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Division I
State of Washington

NO. 74459-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MICHAEL MOCKOVAK,

Appellant,

v.

KING COUNTY; and the KING COUNTY PROSECUTING ATTORNEY'S OFFICE,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Michael Mockovak appeals from the summary judgment dismissal of his Public Records Act (PRA) challenge to the redaction of certain prosecutor file documents. Mockovak also seeks review of an order denying his motion to compel discovery from an FBI task force investigator.

II. STATEMENT OF THE CASE

A. Public Records Request

Mockovak is an inmate with the Department of Corrections. On November 20, 2013, he sent a PRA request to the King County Prosecuting Attorney (PAO) through his attorney, James Lobsenz. (CP 44) The request included several subparts, essentially seeking any documents in the PAO's possession that referred to Daniel Kultin, an informant who testified at Mockovak's criminal trial.[1] *Id.*

1. Criminal case discovery

Some brief background is warranted to place Mockovak's PRA request in context. Mockovak's criminal investigation originated with

[1] Mockovak, a former physician, was convicted of attempted murder in the first degree, solicitation to commit murder in the first degree, attempted theft in the first degree, and conspiracy to commit theft in the first degree arising from his attempt to hire Russian hitmen to murder his business partner, Dr. Joseph King. *State v. Mockovak*, noted at 174 Wn.App. 1076 (2013) (unreported).

the FBI and involved cooperative efforts between federal and local law enforcement officers and prosecutors. *See e.g.* CP 1125-28. The PAO ultimately prosecuted the case in the King County Superior Court. (CP 307) Information sharing between federal and local law enforcement had occasional points of friction regarding the process for obtaining and releasing federal investigation documents. *See e.g.* CP 189, 190-93, 201-15, 218, 229-30, 235, 236, 267-76. These issues initially prompted Mockovak to file a motion to dismiss charges or suppress witnesses based upon purportedly insufficient disclosures regarding Kultin and other matters. (CP 1125, 1749)

As the criminal case progressed towards trial, however, the FBI provided additional documents and summaries and allowed Mockovak to view relevant federal file materials. (CP 1745-48; 1800-04; 1806; 1828-29) Mockovak was represented at his criminal trial by able counsel[2] who, after receiving and viewing the additional materials, candidly affirmed to the Court that they had been provided with all relevant Kultin immigration-related detail:

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[2] Mockovak was represented at his criminal trial by Jeffery Robinson, Joseph Campagna and Colette Tvedt of the law firm of Schroeter, Goldmark & Bender. *Matter of Michael Mockovak*, No. 69390-5-I, 2016 WL 3190500, at 1 (Wash. Ct. App. June 6, 2016). Robinson was lead counsel and has practiced criminal defense for over 30 years in Washington. *Id.*

- December 6, 2010 hearing: with respect to information provided "regarding payments or inducements, including assistance with citizenship," Mr. Robinson indicated, "I have no reason to doubt the accuracy of that information and, assuming that information is complete, then on those two issues, we have been provided the information." (CP 1147-48)

- December 13, 2010 hearing: Mr. Robinson states, "my understanding is that we have a [confidential human source] manual that is outstanding. Everything else we have requested in our discovery has been provided to us as of Wednesday of last week.... So my understanding is that we have the underlying material for everything" (CP 1801-1803)

- December 13, 2010 hearing: Mr. Robinson indicates "I have to acknowledge to the Court that we have been given – to my understanding, we have been given every piece of paper in the FBI file that is responsive to our request, with exception of the manual" (CP 1806)

- December 16, 2010 hearing: Mr. Campagna acknowledges agreement regarding FBI manual and affirms "We have received all of the documents that we need. We have all of the information that we need. We just need to finish the interviews[3]." (CP 1828-29).

B. Public Records Response

In response to Mockovak's post-conviction PRA request for Kultin-related material, the PAO provided a vast number of redacted and unredacted email, email attachments, correspondence, notes and other attorney file documents. These materials were delivered in

[3] Remaining interviews of FBI agents and Kultin were set for December, 2010, with Kultin's taking place on December 22, 2010. (CP 1814-15, 1829, 1839-43)

several installments, the last of which occurred on October 29, 2014. (CP 54–70) In addition to the extensive volume of documents delivered, the PAO made available approximately 8,000 pages of criminal case discovery and pleading documents that had previously been provided to Mockovak. *See* CP 55, 62, 68.

The County's final installment of responsive PRA documents was accompanied by an October 29, 2014 exemption log that specified the basis for each redacted and withheld document. (CP 71 – 131) Minor corrections and clarifications to the log were subsequently provided to Mockovak on March 2, 2015. (CP 163) With the exception of one document, a National Crime Information Center (NCIC) report that was withheld pursuant to 28 USC § 534 and 28 CFR § 20(c), all of the challenged redactions at issue in this case were based upon the exemption for attorney work product.

Mockovak misleadingly insinuates that PRA responses revealed facts relating to Kultin immigration matters that were not made known at the time of his criminal trial. This allegation is neither supported by the relevant documents nor backed by any assertion from his trial counsel that representations made to the Court regarding the completeness of pre-trial disclosures were inaccurate

or overstated in light of PRA disclosures. As discussed in more detail below, prior to his 2011 trial, Mockovak was made aware of each of the Kultin issues he now characterizes as recently revealed. *Infra* at pp. 25 – 28.

C. Public Records Lawsuit

Mockovak filed this PRA lawsuit on September 16, 2014. (CP 1) He asserts that the County: (1) unlawfully delayed providing him with documents responsive to his PRA request; and (2) improperly redacted or withheld documents identified on its October 29, 2014 exemption log. *Id.*

The first of these claims, regarding delay in responding to the PRA request through October 29, 2014, was settled upon Mockovak's December 23, 2014 acceptance of an Offer of Judgment as to all claims except for that challenging the propriety of document redactions and withholdings identified on the PAO's October 29, 2014 exemption log. (CP 346-48)

This appeal thus pertains to Mockovak's only unsettled claim: that the County improperly redacted or withheld certain documents identified on its October 29, 2014 exemption log sheet.

Mockovak initially indicated in interrogatory responses that he was challenging 130 such redactions. (CP 133 to 158)

1. Cross-motions for summary judgment.

On June 25, 2015, the County filed a motion for partial[4] summary judgment on Mockovak's redaction challenge. (CP 18) In conjunction with its motion, the PAO filed sealed and unredacted copies of the 130 documents initially challenged by Mockovak in order to allow for their *in camera* review. (CP 1958 – 2082) At Mockovak's request, the County's motion was initially noted for July 24, 2015, but was then continued to September 4, 2015 in order to accommodate Mockovak's deposition of Daniel Kultin. (CP 983)

On August 20, 2015, Mockovak filed a combined partial summary judgment cross-motion and response that reduced the number of contested document redactions from 130 to 81. (CP 355 - 406 and 756 - 870) Challenged documents were attached to Mockovak's cross-motion in three separate appendices. Appendix A contained documents for which attorney work product protections were allegedly overridden by criminal case discovery requirements under *Brady* (CP 756); Appendix B included documents for which

[4] The motion was for "partial summary judgment" because the delay claim, while settled, had not yet been reduced to judgment.

work product privilege was allegedly waived (CP 809); and Appendix C provided documents that allegedly did not constitute protected work product because they were purportedly not prepared in anticipation of litigation. (CP 842) Mockovak additionally challenged the withholding of Kultin's NCIC report, asserting that the federal prohibition against its disclosure had been waived through partial descriptions of its contents.

