FILED
SUPREME COURT
STATE OF WASHINGTON
6/30/2022 4:02 PM
BY ERIN L. LENNON
CLERK

101061-3

NO. 97494-2
(NO. 36720-7, in the Court of Appeals, Division III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Christopher Denney, Petitioner/Appellant

v.

City of Richland, Respondent/Appellee

PETITION FOR REVIEW

Jesse Wing, WSBA #27751
Nathaniel Flack, WSBA #58582
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604
Attorneys for Appellant

TABLE OF CONTENTS

A. INTRODUCTION 1
B. IDENTITY OF PETITIONER 1
C. COURT OF APPEALS DECISION 2
D. ISSUES PRESENTED FOR REVIEW 2
E. STATEMENT OF THE CASE 4
i. Mr. Denney's Discrimination and Harassment Complaints 4
ii. The City's First Investigative Report 5
iii. The City's Second Investigative Report 9
iv. Mr. Denney's PRA Requests and Lawsuit Filed in Benton County Superior Court 10
v. The Court of Appeals Decision 12
F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 18
i. Washington Law Should Not Condone a Public Employer's Abuse of the Work Product Doctrine to Selectively Shield Legally Mandated Reports of Discrimination from Public View. 18
ii. Even if Some Mandatory Discrimination Investigation Reports Are Protected Work Product, an Employee's Rational and Commonplace Distrust of an Employer's Human Resources Department Cannot Render the Employer's Anticipation of Litigation Objectively Reasonable. 28
iii. The lower court effectively shifted the City's burden of establishing work product protection onto Mr. Denney to disprove such protection, by holding that his distrust

was an objectively reasonable justification for anticipating litigation......31

G. CONCLUSION......32

TABLE OF AUTHORITIES

Cases

City of Lakewood v. Koenig, 182 Wn.2d 87, 343 P.3d 335 (2014) 18

Denney v. City of Richland, 510 P.3d 362 (Wash. Ct. App. 2022) .... passim

Doehne v. EmpRes Healthcare Mgmt., LLC, 190 Wn. App. 274, 360 P.3d 34 (2015) 14, 19, 32

Heidebrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985) 25

Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947) 26

In re Det. of W., 171 Wn.2d 383, 256 P.3d 302 (2011) 16, 24

Kittitas County v. Allphin, 190 Wn.2d 691, 416 P.3d 1232 (2018) 12

Limstrom v. Ladenburg, 136 Wn.2d 595, 963 P.2d 869 (1998) 28, 31, 32

Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 292 P.3d 779 (2013) 29

Morgan v. City of Federal Way, 166 Wn.2d 747, 213 P.3d 596 (2009) 16, 20, 23, 25, 27

Neighborhood All. of Spokane Cnty. v. Spokane Cnty., 172 Wn.2d 702, 261 P.3d 119 (2011) 19

Perry v. Costco, 123 Wn. App. 783, 98 P.3d 1264 (2004) 22, 27

Scrivener v. Clark Coll., 181 Wn.2d 439, 334

P.3d 541 (2014) 31, 32

Soter v. Cowles Publ'g Co., 162 Wn.2d 716,
174 P.3d 60 (2007) 16

State v. Sum, No. 99730-6, 2022 WL 2071560
(Wash. S. Ct.) 26, 27

Statutes

National Labor Relations Act, 29 U.S.C. § 152(11) 29
RCW 42.56 .... 1, 11, 18
RCW 42.56.030 .... 24, 27
RCW 42.56.070(1)..19
RCW 49.60 .... 1, 4, 18
RCW 49.60.010 .... 21, 22, 26, 27

Rules

CR 26(b)(4)...12, 19
RAP 13.4(b)(4) 18, 32
RPC 1.13(f) 14
RPC 4.3 14

Other Authorities

8 Charles Alan Wright, Arthur R. Miller & Richard L.
Marcus, Federal Practice and Procedure § 2024
(3d ed. 2010)...24

dictionary.cambridge.org/us/ dictionary/ english/human-
resource...33

"Advancing Diversity In Law Enforcement,"
www.eeoc.gov/advancing-diversity-law-enforcement
(accessed June 27, 2022) 27

"Medicine And Medical Science: Black Lives Must Matter
More," https://www.thelancet.com/

pdfs/journals/lancet/PIIS0140-6736(20)31353-2.pdf (accessed June 27, 2022) 26

Ordinances

Spokane Municipal Code Chapter 18.01 23
Tacoma Municipal Code Chapter 1.29 23

A. INTRODUCTION

This petition seeks review of an issue of substantial public interest, namely whether the Court of Appeals properly extended the work product doctrine to shield virtually all reports of a public employer's mandatory investigations into allegations of workplace discrimination and harassment. This holding would render the burden on public employers to justify their anticipation of litigation toothless, compromising RCW 49.60's mandate to eradicate discrimination, and RCW 42.56's mandate to enforce transparency so the people can determine whether their government is complying with the WLAD.

B. IDENTITY OF PETITIONER

The Petitioner is Christopher Denney, Plaintiff in the trial court and Appellant in the Court of Appeals. He seeks the relief designated in Part C of this motion.

C. COURT OF APPEALS DECISION

Mr. Denney seeks review and reversal of the Court of Appeals' May 31, 2022, decision affirming the Benton County Superior Court's summary judgment dismissal of his complaint under the Public Records Act ("PRA"). The Court of Appeals opinion is attached here at pages 1 to 23 of the Appendix, and published at *Denney v. City of Richland*, 510 P.3d 362 (Div. III 2022).

D. ISSUES PRESENTED FOR REVIEW

1. Where a public employer's antidiscrimination policies require the employer to investigate, should the employer be allowed to use the "work product" doctrine to avoid disclosure under the Public Records Act of virtually all antidiscrimination investigative reports despite substantial public interests in transparency and the eradication of discrimination in public employment? No.

2. Even if some mandatory remedial reports of investigations into workplace discrimination may be protected

work product, is it objectively reasonable under the "dual purpose analysis" for a public employer to anticipate litigation merely because an employee distrusts the employer's human resources department or city attorney? No.

3. Was it proper for the lower court to effectively shift the employer's burden to prove work product protection over its discrimination investigation reports onto the employee to *disprove* such protection, by holding that an employee's distrust of the human resources department or the city attorney is an objectively reasonable justification for anticipating litigation? No.

E. STATEMENT OF THE CASE

i. Mr. Denney's Discrimination and Harassment Complaints

Mr. Denney seeks review and reversal of the Court of Appeal's affirmance of the Benton County Superior Court's dismissal of his Public Records Act claim, *see Denney v. City of Richland*, 510 P.3d 362 (Div. III 2022).

Chris Denney is a firefighter employed by the City of Richland. CP 185 (¶ 3). In 2016, he reported to the City that he was being harassed, discriminated against, and retaliated against at work. CP 185-186 (¶ 3).

Mr. Denney's report triggered the City's "Policy Prohibiting Discrimination and Harassment," which by its terms required the City to investigate his allegations. *See* CP 55. Citing the Washington Law Against Discrimination, RCW 49.60 (among other laws) as its standard, the City's anti-discrimination Policy declared that the City "will not tolerate harassment by City employees," (CP 55), and "Acts of

discrimination or harassment are not tolerated by anyone, at any time." CP 58. To fulfill this commitment to make its workplace discrimination- and harassment-free, the City's Policy states, "[a]ll complaints will be investigated thoroughly and promptly." CP 55. The Policy assigns the Human Resources Director the responsibility of "[r]eviewing, investigating, and resolving harassment complaints," and allows them to designate "an outside investigator … to investigate the complaint." CP 58.

