NO. 94109-2

THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Petitioner,

v.

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

Respondents, and

UNITED STATES OF AMERICA,

Intervenor/Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Theresa Doyle

DECLARATION OF JAMES E. LOBSENZ

James E. Lobsenz WSBA #8787
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I, JAMES E. LOBSENZ, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I am counsel for the Petitioner, Michael Mockovak. I have personal knowledge of the facts set forth here.

2. Attached as Appendix A is a true and correct copy of the *Motion to Compel* which Petitioner Mockovak filed in the Superior Court on October 19, 2015.

3. Attached as Appendix B is a true and correct copy of the *Certificate of Compliance* which Petitioner filed in the Superior Court along with his motion to compel.

4. Attached as Appendix C is a true and correct copy of the *Response to Motion to Compel* which the United States filed on October 23, 2015 in the Superior Court

5. Attached as Appendix D is a true and correct copy of the *Declaration of Gregory W. Jennings* which the United States filed in the Superior Court in support of its opposition to Mockovak's motion to compel.

6. Attached as Appendix E is a true and correct copy of the *Motion of the United States to Intervene, or for Leave to File an Amicus Curiae Brief* which the United States file in the Court of Appeals.

7. Attached as Appendix F is a true and correct copy of the order entered by Commissioner Mary Neel that reads simply: "Granted."

8. Attached as Appendix G is a true and correct copy of the title page of the brief that the United States filed in the Court of Appeals, on which the United States identifies itself as an "Intervenor/Respondent."

9. I located the audio recording of the Court of Appeals oral argument in this case and I listened to the entire presentation of attorney Michael Shih. Mr. Shih identified himself at the outset of his argument as the attorney appearing "for the United States." He never said the words "amicus" or "amicus curiae."

DATED this 6th day of March, 2017.

James E. Lobsenz WSBA #8787
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 6th day of March, 2017.

Deborah A. Groth, Legal Assistant

APPENDIX A

Honorable Theresa Doyle
NOTED FOR HEARING: October 27, 2015

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

MICHAEL MOCKOVAK,

Plaintiff,

v.

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

Defendants.

NO. 14-2-25191-2 SEA

PLAINTIFF'S MOTION TO COMPEL DETECTIVE CARVER TO SUBMIT TO DEPOSITION

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A Seattle police officer has acknowledged that he has documents responsive to the plaintiff's deposition subpoena, and that he can provide testimony about the existence and whereabouts of other documents. But the Justice Department purports to prohibit the deposition, and to nullify the plaintiff's subpoena, based upon a federal regulation that applies only to federal "employees." The U.S. Attorney asserts the dubious proposition that the Seattle officer became a federal employee when he worked with an FBI Agent on a joint task force. Pursuant to CR 37, the plaintiff moves the Court for an order compelling the city officer to submit to a deposition in this case, and to produce the subpoenaed documents.

I. ISSUES PRESENTED

1. 5 U.S.C. §301 authorizes federal agencies like the Department of Justice [DOJ] to make regulations to govern the conduct of "its employees." Does this statute authorize the DOJ to issue a regulation governing the conduct of a detective employed by the Seattle Police Department, who was assigned to a joint task force where he worked cooperatively with an FBI Agent?

2. Would it violate the Tenth Amendment for a federal agency to adopt a regulation that prohibited a city police officer from being deposed in a state court proceeding unless he had the approval of a federal official?

3. Given the constitutional problems that would be raised by an interpretation of 28 C.F.R. 16.21 that construed a municipal police officer assigned to a joint state/federal task force as an "employee" of the Justice Department, must a court apply the rule of constitutional avoidance by rejecting this construction and holding that the regulation is inapplicable to this officer?

II. STATEMENT OF FACTS

In the Certificate of Probable Cause that he submitted to the King County Superior Court, Detective Carver said that he was "a detective with the Seattle Police Department assigned to the FBI – Safe Streets, Violent Crimes Task Force and [that he had] reviewed the investigations conducted in Federal Bureau of Investigation File No. 166C-SE-95743 . . ." *Decl. Lobsenz in Support Of Motion to Compel ("DSMC"),* Appendix A. Similarly, in his sworn *Application for Authority to Intercept and Record* that he signed and filed in state court when he sought judicial permission to record Mockovak's private conversation, Carver told the Superior Court: "My partner in this investigation is FBI Agent Carr; [and] we have

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worked closely on this investigation . . . ." *DSMC,* Appendix B at 1-2. Carver told the Court that initially he and Agent Carr thought that any criminal case against Mockovak would be charged and tried in federal court, but in October of 2009 they changed their minds and decided to focus their investigation on state law crimes. *Id.* at 11.[1] At that point in time "the possibility of a state prosecution came to the investigators['] attention," so in an "abundance of caution" they decided to start complying with the Washington State's Privacy Act by seeking State court judicial authority to record Mockovak's private conversation. *Id.*

Thereafter the criminal charges *were* filed in State court. Detective Carver testified at the state court trial. When asked "How are you employed?" he responded, "I am a Seattle police detective." *DSMC, Appendix C.* When asked what his current assignment was he replied, "I'm presently assigned to the FBI's violent crime squad." *Id.*

In the present Public Records Act case, Mockovak noted Carver's deposition for August 20, 2015 and accompanied the notice with a subpoena duces tecum directing him to bring documents related to informant Kultin's immigration and citizenship status. *DSMC, Appendix D.* On August 14, 2015, Detective Carver contacted the office of Mockovak's counsel and reported that he was unavailable on the 20th, so Mockovak re-noted Carver's deposition for August 27th. *Id., Appendix E.*

On August 17, 2015 Mockovak's counsel James Lobsenz received a letter from the U.S. Attorney's office stating that without approval from the Justice Department, Detective Carver's deposition could not take place. *DSMC, Appendix F.* That letter described Carver as an "FBI Task Force Officer," made no mention of his employment as a Seattle police

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[1] "Investigators did not initially consider any prosecution of crimes in state court. It was not until October 29, 2009, that investigators identified state crimes as additional possible crimes being committed in this investigation. At that time investigators determined to focus their investigation on the above listed state crimes in addition to the above listed federal crimes."

Carver identified the "above-listed state crimes" as Solicitation of Murder and Conspiracy to Commit Murder. *Id.* at 2-3. He identified the "above-listed federal crimes" as Conspiracy to Commit Murder under 18 U.S.C. §§ 1111 and 1117. Carver said it was not until October 29, 2009 that he realized that the federal crime of conspiracy to commit murder also constituted the crime of conspiracy to commit murder under state law.

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officer, and asserted that Carver was an FBI employee:

> I am in receipt of your Notice of Deposition commanding the testimony of FBI Task Force Officer (TFO) Leonard Carver, III, at a deposition scheduled for August 20, 2015, in connection with the above captioned matter. The FBI is an agency within the U.S. Department of Justice. As such, ***the testimony of FBI employees, to include Task Force Officers, cannot be compelled by a subpoena.*** *See In re Elko County Grand Jury v. Siminoe*, 109 F.3d 554, 556 (9th Cir. 1997). Rather their testimony is subject to approval by the U.S. Department of Justice.