County Exhibit 17 sequentially organizes Mockovak's 81 contested documents, with reference numbers and letters in the left margin adjacent to each redaction. (CP 1035 - 1106) As explained at CP 1036, Exhibit 17 margin numbers cross-reference to numbers that appear on the 130 initially challenged documents attached to the County's Exhibit 13 (CP 181) and provided without redaction under seal. (CP 1958)[5] Exhibit 17 margin letters "A," "B" and "C" indicate whether the challenged redaction appears in Mockovak's Cross-motion Appendix A (documents alleged to contain Brady material), Appendix B (documents for which privilege was allegedly waived), and/or Appx. C (documents allegedly not prepared in anticipation of litigation). (CP 1035 to 1106)

[5] Exhibit 17 numbers likewise correspond with numbering appearing on the exemption log (CP 71) and on Mockovak's interrogatory responses. (CP 133)

Mockovak's August 20, 2015 cross-motion submittals made no mention of any summary judgment need to conduct further discovery. (CP 355 – 870) On August 26, 2015, however, he moved pursuant to CR 56(f) to again continue partial summary judgment motions to October 30, 2015 based on his desire to depose and subpoena records from FBI Task Force Officer Carver.[6] (CP 871) Carver is a Seattle Police detective who was appointed as a Deputy United States Marshal to act as an FBI Task Force Officer. (CP 298, 1277) Regarding his role in the Mockovak matter, Carver received his assignments from and was under day-to-day supervision and control of the FBI. (CP 1277) The Court continued the motions to October 30, 2015. (CP 1007)

In the meantime, in accordance with federal *Touhy* regulations[7], Mockovak sought permission from the United States Department of Justice (DOJ) to conduct Carver's deposition and to subpoena investigatory file documents. As part of that request, Mockovak disputed the need for a *Touhy* submittal and identified

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[6] The deposition subpoena was served on Carver on August 12, 2015. (CP 1228) The DOJ timely objected on August 17, 2015. (CP 1240) *See* CR 45(c)(2)(B) The deposition was then deferred pending review of Mockovak's *Touhy* submittal.

[7] 28 C.F.R. §§ 16.21 - 16.28 sets forth procedures for obtaining DOJ file material or information acquired as part of a DOJ employee's official duties or status. *See* CP 1266-68 (descripting source and scope of *Touhy* requirements.)

the scope and purported relevance of proposed discovery. (CP 920–24) On September 23, 2015, the DOJ sent a letter to Mockovak denying the deposition/subpoena request. (CP 1261-62) On October 19, 2015, Mockovak filed a motion to compel Detective Carver's deposition, noting the matter for consideration without argument on October 27, 2015. (CP 1180) The DOJ and County both opposed the motion. (CP 1263 and 1279)

No CR 56(f) motion to continue the October 30, 2015 summary judgment cross-motion date was made by Mockovak, and no request to defer consideration of dispositive motions occurred either in Mockovak's summary judgment reply (CP 1309-24) or at the time of the October 30, 2015 summary judgment argument.

2. Post-argument submittals and rulings

Following summary judgment argument, the Court requested that the parties each submit additional material to assist in weighing the public interests at stake, if any, in disclosures that might show *Brady* violations, against the interests underlying the asserted work product exemption. (CP 1942) The Court indicated that its request was being made under *Roth v. Dept. of Justice*, 642 F.3d 1161, 1178 (D.C.Cir. 2001). *Id.*

The County initially sought email clarification of the request, because neither party had argued that *Roth*'s privacy-related balancing of interests applied to work product exemption review at issue. Mockovak objected that the County email was an improper "attempt to present new and additional arguments to the Court in a post-argument email." (CP 1939) In response, the parties were advised that legal argument should be submitted by motion or legal briefing – with further direction that briefing and memoranda were to be filed and served on opposing counsel with working copies delivered to the Judge's mailroom. (CP 1939 and 1941)

Mockovak and the County each filed additional material. (CP 1394 and 1686) The County's submittal included a memorandum that summarized the *Roth* decision (CP 1689-91), pointed out that neither party was asserting that its privacy-based balancing of private and public interests applied to the work product exemptions at issue (1691-92), and described how such a balance of interests would nonetheless support work product protections if applied in this case. (CP 1692-99)

On November 23, 2015, the Court granted the County's partial summary judgment motion and denied plaintiff's cross-

motion. (CP 1915-17) Mockovak's discovery motion was subsequently denied on November 25, 2015. (CP 1913)

On December 22, 2015, Mockovak filed a notice of appeal seeking review of both the partial summary judgment and discovery rulings. (CP 1918)

Thereafter, on February 1, 2016, the Court entered final judgment. (CP 1956) In accordance with the accepted Offer of Judgment, the judgment disposed of the pending delay claim by awarding Mockovak $20,000 plus $24,780.89 in attorney fees. *Id.*

III. ARGUMENT

A. Redactions Properly Supported by PRA Exemptions

1. Standard of review

The PRA requires state and local agencies to make available all public records[8] upon request, unless the record falls within a specific exemption. *Bellevue John Does 1-11 v. Bellevue School District,* 164 Wn.2d 199, 209,189 P.3d 139 (2008).[9]

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[8] "Public record" means "any writing containing information relating to the conduct of government ... prepared, owned, used, or retained by any state or local agency." RCW 42.56.010(3). The term "agency" includes state and local agencies and does not include federal agencies. RCW 42.56.010(1)

[9] PRA claims are appropriately resolved by summary judgment. *Spokane Research v. Spokane,* 155 Wn.2d 89, 106, 117 P.3d 1117 (2005); *See also* RCW 42.56.550(3)(authorizing adjudication of PRA claim based solely upon affidavits).

Each of the redactions at issue is grounded in a recognized PRA exemption. For reasons discussed in subsection III(A)(3) below, the redaction of 80 challenged attorney communications is well-supported by applicable attorney work product standards. For reasons discussed in subsection III(A)(4) below, withholding of Kultin's NCIC Report (Document 126) was properly based on federal non-disclosure requirements.

Challenges to an agency action under the PRA are reviewed de novo. RCW 42.56.550(3); *Resident Action Council v. Seattle Housing Authority,* 177 Wn.2d 417, 428, 327 P.3d 600 (2013). "Where the record consists only of affidavits, memoranda of law, and other documentary evidence, an appellate court stands in the same position as the trial court in reviewing agency action challenged under the PRA." *SEIU Healthcare v. DSHS*, 193 Wn. App. 377 (2016). A party opposing disclosure bears the burden of showing that an exemption applies. RCW 42.56.550(1).

2. No merit to challenge of unredacted documents

Before addressing the merits of Mockovak's exemption challenges, three redaction challenges are properly rejected because documents were made available in full:

- Document 130 (CP 779). An unredacted copy of the challenged June 27, 2010 5:00 pm email was provided to Mockovak. *CP* 668 (October 21, 2014 letter advising counsel for Mockovak that enclosed unredacted email provided as substitute for earlier redacted version). CP 771 (unredacted Document 130).

- Documents 58 and 62 (CP 825). Unredacted copies of June 8, 2010 10:12 am (Doc. 58) and September 20, 2010 2:50 pm (Doc. 62) emails were likewise made available in response to Mockovak's PRA request. *See* CP 622 (unredacted document 58); CP 621-622 (unredacted document 62).[10]

3. Redacted material exempt as attorney work product

The PAO's redaction of 80 challenged attorney email and letter communications is well-supported by fundamental attorney work product protections. Each of the challenged work product redactions is a communication concerning Mockovak criminal case preparations, reflecting issues under consideration at various pretrial, trial and appeal stages. Each is from the working file of PAO attorneys involved in Mockovak's prosecution. Each is from the time period between his November 12, 2009 arrest and March 17, 2011 sentencing. With exception of one paralegal email (Doc.