The City's policy is remedial. It promises the City, "will not tolerate harassment" so "[a]ll complaints will be investigated thoroughly and promptly" to ensure "its employees are able to enjoy a work environment free from discrimination." CP 55.

ii. The City's First Investigative Report

On April 29, 2016, Captain Adam Hardgrove of the Richland Fire Department reported to the City's Human Resource Director, Allison Jubb, CP 61, that Mr. Denney had

reported illegal harassment, CP 51. Captain Hardgrove noted that he was reporting Mr. Denney's allegations "Per the [City of Richmond] policy regarding harassment in the workplace." CP 51. Captain Hardgrove first instructed Mr. Denney to submit a written complaint to the HR Department, CP 53, but then the City Attorney, Heather Kintzley, "asked Mr. Denney to provide a written complaint to" her office instead. CP 186 (¶ 6).

Mr. Denney contacted Ms. Kintzley as instructed, and explained he wanted to submit his written complaint to someone else because he felt her "position is adversarial by definition since you represent the City's interest (and you advised Chief Huntington less than two week ago to terminate me if my Paramedic Certification lapsed)." CP 61.

Ms. Kintzley, a lawyer, wrote back to Mr. Denney, directing him to follow the City's anti-harassment policy, which she attached for his review. CP 61. She emphasized the provision that required him "to direct your written complaint of harassment to the Human Resources Director, Allison Jubb."

CP 61. She concluded by telling Mr. Denney that, despite his concerns, her interests as the City's Attorney were not adverse to his: "Although you may perceive my position as legal adviser to mean that my interests are adverse to yours, they are not." CP 61.

Mr. Denney also notified HR Director Jubb of his "concerns about an internal investigation not being fair and impartial," and she held a meeting with him about that on May 25, 2016. CP 111. During that meeting, HR Director Jubb "reviewed the City policy and process for making and addressing concerns," and Mr. Denney expressed "his desire to have an external investigator … because he felt that is the only way he could be assured a fair and impartial response." CP 111. On June 22, 2016, Mr. Denney submitted his written complaint to Human Resources, as instructed. Under the City's Policy, this constituted a "formal" complaint. CP 114; *see also* CP 66-67.

That same day, HR Director Jubb wrote a memo titled "Inquiry Into Concerns – Rationale to Review Externally." CP 111. In it she said that "HR staff will be challenged to conduct a timely investigation internally" into Mr. Denney's complaints. CP 112. "In terms of HR staff resources and availability alone, I recommend we consider outside assistance." CP 112. She also described Mr. Denney's concerns about fairness and impartiality, noting her personal involvement in potential discipline for Mr. Denney, and concluded "It would not be appropriate for Lacey or myself to both act in a consulting role for the Fire department management staff and review/investigate Chris [Denney]'s concerns." CP 112. The memo said nothing about possible litigation.

Consistent with Ms. Jubb's memo, on July 18, 2016, the City hired two outside investigators from a human resources consulting firm, Diversified, to investigate Mr. Denney's complaint. CP 71. In announcing this to department management, City Attorney Kintzley—who had told Mr.

Denney to follow the City Policy that would trigger an investigation, and who had assured him that her position as legal adviser to the City did not make her interests adverse to his—declared that "The investigation will be conducted at my direction, and prepared as attorney work product." CP 71. She gave no reason for this decision.

Around October 31, 2016, the investigators produced a report of their findings. CP 75. Ms. Kintzley wrote a report summary which was made available to the Fire Department's leadership and to Mr. Denney. *See* CP 75. But when Mr. Denney requested a copy of the full report she refused, claiming it was "attorney work product" so "not subject to disclosure." CP 75. Again, she did not document any justification for her assertion.

iii. The City's Second Investigative Report

While the City was conducting the first investigation, Mr. Denney applied for a position on the Fire Department's TRT Team, a position for which he was well qualified; but the City

did not select him. CP 77. He then filed another HR complaint, asserting that the Department's decision was further harassment, discrimination, and retaliation for his previous complaint. CP 183. Ms. Kintzley again took over and hired a different outside investigator, Sarah Hale, a lawyer. CP 68; CP 190 (¶21). When Ms. Hale produced her report, Ms. Kintzley again refused to allow Mr. Denney to review it, asserting it too was work product. CP 109.

iv. Mr. Denney's PRA Requests and Lawsuit Filed in Benton County Superior Court

Mr. Denney submitted a Public Records Act request for the Diversified investigative report on his initial discrimination complaint on November 8, 2016. CP 102. In response, two months later, on January 13, 2017, the City produced an exemption log stating it was withholding the entire 44-page report. CP 94. The log stated the report was prepared at Ms. Kintzley's direction to "evaluate the veracity of the claims made and allow the City Attorney to assess potential legal

exposure in anticipation of litigation." CP 94. It made no mention of the City's Policy under which she had directed him to submit his complaint and that required the City to investigate.

Mr. Denney also requested a copy of the Hale investigative report into his claim of discrimination and retaliation regarding his application to the TRT team. CP 105-106. A week later, the City produced an exemption log stating it withheld the entire 12-page report on the same grounds: that it was commissioned to evaluate the City's legal exposure in anticipation of litigation. CP 109. Again, the City made no mention of its Policy requiring investigation of such complaints.

Mr. Denney filed a Complaint in Benton County Superior Court on October 30, 2017, alleging the City's failure to disclose the investigative report violated the PRA, RCW 42.56. The Superior Court granted summary judgment, finding the

investigative reports protected by the work product doctrine, and the Court of Appeals affirmed.

v. The Court of Appeals Decision

The Court of Appeals began its analysis by observing that if the investigative reports would be protected from discovery as work product under CR 26(b)(4), then they would not be subject to disclosure under the PRA. *Denney*, 510 P.3d at 369-70 (citing *Kittitas County v. Allphin*, 190 Wn.2d 691, 701, 416 P.3d 1232 (2018)). Attorney work product "includes documents and tangible things that are otherwise discoverable, but are 'prepared in anticipation of litigation or for trial' by a party or the party's representative '(including a party's attorney, consultant, surety, indemnitor, insurer, or agent).'" *Id.*, at 370. The Court of Appeals acknowledged that the City created the reports to comply with its own policy requiring investigation in response to complaints of employment discrimination and harassment, regardless of whether the City anticipated litigation, a pre-requisite for work product protection. *Id*. at 366

(noting that in "ordinary circumstances, an investigative report created under the policy would qualify as a public record, available for disclosure, even if the City attorney's office had some involvement with the investigation process."); *see also* (CP 310-11).

The Court of Appeals then applied what it called the "dual purpose" analysis to determine whether the reports were still protected attorney work product, despite that the reports were undisputedly created pursuant to mandatory City policy and without regard for any anticipated litigation. *Id.* at 370. According to the Court of Appeals, the dual purpose analysis still required the court to determine whether the documents at issue were created "because of" anticipated litigation, by first determining whether the documents were created based on a subjective anticipation of litigation that was "objectively reasonable." *Id.* at 370. The Court of Appeals noted in passing that the "objective test keeps in mind that the work product rule cannot be so broad that it allows parties to avoid discovery 'by

adopting routine practices whereby all documents appear to be prepared in anticipation of litigation.'" *Id.* (quoting *Doehne v. EmpRes Healthcare Mgmt*., LLC, 190 Wn. App. 274, 284, 360 P.3d 34 (2015)).