DSMC, Appendix F (emphasis added).

The August 17 letter explained how to request approval for the deposition of DOJ "employees," and cited to the regulations governing such requests for "employee" testimony:

> The relevant regulations governing the testimony of ***Department of Justice employees*** and the production of records maintained by the Department of Justice in litigation not involving the United States are codified at 28 C.F.R. Part 16.21, *et seq.* In particular, in order to obtain testimony from ***U.S. Department of Justice employees***, 28 C.F.R. §16.22(c) provides that:
>
> > . . . an affidavit . . . setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former ***employee of the Department*** shall be limited to the scope of the demand as summarized in such statement.

DSMC, Appendix F (emphasis added). The letter concluded that "***at the present time***, TFO Carver is not authorized by the Department to testify," but stated that if Mockovak submitted a request for Justice Department approval, that request would be "***quickly reviewed*** and acted upon." *Id.* (emphasis added).

In response to the letter, Mockovak's counsel asked Kerry Keefe, the Chief of the Civil Division, to call him. *DSMC, Appendix G.* Two days later, Keefe sent Lobsenz an email stating that Detective Carver was a Joint Task Force Officer, and that under federal regulations (known as the *Touhy* regulations) "Task Force Officers are considered to be 'employees' of the Department [of Justice] as defined in the *Touhy* regulations." *Id.* In reply Lobsenz asked why a Seattle police detective would be "considered" a federal employee

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under the regulation that Keefe cited. *Id.*

On August 21, Lobsenz received a phone call from attorney Greg Jennings, Chief Counsel for the Seattle Division of the FBI. DKT #44, ¶15. After speaking for about an hour Jennings stated that "whether or not *Touhy* applied, and whether or not the approval of the Justice Department and the FBI was legally required, he was tentatively inclined to grant such approval if [Lobsenz] would simply request it." *Id.*, ¶16. Lobsenz agreed to send such a request, and Jennings "said he was not promising that he would grant such a request for approval, but he indicated that he would consult with the United States Attorney's Office and that he felt it was very likely that he would ultimately agree to grant such approval." *Id.*, ¶17.

That same day, Lobsenz sent Jennings the *Touhy* request letter that Jennings had asked for. *DSMC, Appendix H* (Letter of August 21),[2] and Jennings acknowledged its receipt:

> I have reviewed it and passed it to the USAO. I understand the time pressure you're under and will let you know as soon as I hear anything.

DSMC, Appendix I. Then, while waiting for the anticipated DOJ approval of his request to depose Detective Carver, Mockovak again re-noted the deposition for September 28, which was the last day before expiration of the discovery cut-off. *DSMC, Appendix J.*

On August 26, Mockovak moved for a continuance of the County's summary judgment motion so as to give him the opportunity to conduct the deposition of Detective Carver before that motion was considered. DKT #43. On September 2, this Court granted the motion and continued the County's summary judgment motion to October 30. DKT #57.

On September 23, more than one month after the request for deposition approval had been sent, Mockovak received a letter from AUSA Peter Winn *denying* that request. *DSMC, Appendix K.* Winn restated the DOJ's position that Carver "was a deputized officer assigned

[2] In the letter Lobsenz stated that Mockovak was *not* waiving his position that such a request was legally unnecessary because Detective Carver, as a state law enforcement officer, was not covered by the federal *Touhy* regulations. *Id.* at p.1. He explained that he was sending the request letter because it seemed that the request was likely to be quickly granted, therefore sending a request was the most prudent way to get a speedy resolution of the issue that was satisfactory to all. *Id.*

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to a joint FBI task force, and *as such is deemed to be an 'employee'"* of the Department subject to the regulations. *Id.* at 1 (italics added). Winn also said that the Justice Department disagreed with this Court's decision to grant Mockovak a continuance of the summary judgment motions so that he could depose Carver before the Court considered those motions. Winn stated that Mockovak's "attempt to use the State Court's discovery powers to depose Mr. Carver appears to be an improper use of that Court's authority under State law." *Id.*

Given the Justice Department's September 23 refusal to approve of the deposition of Detective Carver, it was unclear to Mockovak whether Detective Carver was going to appear for the re-noted deposition on Monday, September 28. On September 25, the Friday before the scheduled deposition, Detective Carver called Mockovak's counsel and courteously notified him that he was not going to appear. *DSMC,* ¶ 15. Carver said that he was "caught in the middle;" that he was going to just wait and see what the courts and "the lawyers" directed him to do; and that in response to the subpoena duces tecum he had "given over the papers that he had." *Id.* Carver did not say to whom he had given these papers. Carver said that he called because he wasn't sure counsel had received AUSA's letter and he wanted to be sure that it was clear he was not going to appear. Lobsenz did not ask Detective Carver any questions, but he did thank him for calling to inform him that he was not going to appear. As he indicated, Detective Carver did not appear on September 28 for his deposition.

III. STATUTES AND REGULATIONS

Congress has provided that department heads may issue regulations for the control of "the conduct of its employees" and the custody of "its records [and] papers":

> The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct ***of its employees***, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. . . .

5 U.S.C. §301 (emphasis added). This type of regulation is generally referred to as *Touhy*

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regulations.[3] The Department of Justice [DOJ] has adopted its own *Touhy* regulations. They are set forth in 28 C.F.R. Part 16, Subpart B.

28 C.F.R. §16.21 (see Appendix A) gives the procedure to be followed when, in a proceeding to which the United States is not a party, one of the parties seeks "any 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 or because of that person's official status." (Emphasis added). §16.22(b) (see Appendix B) provides that whenever such a demand is made, the "***employee*** shall immediately notify the U.S. Attorney ...." (Emphasis added). 28 C.F.R. §16.22(a) provides that "in response to a demand" for such information, the "***employee or former employee*** of the Department of Justice" is directed not to disclose any such information "without prior approval of the proper Department official ...." (Emphasis added).

Finally, 28 C.F.R. §16.21(b) defines the term "employee" as follows:

> (b) For purposes of this subpart, ***the term 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.

(Emphasis added).

Mockovak submits that these regulations do not apply to Detective Carver because he is an employee of the City of Seattle, and he is not subject to the supervision, jurisdiction, or control of the Attorney General of the United States. Alternatively, if these regulations do apply to him, Mockovak submits that as applied they violate the Tenth Amendment.

IV. ARGUMENT

A. Neither the U.S. Attorney nor Detective Carver has sought a protective order.

"The right to discovery is an integral part of the right to access the courts embedded in our constitution." *Cedell v. Famers Ins.*, 176 Wn.2d 686, 695, 295 P.3d 239 (2013). A person

[3] In *United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951) The Supreme Court considered DOJ regulations adopted pursuant to 5 U.S.C. §22, the predecessor statute to 5 U.S.C. §301. .

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who opposes discovery cannot simply decide unilaterally not to produce it, but must instead seek a protective order. *Wash. St. Physicians v. Fisons*, 122 Wn.2d 299, 354, 888 P.2d 1054 (1993). *Accord Gammon v. Clark Equipment*, 38 Wn. App. 274, 281, 686 P.2d 1102 (1984), *aff'd* 104 Wn.2d 613, 707 P.2d 685 (1985).[4] "The burden of persuasion is upon the party seeking the protective order." *Cedell*, 176 Wn.2d at 696. *Cf. State v. Grenning*, 169 Wn.2d 47, 56, 234 P.3d 169 (2010). The United States cannot meet this burden and thus has not even tried to obtain a protective order.