[10] While documents 58 and 62 were mistakenly redacted and referenced in exemption logs, they were among the criminal file documents that were made available without redaction in response to the PRA request. (CP 55, 58, 62, 68)

64 at CP 1070),[11] each was authored by either a deputy prosecutor or an attorney representing a prosecution witness or investigator. (CP 25, 180 – 296)

These documents were properly redacted as work product. RCW 42.56.290 exempts from public inspection and copying

> [r]ecords which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

This provision establishes the PRA exemption for attorney work product. *Limstrom v. Ladenburg,* 136 Wn.2d 595, 605-12, 963 P.2d 869 (1998).

The PRA's work product exemption relies on the civil rules of pretrial discovery to define its parameters. *Id.* 136 Wn.2d at 613. *Koenig v. Pierce County,* 151 Wn.App. 221, 231, 211 P.3d 423 (2009); *Cowles Pub. Co. v. Spokane,* 139 Wn.2d 472, 478, 987 P.2d 620 (1999) (documents protected from disclosure to the extent they are attorney "work product" under the civil discovery rules).

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[11] The work product doctrine makes "no distinction between attorney and nonattorney work product." *Heidebrink v. Moriwaki,* 104 Wn.2d 392, 396, 706 P.2d 212 (1985). Work product protections apply to attorney and nonattorney documents "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." *In re Detention of West*, 171 Wn.2d 383, 402, 256 P.3d 302 (2011). Work product protection thus applies to this redacted paralegal email seeking case-related direction from DOJ counsel.

See also Wash. State Bar Ass'n, *Public Records Act Deskbook: Washington's Pubic Disclosure and Open Public Meetings Laws* (2d ed. 2014) at §14.3(1) ("courts will apply the civil definition of 'work product' even though the underlying dispute is criminal in nature and might therefore have to be disclosed in criminal discovery").

The applicable civil discovery rule protects "documents and tangible things" that were "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." CR 26(b)(4). The rule provides, in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable ... and prepared in anticipation of litigation ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Id. The rule creates two categories of protected material. **First**, the protection of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation is nearly absolute. *Pappas v. Holloway,* 114 Wn.2d

198, 211–12, 787 P.2d 30 (1990). *In re Detention of West*, 171 Wn.2d 383, 402-403, 256 P.3d 302 (2011). **Second,** factual written statements and other tangible items gathered by the attorney and other representatives of a party are subject to disclosure only where the party seeking disclosure of the documents demonstrates substantial need and an inability, without undue hardship, to obtain the substantial equivalent of the materials by other means."[12] *Limstrom*, 136 Wn.2d at 611-612.

These work product protections are critical to the proper functioning of our legal system. As the Court in *Limstrom* explained,

> it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals

[12] *See also Koenig v. Pierce County*, 151 Wn. App. at 233 (work product is protected unless requestor demonstrates unavailability of requested material); *Block v. City of Gold Bar*, 189 Wn. App. 262, 280, 355 P.3d 266 (2015) (where exemption log properly shows work product, requestor bears summary judgment burden to show otherwise).

> in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Limstrom, 136 Wn.2d at 609-610, *citing Hickman v. Taylor,* 329 U.S. 495, 510-12, 67 S.Ct. 385, 91 L.Ed.451 (1947).

Challenged email redactions consist of attorney perceptions and analysis relating to case preparations and plans, evidence, witnesses and strategy in Mockovak's criminal trial, appeal and post-conviction review proceedings. (CP 1037-91) Challenged letter redactions are from a PAO Deputy to DOJ counsel requesting FBI records and indicating the strategic purpose for the same. (Docs 122, 123 and 125 at CP 1092, 1095 and 1097) The letters reflect PAO efforts to obtain federal investigative materials pursuant to *Touhy* regulations and redact only the PAO's legal analysis and strategy. *Id.* Such documents reflect attorney impressions and opinions, entitled to near absolute work product protection.

Even if any of the redacted material was not in this category, it would nonetheless be protected within the second work product

category. As indicated above, because redacted material contains no immigration fact that was not already made known to Mockovak, no required showing can be made as to either the substantial need for the redacted material or its unavailability by other means.

a. Federal attorney email prepared in anticipation of litigation protected as work product

Mockovak incorrectly argues that work product protection does not apply to documents authored by federal attorneys. The work product doctrine protects documents that were prepared in anticipation of litigation, regardless of whether the requested material was prepared by a party in the present litigation. *Harris v. Drake*, 152 Wn.2d 480, 492, 99 P.3d 872 (2004); *See also Dever v. Fowler*, 63 Wn.App. 35, 816 P.2d 1237, 824 P.2d 1237 (1991) (PAO criminal case files protected as work product in later civil action even though PAO was not a party to that action).

Applicability of work product protection to federal attorney email is particularly apparent here because such communications were all made in furtherance of counsels' common interest in the Mockovak investigation and prosecution. The "common interest" doctrine protects such confidential communications shared among multiple parties pertaining to their common claim or defense.

Sanders v. State, 169 Wn.2d 827, 853-54, 240 P.3d 120 (2010). Such communications remain privileged as to those outside their group and are therefore exempt under the PRA. *Id.*

There is no merit to Mockovak's contention that email from federal attorneys was not "prepared in anticipation of litigation" because prosecution ultimately occurred in state court. The contested federal attorney emails clearly all related to active counsel involvement in litigation representing federal witnesses and addressing discovery demands in the state court case. That involvement included entering formal appearances, submitting briefing and participating in Superior Court argument. (CP 301-43, 1108-16, 1145-50) The redacted documents would not have been generated if it were not for the pendency or prospect of litigation.

Moreover, Mockovak's meritless suggestion that the prospect of federal prosecution no longer existed once state charges were filed is at odds with even his own assertions in other court proceedings, namely that federal prosecution continued to loom even after state charges were filed, with federal charges almost certain to follow if the state case was discontinued for evidentiary or other reasons. (CP 1121 at ¶ 12; CP 1127, 1131 and

1150) In fact, Mockovak makes a significant point in one of his personal restraint petitions of lambasting his trial counsel for failing to accomplish a transfer of the case to federal court, which he claimed would have been to his benefit. *CP 1131-32* (Jeffrey Robinson "chose to try this case in state court, even though he knew that he had a get-out-of-state-court-free card that he could have played, which would have resulted in the refiling of analogous federal charges in federal court").

b. Work product protection was not waived

Mockovak's argument that waiver of work product protection occurred as a result of certain communications made to persons outside of the PAO incorrectly conflates "work product" with "attorney client privilege." Unlike the attorney client privilege, "it is only in cases in which the material is disclosed in a manner inconsistent with keeping it from an adversary that the work-product doctrine is waived." *In re Chevron,* 633 F.3d 153, 165 (3d Cir. 2011) (emphasis added). 8 Wright & Miller, *Fed. Practice and Procedure* § 2024, pp. 531-32 (3d ed. 2010).