The Court of Appeals improperly determined that the City subjectively anticipated litigation when directing creation of the investigative reports. In encouraging Mr. Denney to file a complaint under its policy, Richland City Attorney Kintzley assured Mr. Denney that her "position as legal adviser" did not "mean that my interests are adverse to yours …." CP 61. As a lawyer, she was obligated to truthfully inform Mr. Denney of the interests she was serving. RPC 4.3; RPC 1.13(f). But if Mr. Denney's complaint was investigated to prepare for litigation against him—with the "incidental benefit" of complying with the City Policy, as Ms. Kintzley later claimed (CP 309-310), then she misled him in violation of the RPCs. On summary judgment, the Court of Appeals failed to draw the inference in Mr. Denney's favor that Ms. Kintzley' representation reflected

her belief that she did not anticipate litigation. The Court of Appeals likewise failed to draw the reasonable inference in Mr. Denney's favor that the City Attorney's later assertion that she had anticipated litigation, after she had already induced Mr. Denney to trust her with contrary assurances, violated the RPCs and was abuse of the attorney work-product privilege, because she could not retract her representation of neutrality after-the-fact.

The Court of Appeals then erroneously determined the City's subjective belief was objectively reasonable, and that the investigative reports at issue were therefore created "because of" impending litigation, rather than routine compliance with City policy designed to further remedial purposes, as the City Attorney had admitted at deposition. CP 310-11. In support of this conclusion, the Court of Appeals concluded that "Mr. Denney's repeated assertions that he did not trust HR, and his refusal to provide detailed information as required by the City's policy, were not indicative of someone seeking to work with his

employer toward corrective action to resolve a workplace dispute." *Id*. at 371.

In choosing to apply the so-called "dual purpose" test, the court relied primarily on authority from federal courts. *Id.* at 370-71, n. 5. With respect to Washington cases, the Court of Appeals cited *In re Det. of W.*, 171 Wn.2d 383, 256 P.3d 302 (2011) – a case in which the work product issue turned on the distinction between testifying and non-testifying expert witnesses. *Id.* at 371. The Court of Appeals further relied on *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007), a case that does not reference "dual purpose" records, and holds merely that attorney notes of witness interviews following a student's death at school are protected work product. Finally, the Court of Appeals distinguished *Morgan v. City of Federal Way*, 166 Wn.2d 747, 754, 213 P.3d 596 (2009), in which a public employer's mandatory personnel investigation report was held not to be protected work product, because it was created pursuant to an antidiscrimination policy,

not in anticipation of litigation. The Court of Appeals nonetheless held that "nothing in *Morgan* holds or suggests that a dual-purpose analysis cannot apply to personnel investigation reports." *Denney*, 510 P.3d at 370.

Notably, none of the authority relied on by the Court of Appeals held that a public employer or any government entity can withhold from disclosure reports it is required by law to prepare *for the public's benefit* by coopting them for risk management purposes. And the Court of Appeals cited no authority in concluding that a person's mere distrust or declining to provide information to a government actor makes it objectively reasonable to believe litigation is impending:

> Not only did Ms. Kintzley subjectively anticipate litigation when she ordered the two investigation reports, her assessment of the prospect of legal action was objectively reasonable. Mr. Denney's repeated assertions that he did not trust HR, and his refusal to provide detailed information as required by the City's policy, was not indicative of someone seeking to work with his employer toward corrective action to resolve a workplace dispute. Instead, Mr. Denney made clear that he believed the City was against him and that his goal

> was for an outside entity to validate his point of view. *It does not require many logical inferences to discern that Mr. Denney's ultimate goal was litigation.*

Id. at 372 (emphasis added).

F. Argument Why Review Should Be Accepted

Under RAP 13.4(b)(4), the Court should accept review of this case because the errors in the Court of Appeals holding below raise issues of substantial public interest that should be determined by the Supreme Court, specifically those interests embodied in RCW 49.60, enacted to eradicate discrimination from, among other places, public employment, and in RCW 42.56, for the government to fulfill that promise under the watchful eye of the people of Washington.

i. Washington Law Should Not Condone a Public Employer's Abuse of the Work Product Doctrine to Selectively Shield Legally Mandated Reports of Discrimination from Public View.

"The primary purpose of the PRA is to provide broad access to public records to ensure government accountability." *City of Lakewood v. Koenig*, 182 Wn.2d 87, 93, 343 P.3d 335

(2014). “Agencies are required to disclose any public record on request unless it falls within a specific, enumerated exemption.” *Neighborhood Alliance v. Spokane Cnty.*, 172 Wn.2d 702, 715, 261 P.3d 119, 125-6 (2011) (citing RCW 42.56.070(1)). While work product under CR 26(b)(4) is exempt from PRA disclosure, the work product doctrine does not shield documents created in the “ordinary course of business,” nor should it encourage “routine practices whereby all documents appear to be prepared in anticipation of litigation.” *Doehne*, 190 Wn. App. at 284.

Yet that is precisely what the City of Richland has done here. It is undisputed that the City’s policy required the City to investigate, resulting in reports that are public records, regardless of anticipated litigation. CP 310-11. By affirming the City was justified in shielding its reports, the Court of Appeals has created a *per se* work product exemption under the PRA, allowing any public employer to conceal public records on the ground that the employee distrusts the employer’s HR

department or government attorney. This result impairs substantial public interests in transparency and eradicating discrimination, and conflicts with this Court's decision in *Morgan*, 166 Wn.2d 747.

Skepticism of the government is a cornerstone of democracy that cannot be equated with litigation. Likewise, distrust of human resources departments—which are frequently perceived as defending the interests of employers rather than proceeding in a neutral fashion—cannot be *per se* evidence that justifies anticipation of litigation. A civil rights complaint sustained by Human Resources may create embarrassment or risk for the employer. This creates a powerful incentive for the employer to reject the civil rights complaint and for the employee to distrust an HR investigation. Moreover, an employee who complains of discrimination or harassment in the workplace—especially against someone with power or authority — necessarily places themselves at risk of retaliation from the authority figure or the employer, who may not

appreciate the complaint. For example, the employer may perceive the harasser as more valuable than the victim. This is especially true if the harasser is a highly placed manager. These commonsense reasons for employee skepticism belie that such skepticism can justify an employer reasonably anticipating litigation.

There is a substantial public interest in transparent and accurate evaluation of state and local government practices in employment, in fulfillment of the legislature's mandate in enacting the Washington Law Against Discrimination, RCW 49.60.010. The selective disclosure regime endorsed by the Court of Appeals – in which a City required to investigate allegations of discrimination can shield its own investigations from view by claiming anticipation of litigation – runs afoul of that mandate. The ruling undermines the public's ability to learn about and monitor the activities of its government and violates the clear public policy in favor of rooting out and eliminating discrimination in all walks of life:

> The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, citizenship or immigration status, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.010. Indeed, the City policy that undisputedly required creation of the investigative reports here (regardless of any perceived threat of litigation *vel non*) implements the WLAD's requirement that "[o]nce an employer has actual knowledge…of a complaint of [] harassment, then the employer must take remedial action that is reasonably calculated to end the harassment." *Perry v. Costco*, 123 Wn. App. 783, 793, 98 P.3d 1264 (2004). The City of Richland's antidiscrimination policy mirrors that of municipalities and agencies around the state, reflecting that the issues incorrectly decided by the Court

of Appeals will continue to arise, further necessitating review of the decision below. *See, e.g., Morgan*, 166 Wn.2d at 752 (discussing municipal anti-discrimination policy requiring investigation, similar to that in this case, and finding records of investigation were not work product); Spokane Municipal Code Chapter 18.01; Tacoma Municipal Code Chapter 1.29.