B. *Touhy* held that federal agencies may centralize the making of a decision whether to produce information in possession of a federal agency by denying a subordinate employee the power to make that decision.

In its August 17th letter the DOJ purports to rely on *Elko County Grand Jury v. Siminoe*, 109 F.3d 554 (9th Cir. 1997). But *Elko* involved a state grand jury subpoena issued to a Forest Service employee named Siminoe. Siminoe was a federal employee and nothing more. He was not also an employee of some State agency, nor was he a member of any joint task force where federal and state employees worked together. Thus *Elko* sheds no light on whether a state law enforcement officer can be "considered to be" a DOJ "employee."

The same is true of the *Touhy* case. In *Touhy* a prisoner brought a habeas corpus proceeding in a federal district court and during the proceeding a subpoena was issued and served upon George McSwain, the FBI agent in charge of the FBI's Chicago office. Agent McSwain appeared in court and citing the DOJ regulations, politely refused to produce the documents stating that without the permission of the Attorney General he could not do that. The district court held McSwain in contempt of court, but the Supreme Court reversed the contempt finding, holding that it was permissible for DOJ to centralize the decision as to whether to produce agency records by prohibiting any employee except the agency head from

[4] CR 26(c) provides that "a person from whom discovery is sought" may move for a protective order and the court may grant such a motion "for good cause shown."

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making that decision.[5] McSwain was not a state or local police officer, and he was not working with any state or local police officer on any "joint task force."

C. The Tenth Amendment prohibits the federal government from converting state employees into servants of the federal government.

1. The States cannot be forced to carry out federal policies.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Given this clear constitutional command, "It is incontestable that the Constitution established a system of 'dual sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997). Under this system there are two sovereigns, "one state and one federal, each protected from incursion by the other." *Id.* at 920. In *New York v. United States*, 505 U.S. 144 (1992), the Court struck down a law that compelled the States to adopt programs for the regulation of radioactive nuclear wastes. The Supreme Court held that the federal law violated the Tenth Amendment because "the federal government may not compel the States to enact or administer a federal regulatory program." *Id.* at 188.

2. The federal government cannot tell state law enforcement officers what they can and cannot do.

In *Printz* the Court dealt with a federal gun control law that "purport[ed] to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." 521 U.S. at 904. Jay Printz, a Montana County Sheriff, challenged the law. He objected to the provisions that required him to conduct background checks on individuals who wanted to buy guns. These checks required state law

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[5] The Supreme Court explicitly held that it was *not* deciding whether the U.S. Attorney General could withhold the subpoenaed documents because the case did not raise that issue and the Attorney General was not before the trial court. *Touhy*, 340 U.S. at 467. "We find it unnecessary . . . to consider the ultimate authority of the Attorney General to refuse to produce at a court's order the government papers in his possession . . ." *Id.* And in a concurring opinion Justice Frankfurter said that he assumed that a court *could* hold the Attorney General in contempt if he refused to produce unprivileged material. (I assume the contrary – that the Attorney General can be reached by legal process." *Id.* at 472 (Frankfurter, J., concurring

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enforcement officers to examine State, local, and national records and databases, to see if the would-be gun purchaser was ineligible to possess a gun. *Id.* at 903. Printz "object[ed] to being pressed into federal service" and argued that "compelling state officers to execute federal laws is unconstitutional." *Id.* at 905. The Supreme Court agreed with him and held the law violated the Tenth Amendment. *Id.* at 933.

Recognizing that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service . . . the police officers of the fifty States," the Court held it was incompatible with state sovereignty to allow the federal government to "dragoon" state officers into administering federal law. *Id.* at 922, 928. The federal government sought to distinguish *New York v. United States* by arguing that the federal law in that case was aimed "at the State itself," but the law in *Printz* was aimed at individuals who were state officers. The Court rejected this argument, noting that although the law in *Printz* was directed to individuals, it was "directed to them in their official capacities as state officers, it controls their actions, not as private citizens, but as agents of the State." *Id.* at 931. Thus the Court rejected as "empty formalistic reasoning" the argument that the federal government can direct and control the conduct of state officers because they are merely individuals. *Id.* Adhering to its holding in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program, the Court struck down the commandeering portion of the federal gun control law:

> Today we hold that Congress cannot circumvent that prohibition by conscripting the State officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Printz, at 935. In the present case the U.S. Attorney advances equally "empty formalistic reasoning" when it seeks to "circumvent" the rule of *Printz* by asserting that a Seattle police officer ceases to be a state officer, and becomes a federal officer, whenever he is assigned to a joint task force and works cooperatively with a federal officer.

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D. Congress limited the authority of Department heads to regulating "the conduct of its employees." The DOJ has exceeded that authority by purporting to regulate the conduct of the employees of state and local governments.

1. A Seattle police detective is not a DOJ employee, even if he is assigned to a task force where he works with other officers who are DOJ employees.

Under 5 U.S.C. § 301, Congress authorized federal agencies to adopt regulations for the conduct of "its employees," but it did not define the term "employees." DOJ then purported to define an employee as a person "appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States." But Detective Carver is a Seattle police officer so he is not covered by that definition. The DOJ regulation goes further and states that the term "employees" includes all "U.S. Marshals."

"The ordinary dictionary definition of "employee" includes any "person who works for another in return for financial or other compensation." *NLRB v. Town & country Electric*, 516 U.S. 85, 90 (1995), quoting *American Heritage Dictionary* 604 (3d ed.1992). Detective Carver is paid by the City of Seattle. Though there is no evidence of it, it appears that Carver may have been "deputized" as a "U.S. Marshal" when the Seattle Police Department assigned him to the Joint Task Force. But even if there were evidence of such deputization, that would not convert a city employee into an "employee" of the Justice Department.[6]

2. Applying the rule of constitutional avoidance, this Court should rule that the DOJ regulations do not apply to Detective Carver.

Courts routinely follow the prudent rule of constitutional avoidance. *Utter v. Building Industry Association*, 182 Wn.2d 398, 434-35, 341 P.3d 953 (2015) (the "interpretative principle of constitutional avoidance mandates that [courts] choose the interpretation of the

[6] It is common for even a private citizen to be "deputized" as a member of a law enforcement team, such as a posse, and such deputization makes that person a law enforcement officer with the power to make arrests. *See Wright v. United States*, 158 U.S. 232 (1895) (Native American man sworn in as deputy Marshall was a "de facto officer" of the United States). But the private citizen does not become a federal employee simply because he has been granted the power to assist a U.S. Marshal by making an arrest

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arbitration rule that . . . avoids any constitutional problem").[7] Mockovak submits that his construction of the word "employees" is correct and that the DOJ's interpretation of that word is incorrect. But even if the DOJ's construction of the word was equally plausible, it would raise serious constitutional problems with 28 C.F.R. 16.21 to construe the statutory words "its employees" to include a Seattle police detective who is assigned to a joint task force where he works with a DOJ employee.[8] Therefore, applying the rule of constitutional avoidance this Court should rule that Carver is not a DOJ employee and therefore the DOJ regulations requiring U.S. Attorney approval before Carver can be deposed are not applicable.