Each of the waiver cases cited by Mockovak reaffirms the principle that work product is waived only by disclosure to an

adversary. *See Limstrom v. Ladenburg,* 110 Wn.App. 133, 145 (2002) ("If a party discloses documents to other persons with the intention that an adversary can see the documents, waiver generally results"); *In re Columbia/HCA Healthcare,* 293 F.3d 289, 306 (6th Cir. 2002) ("DOJ was an 'adversary' ...when the disclosure occurred"); *Westinghouse v. Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991) ("work-product doctrine requires us to distinguish between disclosures to adversaries and disclosures to non-adversaries"); *Chrysler Motors Overnight Evaluation,* 860 F.2d 844 (8th Cir. 1988) ("disclosure to an adversary waives the work product protection"). *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1371 (D.C. Cir. 1984) (disclosure of work product to one adversary waives protections as to others).

None of the contested communications here was made in a manner likely to result in its disclosure to an adverse party. Mockovak's argument that PAO and U.S. Attorneys should be treated as adverse based on discovery-related tensions during the criminal case is nonsensical. Frictions between aligned counsel, even co-counsel within the same office, often occur over the course of litigation and by no means render parties with common interests

adverse. Any assertion that DOJ and PAO attorneys were adverse parties in this instance is readily belied by their common investigative and prosecution interests.[13]

Mockovak's unsupported contention that PAO email to Kultin waived work product protection is likewise without merit. Kultin was plainly not an adverse party. The three contested emails sent to Kultin contain attorney impressions and thought process regarding case preparations and did not disclose information in a manner inconsistent with keeping it from an adversary. (Doc's 109-11 at CP 261 and 263) Work product protection was accordingly retained. *See Limstrom,* 110 Wn.App. at 145. The fact that Kultin served as a (non-expert) witness does not alter the applicable work product protection. *See Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985) (showing work product to a witness does not waive privilege); *Carolina Power & Light Co. v. 3M Co.*, 278 F.R.D. 156, 160 (E.D.N.C. 2011) (attorney email to witnesses entitled to work

[13] Even if for sake of argument, PAO and federal attorneys were adverse, waiver would still not have occurred with respect to PAO letters to DOJ attorneys. (Documents 122 and 123 at CP 267-72) Such correspondence was prepared for the purpose of satisfying federal regulatory mandates relating to the disclosure of discovery material. 28 C.F.R. §§ 16.22 and 16.26. In this context, even if the disclosure had been to an adverse party, the communication was legally mandated, and no resulting waiver may be said to occur. *Cf. Limstrom*, 110 Wn.App. at 147 (required disclosure of documents under criminal discovery rules does not waive work product protection in subsequent PRA matter).

product protection); *Gerber v. Down E. Cmty. Hosp.,* 266 F.R.D. 29, 33 (D.Me. 2010) (attorney work-product privilege extends to e-mail correspondence between attorney and potential witnesses).

c. PRA work product exemption is not undermined by *Brady* criminal discovery requirements

i. Redactions do not contain *Brady* material

Mockovak's speculates that 64 email redactions attached to his cross-motion Appendix A contain *Brady* material relating to Daniel Kultin's immigration status. (CP 1035 to 1106) As an *in camera* review of the documents will confirm, they do not.

State v. Mullen outlines the general standards governing review of claims under the *Brady* line of cases. 171 Wn.2d 881, 895 (2011). To establish such a claim, a defendant must demonstrate each of three necessary elements: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Id.* at 895. Prejudice occurs "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 897. *See also Giglio v. United States,* 405 U.S. 150,

153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (*Brady* applies to evidence undermining witness credibility).

"The *Brady* rule is not meant to 'displace the adversary system'; and 'the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose *evidence* favorable to the accused, that, if suppressed, would deprive the defendant of a fair trial.'" *Id.* at 895 (emphasis in original).

There is no *Brady* violation if the means of obtaining the exculpatory evidence has been provided to the defense.

> [W]here 'a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.'"[W]here the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense.' '[T]here is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents with[in] a larger mass of material that it has already turned over.' 'Since suppression by the Government is a necessary element of a *Brady* claim, if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails.' ... '[e]vidence that could have been discovered but for lack of due diligence is not a ***Brady*** violation.'

Id. at 896 (citations omitted).

Mockovak concedes that *Brady* does not ordinarily compel disclosure of attorney thought process and mental impressions.

Appellant's Brief at p.76. Rather, he conjectures that redacted documents may reveal facts showing that Kultin received favorable immigration action as a result of his informant role. Such argument focuses on three subject areas: (1) Kultin's INS arrest; (2) Kultin's initial asylee status and (3) and Kultin's pre-trial lack of citizenship. As the following paragraphs show, Mockovak was made aware of each of the issues prior to his January 2011 trial.[14]

Permanent resident and asylee status. Clear indication that Kultin was a permanent resident, and not a citizen, was provided to Mockovak on October 28, 2010, well before his trial. (CP 598-99) (email to defense counsel confirming "Kultin is a lawful permanent resident, granted asylee status in 1997").[15] This information was then

[14] Mockovak misleadingly asserts that documents pertaining to these matters were first revealed in PRA responses. Appellant's Brief at *p. 27* ("One of the disclosed PRA documents states that Kultin was granted the status of an asylee in 1997."). While it is technically true that this email was included in the County's PRA response, it was also provided years earlier as part of the criminal case discovery. (CP 598-99) Similarly distorted is Mockovak's description of documents concerning Kultin's INS arrest, *see* Appellant's Brief at p. 65 ("The documents that were produced in response to Mockovak's PRA request show that Kultin had been arrested by the INS in the past..."); and citizenship status. *See* Appellant's Brief at p. 8 (As a result of this Public Records Act lawsuit, FBI documents have come to light showing Kultin not a citizen). While these documents were provided in the PRA response, they were also included years earlier as part of Mockovak's criminal case discovery. *See* pp. 25 - 28.

[15] Earlier internal FBI report identification of Kultin as a "permanent citizen" was likely a misnomer for permanent resident. The term "permanent citizen" is not a legally designated status. In any event, any confusion regarding Kultin's resident/citizen status was clarified well in advance of Mockovak's trial.

reaffirmed in a declaration that was provided to Mockovak and filed with the Court in Mockovak's criminal case on December 3, 2010. (CP 617) ("Kultin's records indicate that he has been a permanent resident since 2004. As proof of that status, Kultin was issued a permanent resident card, commonly called a "green card" in 2005.").

Citizenship application. Mockovak erroneously complains he had not been provided with documents indicating that Kultin had an application for citizenship pending in April of 2009. Appellant's Brief at p.16. The document Mockovak points to as evidence that such an application had been pending, however, was provided in criminal discovery nearly a year before trial. (CP 553 and 1172) ("Kultin is currently in the application process to become a naturalized United States citizen.").[16]

INS arrest. Mockovak falsely claims he was not advised that the INS had previously arrested Kultin. Brief of Appellant at p. 67 (asserting that PAO "did not disclose that the INS had once arrested Kultin"). An FBI report provided to Mockovak as part of the criminal case discovery, clearly indicated that "Kultin advised that he was

[16] Kultin indicated in his PRA case deposition that no actual application for citizenship was filed until sometime after Mockovak's trial. (CP 523–24) Redacted documents do not shed light on any potential discrepancy between the comment in Agent Steuer's write-up and Kultin's recent deposition comment.

once arrested by immigration officials who believed that his paperwork was not in order. However, it was discovered that his papers were in order and the case was dismissed." (CP 553) This report was likewise provided to Mockovak nearly a year before his criminal trial. (CP 1172) The fact of the INS arrest was likewise reaffirmed in a December 3, 2010 declaration that was filed in a pretrial motion in Mockovak's criminal case. (CP 617) (noting Kultin's 1997 INS arrest).[17]

