, alone, is not sufficient to overcome a motion for summary judgment and the "presumption of good faith cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Neighborhood Alliance*, 172 Wn.2d at 739 (Madsen, J., concurring).

CSE also overplays its hand with its claimed indignation that the County "abused the judicial process" when it first presented documents for in camera review in September 2013. Br. 19-22. The County's list of documents (CP 781) contained items corresponding with principal log items from the amended exemption log (CP 644-653). Many of these

[10] When that motion was filed, the trial court noted that CSE could not show "how any of the [new] information changes what has been presented…" and that "[t]he lack of clarity has made this otherwise straightforward motion rather complicated." CP 1313-1314.

[11] CSE might have made a claim to obtain materials notwithstanding their work product status based on the "need and hardship" provisions of CR 26(b)(4). But CSE never did.

principal log items included a chain of subordinate emails.[12] At the hearing, counsel for CSE did not recognize that the only items listed were the principal emails. VRP 217-221. But he was clearly aware that log items included subordinate emails, because that had been the case since the first exemption log of April 2, 2013. He commented to the court that various individual emails were sometimes "identified collectively under one number in the County's numbering system." VRP 217.

The main point is that the parties spoke past one another in their manner of listing the items for the first in camera review. This was not made clear at the hearing, but that hardly is evidence that the County misrepresented anything. And as soon as the County recognized how CSE had mistakenly come to believe that only 11 total emails were sealed, the County explained the matter to CSE (CP 1543-1547) and sought to return to court to clarify this matter with an amended order. CP 1040-1045. The court did not believe it had been misled and stated that "the record's fine the way it is" (VRP 278) but could be clarified later. VRP 280. CSE takes out of context the trial court's comment that it was "troubled." This statement related to the County's failure to prepare an order (VRP 267), for which the County was sanctioned. VRP 245; CP

[12] For instance, item 2 on the list submitted for in camera review (CP 781) corresponds with exemption log item 96 (CP 649) and included four subordinate emails; item 4 corresponds with log item 100 (CP 650) and included two subordinate emails; item 10 corresponds with log item 106 (CP 652) and included two subordinate emails.

977-979. CSE errs to suggest that it had anything to do with how the records were submitted to the court. Br. 21.

CSE's insistence that the County engaged in misrepresentation reflects its desire to avoid accepting what was only a mutual mistake. As at many other turns in this case, CSE instead has preferred to heighten conflict and cling to a theme of County bad faith. The evidence does not support CSE's theme.

IV. CONCLUSION

The decisions of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of October, 2015.

Menke Jackson Beyer, LLP

By: _____

Kenneth W. Harper, WSBA #25578
Attorneys for Respondent
Kittitas County

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served a true copy of this document on the following, properly addressed as follows:

Mr. Leslie A. Powers Attorney at Law Powers & Therrien 3502 Tieton Drive Yakima WA 98902	by: Email: powers_therrien@yvn.com AND U.S. Mail, First Class, postage prepaid
Mr. Nicholas J. Lofing Attorney at Law Davis Arneil Law Firm LLP 617 Washington Street Post Office Box 2136 Wenatchee WA 98807	by: Email: nick@dadkp.com AND U.S. Mail, First Class, postage prepaid
Mr. Neil Caulkins Deputy Prosecuting Attorney/Kittitas County Prosecuting Attorney's Office 205 West Fifth Street, Room 213 Ellensburg WA 98926	by: Email: neil.caulkins@co.kittitas.wa.us AND U.S. Mail, First Class, postage prepaid

Electronic filing by JIS Portal :

Clerk of the Court
Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201

DATED THIS 27TH day of October, 2015, at Yakima, Washington.

Kathy S. Lyczewski