All a public employer need do to shield records mandatory investigations, according to the Court of Appeals, is assert the employee showed distrust. *Denney*, 510 P.3d at 370. By endorsing the City's claimed exemption here, the court undermined the legislative purposes behind the WLAD (and Richland's Policy implementing it) — to "eradicate" illegal discrimination — and behind the PRA, with its strong mandate for government transparency.

The Court of Appeals decision allows public employers like the City of Richland to choose what to reveal: they need reveal only the favorable results of mandatory discrimination investigations, while claiming anticipated litigation whenever

an investigation into an employee's complaint might embarrass or damage the employer's interests. This threatens to engender a dangerous public misperception by revealing reports that show no discrimination, while allowing the public employer, at its own option, and on the basis of conclusory assertions of anticipated litigation, to shield reports it considers damaging. And this selective disclosure regime undermines the PRA's insistence that the public "remain[] informed so that they may maintain control over the instruments that they have created." RCW 42.56.030.

Mr. Denney does not dispute the well-established principle that courts should, as a general matter "look at the nature of the document and circumstances of the case to assess whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Denney*, 510 P.3d at 370-1 (quoting *In re Det. of W.*, 171 Wn.2d at 405, 256 P.3d 302 (quoting 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024 (3d

ed. 2010))). There are good reasons in many cases for analysis of whether a particular record created for non-litigation reasons was also created "because of" litigation for purposes of work product analysis. The narrow rule Mr. Denney asks the Court to adopt is that, where, as here, a public employer is required by law to investigate internal complaints of discrimination for the public benefit, it cannot later invoke "dual purpose" analysis to shield from public view the records reporting whether its conduct was discriminatory. This rule would be consistent with this Court's cases and the fundamental purpose of the work product doctrine, which does not seek to protect documents created for purposes other than litigation. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985) (cautioning that work-product doctrine should not encourage parties to "mechanically form[] their practices so as to make all documents appears to be prepared in 'anticipation of litigation'"); *Morgan*, 166 Wn.2d at 755 (2009) (finding records of public employer's workplace misconduct

investigation unprotected by workplace where "no one had threatened litigation" and "[t]he City's antiharassment policy call[ed] for an investigation in any harassment claim and prompt remedial action."); *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947) ("We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases.").

The legislature has declared that ending discrimination in public employment is a state policy of the highest priority. RCW 49.60.010. But the effect of discrimination in public employment has an even wider impact—a corrosive one. It directly influences the government's treatment of minority and disfavored groups, and may contribute to a systemic racial bias. *See generally State v. Sum*, No. 99730-6, 2022 WL 2071560 (Wash. S. Ct. June 9, 2022); "Medicine And Medical Science: Black Lives Must Matter More," https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)31353-2.pdf (accessed

June 27, 2022); "Advancing Diversity In Law Enforcement," *www.eeoc.gov/advancing-diversity-law-enforcement* (accessed June 27, 2022)*; "*The trouble with attracting diversity in the Washington State Patrol," https://www.king5.com/article/news/community/facing-race/washington-state-patrol-diversity/281-2bbeffcb-970d-4a2f-b8b4-f95c3de1669e (accessed June 27, 2022).

This Court has recently and laudably recognized the pervasive, destructive role of discrimination by public officials. *Sum*, No. 99730-6, 2022 WL 2071560. This Petition implicates the same pressing concerns the Court addressed in *Sum,* in a different context. The Court of Appeals decision is a step backward that will enable public employers to protect their own discriminatory practices at the expense of their employees and the public, despite laws and policies already on the books that mandate thorough investigation and transparency, no matter the results. RCW 49.60.010; RCW 42.56.030; *Morgan*, 166 Wn.2d at 754; *Perry*, 123 Wn. App. at 793. This Court should review

and reverse the decision below to protect this substantial public interest.

ii. Even if Some Mandatory Discrimination Investigation Reports Are Protected Work Product, an Employee's Rational and Commonplace Distrust of an Employer's Human Resources Department Cannot Render the Employer's Anticipation of Litigation Objectively Reasonable.

It is well established that documents created in the ordinary course of business are not entitled to work product protection, and that the burden of showing that a document was created in anticipation of litigation is on the party asserting work product protection. *See*, *e.g.*, *Morgan*, 166 Wn.2d at 755; *Limstrom v. Ladenburg*, 136 Wn. 2d 595, 612, 963 P.2d 869, 878 (1998).

In its cursory analysis of whether the City's purported anticipation of litigation was objectively reasonable, the Court of Appeals relied on "Mr. Denney's repeated assertions that he did not trust HR, and his refusal to provide detailed information as required by the City's policy, was not indicative of someone

seeking to work with his employer toward corrective action to resolve a workplace dispute." *Denney*, 510 P.3d at 372. This construes the facts in a light most favorable to the City of Richland, instead of Mr. Denney, contrary to the summary judgment standard. The Court's new standard of "objective reasonableness" is so toothless that every Washington employer will be able to routinely meet it whenever an employee makes claims discrimination, shielding every investigation report of consequence from public view.

Employee skepticism towards employer human resources departments reflects the entirely rational observation that human resources departments are agents of employers, not employees. *See*, *e.g.*, National Labor Relations Act, 29 U.S.C. §152(11) (excluding from coverage of labor laws "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees"); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 849, 292 P.3d 779 (2013)

(discussing human resources as a "position that requires advising [the] employer"); dictionary.cambridge.org/us/dictionary/ english/human-resource (defining "human resources" as "the department in a company that is responsible for dealing with employees, for example by employing them, training them, dealing with their problems, and managing their records"). As such, that an employee expresses distrust of an HR department cannot, or at least not alone, support a finding that the employer's investigation into employee complaints of discrimination are protected work product.

Indeed, the Court of Appeals was not at liberty to infer the possibility that it supported anticipated litigation in the City's favor. The more logical inference, and the one that the Court was required to draw on summary judgment, is that Mr. Denney understandably viewed the City of Richland as biased and wanted a fair and impartial review of his complaint so that he could have some measure of confidence in the result. That, in fact,

is what he said to the City. CP 111. The Court conspicuously failed to construe the facts and inferences in a light most favorable to Mr. Denney. At summary judgment, this was clear error. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014).

iii. The lower court effectively shifted the City's burden of establishing work product protection onto Mr. Denney to disprove such protection, by holding that his distrust was an objectively reasonable justification for anticipating litigation

The party asserting work product protection bears the burden of proof, not merely production. *Limstrom*, 136 Wn. 2d at 612. But allowing the City to rest its assertion of anticipation of litigation on the slender reed of an employee's natural skepticism of an HR department or a city attorney renders the burden essentially meaningless.

Indeed, permitting a public employer to discharge its burden simply by asserting that an employee distrusted its HR department, the decision below effectively shifts the burden of

proof onto the employee who made a discrimination complaint, to disprove that work product protection applies. It affords public employers unfettered discretion to successfully assert anticipation of litigation in the most conclusory fashion, as the City of Richland does here, shielding evidence of discriminatory conduct whenever they want.