E. Application of the DOJ regulations to Carver would violate the 10th Amendment. The Constitution leaves the realm of criminal law primarily to the States.

If this Court is not inclined to dispose of the federal government's objection to the deposition on the ground that the DOJ regulations do not apply to Carver, then it must address the Tenth Amendment issues. Mockovak submits that requiring DOJ approval before Carver can be deposed in this case would violate the Tenth Amendment for several reasons.

First, under *Printz* the federal government has no power to control the actions of a local police officer. Just as Congress cannot force police officers to carry out their programs, neither can the DOJ force Seattle police officers to obey its rules or carry out its internal policies. If Seattle had a statute or rule that said that the decision whether to allow deposition of a police officer in a civil case could only be made by the Mayor, that would not violate the Tenth Amendment. But requiring a city police officer to get the permission of a federal official – the local U.S. Attorney – does violate the Tenth Amendment.

Second, the DOJ's position is even weaker than the position that the federal

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[7] *Accord Clark v. Martinez*, 543 U.S. 371, 380-81 (2005)("when deciding which of two plausible statutory constructions to adopt . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail . . .").

[8] In *Bond v. United States*, 134 S.Ct. 2077, 2091 (2014) the Court rejected the Government's construction of a criminal statute because such a construction "would alter sensitive federal-state relationships" and would "convert an astonishing amount of 'traditionally local criminal conduct' into 'a matter for federal enforcement.'"

CARNEY BADLEY SPELLMAN, P.S.
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government took in *Printz* because there it was recognized that Congress *did* have the power, under the Commerce Clause, to regulate the sale of guns. But it is universally acknowledged that the federal government does *not* have a general police power to make criminal laws. *Bond*, 134 S.Ct. at 2086.[9] Thus, the Supreme Court has been very reluctant to permit the application of federal criminal law to purely local intra-state activity that has no connection to interstate commerce.[10] In this case, the attempt to regulate what a Seattle police officer does with his records of a criminal investigation into a state law crime is on even shakier constitutional ground that the law struck down in *Printz.*

Third, by purporting to overrule this Court's determination that the deponent may have relevant testimony to give, and may be in possession of relevant documents, the local U.S. Attorney, as the DOJ decision maker, is directly interfering with the operation of the judicial branch of state government. No federal official has the power to usurp the judicial power of the state courts by making evidentiary rulings that are binding on state court judges.

In sum, by prohibiting the deposition of a city police officer who has been subpoenaed to testify and to produce evidence in a state case, the local U.S. Attorney's office has violated the Tenth Amendment. The DOJ has not even tried to quash the subpoena, and could not carry its burden of proof even it had made such a motion.

V. CONCLUSION

For these reasons, plaintiff asks this Court to order Detective Carver to submit to a deposition and to produce the subpoenaed documents.[11]

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[9] "A criminal act committed wholly within a State cannot be made an offence against the United States unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *Id. See also Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993).

[10] *See, e.g., Jones v. United States,* 529 U.S. 848, 859 (2000) (refusing to make virtually every arson in the country a federal offense); *United States v. Bass,* 404 U.S. 336 (1971)(avoiding interpretation of federal statute because it would "dramatically intrude upon traditional state criminal jurisdiction").

[11] Plaintiff asks for thirty days to conduct that deposition, to obtain a transcript of it, and to submit additional material from that deposition to the court for consideration in connection with the pending summary judgment motions.

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Seattle, WA 98104-7010
(206) 622-8020

DATED this 19th day of October, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By /s/ James E. Lobsenz
James E. Lobsenz WSBA #8787
Attorneys for Plaintiff

CARNEY BADLEY SPELLMAN, P.S.
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APPENDIX A
28 CFR §16.21

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any 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 or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party; and

(2) 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.

(b) For purposes of this subpart, the term 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.

(c) Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prosecutive, or regulatory agencies.

(d) This subpart is intended only to provide guidance for the internal operations of the Department of Justice, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

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APPENDIX B
28 CFR §16.22

a) In any federal or state case or matter in which the United States is not a party, ***no employee or former employee of the Department of Justice shall***, in response to a demand, ***produce any material*** contained in the files of the Department, ***or disclose any information*** relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status ***without prior approval of the proper Department official*** in accordance with §§16.24 and 16.25 of this part.

(b) Whenever a demand is made upon ***an employee or former employee as described in paragraph (a)*** of this section, ***the employee shall immediately notify the U.S. Attorney*** for the district where the issuing authority is located. The responsible United States Attorney shall follow procedures set forth in §16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter 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 or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible U.S. Attorney shall request a summary of the information sought and its relevance to the proceeding.

(Emphasis added)

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ KING COUNTY E-SERVICE, Email and LEGAL MESSENGER:

Attorneys for Defendant
Michael J. Sinsky
KING COUNTY PROSECUTOR'S OFFICE
516 3rd Ave Rm W400
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mike.sinsky@kingcounty.gov
(VIA KING COUNTY E-SERVICE AND E-MAIL)

Attorney for the United States and for the deponent, Detective Leonard Carver
AUSA Peter Winn
United States Courthouse
700 Stewart Street, Suite 5220
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Peter.Winn@usdoj.gov
(VIA EMAIL AND LEGAL MESSENGER)

DATED this 19th day of October, 2015.

Deborah A. Groth, Legal Assistant

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APPENDIX B

Honorable Theresa Doyle
Noted for Hearing: October 27, 2015

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

MICHAEL MOCKOVAK, Plaintiff, v. KING COUNTY; and the KING COUNTY PROSECUTING ATTORNEY'S OFFICE, Defendants.	NO. 14-2-25191-2 SEA CERTIFICATE OF COMPLIANCE WITH CR 26(i)

I, JAMES E. LOBSENZ, counsel for the plaintiff, certify that I have complied with CR 26(i). I conferred with Assistant United States Attorney Peter Winn, who is counsel for the deponent (Detective Leonard Carver). We conferred by telephone on three separate occasions (September 25, September 29, and October 16) in an attempt to reach a mutually acceptable resolution of the U.S. Attorney's objection to the deposition of Detective Carver. We were unable to resolve our differences.

On September 30, I also conferred by telephone with Senior Deputy Prosecuting Attorney Michael Sinsky regarding the dispute over the plaintiff's attempt to depose Detective Carver. When we spoke Mr. Sinsky was unsure whether he would take any position at all on Mockovak's Motion to Compel. As noted in his Notice of Unavailability, Mr. Sinsky left the country for a vacation and is not due to return to the country until October 19th. But since the plaintiff's discovery dispute is with the United States (as represented by the United States Attorney's Office), even if Mr. Sinsky decided to support the plaintiff's

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motion to compel, that would not suffice to resolve the discovery dispute, because the deponent is declining to appear for deposition on the advice of the U.S. Attorney's Office.