In any event, none of the challenged document redactions even remotely suggests the sort of favorable treatment Mockovak envisions. Indeed, only redactions to challenged documents 26, 77 and 99 make any mention whatsoever of an immigration-related fact concerning Kultin. (CP 1046, 1076 and 1083) Such references reflect incidental facts that had been disclosed to Mockovak well before his trial and do not, therefore, implicate *Brady.*

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[17] Mockovak misquotes email to suggest that there are undisclosed FBI "302" reports of conversations that FBI agents had with Kultin about his immigration detention. *Compare* CP 672 ("There are 302's concerning Kultin's conversations with Mockovak relating to this investigation....") *with* Appellant Brief at p. 21 (omitting "with Mockovak" from quotation). Plain language and context make clear that the referenced 302 reports pertain to conversations that Kultin had with Mockovak regarding the Mockovak investigation -- and not to any non-disclosed immigration detention statements between Kultin and the FBI, as Mockovak asserts. *See* Doc. 9 at CP 1039 (initial email in string); *See also* CP 580 (October 4, 2010 confirming that "the FBI has already provided all records pertaining to Kultin conversations with Mockovak").

The following table generally identifies the factual references that were made in the three redactions and shows how and when such information was made known to Mockovak before trial.

Doc	Issue	Made known to Mockovak?	When?
26	Kultin seeking citizenship	YES. "Kultin is currently in the application process to become a naturalized United States citizen." (CP 533)	Provided to Mockovak as criminal discovery on January 19, 2010 and May 25, 2010. (CP 1707-14)
77	Kultin1997 status	YES. "Kultin is a lawful permanent resident...." *(CP 598-99)*	October 28, 2010 email forwarded to Mockovak on same day. (CP 598-99)
99	Kultin asylee	YES. "Kultin ... granted asylee status in 1997." *(CP 598-99)*	October 28, 2010 email forwarded to Mockovak on same day. (CP 598-99)
	Kultin Not Given or offered favorable immigration assistance	YES no favorable immigration treatment. *See e.g.* CP 570 ("According to case investigators, Daniel Kultin was not directly or indirectly given any promises of immunity, lenience, preferential treatment or other favors, or rewards for his assistance in this case."); CP 617 ("Kultin has not asked for and was not given any assistance with regard to his immigration status.")	May 10, 2010 Letter to Colette Tvedt and December 3, 2010 Declaration of Len Carver.

Mockovak unpersuasively analogizes his claim for overriding work product protections to the general discovery circumstances that were at issue in a criminal case, *United States v. Blanco*, 392

F.3d 382, 389 (9th Cir. 2004). In *Blanco,* the prosecution failed to disclose a special immigration deal allowing an undocumented, deportable informant witness to remain in this country pursuant to a special INS parole visa in return for his cooperation with the DEA. *Id.* at 389 and 392 (undocumented witness "suffering the specter of deportation" was protected by a "public benefit parole visa"). King County has no quarrel with this or other cases criminal cited by Mockovak which acknowledge that explicit or tacit agreements to provide benefits in exchange for testimony may be sufficient to implicate *Brady*. Unlike circumstances presented in each of these cases, however, the redactions at issue do not indicate any such explicit or tacit agreement. *Cf. Douglas v. Workman*, 560 F.3d 1156, 1187 (10th Cir. 2009) (evidence of tacit agreement where "continuing pattern of [district attorney] providing or instigating favorable treatment for [witness] for several years"); *Hovey v. Ayers*, 458 F.3d 892 (2006) (*Brady* materiality standard not met despite explicit agreements by prosecutor to *attempt* to secure lenient treatment in witness criminal case, promising letter, phone call and vow to use best efforts to secure favorable deal in exchange for testimony); *Reutter v. Solem*, 888 F.2d 578 (8th Cir.

1989) (commutation hearing before parole board, at which prosecutor's suggestions would be accorded substantial weight, postponed until after witness provided testimony); *Wisehart v. Davis*, 408 F.3d 321 (7th Cir. 2005) (no *Brady* violation where no express nor tacit agreement regarding favorable treatment concerning witness' "other crimes" in return for testimony).

Mockovak's speculation that attorney work product communications may reveal or suggest some express or tacit immigration-related deal is not a legitimate basis for overriding applicable work product protections. Such conjecture is in any event not borne out by any of the challenged documents or related email. Indeed, to the contrary, the record is replete with evidence explicitly saying that no favorable immigration treatment was being afforded to Kultin as a result of his assistance in the Mockovak matter. *See* CP 570 ("According to case investigators, Daniel Kultin was not directly or indirectly given any promises of immunity, lenience, preferential treatment, or other inducements, favors, or rewards for his assistance in this case."); CP 617 ("With respect to this case, Kultin has not asked for and was not given any assistance with regard to his immigration status.").

These assertions are consistent with FBI testimony at Mockovak's trial, CP 1155 (Kultin advised that "[w]e can't make promises or have anything to do with your immigration status."); with Kultin's trial testimony, CP 1168 (motivation for participating was to "do the right thing"); and with testimony provided by Kultin at his deposition in this PRA matter. CP 524 (Apart from payments for time away from work, nothing was received in exchange for or as a result of his work with the FBI).

Challenged documents neither reveal any express or tacit deal with Kultin nor any immigration-related fact that was not previously made known to Mockovak before his criminal trial. Mockovak's effort to override work product protections based on *Brady* should accordingly be rejected.

ii. *Brady* criminal discovery does not govern PRA response

Mockovak's *Brady* arguments are in any event entirely misplaced in this PRA challenge. Disclosure requirements under the PRA and criminal discovery are distinct, and case-specific criminal discovery requirements under *Brady* are not appropriately considered in the context of a PRA challenge.

In the closely analogous Freedom of Information Act (FOIA) context, courts have repeatedly made clear that *Brady* "provides no authority for releasing material under FOIA. Such a motion is proper only in connection with a criminal proceeding." *Stimac v. DOJ*, 620 F.Supp. 212, 213 (D.D.C. 1985). *See also Cucci v. Drug Enforcement Admin.*, 871 F. Supp. 508, 514 (D.D.C. 1994) (*Brady* does not provide grounds for waiving FOIA exemptions.); *Smith v. Bureau of Alcohol, Tobacco & Firearms*, 977 F. Supp. 496, 499-500 (D.D.C. 1997) (request for *Brady* material is outside the proper role of FOIA); *Richardson v. U.S. Dep't of Justice*, 730 F. Supp. 2d 225, 234 (D.D.C. 2010) (*Brady* violation is a matter appropriately addressed to the court that sentenced plaintiff, not through a FOIA action); *Marshall v. F.B.I.*, 802 F. Supp. 2d 125, 136 (D.D.C. 2011) ("[p]laintiff may not trump the agencies' invocation of the FOIA exemptions by arguing that the exempted information should be provided as exculpatory evidence. His arguments based on *Brady v. Maryland* and its progeny should be raised in a collateral proceeding challenging his conviction."). In each of these matters, the Court rejected requests for particular documents based on the requestor's case-specific *Brady* assertion.

This is not to say that the PRA trumps or otherwise limits what *Brady* allows. It simply means that the issue must be litigated in the proper forum, and that the PRA does not provide a vehicle for seeking constitutional discovery required under the rules governing criminal cases. *Petrucelli v. Dep't of Justice*, 106 F.Supp. 3d 129, 134 (D.D.C. 2015) (government's constitutional obligation under *Brady* to disclose exculpatory material to criminal defendant is not coextensive with the agency's statutory obligations under the FOIA). *See also Turner v. DMV*, 14 Wn. App. 333, 335 (1975) (*Brady* rule limited to criminal cases).