On summary judgment, the Court of Appeals was required – but failed – to draw the reasonable inference in Mr. Denney's favor that his distrust of human resources was not indicative of anticipated litigation. *Scrivener*, 181 Wn.2d at 444; *Limstrom,* 136 Wn.2d 595 (noting that, under PRA, burden is on party opposing disclosure to show exemption for work product); *Doehne*, 190 Wn. App. at 284.

G. CONCLUSION

This Court should accept review under RAP 13.4(b)(4), and hold that the reports of mandatory investigations into discrimination in public employment at issue are not shielded from PRA disclosure by the work product doctrine.

This document contains 4979 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 30th day of June, 2022.

Respectfully submitted,

___*s/ Jesse Wing*___________

Jesse Wing, WSBA #27751
Nathaniel Flack, WSBA#58582
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604
Attorneys for Appellant

DECLARATION OF SERVICE

I hereby declare that on June 30th, 2022, I electronically filed the foregoing *Petition for Review* with the Supreme Court of the State of Washington, and arranged for service of a copy of the same on the parties to this action as follows:

<u>Attorneys for Respondent</u>:	☒ Via WA State Courts' Portal
Ken Harper, WSBA #25578	☐ Via Facsimile
Quinn Plant, WSBA #31339	☐ Via First Class Mail
MENKE JACKSON	☐ Via Email
BEYER, LLP 807 North	☐ Via Messenger
39th Avenue	☐ Via Overnight Delivery
Yakima, WA 98902	
Telephone: (509) 575-0313	
Fax: (509) 575-0351	
kharper@mjbe.com	
julie@mjbe.com	

DATED this 30th day of June, 2022, at Seattle, Washington.

__*s/ Lucas Wildner*________________

Lucas Wildner, Legal Assistant

APPENDIX

Table of Contents

Court of Appeals Opinion 1

FILED
MAY 31, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

CHRISTOPHER DENNEY, Appellant, v. CITY OF RICHLAND, Respondent.	)	No. 36720-7-III PUBLISHED OPINION

PENNELL, J. — Work product documents are exempt from disclosure under the Public Records Act (PRA), chapter 42.56 RCW. A document can be entitled to work product protection if it was prepared in anticipation of litigation, even if the document also served a nonlitigation purpose. But protection in such dual-purpose circumstances is not automatic. Public agencies cannot shield ordinary business records from disclosure by simply claiming some sort of litigation purpose.

A two-step analysis applies to discerning whether a purported dual-purpose document qualifies for work product protection. First, we must assess whether the document was truly created because of the anticipation of litigation. This requires both a subjective and objective inquiry. Second, we analyze whether the document would

have been prepared in substantially the same form but for the prospect of litigation. If a document genuinely was created because of litigation and would not have been created in substantially the same form but for litigation, then the document qualifies for work product protection.

The City of Richland (City) denied Christopher Denney's PRA request seeking two workplace investigation reports, asserting the reports constituted work product. While the documents were generated pursuant to City policy, they were also created with an eye toward anticipated litigation. The record reveals that the City's concerns about litigation were both subjectively valid and objectively reasonable. Furthermore, the City's two reports would not have been generated in substantially the same form but for the anticipation of litigation. The reports are therefore protected from PRA disclosure as attorney work product. The trial court's summary judgment dismissal of Mr. Denney's PRA complaint is affirmed.

FACTUAL BACKGROUND

On April 28, 2016, City firefighter Christopher Denney made an oral complaint of discrimination and harassment to his supervisor, Captain Adam Hardgrove. Captain Hardgrove prepared a memorandum documenting the complaint and e-mailed it to the City's human resources (HR) director, Allison Jubb, the next day. In a second e-mail to

Ms. Jubb, Captain Hardgrove confirmed that he advised Mr. Denney to follow up and submit his formal complaint in writing to HR. Ms. Jubb forwarded the memorandum to City attorney Heather Kintzley the same day she received it. In the memorandum, Captain Hardgrove indicated that Mr. Denney said he was proceeding with a formal complaint on the advice of his attorney.[1] Captain Hardgrove also noted in the memorandum that Mr. Denney had expressed distrust of the City's HR department, and had doubts the City would conduct a fair and independent investigation of his complaint.

The City has a policy with the stated goal of "ensuring its employees are able to enjoy a work environment free from discrimination and all forms of unlawful harassment." Clerk's Papers (CP) at 15. The policy prohibits discrimination and unlawful harassment on the basis of a legally protected status including, but not limited to, sex, race, religion, marital status, veteran status, age, national origin, sexual orientation, color, creed, ancestry, and disability. All City employees are expected to comply with the terms of the policy and report "any observed discrimination and/or harassment." *Id*. at 16. The policy provides that "[h]arassment complaints should be in writing, and list the name(s) of the individual(s) involved, date(s), location(s), witness(es), a description of the

[1] Mr. Denney denies that he told Captain Hardgrove he had even spoken to an attorney. Nevertheless, it is undisputed that Captain Hardgrove reported Mr. Denney had made reference to an attorney.

incident(s) or action(s) in question, and any other pertinent information. The written statement shall be signed and dated by the complainant." *Id*. at 17. HR is the designated recipient of discrimination and harassment complaints and is responsible for facilitating appropriate investigation and resolution. According to the policy, any "competent individual, including an outside investigator," may conduct the investigation. *Id*.

Captain Hardgrove noted in his memorandum that he provided Mr. Denney with a copy of the City's policy at the time Mr. Denney voiced his complaint on April 28. Mr. Denney does not deny being aware of the City's policy.

The nature of HR's resolution of past complaints has varied. Some investigations are conducted by an employee's supervisor, some by the HR department or third parties retained by the HR department, and some by the City's attorney or third parties retained by the City's attorney. In workplace complaints where only remedial action is contemplated and litigation is not anticipated, the City attorney's office is rarely involved in the resolution process. In those ordinary circumstances, an investigative report created under the policy would qualify as a public record, available for disclosure, even if the City attorney's office had some involvement with the investigation process.

After Ms. Jubb received Captain Hardgrove's memorandum, she determined there was insufficient factual information to enable HR to make an informed decision as

to the nature of the claim and scope of investigation. Consistent with the terms of the City's policy, HR requested Mr. Denney provide a detailed written statement about his complaint. Mr. Denney did not comply with this request.

City attorney Heather Kintzley then requested Mr. Denney provide a written complaint and statement to the City attorney's office. On May 9, Mr. Denney indicated he was working on such a statement and hoped to have it completed by May 11. However, on May 12 Mr. Denney sent an e-mail to Ms. Kintzley indicating he felt Ms. Kintzley's position as City attorney was "adversarial by definition [to him] since [Ms. Kintzley] represent[ed] the city's interest." *Id*. at 200. Mr. Denney stated he would not provide any statement until after he met with a union representative and "possibly [his] attorney and we know who'll be investigating this matter and that they will be fair and impartial." *Id*. Ms. Kintzley replied in an e-mail on the same date:

> [P]lease let me clarify that I represent the City as a legal entity, not any particular individual within the organization. Therefore, if I were to ascertain through investigation that an individual in the organization were engaged in unlawful conduct, my legal and ethical obligation to the City as an organization, and to the City Council as the organization's duly-authorized constituents, would compel me to take action, no matter who that person is. Although you may perceive my position as legal adviser to mean that my interests are adverse to yours, they are not.

Id.