DATED this 19th day of October, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By *s/James E. Lobsenz*
James E. Lobsenz WSBA #8787
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ KING COUNTY E-SERVICE, Email and LEGAL MESSENGER:

Attorneys for Defendant
Michael J. Sinsky
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Attorney for the United States and for the deponent, Detective Leonard Carver
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Peter.Winn@usdoj.gov
(VIA EMAIL AND LEGAL MESSENGER)

DATED this 19th day of October, 2015.

Deborah A. Groth, Legal Assistant

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APPENDIX C

Honorable Theresa Doyle
NOTED FOR HEARING: October 27, 2015

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MICHAEL MOCKOVAK,

Plaintiff,

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

Defendants,

Case No. 14-2-25191-2SEA

RESPONSE TO MOTION TO COMPEL

I. INTRODUCTION

Plaintiff, Michael Mockovak, has moved for a Court Order compelling production of information from the files of the Federal Bureau of Investigation ("FBI)" and acquired by a federally deputized Task Force Officer ("TFO") appointed to an FBI Task Force, as a part of his official duties and official status on the Task Force. In support of his motion, Plaintiff argues that the Tenth Amendment precludes the federal government from, "forcing states to carry out federal policies," and "telling state law enforcement officers what they can and cannot do." As such, Plaintiff's motion is based upon a fundamentally flawed premise. This matter concerns the federal government's lawful exercise of authority over its own information, not

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over any information in possession, custody or control of King County or the State of Washington. Accordingly, Plaintiff's motion to compel should be denied.

II. STATEMENT OF FACTS

Plaintiff's subpoena seeks oral testimony from FBI Task Force Officer Leonard Carver III ("TFO Carver") regarding his work on the FBI Task Force. In addition, it seeks to compel TFO Carver to produce certain federal records in the possession of the Immigration and Naturalization Service ("INS") and the FBI, to wit: "All documents (letters, emails, text messages, etc.) in *your* possession that discuss or mention any of the following topics:

> (1) Daniel Kultin's citizenship;
> (2) Daniel Kultin's immigration status;
> (3) Daniel Kultin's desire to obtain U.S. citizenship;
> (4) Daniel Kultin's status as an asylee, or as an applicant for asylum in the United States;
> (5) Any difficulties that Daniel Kultin ever had with U.S. Immigration and Naturalization Services;
> (6) Any incident wherein Daniel Kultin was arrested;
> (7) Any request that you, or any other law enforcement officer, provide assistance to Diniel Kultin in any citizenship or immigration matter, including, but not limited to, obtaining' citizenship for Kultin or a relative of Kiiltin, obtaining a green card for Kultin or a relative of Kultin, and avoiding deportation or arrest of Kultin or any relative of Kultin by JNS;
> (8) Any document that contains any support for, or endorsement of, Daniel Kultin, for any purpose whatsoever; and
> (9) Any document authored by any federal, state, or local government agency or agency official regarding Kultin's citizenship or immigration status."

See Notice of Deposition (emphasis added).

As noted, these records are currently in the possession of the FBI and the INS, not TFO Carver. To the extent they are accessible by TFO Carver, it is only by virtue of his performance of his federal duties on the Task Force and his status as an FBI Task Force

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Officer. The records themselves belong to the federal government and are governed by federal regulations.[1]

III. ARGUMENT AND AUTHORITIES

1. The discovery sought is federal material subject to The Touhy Regulations

The Federal Housekeeping Statute, 5 U.S.C. § 301, gives federal agencies statutory authority to prescribe regulations regarding production of official information for litigation. Such regulations, commonly referred to as *Touhy* regulations, "centraliz[e] determinations as to whether subpoenas . . . will be willingly obeyed or challenged," thus avoiding "possibilities of harm from unrestricted disclosure in court." *United States v. Williams*, 170 F.3d 431, 433 (4th Cir. 1999) (quoting *United States ex rel Touhy v. Ragen*, 340 U.S. 462, 468 (1951)). *Touhy* regulations ensure uniform and well-considered responses to private litigants' requests for information, that responses will not cause injury to the government or the public, and that all requesters are treated equally. An agency's regulations "have the force and effect of federal law." *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979)).

DOJ's *Touhy* regulations, 28 C.F.R. §§ 16.21-16.28, "set[] forth procedures to be followed with respect to the production or disclosure of any material contained in [DOJ's] files" and any information acquired by a DOJ employee, "as a part of the performance of that person's official duties or because of that person's official status." 28 C.F.R. § 16.21(a). For matters in which the United States is not a party, section 16.21(b) of the DOJ's *Touhy* regulations define the term "employee" as follows:

---

[1] Plaintiff argues that TFO Carver that is also a deemed agent of King County (although he is not employed by that agency). Plaintiff is simply confused. The cases he has cited requiring private contractors of government agencies to produce records responsive to PRA requests are not applicable. The FBI's obligations with respect to the records in its possession are governed by the Federal Records Act and the FOIA.

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> (b) For purposes of this subpart, the term 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.

In connection with the issues before this Court, which are focused on Len Carver's work as an FBI Task Force Officer (not on his work as a Detective for the Seattle Police Officer), the Declaration of FBI Chief Division Counsel Gregory Jennings certifies that Carver was appointed and swore an oath of office as a Deputy United States Marshal. This designation is given to law enforcement officers by the United States Marshals Service ("USMS") upon taking an oath of office and it authorizes the officers to conduct investigations of, and make arrests for, violations of Title 18 of the United States Code ("USC"). In addition, as noted by Mr. Jennings, Mr. Carver has also been designated a Special Federal Officer. This designation is given to law enforcement officers by the FBI upon taking an oath of office and it authorizes the officers to conduct investigations of, and make arrests for, violations of Title 21 of the USC. Finally, as Mr. Jennings explains in his Declaration, the FBI sponsored and obtained these federal authorities for Mr. Carver in order for him to execute his responsibilities as an FBI Task Force Officer assigned to the FBI's Seattle Division.

As Mr. Jennings explains, TFO Carver performed his duties on the Task Force under the assignment by an FBI supervisor, and that his day-to-day activities on the Task Force were under the supervision and control of an FBI supervisor, where TFO Carver is required to investigate, and assist others in the investigation of, violations of the USC consistent with FBI policy and procedure. He receives his assignments from a Supervisory Special Agent of the FBI, is under the day-to-day supervision and control of the FBI, is empowered by the FBI and the USMS to engage in law enforcement operations outside the State of Washington under the

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supervision and control of the FBI, and is required to comply with the investigative and administrative requirements of the FBI and the DOJ. As a result of these authorities, all FBI TFOs are appointed federal officials, who are subject to the supervision, jurisdiction, and control of the Attorney General of the United States for purposes of 28 C.F.R. § 16.21(b).

Not surprisingly, members of local FBI Task Forces who were also employed by state and local governments, under precisely the circumstances here (where parties to lawsuits have attempted to conduct thirty-party depositions of them), have been held to be *federal employees* to whom the *Touhy* regulations apply. *See e.g., Mayo v. City of Scranton* 2012 WL 6050551 (M.D.Pa. 2012) (applying *Touhy* regulations to quash subpoena for the third party testimony of an FBI Task Force Officer who also happened to be employed by the state).