Mockovak's individualized criminal case discovery interests or rights have no bearing on the determination of whether a document is exempt as work product under the PRA. RCW 42.56.080 admonishes that "[a]gencies shall not distinguish among persons requesting records." This notion directly parallels FOIA's Exemption 5 work product principal that the determination of whether a document is exempt as work product does not turn on the particular requestor's criminal case interest or assertion of need. The Court in *Williams & Connolly v. SEC,* also an Exemption 5 work product case, explains:

> FOIA does not draw distinctions based on who is requesting the information, or for what purpose. Whether exemption 5 applies is a judgment "to be made without regard to the particular requester's identity" ... It does not matter why the requester seeks the information, what the requester plans to do with it, or what harm the requester might suffer from not getting the information. [R]equiring agencies and courts to explore the requester's circumstances and review documents accordingly would create an administrative nightmare. If Williams & Connolly believes that its client should have received the notes during his criminal trial, FOIA is neither a substitute for criminal discovery, nor an appropriate means to vindicate discovery abuses....

Williams & Connolly v. SEC, 662 F.3d 1240, 1245 (D.C. Cir. 2011). *See also Stein v. U.S. Dep't of Justice*, 134 F. Supp. 3d 457, 477 (D.D.C. 2015).[18]

In reviewing work product under the PRA, as with FOIA, the agency's disclosure obligation accordingly turns on whether the document would be routinely available – not on whether it would be discoverable based on a particular litigant's specialized showing of need and unavailability. *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 103 S.Ct. 2209, 76 L. Ed. 2d 387 (1983). Irrespective of whether work product immunity is absolute or qualified, a protected document is

[18] Mockovak misplaces reliance on *United States v. Gupta,* 848 F.Supp. 491 (S.D.N.Y. 2012), for the notion that individual *Brady* interests should be reviewed in a public records case. *Gupta* involved a defendant's discovery in a consolidated criminal prosecution/SEC insider trading enforcement matter. *Id.* The case did not involve FOIA or purport to address the scope of work product review in a public records context, where special interests of the requestor do not determine a document's exempt status.

not "routinely available" in subsequent litigation and is therefore exempt under FOIA's Exemption 5. *Id.*, 462 U.S. at 27. The contrary view would effectively override any PRA work product protection.

> The logical result of [a contrary] position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA. We have previously rejected that line of analysis. In *NLRB v. Sears, Roebuck & Co.,*[19] we construed Exemption 5 to "exempt those documents, and only those documents, *normally* privileged in the civil discovery context." (Emphasis added) It is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege but that does not remove the documents from the category of the *normally* privileged. Accordingly, we hold that under Exemption 5, attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. Only by construing the exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered.

F.T.C. v. Grolier Inc., 462 U.S. at 28.

Washington courts recognize and apply *Grolier*'s work product approach to exemption review under the PRA. *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993) (As in *Grolier,* PRA

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[19] *Sears Roebuck & Co.* correctly observes that virtually any document not privileged may be relevant and discoverable by some potential litigant, and that FOIA clearly does not give a special interest requestor more rights to disclosure than any other persons. 421 U.S. 132, 149, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

exempts work product without regard to the status of the litigation for which it was prepared); *Limstrom,* 136 Wn.2d at 608-09 (construction of work product exemption similar to *Grolier* is appropriate under the PRA). *See DOT v. Sugiyama*, 182 Wn.App. 588, 601, 330 P.3d 209 (2014) (citing with approval FOIA work product approach of basing exemption on what is "normally privileged in the civil discovery context").

Mockovak's assertion that his particular *Brady*-based arguments warrant disclosure is out of step with the foregoing line of cases and with his own concession that, like FOIA, the PRA does not allow agencies to draw distinctions between who is requesting the records or for what purpose. *(CP 362-63)*

iii. *Roth* balancing is neither applicable nor supportive of request for disclosure of PAO work product

Mockovak's brief goes to extensive lengths to dispute arguments never made by the County regarding the appropriateness of applying a *Roth v. United States* balance of public and private interests to the work product exemption at issue. *Roth*'s balancing of privacy and public interests was based upon application of FOIA's privacy exemption, which considers whether disclosure would result in an "unwarranted invasion" of privacy. The

County cited *Roth* in proceedings below for the limited principal that an individual's right to obtain documents through criminal discovery differs from his or her right to documents in a public records context. (CP 1028, 1687) The County agrees that neither the statutory language providing for the work product exemption nor any reported decision suggests that balancing is proper in the work product context.[20] (CP 1028, 1688) Rather, for reasons set forth above, if the material is normally and routinely protected as work product, it is exempt.

Even if, for sake of argument, *Roth* balancing did apply to work product exemption analysis, however, Mockovak's inaccurate characterizations of alleged disclosure deficiencies reflect at most an individualized interest that is in no respect comparable to the public interest factors that weighed heavily in *Roth*.

Roth addressed a death row inmate's FOIA request for documents that implicated others in the murder he was convicted of committing. 642 F.3d at 1166. The Court held that while an inmate

> certainly has an intense personal interest in obtaining whatever information might bolster the *Brady* claims he is

[20] Mockovak chides the County for not acknowledging *King County v. Sheehan,* 114 Wn.App. 325, 57 P.2d 307 (2002) (balancing inapplicable to PRA privacy exemption review). Appellant's Brief at pp. 82-83. The County has never argued, however, that such balancing is appropriate in this work product context.

> presenting in his collateral attacks on his conviction, [his] personal stake in the release of the requested information is 'irrelevant' to the balancing of public and third party interest required by Exemption 7(c). FOIA is not a substitute for discovery in a criminal case or in habeas proceedings. Instead, its purpose is to protect 'the citizens' right to be informed about what their government is up to.'

Id. at 1177. The Court held, however, that the public's compelling interest in knowing whether the FBI is refusing to disclose information that could help exonerate a death row inmate outweighed the privacy interests of individuals named in law enforcement files. *Id.* at 1181. The Court was careful to note that its public interest balancing "in no way hinges on the doctrinal complexities of *Brady* and its progeny." *Id.* Moreover, the Court did not order release of even the withheld records. Rather, it ordered the FBI to either produce any unidentified "*Glomar*" records[21] linking the particular implicated individuals to the murder investigation or follow the normal FOIA practice of identifying records it has withheld and stating its reasons for their exemption. *Id.* at 1182.[22]

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[21] *Glomar* records are documents the FBI would neither confirm nor deny existed.

[22] Even in the privacy exemption context, *Roth* is narrowly applied. Other courts have held that *Roth*'s death penalty-focused "thumb on the scale" of the privacy balance dealt with review of the FBI's *Glomar* refusal to indicate whether relevant records existed—rather than its use of a FOIA exemption to merely redact content. *Rimmer v. Holder*, 700 F.3d 246, 260 (6th Cir. 2012).

As with FOIA, the PRA is neither a substitute for criminal or post-conviction discovery, nor an appropriate means to vindicate individual criminal defendant's perceived discovery abuses under *Brady.* Mockovak's individual interest in obtaining unredacted email does not override work product interests that are recognized as essential to the proper functioning of our legal system. (CP 1692-99) Because the work product material sought by Mockovak would normally be protected in the civil discovery context, it is exempt from disclosure under the PRA.