By mid-May, Ms. Kintzley concluded Mr. Denney was preparing for litigation against the City. As a former HR director for the city of Kennewick, Ms. Kintzley found Mr. Denney's resistance to providing information was not typical of most complainants who are looking to remedy an ordinary workplace concern. She believed Mr. Denney's behavior to be consistent with complainants she had previously encountered who went on to file EEOC (Equal Employment Opportunity Commission) complaints, demand arbitration, and in one instance file a lawsuit. Ms. Kintzley was also aware the City was preparing for arbitration in a union grievance, filed by Mr. Denney the previous year, that touched on some of the same issues of discrimination and harassment that Mr. Denney recounted to Captain Hardgrove.

On May 25, Mr. Denney and HR director Jubb met to discuss Mr. Denney's concerns about the fairness of an internal investigation by the City. During this meeting, they discussed the City's policy and procedure concerning discrimination and harassment complaints. On June 22, Mr. Denney provided Ms. Jubb with a single-page, signed statement:

> This statement is meant to be a brief overview and not a detailed account of the harassment, discrimination and retaliation that I have been exposed to at Richland Fire & EMS [emergency medical services] for nearly four years. The primary individuals that have taken these actions against me include but is not limited to the following: James Hempstead, Tom Huntington, and Curt Walsh, and various individuals working on their behalf. These

> individuals have targeted me and continually have held me to different standards than other individuals and to make an example out of me. They've consistently engaged in a pattern of dishonesty and deceit when having conversations about my performance, any concerns they had about promoting me, and any internal investigations concerning me. They've certain[ly] have not lived up to the City's Core Value of Integrity. Furthermore, when I have voiced my concerns about being harassed they ignored them and been dismissive many times. I have further been shunned and retaliated against for my grievance regarding my promotion pass over and, most recently, my public records request. What little information I received from the city via my public records request corroborates this. Also, I have documentation and witness accounts to support these claims. Lastly, I would like to reiterate my trepidations about the city conducting an investigation internally into this matter and that they will be fair and impartial. My apprehensions stem from the many entangling personal and professional relationships between [the] ELT [executive leadership team] and the fire department and also from the defensive and retaliatory posture that the city is already displaying.

Id. at 181. Contrary to the requirements of the City's policy, Mr. Denney's statement did not "list the name(s) of the individual(s) involved, date(s), location(s), witness(es), a description of the incident(s) or action(s) in question, and any other pertinent information" that would allow HR to differentiate discrimination and unlawful harassment from typical issues of employee discontent. *Id*. at 17. Mr. Denney's statement also failed to specify the type of protected status (sex, age, religion, etc.) at issue in his complaint.

Two days after receiving Mr. Denney's written statement, Ms. Jubb met again with Mr. Denney to try to obtain further information about his complaint. It was around this

time that Ms. Jubb came to believe that further investigation of Mr. Denney's complaint should be directed through the City attorney's office.

On July 22, City attorney Heather Kintzley engaged Diversified HR Consulting, LLP (Diversified) to investigate Mr. Denney's complaint. Ms. Kintzley retained Diversified "to determine the veracity of Mr. Denney's claims in order to facilitate [her] analysis of the City's potential liability exposure in an anticipated lawsuit, and to enable [her] to provide timely and accurate legal advice to the City." *Id*. at 188. A confidentiality clause in the letter of engagement between Diversified and the City stated:

> The investigation performed by [Diversified] will be conducted at the behest and direction of Richland City Attorney Heather Kintzley, and is intended for the purpose of potential litigation. All communication related to the services contemplated herein shall be directed to the City Attorney. [Diversified] will mark all documents transmitted to the City Attorney as "Attorney Work Product" and "Do Not Disclose."

Id. at 203. Ms. Kintzley later declared she would not have retained Diversified but for what she perceived to be an imminent threat of litigation by Mr. Denney against the City. In addition to the primary legal risk assessment purpose of the investigation, Ms. Kintzley testified the investigation had a secondary purpose of fulfilling the City's responsibility under the policy to thoroughly and promptly investigate complaints and take any appropriate corrective action. From these facts, the City would later assert the report

from Diversified would not have been created in substantially the same form but for the perceived threat of litigation.

Diversified's investigators interviewed Mr. Denney on August 9. Mr. Denney brought a former City firefighter, Ricky Walsh, to the interview. According to Ms. Kintzley, Mr. Walsh told the investigators that the process was likely to result in legal action, and asked whether Mr. Denney could call the investigators as witnesses at trial.[2]

On October 13, Diversified provided a final report of its investigation to City attorney Kintzley. Ms. Kintzley provided Mr. Denney a summary of the report's findings on October 21. She described the report itself as "attorney work product . . . not subject to disclosure." *Id*. at 75. The report[3] itself is captioned as work product, prepared at the direction of the City attorney for purposes of anticipated litigation. The report contains extensive summaries of Diversified's interviews with individuals involved in Mr. Denney's complaint. The report also contains Diversified's analysis

---

[2] Mr. Walsh disputes that he made a statement regarding legal action. We note that by the time of Mr. Walsh's alleged statement, Ms. Kintzley had already retained Diversified and asked Diversified to designate any documents generated by Diversified for the City as attorney work product.

[3] At the time of the trial court's summary judgment proceedings, the report was filed under seal for in camera review. The report is also part of the sealed record on review.

of Mr. Denney's allegations of discrimination, unlawful harassment, and a hostile work environment.

During the course of Diversified's investigation, Mr. Denney submitted a second, written complaint with HR director Jubb on September 21, alleging discrimination, harassment, and retaliation stemming from being passed over for a spot on the City fire department's technical rescue team. Unlike Mr. Denney's prior complaint, his statement on September 21 contained details regarding dates and names. However, the statement still failed to tie Mr. Denney's allegations of unequal treatment to the categories of protected status identified in the City's policy.

HR director Jubb and City attorney Kintzley met in mid-October to discuss the most recent allegations, after which it was decided the matter would be best handled by the City attorney's office. As the most recent allegations were viewed as an extension of the initial complaint, Ms. Kintzley continued to believe Mr. Denney intended to file suit against the City.

To investigate the second complaint, Ms. Kintzley retained attorney Sarah Hale. Ms. Kintzley "instructed Ms. Hale that the purpose of the investigation was to determine the veracity of Mr. Denney's claims in order to facilitate [her] analysis of the City's potential liability exposure in an anticipated lawsuit, and to enable [her] to provide timely

and accurate legal advice to the City." *Id*. at 190-91. As with Diversified, Ms. Kintzley later declared she would not have hired Ms. Hale or personally directed the investigation but for the perceived imminent threat of litigation. Consistent with the previous investigation, Ms. Kintzley later testified that the primary purpose of Ms. Hale's investigation was so that Ms. Kintzley would have sufficient information to assist her in a providing a legal risk assessment to the City, with the secondary purpose of fulfilling the City's obligation under its policy to exercise due diligence by promptly investigating Mr. Denney's allegations. As with the previous investigation, the City later asserted Ms. Hale's report would not have been created in a substantially the same form but for the perceived threat of litigation.

Ms. Hale submitted a final report of her investigation to Ms. Kintzley on February 21, 2017. As with the Diversified report, Ms. Hale's report[4] was marked as confidential and never made public. Ms. Hale's report was mostly comprised of her analysis of Mr. Denney's allegations of discrimination, unlawful harassment, and retaliation based on the evidence gathered during her investigation.

[4] As with Diversified's report, Ms. Hale's report was filed in the trial court under seal for in camera review, and is part of the sealed record on review.