Under the DOJ's *Touhy* regulations, TFO Carver may not testify in a proceeding where DOJ is not a party to the litigation, "without prior approval of the proper [DOJ] official." 28 C.F.R. §§ 16.21(a)(2), 16.22(a). These regulations also mandate that the responsible U.S. Attorney and originating components consider whether disclosure is appropriate under the rules of procedure governing the matter in which the demand arose, and whether disclosure is appropriate under the relevant substantive law concerning privilege. *Id.* at § 16.26(a). The federal government's *Touhy* regulations do not stand in the way of legitimate discovery in state proceedings. Plaintiff can obtain lawful access to the underlying records by filing a request for access to them under FOIA's mandatory public disclosure provisions, *see* 5 U.S.C. § 552(a)(3). However, Plaintiff has not made a FOIA request to the FBI or the INS for these records. To obtain the testimony of a knowledgeable federal employee, Plaintiff these provisions of the regulations apply:

> (a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in

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response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

***

(c) If oral testimony is sought by a demand in any case or matter 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 or by his attorney, setting forth a summary of the testimony sought *and its relevance to the proceeding*, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

28 C.F.R. § 16.22 (emphasis added).

As a matter of federal law, just as under state law, the DOJ's regulations require a threshold showing of *relevancy*. Plaintiffs request here was denied because none of the information about which Plaintiff requested TFO Carver's testimony is relevant to this state court public disclosure action. These factual questions, as set forth in more detail below, are necessarily limited to the records King County produced to Plaintiff in response to his public disclosure request to the County and whether King County's withholdings are justified. *See* RCW 42.56.550. The subject of Plaintiff' proposed inquiry to TFO Carver has no bearing on these factual questions and therefore fails to meet the required threshold showing of relevancy under both federal and state law. The DOJ regulations reasonably were applied to prevent Plaintiff from using the power of this Court to conduct a fishing expedition into matters that have utterly no relevance to the dispute this Court is charged with resolving.

Plaintiff asserts that to apply the DOJ regulation to this case could violate the 10th Amendment and that this Court should therefore apply the canon of constitutional avoidance to narrowly construe the definition of "employee" in the regulations to avoid this result.

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However, the records sought are not, as Plaintiff suggests, in the possession, custody or control of the King County Prosecuting Attorney's Office, but at the offices of federal government agencies like the FBI and the INS. Contrary to Plaintiff's Tenth Amendment argument, his subpoena did not command production of any record or information in the possession of the state (or King County), nor obtained by any state or county official as a result of the performance of his or her official duties for the state. Rather this case simply involves the application of garden-variety constitutional principles of federalism where mutual sovereigns co-exist. Furthermore, as set forth in the next section, there is no fundamental conflict between state and federal law here. Plaintiff appears to be raising the 10th Amendment to try to muddy the fact that he has utterly failed to show the relevance of any of the records and other information he seeks to the PRA case pending before this Court.

2. The discovery sought is not relevant to the underlying proceeding even under State law.

Discovery of facts in a civil case must be "relevant to the subject matter in the pending action." CR 26(b)(1). Discovery in a Public Records Act case is no different. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wash.2d 702, 708 (Wash. 2011) ("discovery in a PRA case is the same as in any other civil action and is therefore governed only by relevancy considerations"). Because litigation under open government statutes is itself simply a kind of discovery dispute, the factual questions are limited to the reasonableness of an agency's search for responsive documents, and the good faith of the agency employees carrying it out. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wash.ed. at 717-18. While such factual inquiries may be wide-ranging, under CR 26(b)(1), they must have *some* relevance to these issues. *Id.* Because these questions usually can be resolved without formal discovery (through use of declarations and indexes listing the records identified), formal

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discovery in open records litigation is the exception and not the rule. *See, e.g., CareToLive v. FDA*, 631 F.3d 336, 345-46 (6th Cir. 2011) ("Claims under the [FOIA] are typically resolved without discovery on the basis of the agency's affidavits."). In addition, since the issue to be decided by the Court usually centers on the appropriateness of the withholding of the records, attempting to use the discovery process to gain access to the withheld records themselves is obviously out of bounds. *See, e.g., Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (noting that in a FOIA case "discovery is limited because the underlying case revolves around the propriety of revealing certain documents").

As a result of the naturally limited scope of discovery in open-records cases, there are only two reported cases involving discovery disputes under the PRA. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wash.ed. 702 (allowing limited discovery); and *City of Lakewood v. Koenig*, 160 Wash.App. 883, 250 P.3d 113 (2011) ("Holding that the requested discovery was not reasonably calculated to lead to the discovery of admissible evidence.") In the analogous FOIA context, the cases say essentially the same thing. When parties have strayed from the limited factual questions relevant to the open government suit before them, courts do not hesitate to exercise their discretion to limit discovery. *Heily v. Dep't of Commerce*, 69 F. App'x 171, 174 (4th Cir. 2003) (per curiam) ("It is well-established that discovery may be greatly restricted in FOIA cases."); *Justice v. IRS*, 798 F. Supp. 2d 43, 47 (D.D.C. 2011) (noting that "discovery is disfavored" in FOIA actions).

In this case, the scope of the factual issues possible for discovery has been narrowed even more than it otherwise would be, because the parties to the underlying PRA suit have settled the issues relating to the reasonableness of the County's search for responsive documents. Because the records at issue in this civil proceeding are in the possession of King

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County and the analysis under the Public Records Act was done by King County, the only issue left for this this Court to decide is segregability of these documents—that is, whether the redactions made by the King County Prosecuting Attorney's Office (the "King County") were appropriate to protect its privileges—primarily its work-product privileges. Plaintiff has not made any showing that the proposed deponent, TFO Carver, has any knowledge about these issues. In fact, since Mr. Carver is not an employee of King County (his other job is as a Seattle Police Detective), he has no knowledge about the basis of the redactions made by the County or the state of mind of the County employees who carried them out.

Likewise, the question what records are currently in the files of the FBI (and INS) has no bearing upon the issue before this court, which is: the propriety of King County's production of information *in King County's possession* responsive to Plaintiff's PRA request. And even more remote to the issues before this Court is Plaintiff's attempt to depose TFO Carver about the substantive issues relating to the underlying criminal investigation of him. None of the above matters relate to any of the material factual disputes that are before this Court (which is limited to factual questions regarding Plaintiff's access to the records in the possession, custody and control of King County).

Government open records laws may not be used to conduct a deposition of a third party on matters not relevant to the underlying case, much less, as here, pry into issues that may be pending before another Court. The purpose of open records laws is to protect the public's interest in transparent government, not to give individuals engaged in litigation another avenue to conduct discovery. In the analogous FOIA context, it is well-settled that discovery in a FOIA suit may not be used to investigate matters related to separate lawsuits. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) ("The Act is

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fundamentally designed to inform the public about agency action and not to benefit private litigants."); *Johnson v. U.S. Dep't of Justice*, 758 F.Supp. 2, 5 (D.D.C.1991) (FOIA "is not a discovery statute"). *Immanuel v. Sec'y of Treasury*, No. 94-884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995) (rejecting discovery that would constitute "a fishing expedition into all the possible funds held by the Department of [the] Treasury which may fall within the terms of [plaintiff's] broad FOIA request. Such an expedition is certainly not going to come at the government's expense when it is evident that [plaintiff] seeks this information only for his own commercial use."), aff'd on other grounds, No. 95-1953, 1996 WL 157732 (4th Cir. Apr. 5, 1996); *Tannehill v. Dep't of the Air Force*, No. 87-1335, 1987 WL 25657, at *2 (D.D.C. Nov. 12, 1987) (limiting discovery to determination of FOIA issues, not to underlying personnel decision).