4. Withholding of NCIC report properly based on federal non-disclosure requirements

The County likewise properly withheld from disclosure Daniel Kultin's NCIC Report. *(CP 126)* The FBI's compilation of NCIC criminal identification, crime and other records is subject to strict statutory restrictions regarding the nature of information collected and its dissemination. *See* 28 U.S.C. §534. Disclosure of NCIC records is expressly limited to a specified list of law enforcement agencies, penal and other institutions. 28 U.S.C. §534(a)(4) (authorizing "exchange such records and information with, and for the official use of, authorized officials of the Federal Government, including the United States Sentencing Commission, the States,

including State sentencing commissions, Indian tribes, cities, and penal and other institutions."). The statute admonishes that release of NCIC records outside of these authorized entities may result in the agency's termination from the further participation in the program. 28 USC §534(b) ("exchange of records and information authorized by subsection (a)(4) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies."). *See also* 28 C.F.R. §20.34 (exchange of criminal history record information is subject to cancellation if dissemination is made outside the receiving departments, related agencies, or service providers).[23]

Mockovak does not dispute that federal law prohibits public disclosure of an NCIC report. Rather, he argues that the federal prohibition does not apply because information regarding the contents of Kultin's NCIC report was partially disclosed. This argument is misses the mark. The County plainly lacks authority to waive disclosure restrictions imposed by federal law. *See SEC v.*

[23] While federal regulations also allow individuals to obtain copies of their own NCIC report pursuant to specified procedures, *see* 28 C.F.R. §20.34 (Individual's right to access criminal history record information); 28 C.F.R. 513.10 to 513.30 (inmates' right to access own criminal history), they do not allow individuals to obtain NCIC searches of other persons.

Yorkville, 300 F.R.D. 152, 167 (2014) (statutory bar on disclosing suspicious activity reports not subject to waiver).

Even if such a federal statutory prohibition could be waived, however, "disclosing facts contained in privileged documents ... does not mean the other party gets the document itself." *Soter v. Cowles,* 131 Wn.App. 882, 906 (2006), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007). The generalized discussion of the NCIC Report contents provided in Mockovak's criminal case and in the County's summary judgment motion do not give rise to a waiver. *See* CP 628 (December 3, 2010 Carver declaration generally indicating familiarity with Kultin's criminal and arrest history report, which reflects only one INS arrest on January 17, 1997); *see also* CP 31(County summary judgment motion noting absence of felonies, warrants, protection orders or arrests in report, except for INS arrest).

Dow Jones and *New York Times* cases cited by Mockovak do not support his contention that these brief and general descriptions waived the federally mandated prohibition on disclosure. See *Dow Jones v. DOJ,* 880 F.Supp. 145, 152 (S.D.N.Y. 1995) (rejecting argument that FOIA exemption for

documents essential to effective law enforcement waived by disclosing specific facts about document findings at press conference); *NY Times v. DOJ,* 756 F.2d 100, 116 (2d. Cir. 2014) (FOIA exemption for attorney client privilege waived by disclosing 16-page white paper that virtually paralleled analysis of legal counsel).

B. Discovery Order Challenge Was Properly Rejected

Mockovak has improperly sought to utilize this PRA case as a vehicle for conducting discovery of FBI Agent Carver regarding matters that have no bearing on the sole remaining summary judgment issue in this case: whether 81 documents were properly redacted. Such discovery is apparently for the purpose of bolstering a Personal Restraint Petition that Mockovak has pending before this Court. *See* CP 1134-36. *See also* Appellant's Brief at p.101.

1. Notice of appeal from discovery order was premature

At the outset, Mockovak's discovery challenge should be rejected because his appeal notice was premature. A party is generally barred from appealing rulings in a case until after entry of final judgment. RAP 2.2(a). Mockovak filed his notice of appeal on

December 22, 2015 -- 43 days prior to the February 3, 2016 entry of final judgment. (CP 1918 and 1956)

While, in certain instances, RAP 5.2(g) allows a premature appeal to retain effect by ripening at the time of final judgment, the rule does not salvage Mockovak's untimely discovery appeal. Like the parallel federal appellate rule,[24] RAP 5.2(g) protection applies only where the prematurely appealed decision is a type that would have been appealable if immediately followed by its entry. *See FirsTier Mortgage Co. v. Investors Mortgage Ins.,* 498 U.S. 269, 275-76, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991) (no FRAP protection for premature appeal of a clearly interlocutory ruling such as a discovery order); *ADAPT v. Philadelphia Housing Authority, 433 F.3d 353, 364 (3d Cir 2006)* (premature appeal of discovery orders dismissed following final judgment based on FRAP 4(a)(2) limits). Mockovak's premature discovery appeal is outside the scope of RAP 5.2(g) protection and should be dismissed.

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[24] *Compare* RAP 5.2(g) ("A notice of appeal or notice for discretionary review filed after the announcement of a decision but before entry of the decision will be treated as filed on the day following the entry of the decision.") *with* FRAP 4(a)(2) ("A notice of appeal filed after the court announces a decision or order--but before entry of the judgment or order--is treated as filed on the date of and after the entry.").

2. Court properly denied motion to compel discovery

Mockovak's effort to compel discovery of Agent Carver was in any event properly denied. Review of trial court discovery orders is based upon an abuse of discretion standard. *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). *Neighborhood Alliance*, 172 Wn.2d 702, 717 (2011) (trial court has discretion to narrow discovery to information relevant to the issues that may arise in a PRA lawsuit). A court abuses its discretion if its decision is manifestly unreasonable or exercised for untenable grounds or reasons. *Eugster v. City of Spokane,* 121 Wn.App. 799, 807, 91 P.3d 117 (2004). A trial court does not abuse its discretion by denying PRA discovery when declarations were detailed enough to provide the court with a sufficient basis for its decision. *SEIU Healthcare*, 193 Wn. App. 377 (2016); *Ameriquest Mortgage Co. v. Office of the Att'y Gen.*, 177 Wn.2d at 494, 499–500, 300 P.3d 799 (2013).

As the DOJ's briefing to the trial court elaborates (CP 1263), Carver serves full-time as a federal investigator, appointed as a Deputy United States Marshal and working on a FBI Task Force. *Supra* at p. 8. In this capacity, Carver received his Mockovak-related assignments from the FBI and was under day-to-day

supervision and control of the FBI. *Id.* These factors fit squarely within the definition of "employee" set forth in 28 C.F.R. § 16.21(b). *See Mayo v. City of Scranton*, 2012 WL 6050551 (M.D.Pa. 2012) (City of Scranton FBI task force officer is "employee" subject to *Touhy* requirements).[25]

Likewise, as further detailed in the DOJ's trial court brief (CP 1263), no conceivable Tenth Amendment violation results from FBI Task Force members submitting to federal regulations associated with their FBI work where, as in this instance, local and state officials have the option of participating or not in the federal program. *See Lomont v. O'Neill*, 285 F.3d 9, 14 (D.C. Cir. 2002) (no Tenth Amendment violation where participation in federal regulatory program is optional).

Separate and apart from those federalism issues, however, Mockovak's discovery motion was properly denied because the proposed deposition would have no bearing on the only unsettled issue before the Court: whether County redactions to 81 documents challenged by Mockovak are supported by the PRA's work product exemption. Nothing that Agent Carver says or produces at a

[25] GR 14.1 allows for citation to an unpublished decision when permitted under the law of the issuing court. *See* M.D.Pa.LR 7.8 (attachment of unpublished opinion to brief).

deposition could shed relevant light on the appropriateness of the challenged work product exemptions. Any conjecture about what redacted communications contain is readily put to rest by simply viewing the actual contents of the challenged redactions *in camera* (CP 1958 – 2082), and not by deposing Detective Carver.