PROCEDURAL BACKGROUND

On November 8, 2016, Mr. Denney made a public records request for "[t]he full report that Diversified . . . sent the [C]ity regarding Chris Denney's Discrimination, Harassment, and Retaliation complaint. Also the 47 documents and policies and procedures that were reviewed as part of this investigation." *Id*. at 219. Mr. Denney ultimately received all requested records save Diversified's final report, which the City contended was protected attorney work product and not subject to release.

On May 18, 2017, Mr. Denney initiated a tort action against the City for employment discrimination, claims that encompassed the content of his complaints to Ms. Jubb.

On October 30, Mr. Denney commenced PRA litigation against the City arising out of the denial of his November 2016 request for the Diversified report.

On January 6, 2018, Mr. Denney made a second public records request for Ms. Hale's report. The City asserted this report was exempt from disclosure as attorney work product.

Mr. Denney amended his PRA complaint in April 2018 to include the City's withholding of Ms. Hale's report. Mr. Denney continued to contend that because there was no pending or threatened litigation at the time of the creation of the Diversified and

Hale reports, the City could not withhold disclosure of the reports under the PRA's attorney work product exemption.

In January 2019, Mr. Denney and the City filed cross motions for summary judgment. After reviewing the summary judgment submissions and conducting an in camera review of the Diversified and Hale reports, the trial court ruled the reports were properly exempted from disclosure under the PRA as attorney work product. With no genuine issues of material fact remaining, the court granted summary judgment to the City and entered an order dismissing Mr. Denney's complaint with prejudice. A final judgment awarding costs to the City was entered just over a month later.

Mr. Denney filed his notice of appeal on April 1, 2019, more than 30 days after the dismissal order was entered (February 12), but less than 30 days after the final judgment was entered (March 14). *Denney v. City of Richland*, 195 Wn.2d 649, 652, 462 P.3d 842 (2020); *see also* CP at 342-53. This court dismissed the appeal as untimely, but on discretionary review the Supreme Court determined the untimely filing of the notice of appeal was an excusable error and remanded the case back to this court for consideration on its merits. *Denney*, 195 Wn.2d at 659-60.

ANALYSIS

We review substantive PRA disputes de novo. RCW 42.56.550(3). When a PRA case is decided on summary judgment, we must view the facts in the light most favorable to the defeated party. *See Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001). If the undisputed facts show that a public agency properly refused to release a record in response to a PRA request, summary judgment must be awarded to the agency.

The PRA is a strongly worded public mandate, requiring citizens be afforded access to public records. *Belenski v. Jefferson County*, 186 Wn.2d 452, 456-57, 378 P.3d 176 (2016). A public record "includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3).

The PRA exempts certain records from production. "Consistent with its purpose of disclosure, the PRA directs that exemptions must be narrowly construed." *City of Lakewood v. Koenig*, 182 Wn.2d 87, 94, 343 P.3d 335 (2014); *see also* RCW 42.56.030. Nevertheless, "where a listed exemption squarely applies, disclosure is not appropriate." *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (plurality opinion); *see also* RCW 42.56.070(1).

The parties agree that the two reports at issue in this case are public records. The question before us is whether the reports are subject to an exemption. The burden of establishing an exemption falls on the City. RCW 42.56.550(1). According to the City, the exemption governing this case is set forth at RCW 42.56.290. This is what is known as the "'controversy exemption.'" *Kittitas County v. Allphin*, 190 Wn.2d 691, 701, 416 P.3d 1232 (2018). The exemption states:

> Records that 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 are exempt from disclosure under [the PRA].

RCW 42.56.290.

The controversy exemption extends to materials protected from discovery pursuant to CR 26, which among other things sets forth the standards for determining the discoverability of records in superior court civil proceedings. *Kittitas County*, 190 Wn.2d at 701. The City claims its two reports are protected from disclosure under CR 26(b)(4) as attorney work product. Thus, to the extent the two reports qualify as work product, they are exempt from disclosure under the PRA's controversy exemption.

Work product protection and dual-purpose documents under the PRA

Attorney work product includes documents and tangible things that are otherwise discoverable, but are "prepared in anticipation of litigation or for trial" by a party or the

party's representative "(including a party's attorney, consultant, surety, indemnitor, insurer, or agent)." CR 26(b)(4). Litigation need not be ongoing for the work product protection to apply. *Soter*, 162 Wn.2d at 732. It need only be "'reasonably anticipated.'" *Id.* (quoting *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993)). Work product includes not only research, theories, and memoranda of investigations, but also "formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation." *Limstrom v. Ladenburg*, 136 Wn.2d 595, 611, 963 P.2d 869 (1998).

Mr. Denney argues that because the reports at issue were required by the City's policy regardless of litigation, the reports do not, and cannot, qualify for work product protection. "The work product doctrine does not shield records created during the ordinary course of business." *Morgan v. City of Federal Way*, 166 Wn.2d 747, 754, 213 P.3d 596 (2009). Mr. Denney thus argues the records are not exempt from disclosure under the PRA.

Mr. Denney's argument that the reports cannot constitute work product, because the reports were prepared pursuant to the City's policy, is incorrect. Protected documents can have dual purposes. *See Soter*, 162 Wn.2d at 733; *In re Grand Jury Subpoena (Mark*

Torf/Torf Envtl. Mgmt.), 357 F.3d 900, 907 (9th Cir. 2004).[5] CR 26(b)(4) does not provide otherwise. The fact that a document has both a litigation and nonlitigation purpose does not mean the document fails to qualify for work product protection. If a document is purported to have dual purposes, it simply requires closer scrutiny. *See United States v. Roxworthy*, 457 F.3d 590, 593-94, 599 (6th Cir. 2006).

Mr. Denney's reliance on *Morgan* to challenge the applicability of a dual-purpose inquiry is misplaced. *Morgan* bears a superficial resemblance to the instant case in that it involved a personnel investigation report prepared by the city of Federal Way. But unlike this case, the city of Federal Way never claimed its report was prepared in anticipation of litigation. *Morgan*, 166 Wn.2d at 755. The report was prepared purely for ordinary business purposes. Because *Morgan* did not involve a claim of anticipated litigation, the investigation report did not qualify for work product protection and there was no need to engage in a dual-purpose analysis. Nothing in *Morgan* holds or suggests that a dual-purpose analysis cannot apply to personnel investigation reports.

Step one of the dual-purpose analysis—the "because of" test

In the dual-purpose document context, the foundational question is whether the

[5] Federal jurisprudence provides "persuasive guidance" on the application of the work product doctrine. *Soter*, 162 Wn.2d at 739.

document at issue truly has a litigation in addition to a nonlitigation purpose. Most federal courts have adopted what has been dubbed the "because of" test in making this inquiry. *See United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). The widespread application of the "because of" test in the context of the federal counterpart of CR 26 is discussed extensively in Wright's *Federal Practice and Procedure*. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2024 (3d ed. 2010). Our Supreme Court appears to have followed the federal example. *See In re Det. of West*, 171 Wn.2d 383, 405, 256 P.3d 302 (2011). Thus, we apply the "because of" test, which asks whether the document in question was really created because of anticipated litigation.[6]

The "because of" test involves both a subjective and objective inquiry. *Roxworthy*, 457 F.3d at 594. We first ask whether the individual who prepared or ordered preparation of the document subjectively did so with the intent of preparing for litigation. *Id*. If the answer is in the affirmative, we then ask whether the subjective anticipation of litigation

[6] The only well-articulated alternative to the "because of" test is the "primary purpose" test, which has been adopted by the United States Court of Appeals for the Fifth Circuit. *See, e.g.*, *United States v. El Paso Co.*, 682 F.2d 530, 542-44 (5th Cir. 1982). This is a more demanding approach than the "because of" test. *See United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010). The "primary purpose" test is inconsistent with the wording of CR 26(b)(4) and has generated little support.

was objectively reasonable. *Id*. at 599. We look at the nature of the document and circumstances of the case to assess whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *West*, 171 Wn.2d at 405 (quoting WRIGHT, MILLER & MARCUS, *supra*, at 502). This objective test keeps in mind that the work product rule cannot be so broad that it allows parties to avoid discovery "by adopting routine practices whereby all documents appear to be prepared in anticipation of litigation." *Doehne v. EmpRes Healthcare Mgmt., LLC*, 190 Wn. App. 274, 284, 360 P.3d 34 (2015).