3. Even if state law permitted such an inquiry, this Court is without power to compel the requested discovery against an employee of the federal government.

This Court should also deny Plaintiff's motion to compel here for reasons of federalism in a constitutional system of dual sovereign immunity. The records listed above to which Plaintiff seeks access through the deposition of TFO Carver are in the possession of the FBI and the INS. As noted above, TFO Carver's access to such records would be permitted only by virtue of his appointment as a FBI Task Force Officer. Because Plaintiff seeks records contained in the files of the federal agencies, and information obtained during the performance of TFO Carver's duties on the FBI Task Force, a state court has no power to subpoena or compel production of records or testimony from him. *Elko County Grand Jury v. Siminoe*, 109 F.3d 554, 556 (9th Cir. 1997) (sovereign immunity bars compelled testimony by state judicial body against federal employee). Plaintiff has not filed a FOIA request for these records and

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has not met the requirements of the DOJ's regulations to allow TFO Carver to testify in this case.

IV. CONCLUSION

The proposed third party discovery is not reasonably likely to lead to the discovery of any relevant information to this action, and thus fails to meet the requirements of the applicable federal regulations. For the same reason, the proposed third party discovery fails to comply with the requirements of CR 26(b)(1). Finally, this Court lacks the power to compel either the requested testimony by a federal employee, or to order the production of the requested federal records. This Court should accordingly deny Plaintiff's motion to compel.

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DATED this 23rd day of October, 2015.

Respectfully submitted,

ANNETTE L. HAYES
United States Attorney

s/ Peter A. Winn
PETER A. WINN, WSBA #34701
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on this date, I e-filed the foregoing with the Clerk of the Court for King County.

I further certify that on this date, I served the foregoing to the person(s) hereinafter named via first class mail, postage prepaid, addressed as follows:

James E. Lobsenz
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104

Michael J. Sinsky
King County Prosecutor's Office
516 3rd Ave Rm W400
Seattle, WA 98104
mike.sinksy@kingcounty.gov

DATED this 23rd day of October, 2015.

s/ Tina Litkie
TINA LITKIE, Legal Assistant
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APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MICHAEL MOCKOVAK,

Plaintiff,

v.

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

Defendants,

Case No. 14-2-25191-2SEA

DECLARATION OF GREGORY W. JENNINGS

COMES NOW Gregory W. Jennings, being duly sworn, does hereby swear and affirm:

1. I am employed as a Special Agent for the Federal Bureau of Investigation ("FBI"). I have been a Special Agent with the FBI for approximately 25 years. I am a Supervisory Special Agent in the Seattle Division of the FBI. Since my arrival in the Seattle Division in 1998, I have worked on both criminal and national security matters. Prior to my transfer to the Seattle Division, I was assigned to the Buffalo Division where I worked a variety of criminal and national security matters. I became a Special Agent with the FBI in 1990, and currently serve as the Chief Division Counsel for the Seattle Division, a position I have held since July of 2001.

2. I provide this declaration based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith. This declaration is submitted to address the role of Leonard Carver III as a federal Task Force Officer ("TFO") for the FBI, and to explain the application of Department of Justice ("DOJ") and FBI rules and regulations to his status as such, including, in particular, his access to FBI records and information.

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3. I am familiar with the general issues associated with the matter entitled MICHAEL MOCKOVAK v. KING COUNTY, et al., NO 14-2-25191-2 SEA. My understanding is that Plaintiff in that matter alleges King County inappropriately responded to a request for records in King County's possession under the Washington State Public Records Act.

4. I have reviewed documents identifying TFO Carver as a Special United States Deputy Marshal. This designation is given to law enforcement officers by the United States Marshals Service ("USMS") upon taking an oath of office and it authorizes the officers to conduct investigations of, and make arrests for, violations of Title 18 of the United States Code ("USC"). I have also reviewed documents identifying TFO Carver as a Special Federal Officer. This designation is given to law enforcement officers by the FBI upon taking an oath of office and it authorizes the officers to conduct investigations of, and make arrests for, violations of Title 21 of the USC.

5. The FBI sponsored and obtained these federal authorities for TFO Carver in order for him to execute his responsibilities as an FBI TFO assigned to the FBI's Seattle Division. As an FBI Task Force Officer, TFO Carver is required to investigate, and assist others in the investigation of, violations of the USC consistent with FBI policy and procedure. He receives his assignments from a Supervisory Special Agent of the FBI, is under the day-to-day supervision and control of the FBI, is empowered by the FBI and the USMS to engage in law enforcement operations outside the state of Washington under the supervision and control of the FBI, and is required to comply with the investigative and administrative requirements of the FBI and the DOJ. As a result of these authorities, all FBI TFOs, and TFO Carver in this case, are considered to be appointed federal officials, who are subject to the supervision, jurisdiction, and control of the Attorney General of the United States for purposes of 28 Code of Federal Regulations § 16.21(b).

6. Like any other TFO or Special Agent of the FBI, TFO Carver investigates and prepares matters for presentation to, and potential prosecution by, the appropriate prosecutorial authority. Depending on the outcome of the analysis of several factors, it may be appropriate to present an FBI investigation to any one, or more than one, of the following authorities: United States Federal Court, State Court, Tribal Court, or a Military Court, in addition to others. Periodically, investigations conducted by Special Agents and TFOs will be prosecuted in state

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court. The fact that a matter is prosecuted in state as opposed to federal court does not convert the status of a federal law enforcement officer, whether that federal law enforcement officer is an FBI Special Agent or an FBI TFO, to the status of a state actor.

7. TFO Carver is subject to the regulations promulgated by the DOJ in the Code of Federal Regulations ("CFR") at 28 CFR 16.21, et seq., commonly referred to as "Touhy Regulations" in reference to Touhy v. Ragen, 340 U.S. 462 (1950). One of these regulations requires TFO Carver to receive permission to disclose information obtained while a TFO of the FBI when that information is acquired as part of his official duties. In this regard, TFO Carver is prohibited from discussing his activities as a TFO even with his command staff at the Seattle Police Department unless given permission by the FBI/DOJ. Further, TFO Carver is prohibited from disclosing information from the files of the FBI and information which he obtains during the course of conducting FBI investigations, unless he is specifically authorized by the FBI to do so for law enforcement purposes.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 23rd day of October, 2015.

GREGORY W. JENNINGS
Supervisory Special Agent
Chief Division Counsel
Seattle Division
Federal Bureau of Investigation

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APPENDIX E

No. 74459-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Appellant,

v.

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

Respondents.