This circumstance is in no respect like that in *Neighborhood Alliance*, which dealt with a broad array of unresolved PRA issues, including questions regarding the adequacy of the agency's search for records, agency motivations and scope and amount of penalties under *PRA* culpability factors. 172 Wn.2d at 717-19. Unlike *Neighborhood Alliance*, there are no search adequacy, motivation or penalty issue remaining is this case.[26]

Mockovak's speculation about whether Carver's deposition might reveal additional FBI or City of Seattle documents of interest to him is plainly beyond the scope of the remaining exemption claim

[26] RCW 42.56.565 bars inmate PRA penalties absent an agency's bad faith. (CP 33-34) Mockovak agrees that no penalties are owing as a result of the redactions at issue. Record of Proceedings at p. 62 ("Mr. Lobsenz: I mean, everything they've said in their brief about penalties was correct. If we couldn't make a showing of bad faith, we're not entitled to penalties and I'm not claiming that we have made such a showing.")

at issue and, indeed, beyond the scope of his PRA request, which sought documents in the PAO's possession.[27] (CP 7)

C. No Basis for Awarding Attorney Fees.

RCW 42.56.550(4) allows a prevailing party to recover attorney fees. Such an award relates "only to what is disclosed and not to any portion of the documents found to be exempt." *Limstrom*, 136 Wn.2d at 616. *See Haines-Marchel v. Dept. of Corrections*, 183 Wn.App. 655, 674, 334 P.3d 99 (2014) (attorney fee determination must consider share of redacted material properly withheld). Because Mockovak's redaction challenge is without merit, his associated request for attorney fees should be denied.

Mockovak's discovery challenge likewise provides no basis for obtaining attorney fees against the County. As indicated above, the Superior Court appropriately exercised its discretion in denying Mockovak's request. In addition, the County has never represented the FBI or controlled its discovery responses. County actions in no sense "necessitated" Mockovak's discovery motion. *See* CR 37

[27] Mockovak cites *Concerned Ratepayers v. Clark County,* 138 Wn.2d 950, 983 P.2d 635 (1999) as support for the notion that the FBI had a discovery obligation produce Carver records. *Ratepayers* did not address any PRA discovery issue, but rather considered an agency's PRA responsibility to produce a requested record that was prepared by the agency's consultant and used by the agency. The case has no bearing on the remaining exemption challenge against the County.

(authorizing court to impose attorney fees upon party or deponent whose conduct necessitated discovery motion).

IV. CONCLUSION

For reasons set forth above, King County respectfully requests that the Court affirm decisions to grant partial summary judgment in favor of the County and to deny Mockovak's partial summary judgment cross-motion and motion to undertake discovery.

DATED this 29th day of July, 2016.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
Michael J. Sinsky, WSBA #19073
Senior Deputy Prosecuting Attorney
Attorneys for King County

Certificate of Service

Today I directed via the method indicated below addressed to the attorneys listed below, a copy of the *Brief of Respondents* in MICHAEL MOCKOVACK V. KING COUNTY ET AL., Cause No. 74459-3-I, in the Court of Appeals, Division I, for the State of Washington.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Natalie Brown

Natalie Brown
Done in Seattle, Washington

7/29/14.

Date

COUNTY

APPENDIX A

2012 WL 6050551
Only the Westlaw citation is currently available.
United States District Court,
M.D. Pennsylvania.

Timothy MAYO, Plaintiff,
v.
CITY OF SCRANTON, et al., Defendants.

Civil Action No. 3:CV–10–0935.
|
Dec. 4, 2012.

Attorneys and Law Firms

Cynthia L. Pollick, The Employment Law Firm, Pittston, PA, for Plaintiff.

Timothy E. Foley, Foley, Cognetti, Comerford & Cimini, Scranton, PA, for Defendants.

MEMORANDUM ORDER

A. RICHARD CAPUTO, District Judge.

***1** Before me is the Motion to Compel Appearance of City of Scranton Detective Sergeant Tim Harding (Doc. 46) filed by Plaintiff Timothy Mayo. Plaintiff served a federal subpoena on Mr. Harding to appear as a trial witness in this matter. Subsequently, the United States Attorney's Office for the Middle District of Pennsylvania contacted Plaintiff's counsel to inform her that Mr. Harding is a Task Force Officer ("TFO") for the Federal Bureau of Investigation ("FBI"). (Doc. 46, Attach.4.) As such, the United States Attorney's Office indicated that in order to secure Mr. Harding's testimony in this proceeding, Plaintiff must comply with the regulations set forth in 28 C.F.R. §§ 16.21–16.29.

The Code of Federal Regulations contain the procedure for production or disclosure of any FBI information "acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties." 28 C.F.R. § 16.21(a). These procedures apply:

> In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a 'demand') of a court or other authority is issued for such material or information.

28 C.F.R. § 16.21(a)(2). An employee of the Department "includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees, and members of the staffs of those officials." 28 C.F. R. § 16.21(b).

In a case in which the United States is not a party, an employee of the Department of Justice shall not disclose information or produce material acquired as part of the performance of that person's official duties without prior approval of the proper Department official. *See* 28 C.F.R. § 16.22(a). And, to obtain approval for oral testimony in a case in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony, must be provided to the responsible U.S. Attorney, and the statement must set forth "a summary of the testimony sought and its relevance to the proceeding." 28 U.S.C. § 16.22(c).

Rather than following these regulations to obtain Mr. Harding's testimony in this matter, Plaintiff filed the instant motion to compel. (Doc. 46.) Plaintiff contends that Mr. Harding is not an FBI Special Agent. Instead, Plaintiff asserts that Mr. Harding has previously testified that he was employed by the City of Scranton at an arbitration proceeding. (*Id.* at Attach. 2.) Thus, Plaintiff argues that Mr. Harding should be compelled to testify at trial because there is "no rule or regulation that states that a City of Scranton employee cannot appear at trial in this matter." (Doc. 46, ¶ 6.)

***2** Plaintiff's motion to compel will be denied. While Plaintiff argues that Mr. Harding was not an FBI Special Agent, Mr. Harding previously testified that he was "assigned full time to the FBI Safe Streets Task Force." (Doc. 46, at Attach. 2.) Based on this assignment to the FBI, Mr. Harding was subject to the supervision, jurisdiction or control of the Department of Justice for purposes of 28 C.F.R. § 16.21(b). Accordingly, to obtain

Mr. Harding's testimony in this matter, Plaintiff must furnish an affidavit or statement to the responsible U.S. Attorney setting forth a summary of the testimony sought and its relevance to this proceeding.[1] As Plaintiff has not complied with this procedure, (Doc. 46, Attach .4), it would be improper to compel the testimony of Mr. Harding. Plaintiff's motion will therefore be denied.

NOW, this 4th day of December, 2012, **IT IS HEREBY ORDERED** that the Motion to Compel Appearance of City of Scranton Detective (Doc. 46) is **DENIED.**

All Citations

Not Reported in F.Supp.2d, 2012 WL 6050551

Footnotes

1 It is unclear from Plaintiff's motion what information he seeks to elicit from Mr. Harding at trial. However, it appears that Mr. Harding is represented by the United States Attorney's Office on a related matter. (Doc. 46, Attach.4.)

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