Step two of the dual-purpose analysis—substantially same form

If the subjective and objective aspects of the "because of" test are met, then the work product protection applies unless we discern that the document would have been prepared in substantially the same form had there not been an expectation of litigation. *Roxworthy*, 457 F.3d at 599; *Grand Jury Subpoena*, 357 F.3d at 908; *Goosby v. Branch Banking & Trust Co.*, 309 F.Supp.3d 1223, 1236 (S.D. Fla. 2018). This appears to be a very narrow exception.[7] Even an ordinary nonlitigation business form will be protected as work product if it was prepared (subjectively and objectively) in anticipation of litigation

[7] Some courts conflate the "substantially same form" test with the "subjective/objective anticipation" test. *See Roxworthy*, 457 F.3d at 599; *Adlman*, 134 F.3d at 1204.

and the contents reflect this fact. *See Goosby*, 309 F.Supp.3d at 1234 (A standard banking form qualifies for protection when it "'would not have been prepared in the way it was prepared but for the anticipated litigation.'") (quoting *Adlman*, 134 F.3d at 1195).

Application of the two-step analysis to the parties' case

1(a) subjective anticipation

The uncontested evidence reveals City attorney Kintzley subjectively anticipated litigation when she directed both Diversified and Ms. Hale to investigate and prepare reports regarding Mr. Denney's discrimination and harassment complaints. Both reports were designated as work product at their inception. The initial correspondence from Ms. Kintzley to Diversified and Ms. Hale stated the purpose of each investigation was potential litigation. And the reports from Diversified and Ms. Hale were both marked as confidential work product.

The May 12, 2016, e-mail from Ms. Kintzley to Mr. Denney does not undermine the City's claim of subjective intent. In the May 12 e-mail, Ms. Kintzley sought to reassure Mr. Denney that her interests as the City attorney were not adverse to his. Read in the light most favorable to Mr. Denney, the e-mail suggests Ms. Kintzley did not yet anticipate litigation on May 12. But this does not help Mr. Denney. Diversified was not retained until late July, and Ms. Hale was not retained until November. Ms. Kintzley has

testified that it was not until after May 12 that she determined Mr. Denney's behavior was indicative of someone posturing for litigation. The evidence supporting Ms. Kintzley's assertion of subjective intent is overwhelming and uncontested.

1(b) objective reasonableness

Not only did Ms. Kintzley subjectively anticipate litigation when she ordered the two investigation reports, her assessment of the prospect of legal action was objectively reasonable. Mr. Denney's repeated assertions that he did not trust HR, and his refusal to provide detailed information as required by the City's policy, was not indicative of someone seeking to work with his employer toward corrective action to resolve a workplace dispute. Instead, Mr. Denney made clear that he believed the City was against him and that his goal was for an outside entity to validate his point of view. It does not require many logical inferences to discern that Mr. Denney's ultimate goal was litigation.

Substantially same form

Having determined the subjective and objective tests are met, we analyze whether the reports would have been created in substantially the same form despite the prospect of litigation.

As an initial point, the process by which the reports were created was unusual. Ordinarily, the City handles workplace complaints through its HR department. The City

attorney's office is not typically involved. Furthermore, even when the City attorney's office is consulted, the City attorney does not typically retain an outside agency to help with an investigation. Had it not been for the anticipation of litigation, it is doubtful that Diversified or Ms. Hale would have authored an investigation report.

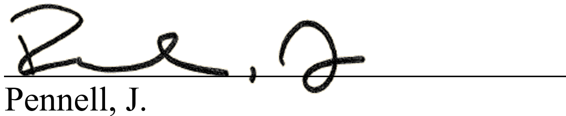
The reports are also unique in terms of substance. For one thing, the reports focus on discerning the nature of Mr. Denney's workplace complaints. This would not have been necessary had Mr. Denney complied with the City's policy requiring a detailed statement from a complainant. In addition, the reports were centered on the narrow issue of whether Mr. Denney could make a legal claim for discrimination or unlawful harassment. They did not address potential remedial action—such as management practices or workplace improvements—that one would expect of an ordinary HR report. By focusing exclusively on the merits of Mr. Denney's claims, the thrust of the two reports was to advise the City attorney's office as to whether Mr. Denney would likely succeed in a legal claim of discrimination or unlawful harassment. This is a quintessential feature of a work product document, not an ordinary business record.

CONCLUSION

The reports at issue were generated because of anticipated litigation and would not have been prepared in substantially the same form had the City not been concerned about

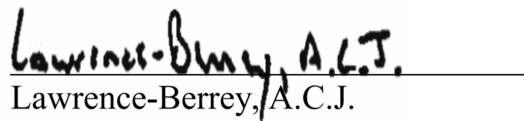
litigation. The reports therefore qualify for work product protection and are protected from disclosure under the PRA's controversy exemption, RCW 42.56.290.[8]

The trial court's summary judgment dismissal of Mr. Denney's complaint is affirmed. Mr. Denney's request for attorney fees is denied.

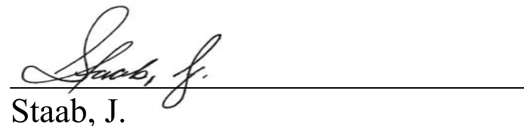


Pennell, J.

WE CONCUR:



Lawrence-Berrey, A.C.J.



Staab, J.

[8] In a footnote in his briefing, Mr. Denney argues that the trial court erred by granting summary judgment to the City because the reports at issue were not entirely attorney work product, and should have been disclosed with redactions of exempt content. We will not review this argument as it has not been properly raised. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993).

MACDONALD HOAGUE & BAYLESS

June 30, 2022 - 4:02 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Christopher Denney v. City of Richland (367207)

The following documents have been uploaded:

- PRV_Petition_for_Review_Plus_20220630160013SC124567_0044.pdf
  This File Contains:
  Certificate of Service
  Other - Court of Appeals Opinion in Appendix
  Petition for Review
  The Original File Name was Petition for Review with Appendix final.pdf

A copy of the uploaded files will be sent to:

- LucasW@mhb.com
- TimF@mhb.com
- TrishW@mhb.com
- chrisb@mhb.com
- cindy@mjbe.com
- julie@mjbe.com
- kharper@mjbe.com

Comments:

Sender Name: Jesse Wing - Email: jessew@mhb.com
Address:
705 2ND AVE STE 1500
SEATTLE, WA, 98104-1745
Phone: 206-622-1604

Note: The Filing Id is 20220630160013SC124567