UNOPPOSED MOTION OF THE UNITED STATES TO INTERVENE OR FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

The United States respectfully files this unopposed motion seeking leave to intervene as respondent in this action and to file the attached brief in that capacity. In the alternative, the United States requests leave to file the attached brief as amicus curiae in support of respondents King County and the King County Prosecuting Attorney's Office (collectively, "King County").

This appeal concerns, in part, a trial-court order denying appellant Michael Mockovak's motion to compel the deposition and subpoena *duces tecum* of Leonard Carver III. Because Carver is a Task Force Officer in the Federal Bureau of Investigation ("FBI"), the United States has a

substantial interest in the resolution of Mockovak's claim. The United States moves to intervene, or in the alternative to participate as an amicus curiae, to protect that interest and to assist this Court in its consideration of the motion to compel.

STATEMENT

This lawsuit under the Public Records Act, RCW §§ 42.56.001 *et seq.*, concerns documents related to a closed criminal case. In 2011, a Washington State jury convicted Mockovak on murder and theft charges arising from his unsuccessful attempt on his business partner's life. *In re Mockovak*, No. 69390-5-I, 2016 WL 3190500, at *1 (Wash. Ct. App. June 6, 2016). After his conviction, Mockovak requested documents from King County related to an individual who had testified at his trial. When King County did not respond to his satisfaction, Mockovak sued the County under the Public Records Act in Superior Court. Eventually, Mockovak agreed to settle all of his claims save one: that King County had improperly invoked the Act's exemption for documents constituting attorney work product to redact 81 documents in part or in whole.

In the course of litigating his remaining claim, Mockovak sought to depose and subpoena Leonard "Len" Carver III. Although Carver is a commissioned officer in the Seattle Police Department, he is assigned full-time to the FBI's Puget Sound Safe Streets Violent Crimes Task Force

and works full-time to investigate "federal crimes for the purpose of federal prosecution." CP 464, 966. To that end, Carver has been designated both as a Special U.S. Deputy Marshal in the U.S. Marshals Service and as a Special Federal Officer in the FBI. CP 1376. These designations grant him investigatory and arrest powers for violations of federal law. CP 1376. Carver's chain of command reflects his federal status: He receives assignments from an FBI Supervisory Special Agent and must "comply with the investigative and administrative requirements of the FBI and the" Department. CP 1376.

Carver declined to respond to Mockovak's discovery requests because regulations promulgated by the U.S. Department of Justice ("Department") prohibited him from doing so. These regulations vest high-level Department officials with exclusive authority to decide whether and how Department employees may respond to requests for testimony or documents. *See* 28 C.F.R. §§ 16.21 *et seq.* In this case, after receiving a request from Mockovak, the responsible Department official determined that Mockovak had failed to establish an adequate basis for his request.

Mockovak then asked the trial court to compel Carver to submit to a deposition and subpoena, arguing that the Department is barred by federal law and the Tenth Amendment to the U.S. Constitution from treating Carver as a Department employee under its regulations. *See* CP

1186-92. The United States and King County filed separate responses to Mockovak's discovery motion. *See* CP 1263-75, 1279-84.

The trial court denied Mockovak's motion for the "reasons set forth" in the responses. CP 1913. The court also determined that King County's redactions were proper as a matter of state public-disclosure law and entered judgment in the County's favor. CP 1915. Mockovak has appealed both the denial of his motion to compel and the judgment against him on the merits of his Public Records Act claim.

ARGUMENT

The United States seeks leave to intervene as a respondent in this action with respect to Mockovak's attempt to compel the deposition and subpoena of FBI Task Force Officer Leonard Carver.[1] Although the Rules of Appellate Procedure do not expressly provide for intervention, Superior Court Civil Rule 24 supplies an informative standard. Intervention as of right is appropriate "when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the person is so situated that the disposition of the action may as a practical matter impair or impede the person's ability to protect that interest." CR 24(a)(2).

The United States has a substantial interest in the resolution of Mockovak's discovery claim because Carver, an FBI Task Force Officer,

[1] The United States takes no position on Mockovak's claim that King County violated state public-disclosure law by redacting 81 documents.

is the subject of Mockovak's motion. Furthermore, Mockovak's arguments seek to cast doubt on the validity of regulations promulgated by the Department of Justice. A holding in Mockovak's favor would interfere with the Department's ability to apply those regulations to Task Force Officers such as Carver, who play a significant role in the FBI's national operations. *See Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 17 (2014) (statement of James B. Comey, Director, FBI), *available at* http://go.usa.gov/xxRWT. Finally, Mockovak's claim implicates the sovereign immunity of the United States, which precludes state courts from compelling agency employees to testify "contrary to [their] federal employer's instructions under valid agency regulations." *See State v. Vance*, 184 Wn. App. 902, 914 (2014) (collecting cases).

In the alternative—and for the same reasons—the United States requests permission to participate in this appeal as amicus curiae with respect to Mockovak's discovery claim. *See* RAP 10.6(a). The United States has already filed a response to Mockovak's discovery motion in the trial court, which formed the basis of the trial court's decision, and is familiar with the issues this claim presents. *See* CP 1263-75. Because this case concerns the applicability of a federal regulation to a federal agent, the government's additional submission is necessary to provide this Court

with a complete understanding of the factual and legal underpinnings of Mockovak's appeal.

The government has conferred with counsel for Mockovak and for King County. Neither party opposes this motion.

CONCLUSION

For these reasons, the government respectfully requests leave to intervene as respondent in this action and to file the attached brief in that capacity. In the alternative, the United States requests leave to file the attached brief as amicus curiae in support of King County.

Respectfully submitted.

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JULY 2016

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Today I directed electronic mail addressed to James E. Lobsenz, the attorney for the petitioner, at lobsenz@carneylaw.com, and Michael J. Sinsky, Senior Deputy Prosecuting Attorney, attorney for the respondent at Mike.Sinsky@kingcounty.gov, containing a copy of the foregoing motion in *Mockovak v. King County*, Cause No. 74459-3, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 29th day of July, 2016.

HELEN J. BRUNNER
WSBA No. 30245
Done in Seattle, Washington

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

APPENDIX F

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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August 5, 2016

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CASE #: 74459-3-I
Michael Mockovak, Appellant v. King County, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on August 4, 2016, regarding unopposed motion of the United States to intervene or for leave to file an amicus curiae brief:

"Granted."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

emp

APPENDIX G

No. 74459-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK, *Appellant*,

v.

KING COUNTY and the KING COUNTY PROSECUTING ATTORNEY'S OFFICE, *Respondents*,

and

UNITED STATES OF AMERICA, *Intervenor-Respondent*.

On Appeal from the Superior Court of Washington for King County

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BRIEF OF THE UNITED STATES

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March 06, 2017 - 1:21 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94109-2
Appellate Court Case Title:	Michael Mockovak v. King County, et al.

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- mike.sinsky@kingcounty.gov
- Micki.Brunner@usdoj.gov
- Michael.Shih@usdoj.gov

Comments:

Motion for Order Declaring that USA is a Respondent and Rejecting its Assertion that it Participated as an Amicus Curiae; Declaration of James E Lobsenz

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